THE BEST INTERESTS OF THE CHILD AND THE RIGHT TO FAMILY UNITY UNDER THE EU LAW

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1.1 INTRODUCTION

The scope of this paper is to analyse the way the best interests of the child and the vulnerability of other asylum seekers can limit the States' discretion in migration control. This paper also addresses the extent the jurisprudence on the entry human rights principle and the Dublin Regulation can be applied by analogy to the Asylum Procedure Directive and the Reunification Directive, evidencing opportunities for jurisprudential cross-fertilization. The purpose is to show the full potential of the EU legislation applicable to family unity and the extent to which it is possible to bypass some of the current restrictive legislation on family unity under the refugee and subsidiary protection regimes in the EU internal and external dimension.

From a methodological perspective, the paper explores how a judge must apply and interpret the BIC under the EU law, in particular, Article 24(2) in conjunction with Article 52(5) of the EU Charter of Fundamental Rights (CFR).[1] In other words, whether a judge can only use the BIC to inform decisions based on provisions that explicitly require the BIC assessment under secondary EU law, or may go beyond and interpret provisions which do not make explicit reference to such requirement. For this purpose, it explores the ambit of the BIC under international, EU treaty law and EU primary and secondary legislation. Particular attention is given to the Asylum Procedures Directive (APD),[2] the Dublin Regulation III (DRIII),[3] the Family Reunification Directive (FRD),[4] and the Qualification Directive (QD).[5]

[1] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407. Article 24(2). "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". Article 52(5). "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

[2] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.

[3] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59

[4] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18.

This paper argues that recent jurisprudence from ECtHR and the CJEU has come to treat the BIC as a stand-alone principle, in certain cases all the more as a right, that must inform decisions that have a bearing on children, even where these decisions relate to legal provisions which do not explicitly refer to the BIC. This development has come about by the courts choosing to interpret the BIC in the context of the international instruments referred to in the EU treaties and the ECtHR jurisprudence rather than solely reading it in the vacuum of the EU legislation. The result has been that the BIC is now seen more as a right than a principle – a right that can place positive obligations on States, including a requirement to adopt proactive measures to support family unity.

This paper concludes that the BIC must inform decisions both the provisions of the secondary legislation which explicitly make reference to the BIC and those which do not. As a consequence, the BIC can limit – when interpreting the EU secondary legislation in conjunction with the EU primary legislation – the States' margin of appreciation on family reunification in the EU. Moreover, because children and, in particular, unaccompanied minors are an inherently vulnerable group, they require a different standard in the Article 8 proportionality assessment or the evaluation of the facts relevant to Article 3 ECHR – including the eligibility for protection under the 1951 Geneva Convention's ground of membership of a particular social group.[6]

This paper is divided in six sections. The first section explores the relevant EU and international legal framework to highlight the most important provisions concerning the BIC and the right to family unity. Section two shows how the BIC evolved over time as a legal concept and its impact on the way the right to family unity has been interpreted with the adoption of various tests used by courts to establish a right of admission for the purpose of family unity. In the third section this paper clarifies how the courts have been able to bridge the immigration and international protection cases by applying a single test which assesses the consequences of separation and whether it is reasonable to expect aliens to develop family life elsewhere. The fourth section puts the BIC in the context of the emerging jurisprudence on the entry human rights principle. The fifth section addresses the extent the jurisprudence on the entry human rights principle and the Dublin Regulation – by advocating for a more extensive interpretation of dependency, family members or inhuman treatment – can be applied by analogy to the Asylum

[5] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26

[6] The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to resolution 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950.

Procedure Directive and the Reunification Directive suggesting opportunities for jurisprudential cross-fertilization. Finally, section six – by focussing on the BIC – demonstrates how the arguments on the allocation of responsibility and effective protection are connected to the concept of international protection and the compensatory approach to persecution focussed on the internal and external elements of protection.

5.2 LEGAL FRAMEWORK

5.2.1 THE INTERNATIONAL FRAMEWORK

The respect for private and family life and the best interests determination under the ECHR and the CFR cannot be read in a vacuum – they form part of a broader legal framework which encompasses all the international instruments to which the EU Member States are party. It is important to remember that the 1951 Convention recommends governments to take the necessary measures for the protection of the refugee's family, with a view to protecting refugees who are minors – in particular, unaccompanied children. Thus, the 1951 Geneva Convention regards family unity as an instrument of protection of children and requires States to adopt positive actions to keep families united.

EXCOM Conclusion No. 24 (XXXII) on Family Reunification (1981) provided that "the separation of refugee families has, in certain regions of the world, given rise to a number of particularly delicate problems related to unaccompanied minors" so "every effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement".[7] Principle 4 of the 1998 Guiding Principles on Internal Displacement states that certain internally displaced persons, such as unaccompanied minors, are entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.[8] The International Convention on Economic, Social and Cultural Rights (ICESCR)[9] provides at Article 10(1) that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children".

[7] EXCOM Conclusion No. 22 (XXXII) – 1981on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, para 7.

[8] UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109, available at: http://www.refworld.org/docid/3c3da07f7.html [accessed 15 February 2017].

[9] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

The UN Convention on the Rights of the Child (CRC)[10] is certainly the main legal instrument aimed at ensuring the respect for children's rights. Article 22 provides that States shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee, whether accompanied or not, receives appropriate protection and humanitarian assistance, including the enjoyment of family life as established in the CRC and other international human rights instruments. Article 3 CRC provides that in all actions concerning children the BIC shall be a primary consideration.

The Committee on the Rights of the Child in its 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin stressed the primacy of the BIC. The General Comment stipulates that the BIC must be the decisive factor for specific actions – notably adoption (Article 21) and separation of a child from parents against their will (Article 9). The best interests must be a primary – but not the sole – consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).[11] The Committee's General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration instead defines the best interests as a right, a principle and a rule of procedure.[12] The Committee's authoritative interpretation presents the child's best interests as a threefold concept:

> *(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.*

[10] United Nations Convention on the Rights of the Child, 20 November 1989.
Article 3(1). "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".
Article 3(2). "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".

[11] UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6.

[12] Article 3(1) of the UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC /C/GC/14, available at: http://www.refworld.org/docid/51a84b5e4.html [accessed 16 May 2017].

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. [13]

Advocate General Bot in *A v. B* stated that the EU Charter expressly incorporates *an obligation* to consider the best interests of the child, as laid down in Article 24(2).[14] This guarantees a right to a procedure that considers the BIC as a primary consideration. The wording of most of the EU legal instruments also provides that the best interests of the child must be a primary consideration.[15]

This interpretation seems to be confirmed by the CRC[16] and the general comments. However, the General Comment No. 14 defines the BIC as *the right of the child* to have his or her best interests taken as *a primary consideration.* This indicates that the BIC is a subjective and directly applicable right that requires the best interests to be assessed as a primary consideration. So, whenever a decision is to be made that will affect a specific child – as a rule of procedure and obligation – the decision-making process must include the BIC assessment and read any legal provision open to more than one interpretation with the interpretation which most effectively serves the child's best interests.

5.2.2 THE EU FRAMEWORK

Article 6 TEU[17] provides that the Union recognises the rights, freedoms and principles set out in the CFR, which have the same legal value as the treaties. The rights, freedoms and principles in the Charter are to be interpreted in accordance with the general provisions of Title VII of the Charter governing its

[13] UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: http://www.refworld.org/docid/51a84b5e4.html [accessed 16 May 2017].

[14] CJEU, C-184/14, *A v. B* of 16 April 2015, paras 30-35.

[15] See Recital 13 and Article 6(1) of Regulation (EU) No 604/2013; Recital 33 and Article 25(6) of Directive 2013/32/EU; Recital 18 and Article 20(5) of Directive 2011/95/EU; Article 23(1) of Directive 2013/33/EU**;** and Recital 22 and Article 17(5) of Directive 2008/115/EC.

[16] Article 3 of the United Nations Convention on the Rights of the Child, 20 November 1989.

[17] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Tables of equivalences, OJ C 202, 7.6.2016, p. 1–388.

interpretation and application and with due regard to the explanations referred to in the Charter that set out the sources of those provisions. The fundamental rights that are guaranteed by the European Convention on Human Rights (ECHR) and that result from the constitutional traditions common to the Member States, also constitute general principles of the European Union's law (Art. 6(3) TEU). One of the main interests of the child is family unity, which is recognised under Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights (CFR); both provisions guarantee the right to family life to the same extent. [18]

Despite the fact that the EU is not a contracting party to the ECHR and that the latter has not been formally incorporated into EU law,[19] the CJEU in its opinion *2/13 – Adhésion de l'Union à la CEDH* stated that, in so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be read in combination with Article 53 of the Charter. As a result, the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.[20]

Thus, when implementing EU law, Member States may under EU law be required to presume that fundamental rights have been observed by the other Member States. Not only are they prevented from demanding a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases they may not check whether that other Member State has actually – and in a specific case – observed the fundamental rights guaranteed by the EU.[21] In the asylum field, exceptional cases lately have become less exceptional, so a conclusive presumption of compliance with fundamental rights is now unlikely to be compatible with the protection of fundamental rights. [22]

The Charter and the fundamental rights it protects have the same legal standing as the provisions of EU treaties. The Charter's general provisions on the interpretation and application of Chapter VII establishes that its provisions must be interpreted in accordance with Articles 51, 52, 53 and 54 of the

[18] CJEU, C-400/10 PPU *J. McB. v. L. E.* of 5 October 2011, para 53: "Article 7 of the Charter must therefore be given the same meaning and scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights."
[19] CJEU, *Åklagaren v. Hans Åkerberg Fransson* C-617/10 of 7 May 2013, para 44.
[20] CJEU, *Avis 2/13 - Adhésion de l'Union à la CEDH* of 18 December 2014, para 189.
[21] *Ibid*, para 192.
[22] CJEU, C-411-10 and C-493-10, *N.S. v. United Kingdom* and *M.E. v Ireland* of 21 December 2011, para. 99

Charter. Thus, the ECHR provisions also constitute general principles of EU law and they set the minimum protection standard in respect of the Charter (Art. 52(3) CFR). However, this rule does not prevent the EU law from providing more extensive and favourable protection. Article 53 of the CFR provides that nothing in it shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the ECHR, and by the Member States' constitutions. Hence, there is not only a relation of deference between the Charter and the ECHR, including the ECtHR case law, but the CFR must be also interpreted taking into account the provisions of international conventions by which the EU and the individual Member States are bound, including the CRC.

As to the implementation of the provisions of the Charter through the secondary law, Article 52(5) of the CFR provides that they may be implemented by the Union and by Member States when they are implementing Union law, in the exercise of their respective powers. However, Article 51(1) of the Charter clarifies that when they are implementing Union law, they shall respect the rights and observe the principles and promote the application thereof, complying with the limitations on the powers of the Union as conferred on it in the Treaties. In regard to the Member States' power to interpret the EU legislation, the CJEU in *N.S./M.E.* recalled the primacy of the EU primary law over secondary law in all matters concerning the exercise of that power by the Union or the Member States (Article 52(2) CFR).[23] The ECtHR held that Member States have limited power to exercise migration control measures when they are incompatible with fundamental rights.[24] The same is valid for the internal responsibility allocation. Both the CJEU and ECtHR have clarified, in the context of the non-return cases, that it is not allowed to hinder access to protection through responsibility allocation, thus reinforcing the States responsibilities.[25]

In *NS/ME* the CJEU also stressed that the exercise of the discretionary power under secondary law is subject to the provisions of EU primary law, including the CFR.[26] All acts adopted in the exercise of that power, whether internal or external,[27] fall within the scope of the implementation of Union law and within the meaning of Article 51(1) of the Charter. Member States must implement European Union law

[23] Article 52(2) of the EU Charter of Fundamental Rights. "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties".

[24] See also ECtHR, *Hirsi Jamaa and Others v. Italy,* Application No. 27765/09 of 23 February 2012.

[25] ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09 of 21 January 2011; CJEU – C-411-10 and C-493-10, *N.S. v. United Kingdom and M.E. v. Ireland* of 21 December 2011.

[26] CJEU, C-411-10 and C-493-10, *N.S. v. United Kingdom and M.E. v Ireland* of 21 December 2011, para. 69.

[27] On the external jurisdiction See *Hirsi Jamaa and Others v. Italy* para. 70; CJEU, Advocate General Mengozzi Opinion in C-638/16 PPU *X and X v. État Belge* of 7 March 2017, para. 94.

in accordance with Article 6(1) TEU and Article 51 of the Charter – with due regard to the fact that the Union recognises the rights, freedoms and principles set out in the applicable international legal instruments.[28]

Member States must exercise their discretionary power in accordance with, among others, the CFR, the ECHR, the rules of the 1951 Geneva Convention and the CRC (Article 18, 53 CFR and Article 78(1) TFEU).[29] In particular, take into account that the CRC confirms in line with 1951 Convention that family unity is an instrument of protection of minors, so the BIC should inform any decision related to family unity. Therefore, while the ECtHR is not an EU court, its jurisprudence may become EU law because of the CJEU deference towards the ECtHR case law, and also because the ECHR freedoms and principles have the same legal value as the EU treaties, representing general principles of EU law.

For these reasons, some fundamental rights under the Charter, the ECHR, the 1951 Convention or the CRC may represent subjective rights which can create positive obligations for States and limit their discretion in exercising authority on return or entry – in particular, in cases on family unity. While discretion is an integral part of the system of rules established by secondary legislation, it must be exercised in accordance with other legislative provisions and with due respect to fundamental rights. As Article 24 of the Charter provides at paragraph 2, in all actions affecting children, taken in accordance with *all* provisions of the secondary legislation – whether taken by public authorities or private institutions and whether the legislation explicitly provides for the child's best interests assessment or not – the BIC must be a primary consideration.

On the subject of secondary legislation, the Dublin III Regulation at recital 32 provides that, in the treatment of persons falling within the scope of the Regulation, Member States are bound by their obligations under instruments of international law and the jurisprudence of the ECtHR. Both the

[28] CJEU, C-411-10 and C-493-10, o *N.S. v. United Kingdom and M.E. v Ireland* of 21 December 2011, para. 69.

[29] Article 18 the EU Charter of Fundamental Rights. “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).”
Article 53. “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”
Article 78(1) of the Treaty on the Functioning of the European Union. “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

Reunification Directive (Article 5(5)) and the Dublin Regulation (particularly Articles 6 and 8) require Member States to take into account the BIC, with the Dublin emphasising that the BIC must be taken into account in all procedures under the Regulation (recital 13 and Article 6(1)) as a primary consideration.

The Asylum Procedure Directive also provides at recital 33 that the best interests of the child should be a primary consideration when applying the Directive, in accordance with the CFR and the CRC. Both the Reunification Directive and the Dublin Regulation recognise the right to family reunification. The Reunification Directive governs the family reunification practice and procedure for refugees and third country nationals specifying at recital 8 that "special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there". Therefore, "more favourable conditions should be laid down for the exercise of their right to family reunification". The Dublin Regulation, as other instruments of secondary legislation – besides various references to the primacy of family unity – includes in recital 14 a general clause that family life should be a primary consideration of Member States when applying the Regulation. The CJEU has established that also the Reunification Directive provides for a right to family reunification.[30] This point is addressed further down in this paper, clarifying that family unity, unlike the BIC, is not a subjective right. [31]

The Reception Directive at recitals 9 and 10 also provides that, in applying the Directive, Member States should seek to ensure full compliance with the principles of the BIC and of family unity, in accordance with the CFR, the UNCRC and the ECHR. Hence, it is provided at recital 10 that, in the treatment of persons falling within the scope of the Directive, Member States are bound by obligations under instruments of international law to which they are party.

Recitals 16, 18, 19, 28 and 38 of the Qualification Directive may be interpreted as applicable solely to the content of international protection and not to the substantive determination for the granting of refugee status or to subsidiary protection, because Chapters III, IV, V and VI of the Qualification Directive do not contain references to the BIC at all, while only Chapter VII of the Qualification Directive – on the content of protection – contains the reference to the BIC in Article 20(5). This systemic interpretation could lead to the conclusion that the BIC is applicable – as regards eligibility criteria for refugee status or subsidiary protection – only to the legal issues of internal protection due to recital 27 of the Qualification Directive.

[30] CJEU, C-578/08, *Chakroun* of 4 March 2010; CJEU, Cases C-356/11 and C-357/11, *O. & S*. of 6 December.
[31] See pages 14, 19.

However, while recital 38 may reasonably lead to such conclusion, recitals 16, 19, 28 – and especially 18 – may not. Recital 38 can be read in conjunction with Article 20(5), as both address the content of protection. However, recitals 16 and 18 concern the overall implementation of the Directive, so they must be read in conjunction with Article 4(3)(c) and the rest of Chapter II of the Directive for the assessment of the circumstances relevant for the qualification for international protection. The Qualification Directive also provides at Article 23(1) that Member States shall ensure that family unity can be maintained.

It is evident that both the EU primary and secondary legislation require the BIC to be a primary consideration. The instruments of secondary legislation contain general clauses requiring the overall implementation of the instrument to take into account the BIC. However, the primacy of the BIC must be viewed in the context of the relevant international law. From that perspective, it becomes a subjective right, so that the BIC is always a primary consideration which must apply to all the provisions, whether they explicitly refer to the BIC or not, with family unity being a key element of the BIC and the BIC being foremost relevant when assessing the right to family unity. This is consistent with the decision in *NS/ME*,[35] which may be interpreted as limiting the margin of appreciation in regard to the facts relevant to Article 24 of the Charter requiring the BIC to be a primary consideration for all provisions of the Dublin Regulation as Article 51(1) of the Charter provides that when the Member States are implementing Union law, they shall respect the rights and observe the principles and promote the application thereof, complying with the limitations on the powers of the Union as conferred on it in the Treaties. This is what the EU law prescribes; however, in the next sections this paper considers whether the most recent jurisprudence leads to the same interpretation and whether it is consistent enough not to allow alternative interpretations (BIC as a subjective right).

5.3 The Best Interests of the Child: Tipping the Scale Towards Family Unity?

5.3.1 The Only or the Most Adequate Way to Family Life?

European courts recognise that Member States, in exercising their power under the secondary legislation, have a margin of appreciation. However, when family unity is at stake, that margin of appreciation requires the application of a proportionality test between the interest of the State to control admission to its territory and the effective enjoyment of the individuals' right to family unity. European courts recognised that in certain circumstances that margin of appreciation can be very limited, and provided some guidelines. Before considering the relevant case law, it is important to point

[35] CJEU, C-411-10 and C-493-10, *N.S. v. United Kingdom and M.E. v Ireland* of 21 December 2011, para. 69.

to the reason this section considers both cases of immigration and international protection arguing that the principles of juridical adjudication should be very similar.

As ECRE recently evidenced – through a comprehensive analysis of the EU case law[32] – first of all, there should be no discrimination under the Qualification Directive for the purpose of reunification between refugees and subsidiary protection holders. The European Commission has stressed that there is no obligation in the Family Reunification Directive for Member States to deprive subsidiary protection holders of family reunification under more favourable conditions,[33] and encouraged the Member States to adopt rules granting applicants similar rights, explaining that 'the *humanitarian protection needs* of persons benefiting from subsidiary protection do not differ from those of refugees'.[34] Besides the almost inexistent difference between refugees and subsidiary protection holders, the general principles of equal treatment and non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[35]

For instance, in *Alo and Osso,*[36] that examined restrictions of movement in a Member State, the CJEU interpreted the recast Qualification Directive as affording beneficiaries of international protection the same rights and benefits to those enjoyed by refugees. The CJEU ruling was influenced by the stated intention of the EU legislature to establish a uniform status for beneficiaries of international protection,[37] with the Advocate General also highlighting the principle of equal treatment.[38] The CJEU held that national rules that differentiated between subsidiary protection holders and, *inter alia,* refugees, would only be legitimate if these groups were not in an objectively comparable situation as regards the aim pursued by those rules.[39] Hence, differences in the treatment of persons in analogous or relevantly similar situations – with no objective and reasonable justification for such a difference[40] –

[32] ECRE, 'Information Note on Family Reunification for Beneficiaries of International Protection in Europe' June 2016 available at https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf.

[33] Article 3(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[34] European Commission Guidelines on Family Reunification, p.24 (emphasis added).

[35] ECRE, 'Information Note on Family Reunification for Beneficiaries of International Protection in Europe' June 2016 available at https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf.

[36] CJEU, C-443/14 and C-444/14 *Kreis Warendorf v. Ibrahim Alo and Amira Osso v Region Hannover* of 1 March 2016.

[37] *Ibid,* paras. 28-36.

[38] CJEU, C-443/14 and c-444/14 *Kreis Warendorf v. Ibrahim Alo and Amira Osso v Region Hannover*, Opinion of Advocate General Cruz Villalon of 6 October 2015, para. 71.

[39] *Ibid* at para. 54 and 61.

[40] ECtHR, *D.H. and Others v. the Czech Republic,* Application No. 57325/00 of 5 February 2015, para 175, ECHR 2007; ECtHR*, Burden v. the United Kingdom*, Application No. 13378/05 of 28 April 2008, para 60; ECtHR,

require the impugned measures to pursue a legitimate aim or the existence of a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[41]

On the basis of this reasoning, it can be argued that the immigration status is included as one of the prohibited grounds of discrimination as well.[42] Therefore, as it has been established in *Hode and Abdi v. the UK,*[43] students, workers and refugees (hence also subsidiarity protection holders) are in an analogous situation given that they are granted a limited period of leave to remain. Pre-flight and post-flight marriage applicants are also in analogous situations, with the only difference being the time of marriage. The ECtHR held that the difference in treatment between students, workers and – on the one hand, those who were able under national law to reunify with their spouses regardless of whether the marriage took place before or after their grant of leave to remain – and those on the other hand, who could only reunify with pre-flight spouses, did not pursue a legitimate aim and thus had no objective and reasonable justification.[44]

It is clear from the above considerations that refugees, students, workers and subsidiary protection holders are all in analogous positions. This is similarly the case of minor children of a recognised refugee, subsidiary protection holders or the family members of a minor, who are willing to be reunified with the child on the basis of his/her status. Since the purpose of the Family Reunification Directive is to promote family reunification and the effective enjoyment of family life for everybody,[45] any disparity or discrimination is forbidden, unless it is reasonably motivated. In the case of unaccompanied children, however, the BIC can play a role in promoting even a much more favourable treatment under the Reunification Directive.

As to the development of jurisprudence on family unity, the ECtHR has been more active in this field than the CJEU and is more willing to protect family rights in relation to removal than to admission.[46] However, in both cases the weighing of the competing interests is paramount. States are obliged to

Abdulaziz, Cabales and Balkandali v. The United Kingdom, Application Nos. 9214/80, 9473/81, 9474/81 of 25 April 1985.

[41] ECtHR, *Niedzwiecki v. Germany*, Application No. 58453/00 of 25 October 2003, para. 32 and ECtHR, *Okpisz v. Germany*, Application No. 59140/00 of 25 October 2005, para. 33.

[42] ECtHR, *Ponomaryovi v. Bulgaria,* Application No. 5335/05, of 21 June 2011; ECtHR, *Bah v. the United Kingdom*, Application No. 56328/07 of 27 September 2011; ECtHR, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09 of 6 November 2012.

[43] ECtHR, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09 of 6 November 2012.

[44] *Ibid* at para. 52.

[45] CJEU, Case C-578/08, *Chakroun*, 4 March 2010, para 43; Cases C-356/11 and C-357/11, *O. & S.,* 6 December 2012, paras. 74 and 82.

[46] Hélène Lambert, 'The European Court of Human Right and the Right of Refugees and Other Persons in Need of Protection to Family Reunion', International Journal of Refugee Law 11 (3) 1999, pp.427-450.

balance the individual's fundamental right against the community's interest and consider whether it is reasonable to expect aliens to develop family life elsewhere.[47] As the ECtHR held in *Gül v. Switzerland,* the principles applicable to the State's negative and positive obligations under Article 8 ECHR are similar: "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation".[48]

In older cases from the 90's both concerning immigration and international protection (refugee, subsidiary protection and temporary protection), reunification was evaluated as *the only way to re-establish family life,* where the applicants could not choose the most suitable country where to bring together family life – see, for example, *Gül v. Switzerland*[49] or *Ahmut v. The Netherlands*.[50] Now, both in immigration and international protection cases, the jurisprudence is moving towards understanding reunification as *the most adequate way to family unity* – like in *Jeunesse v. The Netherlands,*[51] *Tuquabo-Tekle and Others v. The Netherlands*[52] *or Sen v. The Netherlands*.[53] Hence, family unity is no longer viewed as a rare exception to the immigration rules, but rather as a rule when it is the most adequate way to family life, with a lower threshold or burden of proof applicable, compared to the previous approach of the 90's.

In the balancing exercise between the competing interests, sufficient weight must be given to the individual's right in order to ensure the effective enjoyment of the right. The State interest to control admission (for economic or political aims) can be outweighed by the rights under the ECHR/Charter because a State has a legitimate interest to control entry, but has also a genuine obligation to guarantee the practical and effective enjoyment of the individual's rights (see *Gäfgen v. Germany* [54] and *Murray v. Belgium*[55]). While recently family unity has been given increased weight, however, not yet to the extent of generalising the existence of a right to family unity.[56] Nevertheless, in the weighing of the competing interests and the proportionality test relevant to family life, it is evident from the selection of cases of

[47] *Ibid*.
[48] ECtHR, *Gül v. Switzerland*, Application No. 23218/94 of 19 February 1996, para. 38.
[49] ECtHR, *Gül v. Switzerland*, Application No. 23218/94 of 19 February 1996; ECtHR, *Ahmut V. The Netherlands*, Application No. 21702/93 of 28 November 1996.
[50] ECtHR, *Ahmut v. The Netherlands* Application No. 73/1995/579/665 of 28 November 1996.
[51] ECtHR, *Jeunesse v. The Netherlands,* Application No. 12738/10 of 3 October 2014.
[52] ECtHR, *Tuquabo-Tekle And Others v. The Netherlands*, Application No. 60665/00 of 1 December 2005.
[53] ECtHR, *Şen C v. Pays-Bas* Application No. 31465/96 of 21 December 2001.
[54] ECtHR, *Gäfgen v. Germany*, Application No. 22978/05 of 1 June 2010, para 213.
[55] ECtHR, *Murray v. Pays-Bas*, Application No. 10511/10 of 26 April 2016, para 104.
[56] ECtHR *Biao v. Denmark* Application No. 38590/10 of 24 May 2016; ECtHR *Jeunesse v. The Netherlands* Application No. 12738/10 of 3 October 2014; ECtHR *Tuquabo-Tekle and Others v. the Netherlands* Application No. 60665/00 of 1 December 2005.

this section that the BIC is playing a substantial role and can sometimes tip the scale towards family unity as a right.

Children are members of a family, and the latter is the *quintessential* social group. Hence their best interests must be fully and properly considered when balancing the competing interests and deciding on family unity.

5.3.2 THE RISE OF THE BIC AND ITS IMPACT ON FAMILY UNITY

The BIC has considerably evolved over time; in the past it was quite an uncertain legal concept. This section will explore the development of the BIC and show how its interpretation has changed. Before doing so, it is important to remind that, while the ECHR does not contain a specific provision on the BIC, this does not limit the ECtHR jurisprudence and the extent to which it can consider in certain cases the relevance of the BIC. There has always been a relation of deference between the Charter and the ECHR, including the ECtHR case law, but the CFR must be also interpreted taking into account the provisions of international conventions by which the EU and the individual Member States are bound, including the CRC.

Since 2000 the ECtHR started including in its decisions the obligation to take into proper account the BIC – see, e.g., *Ignaccolo-Zenide v. Romania*.[57] On that occasion, the partly dissenting opinion of Judge Maruste in the decision, referred to Article 4 of the CRC.[58] Also the CJEU in *Commission v. Parliament* of 2006 expressed the need to take into account the BIC as a principle that should inform a final decision.[59] The CJEU clarified that the CRC, the Charter and the ECHR stress the importance of family life and recommend that States have regard to the child's interests. However, the CJEU held that the CRC, the Charter and the ECHR do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.[60] Following *Commission v. Parliament* of 2006, however, the best interests of the child have been given greater prominence in the

[57] ECtHR, *Ignaccolo-Zenide v. Romania* Application No. 31679/96, 25 January 2000, para. 94.
[58] *Ibid*.
[59] CJEU, C-540/03, *European Parliament v. Council of the European Union* of 27 June 2006, paras. 58-59. "The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents".
[60] CJEU, C-540/03, *European Parliament v. Council of the European Union* of 27 June 2006, para 59.

CJEU jurisprudence[61] until the ECtHR in *Jeunesse v. the Netherlands*[62] established that BIC must be afforded significant weight.

The *MA, BT, DA*[63] case has been a game changer on the influence of the best interest assessment on any decision regarding children. It clarified that, although express mention of the best interests of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003 (Dublin II),[64] the effect of Article 24(2) of the Charter in conjunction with Article 51(1) is that the child's best interests must be 'a primary consideration' in *all* decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003. [65] Thus, it established that, even if a provision of the secondary legislation does not explicitly make reference to the BIC, it can be inferred that the BIC has to be a primary consideration in the decision-making process.

This approach is consistent with the above mentioned General Comment No. 14 which defines the BIC *as the right of the child* to have his or her best interests assessed (procedural right) and taken as a primary consideration.[66] It could be argued that that this position contradicts the previously mentioned decision in *Commission v. Parliament,* where the CJEU held that when States have regard to the child's interests, this does not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.[67] However, there is no contradiction. It is not a question of creating an absolute right or totally denying a margin of appreciation, but it is about significantly limiting it. When the circumstances so require, the discretion of Member States to deny admission and family unity can be limited where it is not adequate or reasonable to request the family to develop family life elsewhere – and such circumstances *must* (as a subjective right that creates an obligation) be assessed in a procedure where the BIC must be a primary consideration.

[61] See, e. g., CJEU, C-356/11 and C-357/11, *O. & S*., 6 December 2012, para. 80-81.
[62] ECtHR, *Jeunesse v. the Netherlands*, Application. No. 12738/10, 3 October 2014.
[63] CJEU, C-648/11 *R (on the application of MA, BT, DA) v. Secretary of State for the Home Department* of 06 June 2013.
[64] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10.
[65] CJEU, C-648/11 *R (on the application of MA, BT, DA) v. Secretary of State for the Home Department* of 6 June 2013, para. 59.
[66] UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: http://www.refworld.org/docid/51a84b5e4.html [accessed 16 May 2017].
[67] CJEU, C-540/03, *European Parliament v Council of the European Union* of 27 June 2006, para 59.

Another important conclusion coming from *MA, BT, DA* is that Article 24 of the Charter 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." Given the compelling arguments in *MA, BT, DA*, the EU legislator, immediately after the case has been adjudicated, modified substantially the secondary legislation (Dublin Regulation III) in order clearly to reflect such essential point. Since then, the BIC is seen as a fully-fledged right under the EU law.

In another recent case – *MK, IK & HK*[68] – the UK Upper Tribunal stressed again that rights to the respect for private and family life and the best interests determination in the ECHR and the Charter cannot be read in the vacuum of the EU legislation, but instead form part of a broader legal framework which encompasses the CRC.[69] The Upper Tribunal held that since the UNCRC's General Comment No. 14 of 2013 on the child's best interests is an authoritative interpretation of the UNCRC which must be interpreted in this light of the fact that the General Comment considers the best interests as both a substantive right and a procedural duty.[70]

In *MK, IK & HK* the Upper Tribunal took note also of the decision in *ZAT*[71] and pointed to the fact that, by virtue of Article 8 of the ECHR, the ECtHR decisions on the applications for family reunion involving children must be made in a positive, humane and expeditious manner requiring appropriate *proactive* steps on the part of the state concerned. The Upper Tribunal held that rights to respect for private and family life and best interests determination, coupled with the 'Tameside' principle (expeditious processing),[72] gave rise to a proactive positive duty of enquiry into all material considerations – including any necessary DNA test. A similar point has been made recently by the UK Upper Tribunal in *R (on the application of Al-Aniz*y),[73] where the court found a violation of the right to family unity under Article 8 ECHR, in particular, because the Secretary of State had not appropriately considered the BIC. The Home Office caseworkers failed to consider alternative options for proof of identity in the family reunification case, hence, the Upper Tribunal held that – while it is for the applicant and their sponsor to provide sufficient evidence – the Home Office has a duty to inquire by requesting further evidence or

[68] *R (on the application of MK, IK) v. Secretary of State for the Home Department*, JR/2471/2016, 29 April 2016.
[69] *Ibid* para. 21.
[70] *Ibid* paras. 22-26.
[71] *R (on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM) v. Secretary of State for the Home Department* (2015) UTIJR6, JR/15401/2015-JR/15405/2015.
[72] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.
[73] *R (on the application of Al-Anizy) v. Secretary of State for the Home Department* [2017] UKUT 00197 (IAC).

documents, being realistic to the situation which has prompted the refugee to leave their country of origin or habitual residence.[74]

Therefore, Article 8 of the ECHR requires expeditious and proactive steps on the part of the State concerned to assess a family link.[75] The court in *MK, IK & HK* referred also to some rules and principles applied in *ZAT*[76] ("entry" human rights principle), as well as the ECtHR jurisprudence on family unity (*Senigo-Longue Sen v. Netherlands*, *Mugenzi v. France*) on Article 10 UNCRC. The court also cited *Mayeka and Mitunga v. Belgium,* where the ECtHR referred to a 2002 publication of the UN Committee on the Rights of the Child. In *MK, IK & HK* the Upper Tribunal also recommended to improve the co-operation and exchange of information among all relevant agencies, *inter alia,* for family tracing.

Note that, in the EU legal framework, a similar obligation exists under Article 6(4) of the DRIII, which requires Member States, in the application of Article 8 ECHR, to take appropriate action to identify the family members, siblings or relatives of unaccompanied children as soon as possible upon the lodging of an application for international protection in that Member State, whilst protecting the best interests of the child. In pursuing that objective, Member States may call upon the assistance of international or other relevant organizations and may facilitate the child's access to the tracing services of such organizations. Article 12(3) of the Implementing Regulation No 1560/2003, as amended by Implementing Regulation No 118/2014,[77] at Article 1(7) also requires that Member States – after holding the personal interview – "to search for and/or take into account any information provided by the child or coming from any other credible source familiar with the personal situation or the route followed by the child or a member of his or her family, sibling or relative for the purposes of family tracing".

Other three ECtHR's key judgments on the family reunification of refugees focused on the procedural flaws and the possibility that Article 8 ECHR can be infringed due to the length of the proceedings for

[74] *R (on the application of Al-Anizy) v. Secretary of State for the Home Department* [2017] UKUT 00197 (IAC), para. 17.

[75] *R (on the application of MK, IK) (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v. Secretary of State for the Home Department,* JR/2471/2016, 29 April 2016, para 27.

[76] *R (on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM) v. Secretary of State for the Home Department* (2015) UTIJR6, JR/15401/2015-JR/15405/2015, para. 36-40.

[77] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 222 of 05 September 2003), amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 39 of 8 February 2014).

family reunification and the difficulties the applicants are confronted with in proving their relationship to their children.[78] In *Senigo*[79] and *Tanda-Muzinga,* concerning speedy examination,[80] the secondary legislation has been placed within the realm of adherence to fundamental rights, in particular the procedural components, fortifying the right to family unity under the ECHR, the Charter and the EU secondary legislation. This trajectory has been also followed by the CJEU in the Dublin context in *Ghezelbash* (incorrect application of a criterion) and *Karim* (infringements of the rules)[81] and in *R (on the application of MA, BT, DA)* where the CJEU emphasised the importance of unaccompanied minors having prompt access to procedures for determining refugee status.[82]

In *Tanda-Muzinga v. France,*[83] instead, the ECtHR made a step further on family reunification as the adequate way to family unity[84] (concerning both international protection and immigration cases). It clarified that, in cases of international protection only, the arrival of the applicant's family in the EU Member State may not be only the most adequate but it might be indeed *the only means* by which the family life can be brought together given the circumstances. Note, this approach is not a turn back to the higher burden of proof of the early jurisprudence on family reunification as *the only way to re-establish family life* applied in *Gül v. Switzerland*[85] or *Ahmut v. the Netherlands*[86] but rather a recognition that sometimes the arrival and reunification in the EU is the only reasonable option in cases of international protection.

Such an approach can be easily explained. In certain circumstances, the proportionality assessment under Article 8 ECHR is significantly limited – as a consequence, the final decision may result in a significant limitation on the discretion of Member States to deny admission and family unity where there are major or insurmountable obstacles to developing family life elsewhere[87] – in particular, due to

[78] ECtHR, *Mugenzi v. France*, Application No. 52701/09 of 10 October 2014; ECtHR, *Tanda Muzinga v. France*, Application No. 2260/10 of 10 October 2014; ECtHR, *Senigo Longue and Others v. France*, Application no. 19113/09 of 10 October 2014.

[79] ECtHR, *Senigo Longue and Others v. France*, Application no. 19113/09 of 10 October 2014.

[80] ECtHR, *Tanda Muzinga v. France*, Application No. 2260/10 of 10 October 2014.

[81] CJEU, C-63/15 *Ghezelbash* and C- 155/15 *Karim* of 7 June 2016.

[82] CJEU, C-648/11 *R (on the application of MA, BT, DA) v. Secretary of State for the Home Department* of 6 June 2013, para. 61.

[83] ECtHR, *Tanda Muzinga v. France*, Application No. 2260/10 of 10 October 2014

[84] See ECtHR, *Jeunesse v. The Netherlands,* Application No. 12738/10 of 3 October 2014; ECtHR, *Tuquabo-Tekle And Others v. The Netherlands*, Application No. 60665/00 of 1 December 2005; ECtHR, *Şen C v. Belgium* Application No. 31465/96 of 21 December 2001.

[85] ECtHR, *Gül v. Switzerland*, Application No. 23218/94 of 19 February 1996

[86] ECtHR, *Ahmut v. The Netherlands*, Application No. 21702/93 of 28 November 1996

[87] ECtHR, *Sen v. the Netherlands*, Application No. 31465/96, 21 December 2001, para.40; ECtHR *Mengesha Kimfe v. Switzerland*, Application No. 24404/05, 29 July 2010, para. 68, where the court considered it particularly important that the applicant and her husband were prevented from returning to their country of origin (Ethiopia) and therefore, developing a family life outside Switzerland

risks connected with international protection.[88] So, while Article 8 ECHR does not guarantee a right to choose the most suitable place to develop family life, when the interruption of family life is due to a genuine fear of persecution[89] or where a situation of indiscriminate violence disrupts family ties through no choice of the sponsor – who cannot be said to have voluntarily left family members behind"[90] – there is no alternative but to guarantee admission to the EU.

The same reasoning has been followed by the UK Upper Tribunal in *AT and another*[91] where it was held that if the family reunification could not be secured in the Member States because of a public interest, and – as an alternative the sponsor would have to leave the Member State – in such a case the public interest of migration control would affect disproportionally the individual's right. It would deprive the individual of the protections as a refugee and represent an insurmountable obstacle, as the alternative to family unity the UK would be family unity in a country where the sponsor – and possibly his/her family – are at risk of persecution.[92] This would be incompatible with the philosophy and rationale of the Refugee Convention and it would also expose the applicant to a risk of violation of his rights, in particular those protected by Articles 3 and 4 ECHR.[93]

Similarly, in a case before the Administrative Court of Berlin[94] family unity was considered in the perspective of effectiveness and of the exceptional circumstances of the case as part of a humane family reunification policy, with the vulnerability of some family members limiting the margin of appreciation for Member States. In this case the State's margin of appreciation on admission has been weighted

[88] As opposed to the situation in ECtHR, *Ahmut v. the Netherlands*, Application No. 21702/93, 28 November 1996, para. 70-73 where the Court found that the applicant willingly decided to settle in the Netherlands, apart from his son in Morocco; ECtHR, *Gül v. Switzerland*, Application No. 23218/94, 19 February 1996, where the sponsor held a residence permit issued on humanitarian grounds but had subsequently visited his minor son in Turkey, indicating that the original reasons for his application for political asylum were no longer valid; ECtHR, *Berisha v. Switzerland*, Application No. 948/12, 20 January 2014, para. 60 and ECtHR, *Benamar v. the Netherlands*, Application No. 43786/04, where it was possible for the applicants to enjoy family life elsewhere.

[89] ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006, para. 75.

[90] ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, Application No. 60665/00, 1 March 2006, para. 47, "it is questionable to what extent it can be maintained...that Ms Tuquabo-Tekle left Mehret behind of 'her own free will' bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad"; ECRE, 'Information Note on Family Reunification for Beneficiaries of International Protection in Europe' June 2016 available at https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf.

[91] *AT and another (Article 8 ECHR – Child Refugee – Family Reunification)* Eritrea [2016] UKUT 00227 (IAC) [2016] UKUT 227 (IAC), 24 March 2016.

[92] *Ibid*, para 38.

[93] *Ibid*.

[94] VG Berlin, 26 L 489.15 V, 29.12.2015 December 21, 2015, Ovg 3 S 95.15.

against the applicant's effective enjoyment of fundamental rights – such as the right to family unity – leading the public interest to yield to the practical and effective enjoyment of the individual right.[95]

As shown by the analysed case law, the BIC has seen a development from a simple criterion used to inform decisions to a principle and in the end a fully-fledged right. The BIC gave increased weight to the right to family life, even if not to the extent of generalising the existence of a right to family unity. This is a development that lead to a shift from family unity as *the only way* to family life to *the adequate way* to family life. In the case of international protection even to the extent that it could be argued that sometimes admission can be *the only means* to achieve family unity due to major or insurmountable obstacles to developing family life elsewhere and the risks connected with international protection.

The best interests of the child, alone or accompanied by family members, are becoming a primary consideration that must influence all decisions, whether procedural of substantive and whether it concerns a provision explicitly or implicitly regulating such aspect, including positive proactive obligations. Thus the BIC can fortify the right to family unity – even if not to the extent of making family unity a subjective right – in appropriate balance with the interests on admission to the Member States' territory.

Even though most of the above reasoning on family unity comes from the ECtHR, and the CJEU has not yet developed a well-established jurisprudence, the CJEU has a strong case law on the BIC and looks with deference at the ECtHR jurisprudence on family unity, so the CJEU cannot in future return to the concept of BIC as a principle. The reason is that Article 24(2) CFR – read in light of the General Comment No. 14 – clearly supports the concept of the BIC as right. The right of any child to have the best interests assessed and taken as a primary consideration when different interests are being weighed in order to reach a decision on admission or return.

5.4 *R (on the application of MM (Lebanon)* and *SS (Congo)):* A Degree of Hardship and the BIC

In the previous sections,[96] we observed the development of the jurisprudence on family unity in humanitarian and immigration cases, with the BIC pushing towards family unity as a right. This is a development that lead to a shift in the legal doctrine from family reunification as 'the only' way to family life to 'the most adequate' way to family unity. However, in the cases of international protection sometimes admission for the purpose of family unity is seen as 'the only means' to achieve family unity

[95] On the practical and effective enjoyment of their rights See ECtHR, *Gäfgen v. Germany* Application No. *22978/05* of 1 June 2010, para 213 and ECtHR, *Murray v. The Netherlands*, Application No. 10511/10 of 26 April 2016, para 104.

[96] See section 5.3.1 and 5.3.2.

due to insurmountable obstacles to developing family life elsewhere and the risks connected with international protection.

Recently, [97] the UK Supreme Court was able to bridge the concepts of family reunification as the 'most adequate way to family unity' in immigration cases and family life as 'the only means' to achieve reunification in international protection cases. The court, with one single approach clarified when it is not adequate or reasonable to request to develop family life elsewhere both in immigration and international protection cases.

In 2017 the UK Supreme Court adjudicated the cases *R (on the application of MM (Lebanon) and SS (Congo)) v. Entry Clearance Officer, Nairobi* along with other three similar cases.[98] In *MM (Lebanon)* the court applied the insurmountable obstacles test of *Tuquabo-Tekle v. The Netherlands* and *Tanda Muzinga v. France* and the prominent nature of the BIC. In *SS (Congo)* the court endorsed the '*Jeunesse* factor' and the exceptional circumstances or major impediments approach. While the first one was a case of international protection and the second one an immigration case, the court held that in both cases it was not adequate to develop family life elsewhere since in both cases it would result – even if for different reasons – in a *degree of hardship.*

Both *MM (Lebanon)* and *SS (Congo)* focussed on whether the Minimum Income Requirement (MIR) in the UK, as an instrument of immigration control, could jeopardise the right under Article 8 ECHR. The cases concerned the assessment of the MIR's instructions and the way the proportionality test under Article 8 ECHR must reflect a balance between individual rights and the public interest. In other words, what are the exceptional circumstances in which a refusal of entry would result in unjustifiably harsh consequences for the individual or their family for the refusal to be disproportionate under Article 8 ECHR. Note that, as for every case in this paper, exceptional circumstances to warrant a grant of entry

[97] *R (on the application of MM (Lebanon)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Abdul Majid (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Master AF) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Shabana Javed (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) SS (Congo) (Appellant) v. Entry Clearance Officer, Nairobi (Respondent),* [2017] UKSC 10 of 22 February 2017.

[98] *R (on the application of MM (Lebanon)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Abdul Majid (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Master AF) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Shabana Javed (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) SS (Congo) (Appellant) v. Entry Clearance Officer, Nairobi (Respondent),* [2017] UKSC 10 of 22 February 2017.

outside the normal rules are likely to be rare and case specific,[99] but some principles are indicative of the way the jurisprudence is developing.

In *MM (Lebanon)* the applicant was a national of Lebanon living in the UK. After meeting a Lebanese woman in Syria and spending five months with her in Cyprus between September 2012 and January 2013, they married by proxy in Lebanon. The applicant's earnings were below the MIR benchmark, so he could not seek family reunification in the UK; but the applicant could also not live in Lebanon with his wife because of the applicant's refugee status and well-founded fear of persecution in that country. There was no other country in which they have a right to reside, as they have met in Cyprus on short term visitors' visas. MM claimed that their inability to live together in the UK was an unjustified interference with his Article 8 right to respect for his family life. The child of the woman was included as an interested party to the claim because of the adverse impact upon him in achieving family unity in the UK.

In *SS (Congo) (Appellant) v. Entry Clearance Officer, Nairobi (Respondent),* the applicant was a citizen of the Democratic Republic of Congo ("DRC") resident in Congo. She was married to a Congolese national, who was granted refugee status in the UK, and later became a naturalised British citizen. Hence the application was on the basis of the UK citizenship, rather than on the basis of the refugee status. Once they got married, they applied for family reunification in the UK, but did not meet the MIR criteria, even though the appeal was allowed on the basis of Article 8 ECHR. The couple could not live together in the DRC, as the British national (sponsor) would have to abandon his job. Therefore, the wife had to be admitted to the UK, so that she could take solace with her husband and begin to form a family.

The Supreme Court in deciding the two cases noted that in *Abdulaziz, Cabales and Balkandali v. United Kingdom*,[100] the ECtHR held that refusing to admit the foreign spouses of British citizens or persons settled in the UK was not a breach of the Article 8 ECHR right to respect for family life. The court pointed to the fact that in that case no general obligation was found to respect a married couple's choice of country to live in. Furthermore, in the circumstances of that case there were no obstacles to establishing family life in their own or their husbands' home countries. The Supreme Court noted that, while in the majority of cases before *Abdulaziz* there was no violation of Article 8 ECHR, since that case the ECtHR

[99] *MM & Ors v. Secretary of State for the Home Department* [2013] EWHC 1900 (Admin)

[100] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom* Application No. 15/1983/71/107-109 of 24 April 1985.

case law moved on, and recognised that such refusals can amount to a lack of respect – as the Supreme Court held for instance in *R (Aguilar Quila) v. Secretary of State for the Home Department.*[101]

The Supreme Court mentioned the ECtHR decision in *Jeunesse v. The Netherlands,* observing that "the criteria developed in the court's case law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 ECHR cannot be transposed automatically to the situation".[102] However, the court noted that in many cases dating back at least as far as *Gül v. Switzerland,* the principles applicable to the State's negative and positive obligations under Article 8 ECHR were similar, so in any case a fair balance has to be struck between the competing interests of the individual and of the community as a whole.[103]

MM (Lebanon) and *SS (Congo)* both concerned the positive obligation to admit and in both cases there was no general obligation to respect a married couple's choice of country in which to reside or to authorise family reunification. However, there were particular circumstances of the persons concerned which had to be given enough weight. Among the Factors to be taken into account were: the extent to which family life would effectively be ruptured; the extent of the ties in the host country; but, most importantly, whether there were 'insurmountable obstacles' (or 'major impediments' – see *Tuquabo-Tekle v. The Netherlands*[104] or *IAA v. United Kingdom)* to developing family life elsewhere.[105]

In *MM (Lebanon)* the Supreme Court reminded that the ECtHR in *Neulinger v. Switzerland*[106] stressed the importance, in Article 8 ECHR cases, of taking into account the best interests of any child whose family life was involved. The court further observed that in *Nunez v Norway,*[107] an immigration case, the BIC played a major role, and that in *Jeunesse* the ECtHR held that it is of paramount importance to give effective protection and sufficient weight to the best interests of the children directly affected by the decision.[108]

The court noted, with reference to *Jeunesse*, that there were no insurmountable obstacles to the family relocating to the home country, however, the family would have also experience *a degree of hardship* if

[101] *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45; [2012] 1 AC 621.
[102] ECtHR, *Jeunesse v. The Netherlands,* Application No. 12738/10 of 3 October 2014, para. 105.
[103] ECtHR, *Gül v. Switzerland*, Application No. 23218/94 of 19 February 1996, para 166.
[104] ECtHR*, Tuquabo-Tekle and others v. the Netherlands,* Application no. 60665/00, 1 March 2006, para 48
[105] *IAA v United Kingdom* (2016) 62 EHRR 233, paras 40 and 48
[106] ECtHR, *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07) of STRASBOURG 6 July 2010
[107] ECtHR, *Nunez v. Norway*, Application no. 55597/09 of 28 June 2011.
[108] ECtHR, *Jeunesse v. The Netherlands,* Application No. 12738/10 of 3 October 2014, para 109.

forced to live there rather than in the UK.[109] Moreover, it held that in *MM (Lebanon)* the authorities had not given sufficient weight to the interests of the children. The Supreme Court stressed that the central issue of the case was whether a fair balance had been struck between the personal interests of all members of the family and the public interest in controlling immigration. The Court noted that the ECtHR has applied this test in numerous family reunion cases, with varying results, depending on the individual circumstances.[110]

In *MM (Lebanon)* the Supreme Court applied a test that strikes a fair balance between the rights of the individual and the interests of the community, citing Lord Hodge in *R (Bibi) v Secretary of State for the Home Department:*[111] "the court would not [be] entitled to strike down the [r]ule unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases."[112] However, the Supreme Court noted that the failure to meet the MIR does not in itself lead to an application for entry clearance being refused in all cases as the "Secretary of State retains a discretion to grant entry clearance outside the rules in appropriate cases, which must be exercised in accordance with section 6 of the Human Rights Act 1998."[113] Note that this is the very reason why at the appeal stage *SS (Congo)* benefited of a full merits based fact-sensitive assessment outside the standard rules.

In *MM (Lebanon)* the Supreme Court court noted that, when the assessment is based on the full merits of the case, the test established in *Jeunesse,* which draws together earlier Strasbourg jurisprudence, is ultimately whether a fair balance has been struck between individual and public interests, taking account of the various factors identified. The MIR instructions reflected the view that a decision in accordance with the rules will not involve a breach of Article 8 ECHR, save in 'exceptional circumstances'. However, the court identified exceptional circumstances as those that would lead to 'unjustifiably harsh' consequences for the individual or their family. It also noted that, even if a rule

[109] ECtHR, *Jeunesse v. The Netherlands,* Application No. 12738/10 of 3 October 2014, para 117.

[110] *Gül v Switzerland*, para 38*; Ahmut v The Netherlands* (1997) 24 EHRR 62, paras 63, 73; *Sen v. The Netherlands* (2003) 36 EHRR 81, para 31; *Tuquabo-Tekle v. The Netherlands,* para 41; *Konstantinov v The Netherlands* [2007] ECHR 1635/03, paras 46, 53; *Rodriguez da Silva v. The Netherlands*; *Y v Russia* (2010) 51 EHRR 531, paras 39, 44; *Nunez v. Norway*, above, para 68; *IAA v. United Kingdom* (2016) 62 EHRR 233, paras 38, 40, 42, 47.

[111] *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055, para 69 (referring to *R (MM (Lebanon)) v Secretary of State for the Home Department* [2015] 1 WLR 1073, paras 133 and 134 per Aikens L).

[112] *UK Supreme Court, R (on the application of MM (Lebanon)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Abdul Majid (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Master AF) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Shabana Javed (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) SS (Congo) (Appellant) v. Entry Clearance Officer, Nairobi (Respondent),* [2017] UKSC 10 of 22 February 2017, para. 56.

[113] *Ibid*, para. 58.

causes hardship to many, including some who are in no way to blame for the situation in which they now find themselves, this does not by itself mean that the rule is overall incompatible with the Convention rights or otherwise unlawful at common law.

While the Supreme Court in *MM (Lebanon)* found that the MIR is part of an overall strategy aimed at reducing the net migration, which goal can sufficiently justify the interference with, or lack of respect for the Article 8 ECHR right, sometimes it may also have a disproportionate effect in the specific circumstances of individual cases. In particular, in the circumstances before the court. The "*Jeunesse* factor" in *MM (Lebanon)* pointed strongly in favour of the applicants, due to the BIC and because the MIR was representing an 'insurmountable obstacle'. The insurmountable obstacle was that the sponsor could not move to Lebanon because of risks related to his refugee status; at the same time, having to settle in another country (such as Cyprus), where the couple had a right to reside, would result in an unjustifiably harsh situation. Therefore, the court found an unjustified interference with the applicant's Article 8 ECHR and a breach of section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"). In particular, a breach of the obligation to safeguard and promote the welfare of children when making decisions which affect them.

In *SS (Congo)*, while there were no insurmountable obstacles to the couple carrying on family life in the DRC, however, there were other exceptional circumstances which would mean that the refusal of the application would result in a degree of hardship for the sponsor and the claimant, as the sponsor would have had to leave his job in the UK.

In essence, two different cases, one concerning international protection and the other one on immigration, have been decided using the same test which bridged the 'most adequate way' to family unity test with 'the only means' test. This shows that in both cases, even if for different reasons, it was not adequate to request the applicants to develop family life elsewhere because it would result in a degree of hardship and therefore would be unreasonable. In the first case because there were not only exceptional circumstances, but also insurmountable obstacles that would result in an unjustifiably harsh situation. In the second case, even though there were no insurmountable obstacles, there were still exceptional circumstances, or major impediments, that would result in a degree of hardship.

With particular regard to the BIC, in *MM (Lebanon)* the Supreme Court pointed out that the MIR instructions at the time of the events did not adequately fill the gap left by the MIR rules: '[r]ather than treating the best interests of children as a primary consideration, taking account of the factors

summarised in *Jeunesse*, they lay down a highly prescriptive criterion requiring "factors ... that can only be alleviated by the presence of the applicant in the UK", such as support during a major medical procedure, or "prevention of abandonment where there is no other family member ..."'. [114] Note that the court stressed how doubtful it seemed that even the applicant in *Jeunesse* itself would have satisfied such a stringent test. Hence, the court concluded that the gaps in the MIR instructions needed to be filled because they did not treat the BIC as a primary consideration as required under article 3(1) CRC.

5.5 The BIC and the "Entry" Human Rights Principle

5.5.1 The EU Admissibility Procedure

Like the MIR, the Dublin Regulation and the admissibility procedure under the Asylum Procedure Directive seem to have gaps in the treatment of vulnerable persons, such as children, and in the promotion of family unity.

One of the most striking shortcomings in the EU *asylum acquis* is the possibility to evaluate the applicant's links to a third country external to the EU in isolation in the context of the inadmissibility procedure under Article 3(3) of the Dublin Regulation III and Directive 2013/32/EU (Asylum Procedure Directive). The Dublin Regulation seems to permit identifying a third country external to the EU, where the applicant has a right to request asylum, as the country responsible for processing the asylum claim. Even though some commentators believe[115] that this approach is not prohibited by Article 31(1) of the 1951 Geneva Convention,[116] there are several strong arguments – presented in this section – that are against this point of view.

As for the inadmissibility procedure, the CJEU in *Mirza* established that the Dublin III Regulation allows Member States to send an applicant for international protection to a safe third country, irrespective of whether the decision is taken by the EU Member State responsible for processing the application under the APD (Member State determined under the Dublin responsibility criteria) or another Member State

[114] *UK Supreme Court, R (on the application of MM (Lebanon)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Abdul Majid (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Master AF) (Appellant) v. Secretary of State for the Home Department (Respondent) R (on the application of Shabana Javed (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent) SS (Congo) (Appellant) v. Entry Clearance Officer, Nairobi (Respondent),* [2017] UKSC 10 of 22 February 2017, para. 91.

[115] Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 IJRL.

[116] Article 31(1) of the 1951 Convention Relating to the Status of Refugees states: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

(MS determining the Dublin responsibility).[117] In *Mirza* the CJEU acknowledged that any Member State may rule on the inadmissibility of a claim under Article 33 APD (inadmissible applications) regardless of the responsibility under the Dublin Regulation.

According to this interpretation, the applicant can be sent to a third country (external to the EU) if he has a mere 'possibility' to request refugee status in that State,[118] regardless of previous presence or transit in that country and meaningful connections. So rather than first apply the Dublin Regulation and consider whether the applicant has the possibility to request asylum in a EU Member State with which he might have a meaningful link, the applicant can be sent to a third country where there is a mere possibility to request asylum, regardless of any link with such country or indeed with an EU Member State.

We believe that this interpretation is contrary to the EXCOM Conclusion No. 15 (XXX) of 1979 titled paragraph (h)(iv)[119] that requires that asylum is not refused solely on the ground that it could be sought from another State, so it is fair and reasonable to request asylum first from a State with whom the applicant has a connection. According to the UNHCR, the closer the connection between an asylum seeker and a State, the greater the claim that the State should accept responsibility.[120] Not considering a connection would represent a penalty contrary to Article 31(1) and a violation of the fundamental right to family unity. It is also contrary to the EU law as it permits to bypass *de facto* the Dublin Regulation and infringe the right to family unity.

In order not to penalise protection seekers or violate fundamental rights, the formal identification of the third country external to the EU should take place in parallel and in a comparative way with the determination of the competent EU Member State under the Dublin Regulation. Therefore, the first step in the procedure should be the application of the Dublin Regulation to identify if any other Dublin criteria under Article 3(2) apply (e. g. family unity, dependency or humanitarian/discretional reasons). If the only applicable Dublin criterion is that of the country of first irregular entry within the EU, then it is possible to try to identify another State external to the EU with which the applicant might have stronger

[117] CJEU, C-695/15 PPU *Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal* of 17 March 2016.

[118] Article 38(1)(e) of the Asylum Procedure Directive 2013/32/EU.

[119] EXCOM Conclusion No. 15 (XXX) of 1979 titled "Refugees without an Asylum Country". Paragraph (h)(iv): "Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State".

[120] UNHCR, 'Convention Plus Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers' FORUM/CG/SM/03, 11 MARCH 2004 APARA 31-3, which cities family ties, lawful residence, 'or other demonstrable connections'.

links than with the EU country of first irregular entry. The UNHCR stressed that responsibility should lie primarily with the State to which the application has been submitted, unless the applicant already has a connection or close link with another State – be this another EU state or a third country – and, therefore, it appears fair and reasonable that he requests asylum there.[121]

The second aspect that raises concerns is the application of the concept of the extended family member and other meaningful links. While close family members must be reunified, extended family members or other meaningful links are not taken into proper account under the Dublin Regulation, except for the case of unaccompanied children or admission on humanitarian grounds – where Member States have a wide margin of discretion – under Article 17 of the Dublin Regulation III. As a possible solution, EXCOM Conclusion 15 at paragraph (h)(iii) suggests that "the intentions of the asylum-seeker in regard to the country in which he wishes to request asylum should as far as possible be taken into account". The rationale is that, according to the UNHCR, along with extended family links, the possibility to choose a country according to meaningful links or a reasonable preference expedites and enhances the prospects of integration and increases the quality of protection offered, thus fostering international solidarity and equitable responsibility-sharing.[122] This suggests that not considering extended family links and other meaningful links, focussing instead on the transit or point of entry, could represent a penalty for both the asylum seeker and the receiving country, because an applicant without any link or reason to be in a country is more likely to represent a burden and less likely to integrate.

The UNHCR recommends that "special regard should be given to family but also other cultural and relevant links".[123] The UNHCR stressed that, for the purpose of better prospects of integration, "besides family connections, cultural ties, knowledge of the language, the possession of a residence permit and the applicant's previous periods of residence in the other State would constitute meaningful links"[124] and thus an acceptable ground for a reasonable preference. These criteria will normally include also

[121] See UNHCR, 'Revisiting the Dublin Convention – Some reflections by UNHCR in response to the Commission staff working paper', January 2001.

[122] Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 IJRL, 667.

[123] UNHCR Considerations on the 'Safe Third Country' Concept, EU Seminar on the Associate States as Safe Third Countries in Asylum Legislation, Vienna (8-11 July 1996) at 4. http://www.refworld.org/docid/3ae6b3268.html

[124] UNHCR's Observations on the European Commission's Proposal for a Council Regulation establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (1 February 2002) para. 7. http://www.refworld.org/docid/3cbc27e34.html

other *demonstrable* connections between the individual asylum-seeker and the country into which re-admission/admission is sought. [125]

Indeed, Article 31(1) of the 1951 Geneva Convention was intended to apply in the first place to those who have briefly transited through other countries where they are unable to find protection from persecution, but also to those who have some other 'good cause' for not applying in such countries.[126] Lack of effective protection in a transit country is indeed the primary 'good cause' for illegal entry in another State, however, the presence of family members or other meaningful links or reasonable preferences represent good reasons to seek asylum in another country and for this purpose perform secondary movements.

As an example, Simon Brown LJ in *R. v. Uxbridge Magistrates* has restricted the interpretative openness of Article 31(1) by explaining that transit in a third country does not forfeit automatically protection elsewhere.[127] If an applicant has a connection or close link with a State, referral to that State is not only fair, but also reasonable.[128] Under the EU law, referral to another Member State in case of close family links is compulsory, otherwise the Member State applying the inadmissibility procedure might breach the rules of primary and secondary legislation that protect family unity.

Hence, since Article 31(1) does not prohibit transfer or allocation of responsibility to a country that is willing and able to provide effective protection, but with which the applicant has insufficient comparative links, the Dublin Regulation has been always in line with the law.[129] However, by not taking into account the reasonable preferences, except for the possibility for each individual State to do so voluntarily by means of the discretionary or humanitarian clauses, the mechanism seems to be going against the EXCOM Conclusion and the EU primary and secondary legislation.

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[125] UNHCR 'Convention Plus Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum Seekers' FORUM/CG/SM/o3, 11 March 2004 para 31-33. Which cites family ties, lawful residence, 'or other demonstrable connections'.

[126] G. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' in E. Feller et al (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Oxford 2003), 218.

[127] *R. v. Uxbridge Magistrates' Court and Another, ex parte Adimi* [1999] 4 All ER 520 (UK), para. 16 (Simon Brown LJ) para 18.

[128] Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 IJRL, 627.

[129] Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 IJRL, 667

5.5.2 Access to Territory and the Emergence of the Entry Human Right Principle

In the *ZAT* case[130] for the first time a national or EU court looked at the balancing act between the functioning of the Regulation and the qualified right under Article 8 ECHR in a case of request for admission to the territory of one Member State from another one under the Dublin III Regulation.

The result has been that the UK courts contended that Article 8 operates in a manner which might permit a total circumvention of the Dublin Regulation procedures and mechanisms. In whole, bypassing the entire initial procedure for compelling circumstances (test 1), and in part – when the applicant engages with the system and the latter fails to guarantee the respect of fundamental rights efficiently and with expedition (test 2).

In the circumstances of *ZAT,* it was possible completely to bypass the Dublin Regulation initial procedure because there were also facts relevant to Article 3 ECHR, which has been used in the proportionality test to ascertain that the material and procedural deficiencies in the country of presence were disproportionately interfering with the rights under Article 8 ECHR. Already before the *ZAT* case, in *M.S.S.* and *Cimade* the ECtHR recalled that Article 3 might be engaged where individuals find themselves faced with social indifference, in situations of serious deprivation or in material conditions incompatible with human dignity (Art. 1 CFR).[131] In *ZAT* particular weight has been given to the domestic "best interest duty" of children, however, it has been also suggested, in relation to Article 8 ECHR, that a refusal to exercise the power under Article 17 is justiciable. This particular point has been later addressed in another case before an English court and it is analysed below.[132]

In *ZAT*, the jurisprudence on the exit human right principle pertaining to the landmark cases *M.S.S*, *N.S/ME* and *Tarakhel* has been used by analogy to the jurisprudence on family re-unification outside the Dublin Regulation context,[133] to argue for a right to family unity bypassing the EU internal rules on responsibility allocation within the Dublin initial procedure, notwithstanding the 'solid' presumption of

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[130] *R (on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM) v, Secretary of State for the Home Department* (2015) UTIJR6, JR/15401/2015-JR/15405/2015*; ZAT v. Secretary of State for the Home Department* the Court of Appeal (Civil Division) on Appeal fromtThe Upper Tribunal Immigration and Asylum Chamber, Case No: C2/2016/0712, [2016] EWCA Civ 810.

[131] ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09 of 21 January 2011, paras. 252-253; CJEU - C-179/11 *Cimade, Groupe d'information et de soutien des immigres (GISTI) v. Ministre de l'Interieur, de L'Outre-mer, des Collectivities territorials et de l'Immigration* of 27 November 2012.

[132] *R (on the application of RSM and Another) v. Secretary of State for the Home Department* [2017] UKUT 124 (IAC). See page 39.

[133] *See R (Aguilar Quila) v. Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45; [2012] 1 AC 621, para 30 – 43; See ECtHR, *Tuquabo-Tekle and others v. The Netherlands,* Application no. 60665/00, 1 March 2006, paras.42-43; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03 of 12 October 2006, para. 90.

equivalent protection that underpins the EU internal Schengen area.[134] This jurisprudence derives from the principle established in *Tarakhel,* where Article 3 ECHR has been used as a benchmark to establish the risk of a serious and flagrant breach or infringement of Article 8 ECHR in a case of non-return.

In *ZAT,* the Upper Tribunal has evidenced that the requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when the children seeking asylum are accompanied by their parents[135]. Accordingly, the reception conditions in the country of presence for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create ... for them a situation of stress and anxiety, with particularly traumatic consequences"[136]. Otherwise, the conditions in question would have to attain the threshold of severity required to come within the scope of the prohibition under Article 3 ECHR. The same reasoning can be applied to the procedure under Article 33 APD for the allocation of responsibility between an EU Member State and a STC. In this regard, this paper suggests that some of the reasoning applicable to the Dublin jurisprudence may also apply to other instruments of the EU secondary legislation. This thesis is supported also by other studies.[137]

Concerning Article 3 ECHR a similar argument was recently made by AG Megozzi in the *PPU X. and X. v. État Belge* opinion in regard to access to protection in the EU through humanitarian visa.[138] The striking similarity between these cases is that the Member States' responsibility has been engaged even though the applicants were not on their territory. Therefore, due to the absolute nature of Article 3 ECHR, alone or in conjunction with Article 8, the AG could not dismiss a duty to admit based on a similar risk involving children.[139] In particular, in *X.X.* the Advocate General reminded that the minor children's "superior interests" must be a primary consideration in all acts performed by public authorities in accordance with Article 24(2) of the Charter.[140]

[134] Paolo Biondi, 'The *ZAT* case and the far-reaching consequences for the Dublin Regulation', European Database of Asylum Law, 9 February 2017 available at http://www.asylumlawdatabase.eu/en/journal/zat-case-and-far-reaching-consequences-dublin-regulation.

[135] ECtHR, *Popov v. France*, Applications Nos. 39472/07 and 39474/07 of 19 January 2012, para 91.

[136] *Ibid,* 102.

[137] See section 5.5.3; ECRE, 'Information Note on Family Reunification for Beneficiaries of International Protection in Europe' June 2016 available at https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf, p. 36-37.

[138] CJEU, Advocate General Mengozzi Opinion in C-638/16 PPU *X and X v. État Belge* of 7 March 2017, paras, 3, 6, 36.

[139] CJEU AG Opinion in Case C-638/16 *PPU X. and X. v. État Belge* of 7 February 2017; Paolo Biondi - The Emergence of the Entry Human Rights Principle. Looking Beyond the X.X. Case, EDAL.

[140] CJEU AG Opinion in Case C-638/16 *PPU X. and X. v. État Belge* of 7 February 2017, para 137.

The *X.X.* opinion, similarly to *ZAT*, clarified that, in order correctly to assess the margin of appreciation under a visa regime, it is essential to weigh the competing interests between protection of fundamental rights and migration control and consider the facts relevant to Article 3 ECHR. As a consequence, the decision has to be based on information on the country of presence provided by objective sources. Another key point made by Advocate General Megozzi was that, due to its absolute nature, Article 3 ECHR can also be used independently.[141] This means that a link between the applicant and the country requested to issue a visa is not necessary. The reason is that when the visa is requested at the consulate, the concept of *de iure* jurisdiction over the applicant comes into play where a refusal to issue a visa might result in a risk of violation of fundamental rights independently from any link with the requested country, and that is a sufficient link.

Some commentators have previously suggested that, where there is a causal link between the rejection of a visa application and the appropriate level of risk to trigger an Article 3 ECHR violation, the responsibility of the State should be engaged.[142] Article 33 of the 1951 Geneva Convention and Article 3 ECHR ought to be read constructively in light of evolving IHRL precepts on jurisdiction.[143] Although the text of the ICCPR is ambiguous,[144] the Human Rights Committee, displaying considerable creativity, interprets Article 33 of the 1951 Geneva Convention as applying "to anyone within the power or effective control of that State party, even if not situated within the territory of the State party".[145] The Advocate General in *X.X.* also pointed to another key characteristic of Article 3 ECHR – that, in view of its absolute nature, the absence of family ties or other ties of the applicants to the requested country is not relevant.

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[141] *Ibid,* 161.

[142] Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 International Journal of Refugee Law, pp. 564-70.

[143] UNHCR Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, available at: http://www.unhcr.org/refworld/pdfid/45f17a/a4.pdf. Lauterpacht and Bethlehem, supra n 30 at 110^11; and Klug and Howe 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement principle to Extraterritorial Interception Measures' in Ryan and Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges (The Hague: Martinus Nijhoff, 2010), pp. 69 and102.

[144] Article 2(1) International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR) states that the rights apply to all individuals within a state's 'territory and subject to its juris- diction.' To read this phrase cumulatively would exclude extraterritorial effects.

[145] Human Rights Committee, General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 12 May 2004, HRI/GEN/1/Rev.7 at 195; 11 IHRR 905 (2004). The ICJ subsequently confirmed this view in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 136 at 179. Cf. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 International Journal of Refugee Law 542 at 557, for a more skeptical assessment of the Human Rights Committee's attempt 'to rework the cumulative criteria' in Article 2(1) ICCPR.

In *ZAT* there was also a *de iure* exercise of jurisdiction as the UK has refused responsibility for the applicants on the basis of the Dublin Regulation and the CEAS. Even though the applicants were not on the UK territory and they had not been granted access to the territory, they were already under the jurisdiction of the UK. In fact, the UK was trying to relinquish its responsibility using the EU legislation which applies to all EU Member States and engages their responsibility whenever they return a person or refuse admission. The EU Member States are connected into a single jurisdiction by virtue of EU law, so when they exercise any discretional power under such jurisdiction, they are required to uphold international and EU human and refugee rights at all times.[146]

In *ZAT* there were also compelling humanitarian grounds similar to those suggested the *X.X* case that have been taken into account in the balancing exercise of the risk at stake, and similarly the information on the country of presence has been provided by reliable sources. Similarly, the best interest of the child (BIC) and the risk of trafficking have also reinforced the arguments about eventual risk of a violation of Article 3 ECHR on undeniable humanitarian grounds. In *X.X*. and *ZAT*, particular weight had to be given to the risk of trafficking or smuggling as a consequence of the refusal of entry. If a state prevents people from seeking protection legally without offering effective alternatives, it *de facto* forces people into illegality. This risks placing individuals in dangerous situations in which they may be exploited by criminal networks. Hence, the consequences of refusing entry must be assessed by considering how an applicant's condition would evolve after the refusal of entry.

It was from the *ZAT* case that the so-called "entry" human rights principle emerged as a term of art, but now it has also been endorsed in other decisions.[147] The entry human rights principle is an approach that considers international protection in a way that limits the state's margin of appreciation in regulating access to protection proportionally to the procedural and/or material conditions prevailing in a country or the risk the applicant must undergo to access effective and timely protection.[148] The direct consequence of the refusal to admit must not jeopardise the applicants' lives or integrity, forcing them to stay or encourage them to choose alternative dangerous routes in order to exercise their right to seek international protection. The paramount interest of maintenance of effective and orderly immigration

[146]See CJEU, C-411-10 and C-493-10, *N.S. v. United Kingdom* and *M.E. v. Ireland* of 21 December 2011, para. 69.

[147] See *R (on the application of MK, IK) v. Secretary of State for the Home Department*, JR/2471/2016, 29 April 2016; *AT and another (Article 8 ECHR – Child Refugee – Family Reunification)* Eritrea [2016] UKUT 00227 (IAC); *R (on the application of RSM and Another) v. Secretary of State for the Home Department* [2017] UKUT 124 (IAC); R (on the application of SA & AA) v Secretary of State for the Home Department (Dublin – Article 8 ECHR – interim relief) IJR [2016] UKUT 00507 (IAC); R (on the application of AO and AM v Secretary of State for the Home Department, JR/2535/2017 & JR/2486/2017, 28 March 2017.

[148] Paolo Biondi, 'The *ZAT* case and the far-reaching consequences for the Dublin Regulation', European Database of Asylum Law, 9 February 2017 available at http://www.asylumlawdatabase.eu/en/journal/zat-case-and-far-reaching-consequences-dublin-regulation.

control, which is central to determining whether the refusal could be legitimate, must be balanced with the proportionate means of achieving this aim – namely by measuring proportionality with the foreseeable consequences, including the BIC and the undeniable violation of absolute rights under the ECHR or the CFR.

5.5.3 The Potential for Cross-Fertilization of EU Secondary Legislation

In line with the "entry" human rights principle, *Gül v. Switzerland,* discussed in the previous sections, confirmed that the principles applicable to the State's negative and positive obligations under Article 8 ECHR are similar: "in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation".[149] The previous chapter demonstrated that a similar reasoning applies also to Article 3 ECHR.[150]

However, if one reflects on the nature and scope of the "entry" human rights principle in the Dublin context and the reasoning provided in *R (on the application of MM (Lebanon) and SS (Congo))* concerning the MIR, there is a striking similarity. It seems that whenever there are major impediments or insurmountable obstacles to family unity, such as an ineffective Dublin procedure or the MIR, admission can become the only solution in order for the migration control measures not to result in harsh consequences.

Thus, the claims based on Article 8 ECHR or/and Article 3 ECHR can be read as imposing an obligation of admission in order to prevent violations of fundamental rights, to avoid harsh consequence and not to undermine the effective enjoyment of the rights. The risk of serious human rights violations (e. g., ill-treatment and right to life), the risk of not being reunited with close family members, or a combination of both, can impose a duty to admit. Note also that under Article 31(1) of the 1951 Geneva Convention serious human rights violations, such as ill-treatment and the breach of the right to family unity, amount to "good causes" to perform secondary movements.[151]

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[149] ECtHR, *Gül v. Switzerland*, Application No. 23218/94 of 19 February 1996, para 166.

[150] See CJEU, Advocate General Mengozzi Opinion in C-638/16 PPU *X and X v. État Belge* of 7 March 2017; *R (on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM) v. Secretary of State for the Home Department* (2015) UTIJR6, JR/15401/2015-JR/15405/2015*; ZAT v. Secretary of State for the Home Department* the Court of Appeal (Civil Division) on Appeal From The Upper Tribunal Immigration and Asylum Chamber, Case No: C2/2016/0712, [2016] EWCA Civ 810.

[151] See page 27. See also G. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' in E. Feller et al (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Oxford 2003), 218.

The similarities between the reasoning in some cases related to the Dublin Regulation and the reunification outside the EU open space for cross-fertilization: the jurisprudential reasoning applicable to one piece of EU secondary legislation can be transposed by analogy to another piece of secondary legislation, as in both cases the law must be interpreted keeping in mind the primacy of the primary legislation and the respect of fundamental rights.[152] As we will see further down in this section[153] some considerations applicable to the Dublin Regulation can be transferred by analogy to the Reunification Directive – see, for example, *ZAT,* where arguments related to the jurisprudence on the Family Reunification Directive have been used in analogy with the Dublin Regulation. As we have already partly demonstrated on the example of *ZAT*, there is an extensive possibility for cross-fertilisation among the CEAS secondary legislation.

As a result, the "entry" human rights principle is applicable to both the EU internal and external dimension and the respective secondary legislation, and in both cases the interest in the maintenance of migration control, whether internal or extraterritorial to the EU, can be outweighed by rights under the CFR and the ECHR. As suggested in *R (on the application of MM (Lebanon) and SS (Congo))*, and before that by the extensive case law concerning the Dublin Regulation, States have a genuine right to exercise migration control measures, such as the MIR, the APD or the Dublin Regulation, but individuals must be guaranteed a practical and effective enjoyment of their rights. There are exceptional cases in which the refusal of entry can result in harsh consequences for the child and not be proportionate under Article 8 ECHR or be contrary to the rights protected under Article 3 ECHR. In those cases, it is essential to adopt an approach that correctly balances the individual's right to respect for family life and integrity with the public interest in safeguarding the economic well-being of the country by controlling immigration.

In *ZAT,* the use of the jurisprudence on family reunification outside the Dublin Regulation context (Reunification) has been possible because particular weight was given to the UK domestic 'best interest duty' regarding children – similarly to non-return cases, such as *Tarakhel,*[154] where the ECtHR focussed on the 'special protection' of children asylum seekers which has been considered of primary importance in view of their specific needs and their extreme vulnerability. Both in *ZAT* and *Tarakhel* the child's extreme vulnerability has been the decisive factor that took precedence over considerations relating to the status of illegal immigrant.[155]

[152] CJEU, C-411-10 and C-493-10, *N.S. v. United Kingdom* and *M.E. v. Ireland* of 21 December 2011, para. 69.
[153] See section 5.6.
[154] ECtHR, *Tarakhel v. Switzerland,* Application No. 29217/12 of 4 November 2014.
[155] See also ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03 of 12 October 2006; ECtHR, *Popov v. France*, Applications Nos. 39472/07 and 39474/07 of 19 January 2012.

Recently the *Tarakhel* guarantees approach has been clarified also in *C.K. v. Slovenia,*[156] so now the risk of inhuman or degrading treatment must be avoided also during the transfer and not only as a consequence of the transfer. It is likely that in the future similar considerations will apply to other the "entry" cases. In particular, in the circumstances where transfer has to take place in an expeditious manner, as it has been established in *R (on the application of RSM and Another)*[157] and in *R (on the application of SA & AA) v. Secretary of State for the Home Department.*[158]

In this context, the ECtHR in *Paposhvili* made a very important statement in regard to Articles 3 and 8 ECHR: access to effective protection – in that case in the form of sufficient and appropriate medical care – must be available in reality and not merely in theory.[159] While those considerations applied to the Reunification Directive, the is no reason why the same principle should not inform also the decision under the Asylum Procedure Directive and Reception Conditions Directive. An efficient procedure and decent reception conditions must be always available in reality and not only in theory – both in an EU Member State and a third country, without making any distinction.

However, *Paposhvili* is best known for having clarified the positive obligation inherent in the preventive purpose of Article 3 ECHR[160] – the State's duty to perform a rigorous assessment of the foreseeable consequences of a negative obligation and, indeed, a positive obligation to make prospective risk assessments of the action or inaction.[161] The court explained whether "time" has any role in the assessment of risk and whether decisions involving longer-term forms of harm must truly reflect a definition of risk as being likelihood and the possible consequence, rather than just likelihood alone.[162]

This interpretation is applicable to the "entry" human rights principle, which, as we stressed above, limits the State's margin of appreciation in regulating access to protection proportionally to the

[156] CJEU, C-578/16 PPU *C.K. and Others v. Supreme Court of Republic Slovenia* of 16 February 2017.

[157] *R (on the application of RSM and Another) v. Secretary of State for the Home Department* [2017] UKUT 124 (IAC).

[158] *R (on the application of SA & AA) v. Secretary of State for the Home Department* (Dublin – Article 8 ECHR – interim relief) IJR [2016] UKUT 00507 (IAC).

[159] Lourdes Peroni and Steve Peers, 'Expulsion of seriously ill migrants: a new ECtHR ruling reshapes ECHR and EU law', EU Law and Analysis Blog, available at http://eulawanalysis.blogspot.it/2017/01/expulsion-of-seriously-ill-migrants-new.html.

[160] ECtHR, *Paposhvili v. Belgium*, Application No. 41738/10 GC of 13 December 2016, para 186

[161] In regard to speculation as inherent and acceptable in Article 3 ECHR enquiries see also ECt HR, *Trabelsi v. Belgium,* App. No. 140/10 of 4 September 2014) and ECtHR, *Saadi v. Italy,* App. No. 37201/06 of 28 February 2008.

[162] ECtHR, *Paposhvili v. Belgium*, Application No. 41738/10 GC of 13 December 2016, para 155, 225. See also Adrienne Anderson, 'Comment on Paposhvili v Belgium and the Temporal Scope of Risk Assessment', EJIL: *Talk!.* https://www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/.

procedural and/or material conditions prevailing in a country or the risk the applicant must undergo to access effective and timely protection. In particular, in the case of children, the risk must be assessed in a totally different way, as the risk of harm from to a child must be seen from a child's perspective. What may not rise to the level of risk of harm in the case of an adult, may do so in the case of a child, even if not immediately, but subsequently to the refusal of admission.[163]

Regarding the threshold required for entry under Article 8 ECHR, before the *ZAT* case was heard by the Court of Appeal, the UK High Court decided the *UK - R on the Application of CK (Afghanistan).* By reference to the decision of the Upper Tribunal in *ZAT*, the High Court in *CK* established that if an applicant is not dependent under Article (15(2)) DRII, a *compelling case* under Article 8 ECHR has to be demonstrated in order for the person not to be returned to the responsible Member State under the DRII.[164] Hence, in practice the absence of an individual right of the applicant to challenge the determination of the State responsible to examine their asylum claim on Dublin II grounds does not prohibit the autonomous application of Article 8 ECHR to decisions to remove persons from one Member State to another. However, taking into account the significance of the Dublin Regulation and the need to preserve its effectiveness, an especially compelling case (test) would have to be demonstrated to deny removal following a Dublin II decision. Subsequently, the compelling case test – with reference to *CK* – has been used by the Court of Appeal in *ZAT*. Such threshold, however, cannot but remind of the 'most adequate way to family unity' test or the subsequent 'degree of hardship' of *R (on the application of MM (Lebanon) and SS (Congo)),* where only on the basis of exceptional or insurmountable circumstances resulting in a degree of hardship admission could not be denied.

By contrast, concerning the threshold for Article 3 ECHR and the relevance of the BIC, the ECtHR in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* stressed that *"*[i]n order to fall within the scope of Article 3 ECHR, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or

[163] See for instance, United States Bureau of Citizenship and immigration services, *Guidelines For Children's Asylum Claims*, 10 dec. 1998 (hereafter the "u.s. Guidelines for Children's asylum Claims"), http://www.unhcr.org/refworld/docid/3f8ec0574. html, noting that "the harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution." see also, *Chen Shi Hai, op. cit.*, where the Court found that "what may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child", para. 79.

[164] *UK - R on the Application of CK (Afghanistan) & Others v. The Secretary of State for the Home Department*, [2016] EWCA Civ 166, 22 March 2016.

mental effects and, in some cases, the sex, age and state of health of the victim."[165] In the same judgement, referring to *Z, A, and Osman,* the court explained that:

> *"*[*t*]*he obligation on the parties under Article 1 of the Convention taken in conjunction with Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment including such ill-treatment administered by private individuals. Steps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge."* [166]

It is important to note once again that the threshold under Article 3 ECHR in regard to children has been recently clarified also by AG Megozzi in *X.X. v Belgium,* which concerned access to protection in the EU through humanitarian visa. The Advocate General reminded that the minor children's *superior interests* must be a primary consideration in all acts performed by public authorities in accordance with Article 24(2) of the Charter.[167] In *X.X. v Belgium* opinion the interests of the child (BIC) and the risk of trafficking have been used as arguments to support a duty to admit on *undeniable humanitarian grounds*.

The landmark case *Kim v. Canada,* a case outside the EU jurisdiction, provided a similar interpretation. The Canadian Court held that if a child's rights under the CRC were violated in a sustained or systematic manner demonstrating a failure of state protection, the child may qualify for refugee status.[168] In the case of allocation of responsibility that would mean that the applicant is entitled to a speedy transfer to a country where his physical and physiological integrity can be protected.

The above mentioned arguments under Article 3 ECHR brought forward in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* and *Kim v Canada* have been made in the context of determination of an asylum claim, therefore in the EU they fall under the Qualification Directive. However, as we have seen, similar arguments apply also to the allocation of responsibility and the transit or presence of asylum seekers in *any* third country.[169] It should not be forgotten that the concept of effective protection[170] applies both in relation to the country of origin and any country of transit or presence.

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[165] ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03 of 12 October 2006, para 48.
[166] *Ibid*, para 53.
[167] CJEU, AG Opinion in Case C-638/16 *PPU X. and X. v. État Belge* of 7 February 2017, para 137.
[168] *Kim v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 720, Canada: Federal Court, 30 June 2010.
[169] See pages 27-28.

This interpretation derives from the 'compensatory approach'[171] model focussing on the internal and external elements of protection, where an act of persecution is defined in terms of human rights violations.[172] The purpose is to enable a person who no longer has the benefit of protection in his own country and any other transit country to turn for protection to the international community, including the right to be able effectively to access such protection through admission and the effective respect of the right to seek asylum. The compensatory approach should apply both to the denial of access to protection in the case of access to the territory of a State to claim asylum[173] and in cases of allocation of responsibility for international protection where entry might be denied indeed on account of an agreement aimed at allocating responsibility. This is confirmed by the 1951 Geneva Convention which does not regulate access to the asylum procedure, however, access is intrinsic in the scope of the *non-refoulement* and the prohibition to constrain and interdict entry, while exposing protection seekers to risk of harm, torture or inhuman and degrading treatments in *any* country.[174]

As seen above, it is evident that the applicability of the jurisprudential reasoning of one field can be transposed to another. This means that the "entry" human rights principle is in many ways applicable to both the internal and external dimension of the EU and the relevant secondary legislation, which should be applied with due regard to the primary legislation and the respect of fundamental rights. The respect of Article 3 ECHR must be granted in relation to any country, whether it is the country of origin, transit or temporary presence.

5.5.4 THE BIC IN THE JURISPRUDENCE DESCENDING FROM THE *ZAT* CASE

As section 5.5.2 mentioned, a number of cases followed *ZAT*: they all contributed to the interpretation of a separate aspect of the "entry" human rights principle. All required the national or EU legislation to

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[170] ExCom Conclusions on Protection of Asylum-Seekers in Situations of Large-Scale Influx (No. 22(XXXII) – 1981) refers to effective protection in the third country as 'measures of protection' beyond entry and *non-refoulement,* but rather as 'treatment' in accordance with 'minimum basic human standards', which it lists.

[171] "The extent that refugee protection compensates for the lack of national protection, then this refers not only to internal protection considerations but also has a strong external component that reflects the challenges posed by the refugee as an alien lacking effective nationality". "The standard of treatment in Article 3 to 34 reflect a special 'human rights' concern on the part of drafters with ensuring that refugees are not unduly discriminated against in access to services and similar nationality-derived benefits in the host country". David Cantor, "Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm" in Bruce Burson and David Cantor (eds) *Human Rights and the Refugee Definition* (Brill, 2016) 394.

[172] David Cantor, "Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm" in Bruce Burson and David Cantor (eds) *Human Rights and the Refugee Definition* (Brill, 2016) 358-395.

[173] On this matter See section 5.6.

[174] Article 33(1) of the 1951 Convention Relating the Status of Refugees states: *"*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever *to the frontiers of territories* where his life or freedom would be threatened on account of his race, religion, nationality, member-ship of a particular social group or political opinion" (emphasis added).

be interpreted in light of the international obligations with a particular focus on the BIC and family unity. This section will focus on those cases and the arguments most relevant to the BIC demonstrating that, for children, admission is sometimes the most adequate means for the development of family life, and the BIC can further help achieve family unity. Separation can be disproportionate in relation to the BIC and might even result in a hardship for the child incompatible with his/her safety.

In *UK - AT and another,* for instance, the Upper Tribunal held that "the UK Border Agency must fulfil the requirements of these instruments (the ECHR, the ICCPR, the Reception Conditions Directive, the COE Convention against Trafficking and the UNCRC) in relation to children when exercising its functions as expressed in UK domestic legislation and policies".[175] The Court found that the international law should be given effect when the Secretary of State and her various *alter egos* are making immigration and related decisions which affect children. This suggested that, by virtue of international law and by virtue of Article 24 of the Charter, which is binding on Member States and based on the UNCRC, States must have regard to the best interests of the child in family unity decisions, *even when they are not on their territory*. It is thus clear that, in consideration of the arguments in the previous section on the applicability of the case law to the internal and external dimension, the same reasoning can be applied to the Reunification Directive and Asylum Procedure Directive.

UK - AT and another made reference to *Draon v. France,* where the Grand Chamber identified positive obligations on States by virtue of Article 8 ECHR in order for the respect for family life to be effective.[176] The court also noted, by reference to *ZAT,* that the public interest of border control has been assessed generally without taking into account the individual circumstances. However, where the interests of a child are at stake, the width of the margin of appreciation on admission tends to be reduced. Referring to *SS(Congo*), the court also noted that the test for the most adequate means for the development of family life – insurmountable or exceptional circumstances which would mean that refusal of the application results in a degree of hardship – must be assessed in conjunction with the age of the child, dependency and the environment in the country of origin or presence.[177] This means that even in the context of the hardship test, the BIC could further help achieve family unity.

In his opinion, Judge McCloskey in particular noted that the refusal of entry could give rise to a dangerous journey if the family reunification application were denied, exposing the sponsor and the

[175] *AT and another (Article 8 ECHR – Child Refugee – Family Reunification)* Eritrea [2016] UKUT 00227 (IAC) [2016] UKUT 227 (IAC), 24 March 2016.
[176] ECtHR, *Draon v. France* Application No. 1513/03 of 6 October 2005
[177] *SS (Congo) (Appellant) v, Entry Clearance Officer, Nairobi* (Respondent) [2017] UKSC 10.

children to an Article 3 ECHR risk which is contrary to the rationale of the 1951 Refugee Convention. The same arguments have been brought forward in both *ZAT* and the AG Mengozzi opinion in *X.X.*[178] In particular in *X.X.* the Advocate General noted that there was a risk of violation of Article 3 ECHR due to the possibility that the applicants would try to access the EU making use of trafficking channels.[179] All these circumstances imposed a positive duty on the Member State. Thus, trafficking is a risk that in the case of children must assume a very high importance in any decision related to admission.

In the decision in *R (on the application of SA & AA) v. Secretary of State for the Home Department,*[180] with reference to *ZAT* and the compelling case requirement, certain factors related to children have been considered prominent again: the children's mental health and the risk of self-harm or suicide (duty to protect life under Article 2 ECHR), the status of unaccompanied minors and, the speed at which the Dublin Regulation process is capable of providing the ultimate goal of family reunification. All these arguments and the compelling expert psychiatric evidence have been taken into account, leading to the conclusion that the best interests of the child were to be reunified with their family members in the UK because further delay in family reunification could have the most appalling consequences for either or both of them.[181] This case is particularly important in consideration of the numerous reports from NGOs that evidence a lot of episodes of self-harm among children in Greece.[182]

The Court in *RSM* also suggested that the BIC points incontestably towards immediate reunification with the only family members left to the child. This ranks as a primary consideration. Citing *El Ghatet v. Switzerland*, the Court suggested that "there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount".[183] The Court recalled *Tuquabo-Tekle and others v. The Netherlands,* where the ECtHR noted that *"*[i]n cases regarding family reunification the Court pays 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".[184]

[178] See pag. 30.
[179] CJEU, AG Opinion in Case C-638/16 *PPU X. and X. v. État Belge* of 7 February 2017, para. 173.
[180] *R (on the application of SA & AA) v. Secretary of State for the Home Department* (Dublin – Article 8 ECHR – interim relief) IJR [2016] UKUT 00507 (IAC).
[181] *Ibid*, para 11, 13, 33 and 35.
[182] The Independent, 'Child refugees attempting suicide amid increasing desperation among thousands of trapped migrants in Greece', 16 March 2017. http://www.independent.co.uk/news/world/europe/refugee-crisis-eu-turkey-deal-year-results-latest-child-suicide-attempts-self-harm-drownings-a7631941.html.
[183] ECtHR, *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07 of 8 January 2009; ECtHR, *M.P.E.V. and Others v. Switzerland*, Application No. 3910/13 of 8 July 2014, para 46.
[184] See ECtHR, *Tuquabo-Tekle and others v. The Netherlands,* Application no. 60665/00, 1 March 2006, para 44.

Moreover, in *RSM*[185] the court declared that expedition has special importance in the case of unaccompanied children. In the particular circumstances of the case expedition was critical, as the child refused entry or delayed entry could take matters is his hands and resort to traffickers, putting his life at risk. Expedition was also necessary in light of the Italian reception system that had turned out to be inadequate for protecting lone refugee and migrant children and their rights. Lastly, the court in *RSM* stated that there was substantial proof that Italian asylum procedure could generate delays of up to eight months, the guardians did not have specific training in the asylum field and the guardianship system in Italy was creaking.[186] In other words, the circumstances prevalent in the country would inevitably result in serious risk for the children.

Most recently, in *AO and AM*[187]*,* the UK Secretary of State applied for a stay of proceedings before the Upper Tribunal regarding two children (one had just turned 18) who were originally identified under the "Managing Migratory Flows in Calais: joint declaration on UK/French co-operation" policy as eligible to reunify with their family members under Dublin. Both were subsequently rejected with no reasoning given. Whilst the case concerned solely the request to stay proceedings pending ongoing litigation by Citizens UK concerning child refugees in Calais, the Upper Tribunal emphasised the judicial expediency and swift and effective remedy that the applicants were entitled to. In particular, because of the family reunification requirement under Articles 8 and 17 of the DR III (as ruled by the Upper Tribunal in *RSM*) and the vulnerability of the specific applicants. The Tribunal denied the stay of proceedings and permitted through Article 8 ECHR the total circumvention of the new expedited Dublin III process, similarly to *ZAT*. A particularly indicative aspect of this case was that even though the authorities tried a new and more expeditious procedure with better guarantees, the latter was still not compliant with the BIC. This demonstrates the high level of guarantees necessary for children when the BIC is at stake.

Whether the BIC is regarded as a supreme interest or as a best interest duty, the BIC plays a major role in the emergence of the "entry" human rights principle. Both in the internal and external EU dimension the Member State must take into account the BIC when balancing the interests involved. The risk of trafficking and certain other circumstances prevailing in the country of presence can assume prominent importance in any decision related to admission. Sometimes admission for children is the most

[185] R (on the application of RSM and Another) v. Secretary of State for the Home Department [2017] UKUT 124 (IAC).

[186] *R (on the application of RSM and Another) v. Secretary of State for the Home Department* [2017] UKUT 124 (IAC), para. 22.

[187] *R (on the application of AO and AM v Secretary of State for the Home Department*, JR/2535/2017 & JR/2486/2017, 28 March 2017.

adequate means for the development of family life and, in the context of the hardship test, the BIC can further tip the scale towards family unity.

5.6 Vulnerability, Dependency and the Right to Family Unity

Some further Dublin cases adopted a very promising interpretation of the EU law that could be applied by analogy to the Family Reunification Directive, the Asylum Procedure Directive or to family unity in general. This aspect has been discussed to a certain extent already above.[188] However, there are further options to achieve family unity: the use of the Member States' discretion for humanitarian grounds or in case of dependency or hardship; the need, by virtue of international law and Article 24 of the Charter, to have regard to the BIC in family unity decisions, even when the child is not on the State territory – including for family reunification purposes; and the need to consider a more extensive interpretation of dependency, family members and hardship.

As we have seen so far, the rights of the child read in light of the UNCRC's General Comment in 2013 on the child's best interests, coupled with the duty of enquiry, the right to good administration, and the principle of effectiveness under secondary law may require Member States to take appropriate proactive steps to assess the right to family unity from a totally different perspective compared to a case of an adult. We have also seen that the the BIC can favour a more liberal approach to family unity. However, the EU law offers even wider opportunities in respect of the BIC when dependency and vulnerability are engaged, and the BIC must be applied the same way to all the provisions of the secondary legislation – both those which explicitly require the BIC assessment under secondary EU law and those which do not make explicit reference to such requirement.

A very important case in this regard is *K v. Bundesasylamt,* where "vulnerability has been defined as a factor that is connected with protection in the EU".[189] Note that vulnerability can derive from the mere fact of being a refugee, since it has been recognised in several decisions that asylum seekers as such are a *prima facie* vulnerable population group.[190] In *K v. Bundesasylamt,* Article 16 of the DRII for dependent persons became a vehicle for the protection of the right to family life. Therefore, the

[188] See section 5.5.3.

[189] CJEU, C-245/11 *K v. Bundesasylamt* of 6 November 2012.

[190] ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09 of 21 January 2011, para. 232, 233, 251, 263, 375 ; and by analogy with ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy*, Application No. 27725/10, 2 April 2014, at para. 75. See also ECtHR, *Mugenzi v. France*, Application No, 51701/09, 22 January 2015, para. 54, ECtHR, *Tanda-Muzinga v. France*, Application No. 2260/10, 10 July 2014, para. 75

humanitarian/discretional clause has become a criterion for the assignment of responsibility in the EU[191] – no more as a discretional criterion of responsibility allocation that can eventually derogate to the standard criteria under Chapter III of the Dublin Regulation, but a compulsory one. Thus, exactly as in other non-return cases, where the sovereignty clause became a proper criterion for responsibility allocation without the Member States being able to exercise discretion on its application, in this case the same principle applied to the humanitarian clause, mainly due to the dependency of the applicant.[192]

In *K v. Bundesasylamt* the humanitarian clause was used as a binding responsibility criterion even in the absence of a formal take charge procedure, because the case involved vulnerable persons.[193] Therefore, in such cases the humanitarian clause, vulnerability and a relation of dependency can become a means for the protection of the right to family life even to the extent of expanding the definition of 'family member' under the DRIII.[194] This approach must be also applied to unaccompanied minors or children because of their inherent vulnerability, dependency on the family and the obligation to take into account the BIC while interpreting the EU secondary legislation.

This very same approach has been endorsed recently in the above-mentioned *RMS* case, where the Dublin procedure was bypassed because of compelling circumstances. In that case were underlined the powerful humanitarian elements similar to those in *ZAT.* The Court recalled *Tuquabo-Tekle and others v. the Netherlands,* where the ECtHR stressed that*"*[i]n cases regarding family reunification the Court pays 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".[195] Also in *RSM* reference was made to *K v. Bundesasylamt* and the fact that the humanitarian clause can be used as a binding responsibility criterion even in the absence of a formal take charge procedure, in particular when there is a child involved.

[191]Silvia Morgades-Gil, 'Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?'(2005) International Journal of Refugee Law, Vol. 27, No. 3, 433–456.

[192] Paolo Biondi, 'Allocation of Responsibility in Time of "Crisis". The Impact of the Exit and Entry Human Rights Principles on Responsibility-Sharing in the EU' RLI Blog available at https://rli.blogs.sas.ac.uk/2017/06/26/allocation-of-responsibility-in-times-of-crisis-the-impact-of-the-exit-and-entry-human-rights-principles-on-responsibility-sharing-in-the-eu/.

[193] CJEU, C-245/11 *K v. Bundesasylamt* of 6 Nov 2012.

[194] Silvia Morgades-Gil, 'Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?'(2005) International Journal of Refugee Law, Vol. 27, No. 3, 433–456.

[195] See ECtHR, *Tuquabo-Tekle and others v. the Netherlands,* Application no. 60665/00, 1 March 2006, para 44; ECtHR - El Ghatet v Switzerland, Application No 56971/10 of 8 November 2016, para 46.

K v. Bundesasylamt and *RSM* are important because, in line with *R (on the application of MM (Lebanon) and SS (Congo)),* they suggested that the use of some EU secondary legislation's provisions (e. g. Article 16 DRIII and 17 DRIII) can become compulsory where there is a risk that a decision might result in some hardship. Thus very similarly to what has been argued in *R (on the application of MM (Lebanon) and SS (Congo))* in the EU external dimension.[196] So it is clear that the same reasoning is applied both in the context of the EU internal dimension under the Dublin Regulation and in the EU external dimension under the reunification procedure. We argue that the same approach should be followed under the Asylum Procedure Directive because other cases followed recently a similar approach so the jurisprudence is becoming consistent.

For instance, in a decision by the Hannover Administrative Court (Germany),[197] the court examined the grounds under which family unity can be used to deviate from the responsibility criteria as set out in Article 17 of the Dublin III Regulation. The applicants applied for the suspension of the transfer decision on Article 17(1) DR grounds, in particular the BIC and the respect for family unity (Article 8 ECHR). The Court found that the reunification of families under Dublin and, in particular, in cases of particular hardship (mother's mental health, dependency on other relatives and family unity reasons), allows for the possibility to deviate on humanitarian grounds from the standard responsibility criteria under Chapter III. Such an approach serves to protect and make the basic rights of the individual effective and it furthers the BIC.

So the discretionary clause of the DRIII, which requires to reunify 'any family relations' on humanitarian grounds, is becoming in some cases a mandatory criterion instead of a discretionary one. The Dublin Regulation discretionary clause applies to asylum seekers and beneficiaries of international protection and both groups (in particular unaccompanied children) are a *prima facie* vulnerable population groups.[198] Hence, the reason behind allowing Member States to use their discretion to unify asylum seeking family members should also apply by analogy to beneficiaries of international protection under the Reunification Directive as otherwise might result in a form of discrimination without a legitimate ground.

[196] See section 5.4.

[197] VG Hannover · Beschluss vom 7 March 2016, Az. 1 B 5946/15.

[198] ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09 of 21 January 2011, para. 232, 233, 251, 263, 375; and by analogy with ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy*, Application No. 27725/10, 2 April 2014, at para. 75. See also ECtHR, *Mugenzi v. France*, Application No, 51701/09, 22 January 2015, para. 54, ECtHR, *Tanda-Muzinga v. France*, Application No. 2260/10, 10 July 2014, para. 75

Protection considerations and the humanitarian needs, as well as particular hardship for the applicants may provide leeway for an expansive interpretation of dependency when considering the particular circumstances of the case,[199] or a more extensive notion of family members or "inhuman treatment" like in *K v Bundesasylamt.*[200] The *RSM* and *AO and AM* cases also refer to the humanitarian circumstances requiring immediate reunification with the *only* family left to the child, as the refusal or delay could have as a foreseeable consequence risk of loss of their life or self-harm, hence, a quite evident hardship.

It is essential to stress that reunification in the case of children should be directed at locating any family member, whether that might be a close or extended family member. This is consistent with Recital 17 of the DRIII and Article 17(2) Dublin III which both require *to bring together any family relations* on humanitarian and compassionate grounds. In this sense the discretionary clause, which required to bring together any family member, is a tool that accommodates the differences in the case law of the ECtHR (which does not define who can be a family member) and the EU secondary law, such as the Qualification Directive, which has strict provisions defining who can be a family member under Article 2(j) and 23(5).

Therefore, a number of conclusions can be reached. The Dublin Regulation's sovereignty and humanitarian clauses can both become proper criteria for responsibility allocation without Member States being able to exercise a margin of appreciation – in particular when the BIC is at stake. The same reasoning should apply to the Reunification Directive or the Asylum Procedure Directive, where the discretion to reunify and exercise a margin of appreciation on the 'duty to admit' members of a family should be similarly limited to protect the interest of the children, particularly those unaccompanied.

Thus all the provisions of the secondary legislation, whether explicitly or implicitly referring to the BIC, should be interpreted as granting the effective enjoyment of the right to family unity, both on exit and entry and whether they are aimed at addressing the internal allocation of responsibility or provide access to the EU territory through an admissibility procedure or family reunification. In such circumstances, protection considerations and the humanitarian needs, as well as particular hardship of the applicants, may provide leeway for an expansive interpretation of dependency and family members, in particular when children are involved.

[199] See ECtHR, *Tuquabo-Tekle and others v. the Netherlands,* Application no. 60665/00, 1 March 2006, where the particular circumstances of the applicant in her country of residence where she was at risk of forced marriage weighed in favour of family reunification, despite the fact that by considering her age alone, previous case law would point to the opposite conclusion.

[200] CJEU, C-245/11 *K v. Bundesasylamt* of 6 Nov 2012, paras 25, 40-45.

5.7 The Best Interests of the Child and the Substantial Determination

The last point to be addressed is the relevance of the BIC in regard to the substantial determination of a protection claim concerning a child or an unaccompanied child. It is important to address this aspect because – as evidenced already in this paper[201] – the consideration applicable to the substantial determination are not very dissimilar to those applying to allocation of responsibility and admission.

The concept of effective protection applies both in relation to the country of origin but also 'any' country of transit or presence. This interpretation derives from the compensatory approach[202] model focussed on the internal and external elements of protection, where an act of persecution is defined in terms of human rights violations,[203] and the purpose is to enable a person who no longer has the benefit of protection in his own country and any other transit country to turn for protection to the international community, including the right to be able effectively to access such protection through admission and the effective respect of the right to seek asylum.

Both in the case of return and admission in family unity cases, the BIC can further family unity. However, some of the above considerations applied to admission and return under the EU secondary legislation inevitably can be transferred to the substantial determination of a child's protection need. Hence, there is much more space for cross-fertilization because the consideration put forward so far concerning the way the allocation of responsibility within and beyond the EU takes place, is strongly connected to how is assessed a protection need under the EU Qualification Directive and indeed the 1951 Geneva Convention. It is irrelevant whether the persecution or ill-treatment takes place in the country of origin or any other third country of transit.[204] We argue that, like in the case if ill-treatment and admission, the risk of persecution must be assessed from a child's perspective, considering the child's inherent

[201] See pages 36-37.

[202] "The extent that refugee protection compensates for the lack of national protection, then this refers not only to internal protection considerations but also has a strong external component that reflects the challenges posed by the refugee as an alien lacking effective nationality". "The standard of treatment in Article 3 to 34 reflect a special 'human rights' concern on the part of drafters with ensuring that refugees are not unduly discriminated against in access to services and similar nationality-derived benefits in the host country". David Cantor, "Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm" in Bruce Burson and David Cantor (eds) *Human Rights and the Refugee Definition* (Brill, 2016) 394.

[203] David Cantor, "Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm" in Bruce Burson and David Cantor (eds) *Human Rights and the Refugee Definition* (Brill, 2016) 358-395.

[204] Access to protection in any third country, as the lack of protection in one or more countries of transit, constitutes extension of the persecution risk. The UNHCR clarified, in relation to Article 31(1) of the 1951 Geneva Convention that the 'inability to access protection is a continuation of direct flight and hence, should be deemed to be *primary* rather than secondary movements' (emphasis added). UNHCR High Commissioner's Forum, 'Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers: Joint Statement by the Co-Chairs' FORUM/2005/7, 8 November 2005 which refers to the view that 'Inability to access protection is a continuation of direct flight and hence, should be deemed to be "primary" rather than secondary movements'.

vulnerability, the risk of harm from a child's unique perspective and the risk of inhuman treatment alone or in relation to the foreseeable risks to access protection – including how the child's particular condition would evolve after the refusal of protection or admission.[205] Let us now elaborate on this hypothesis.

The UNHCR Executive Committee (ExCom) Conclusion No. 107 on Children at Risk stressed the *inherent vulnerability* of children and the need to facilitate children's enjoyment of family unity in respect of unaccompanied and separated children through the tracing and family reunification in accordance with the respective child's best interests.[206] According to the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, when it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criterion of 'well-founded fear'. If a minor is accompanied, the minor's own refugee status will be determined according to the principle of family unity. If a minor is unaccompanied, the guardian/representative or, in their absence, the authorities will ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.[207]

According to the handbook, during the determination of well-founded fear, minors under 16 years may have fear and a will of their own, but these may not have the same significance as in the case of an adult. In such case, the BIC must be a primary consideration to ensure to the maximum extent possible that all facts relevant to a child's application are taken into account in regard to his/her survival and development, with all matters affecting the child given due weight, providing the possibility to express his/her views freely. These principles must inform both the substantive and the procedural aspects of the determination of a child's application for international protection.

According to the UNHCR handbook, the principle of the best interests of the child requires the harm to be assessed from the child's perspective. This may include an analysis as to how the child's rights or interests are or the well-being will be affected by the potential harm or ill-treatment upon return, in other words its perspective consequences in time. So what may not amount to persecution of an adult, may do so in the case of a child, even if not immediately, but subsequently to the refusal of

[205] See section 5.4 and pages 30 and 31.

[206] EXCOM Conclusion on Children at Risk No. 107 (LVIII) – 2007. Executive Committee 56th session. Contained in United Nations General Assembly Document A/AC.96/1048.

[207] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 21 July 2017], p. 41.

protection.[208] The same assessment must inform the issue of internal flight alternative, as relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.[209] Note that the same assessment applies to admission in case of agreements for the allocation of responsibility.[210]

As a matter of example, in 2017 the Dutch Court of Appeal in the Hague decided to grant an appeal to an unaccompanied minor from Iraq, largely relying on the principle of best interests of the child.[211] The child has been initially refused asylum on the grounds that a fragment of his story lacked credibility and that he could return to the Kurdish Autonomous Region (KAR) since his parents still lived there. This decision was appealed based, *inter alia,* on the unsafe and unstable situation in the KAR and on the fact that he would not be allowed to enter the KAR without a passport. Moreover, the Court reported that there was no internal protection alternative for minors without family nor for people belonging to a vulnerable minority. It ruled that the decision-makers had not meticulously motivated why this should not be the case for the applicant, especially since the BIC had to be taken into account. Specifically, it ruled that the Dutch authorities had not inquired about the availability of sufficient food, clothing, medical care and access to education (elements to be taken into account when considering the BIC and when basing the rejection on the availability of an internal flight alternative). The authorities also did not prove that the child would be allowed in the KAR without a passport.[212] So the assessment totally lacked any consideration as to how the child's life would be affected after the refusal of protection, even in perspective of the internal flight alternative.

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[208] See, for instance, United States Bureau of Citizenship and immigration services, *Guidelines For Children's Asylum Claims*, 10 dec. 1998 (hereafter the "u.s. Guidelines for Children's asylum Claims"), http://www.unhcr.org/refworld/docid/3f8ec0574. html, noting that "the harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution." see also, *Chen Shi Hai, op. cit.*, where the Court found that "what may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child", para. 79.

[209] CRC, Arts. 3, 6 and 37. See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, ECtHR, 12 Oct. 2006, http://www.unhcr.org/refworld/docid/45d5cef72.html, which concerned the return (not internal relocation) of an unaccompanied five-year old girl. The Court was "struck by the failure to provide adequate preparation, supervision and safeguards for her deportation", noting further that such "conditions was bound to cause her extreme anxiety and demonstrated such a total lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment [violation of article 3 of the European Convention on Human Rights]", paras. 66, 69.

[210] See pag. 27. "Indeed, Article 31(1) was intended to apply in the first place to those who have briefly transited through other countries but where they are unable to find protection from persecution, but also to those who have some other 'good cause' for not applying in such countries. Lack of effective protection in a transit country is indeed the primary 'good cause' for illegal entry in another State".

[211]ECLI:NL:RBDHA:2017:4663 https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:4663.

[212] ECRE, Netherlands: Asylum authorities failed to take into account best interests of the child when considering internal flight alternative, ELENA Legal Weekly Update. http://mailchi.mp/ecre/elena-weekly-legal-update-19-may-2017.

In numerous recent cases involving the Dublin Regulation and responsibility allocation, courts expressed similar considerations: that, before returning an applicant to another Member State or refusing entry – in particular when such Member States are under pressure – the Member State's authorities have to inquire and receive guarantees that the reception centres will have sufficient food, clothing, medical care and access to education and guardianship.[213]

This is the reason the BIC, in the substantial determination (the same applies to return and entry under responsibility allocation), must be combined with the requirement to evaluate the fear of persecution (in return and entry – the risk of harm or ill-treatment in a forward-looking way, and – when necessary – independently from the evaluation of past persecution or ill-treatment. While past circumstances are relevant, they are not decisive in the assessment. The conditions prevailing in the country at the very moment of the assessment have primary relevance. However, in the case of unaccompanied minors, the assessment must include an analysis of how the child's rights, interests and well-being will be affected upon return and rejection, in particular due to belonging to a family and being a particularly vulnerable subject.

These requirements to the assessment of the BIC are consistent with the EU Qualification Directive, and it could not be otherwise. Recital 27 of the Directive confirms that if the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interests of the unaccompanied minor, should form part of the assessment as to whether that protection is *effectively* available and not only in theory.[214] Moreover, Recital 28 requires that, when assessing applications from minors for international protection, Member States should have regard to child-specific forms of persecution. Article 4(3)(c) provides that the assessment of an application for international protection is to be carried out on an individual basis and takes into account the individual position and personal circumstances of the applicant, including age, so as to assess whether the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

In several cases on entry discussed above, including *ZAT*, *RSM*, *Tuquabo-Tekle v. The Netherlands*, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,[215] without distinguishing between internal and

[213] *R (on the application of RSM and Another) v. Secretary of State for the Home Department* [2017] UKUT 124 (IAC), para. 22.

[214] Lourdes Peroni and Steve Peers, 'Expulsion of seriously ill migrants: a new ECtHR ruling reshapes ECHR and EU law', EU Law and Analysis Blog, available at http://eulawanalysis.blogspot.it/2017/01/expulsion-of-seriously-ill-migrants-new.html.

[215] ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03 of 12 October 2006.

external dimension, the court put a strong emphasis on the 'extreme vulnerability' of the minors involved. In *Mayeka,* the fact that one of the individuals involved was an unaccompanied minor played a major role in part leaning the court in his favour, outweighing the considerations of illegal immigrant status. Similar arguments have been made in *Tarakhel*, where the court stressed the double vulnerability of children, who have specific needs related to their age and lack of independence as well as being part of the 'particularly underprivileged' population group of asylum seekers.[216]

It is now essential to apply these principles governing vulnerability and the BIC to the substantial determination, because the legal approach has to be very similar.[217] There are no cases of this kind yet involving minors or unaccompanied children, therefore we will provide a hypothetical example. Suppose that Mr. Bodj, in the case *M'Bodj v. État Belge*, was a child – would the outcome of the case have been different?[218] We answer this question in the affirmative, for two possible reasons.

First, not granting subsidiary protection to Mr. Bodj as a child would have been incompatible with the QD purpose and functional interpretation, which requires that the QD be read in connection with the 1951 Convention, along with the UNCRC. Moreover, the QD must be read in light of the principles recognised in the CFR, in particular, Article 24 on the BIC[219] concerning the determination of the protection need. Hence, the minor's well-founded fear must be assessed from their own particular and vulnerable perspective. However, the best interests of the child are to ensure – as a primary consideration and to the maximum extent possible – not only the survival and safety but also the development of the child. These principles inform both the substantive and the procedural aspects of the determination of a child's application for refugee status.[220] The same assessment methodology must apply to the internal flight alternative, as the relocation may violate the human right to life, survival and development, and the right not to be subjected to inhuman treatment.

The second reason is that, according to recital 38 and Article 20(5) QD, when deciding on entitlements to the benefits included in the QD (on the content of protection), Member States should take due account, again, the BIC. The QD must be read in line with the Dublin jurisprudence on the BIC, in particular, in light of *MA, BT, DA,* which allowed to derogate to the rules provided in the secondary legislation. However, also in accordance with *NS/ME,* where the CJEU held that Member States must

[216] ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12 of 4 November 2014, paras 118-119.
[217] See pages, 27-28.
[218] CJEU, C-542/13, *Mohamed M'Bodj v. État belge* of 18 December 2014.
[219] See recitals 18 and 27 of the Qualification Directive.
[220] For the principle of non-discrimination, suggested above, the same consideration applies to the subsidiary protection. See pages 10-11.

implement European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter. Indeed, Member States must exercise their discretionary power under the QD respecting the fundamental rights recognised in the Charter, including Article 24 CFR, the rules of the 1951 Geneva Convention and other international conventions, such as the CRC. Some fundamental rights, such as the rights of the child under the Charter, definitely represent subjective rights that can create positive obligations and give rise to a duty to take appropriate proactive steps or adopt a more favourable approach in applying the rules of the secondary legislation.

If Mr. Bodj as a child, had – besides the family members present in already in Belgium with whom he had to be kept unified – also family members back in his country, the substantial determination of his protection need, and the subsequent identification of his family for the purpose of reunification should have been based on the BIC as well. As the UNHCR Handbook explains, the Convention envisages the possibility that membership of a particular social group can, in certain circumstances, be a sufficient ground to fear persecution.[221] Family constitutes a social group to which the unaccompanied minor belongs. Therefore, membership of a family can be a sufficient ground to fear persecution in cases where the persecution of another family member is taking place or where belonging to a particular family can be a reason to seek protection. Furthermore, the QD at recital 36 stresses the need to take into account that family members of a refugee will normally be vulnerable to persecution (that could also be the basis for refugee status) merely due to their relation to the refugee. For the purpose of family unity, it is instead valid the principle that a characteristic or association that is so fundamental to human dignity that a group member should not be compelled to forsake it, applies to family unity as well.[222]

It follows that, while it must be kept in mind that it would be a stretch to argue for an absolute subjective right to family unity under IRL or IHRL, a strong argument can be made in favour of a right to family unity after a positive substantial determination of an unaccompanied child, as in certain given circumstances,[223] family reunification in the destination country is the only solution for the whole family. Unaccompanied minor asylum seekers depend on their family, and not unifying them, would put him/her at risk of persecution if the child had to return to the home country as the only alternative to

[221] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 21 July 2017], p. 17.

[222] UNHCR, *Guiding Principles on Internal Displacement,* page 93.

[223] See section 5.4.

family unity; or amount to a violation of their right to the effective enjoyment of family life and family security, if the family was not allowed entry in the child's country of destination.

Finally, by applying 1951 Geneva Convention protection ground of membership of a particular social group, children can be considered a particular social group also outside the family. As the UK Home Office explained, "at any given point, a child's age may be considered an immutable characteristic notwithstanding the fact that the child will ultimately grow out of their present age-group".[224] This interpretation perfectly fits in the approach of protected characteristics (immutability),[225] suggesting that the Convention ground of social group is applicable.

Hence, children can be subject to persecution on account of their status as members of a persecuted family (family social group) or they can be persecuted independently as autonomous individuals who, having an immutable characteristic, belong to a particular vulnerable group (children social group). For instance, a child coming from a particular geographic area, like East Aleppo, with his family still residing there, can be persecuted as a member of his family or as independent individual. As a consequence, s/he might not have the perspective of a safe return to the home country or an internal protection alternative separated from his family.[226]

5.8 CONCLUSION

Recent decisions of the CJEU, ECtHR and national courts applying Article 7 CFR, Article 8 ECHR and Article 24 of the Charter have recognised that, in certain cases, the right to family unity can become an autonomous right when the BIC is involved. This is a positive development, even though there is still a long way to go before the courts apply the more extensive interpretation given by the Committee on the Rights of the Child, which defines the best interest as a subjective right.[227]

This change is in part due to the emergence of the best interests of the child as a key element of the decision-making. The BIC has become a crucial element in the proportionality assessment and the weighting of the interests of the Union in controlling admission to territorial protection and the

[224] UK Home Office, Processing children's asylum claims https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537010/Processing-children_s-asylum-claims-v1.pdf at 42.

[225] As opposed to the social perception approach in defining a particular social group.

[226] ECLI:NL:RBDHA:2017:4663. See pages 46-47.

[227] UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC /C/GC/14, available at: http://www.refworld.org/docid/51a84b5e4.html [accessed 16 May 2017].

individuals' effective enjoyment of both substantive and procedural rights under Article 8 ECHR and Article 7 CFR.

Key decisions have read the right to family unity not in the vacuum of the EU legislation but in the context of international obligations, including the UNCRC – to which the EU treaties make reference and that represent general principles of EU law. As a result, in certain circumstances now the EU Member States have a positive obligation to keep a family unified or reunite it, with proactive duties when making immigration-related decisions affecting children as a particularly vulnerable social group.

The right to family unity for unaccompanied children thus derives from the obligation proactively to consider the child's interests at all times and in all circumstances, by going beyond what is explicitly provided in secondary EU law. The unity of the family under any instrument of EU secondary legislation must be always assured with the impossibility of interpreting the legislation in a way that might represent an obstacle to the effective enjoyment of the right to family unity under the ECHR, the EU Charter and the 1951 Geneva Convention. Any substantive or procedural decision taken under the EU secondary legislation, whether such legislation refers to the BIC explicitly or not – and whether it is aimed at controlling migration internally or externally – must be taken in accordance with the BIC, because when children are involved, the BIC is the starting point of any proportionality or interest balancing exercise.

It must be always kept in mind that unaccompanied refugee children are the most vulnerable social group. When they are separated from their family, they are exposed to multiple risks, such as psychological trauma, self-harm, exploitation, sexual abuses or trafficking. Therefore, they require their best interests to be taken into account in all decisions concerning them, whether related to family unity for immigration and responsibility allocation purposes or for the substantive determination of their protection claim, as in all cases the child must be protected against ill-treatment or persecution.