

THE BEST INTERESTS OF THE CHILD IN ECJ ASYLUM AND MIGRATION CASE LAW: TOWARDS A SAFEGUARD PRINCIPLE FOR THE GENUINE ENJOYMENT OF THE SUBSTANCE OF CHILDREN'S RIGHTS?

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Abstract

This article discusses whether and how the best interests of the child, enshrined in Article 24(2) of the Charter of Fundamental Rights, became an instrument for increased protection of the rights of migrant children and their families in the European Union. First, an overview is presented of the temporal and substantive expansion of the case law of the European Court of Justice reflecting on the use of references to Article 24(2) of the Charter. Then, a range of issues is analysed concerning the interpretation of the legal instruments of the Common European Asylum System, the Family Reunification Directive, and the Return Directive. The ECJ decisions are grouped by sub-topics and presented in chronological order. This analysis allows for a reflection of the evolution of the Court's interpretation of the best interests of the child in this field of Union law. It is observed that the primary consideration of the best interests of the child is gradually becoming, if not a general principle, at least a safeguard principle for the genuine enjoyment of the substance of children's rights.

1. Introduction: An exponential growth

Following a series of rulings on EU asylum and migration law in 2022 in which the European Court of Justice (ECJ) made reference to Article 24(2) of the Charter of Fundamental Rights of the European Union (CFR), a detailed analysis of this case law appears timely.¹ Article 24(2) CFR codifies the obligation to take into account the best interests of the child in all actions relating to children directly or indirectly affecting them.² Once the Charter

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1. A comprehensive list of the rulings examined in this article is provided in Annex 1.

2. Art. 24(2) CFR reads as follows: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

became binding, little by little, the formerly infrequent and brief references to the child's interests found in early cases multiplied. Although a large share of the ECJ's judgments on the child's best interests concerns classic and well-established fields of EU law (free movement, Union citizenship and EU private international law), asylum and migration have gained prominence in the Court's case law.³ Until December 2022, a total of 21 relevant preliminary rulings were identified following the 2006 *European Parliament v. Council* action for annulment.⁴ References became more consistent with a peak of 12 judgments which contain references to Article 24(2) CFR in the last two years alone (2021–2022).

Barring some exceptions, the weight the Court awards to children's rights in asylum and migration cases is growing. In the spirit of judicial dialogue, this is partly due to the explicit wording of the preliminary questions whereby the referring Courts, particularly from Belgium, Germany and the Netherlands, ask for the interpretation of EU secondary law provisions in light of Article 24(2) of the Charter. This is not surprising, as many EU migration law instruments include references to the best interests of the child in horizontal clauses.⁵

3. An account of the ECJ case law on children's rights in Migration and Asylum can be found in FRA, "Handbook on European law relating to the rights of the child", (2022), 197–223.

4. Case C-540/03, *Parliament v. Council*, EU:C:2006:429.

5. Although the wording of each provision can slightly differ, the best interests of the child feature in many instruments of EU migration and asylum law. We report the horizontal clauses in full. Art. 6(1) of the Dublin III Regulation (EU) 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 (recast), O.J. 2013, L 180/31–59: "The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this regulation." Art. 25(6) of the Asylum Procedures 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 (recast), O.J. 2013, L 180/60–95: "The best interests of the child shall be a primary consideration for Member States when implementing this directive." Art. 20(5) of the Qualification Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec. 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 (recast), O.J. 2011, L 337/9–26: "The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors." Art. 23(1) of the Reception Conditions Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), O.J. 2013, L 180/96–116: "The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this directive that involve minors." Art. 5(5) of the Family Reunification Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification, O.J. 2003, L 251/12–18: "When examining an application, the Member States shall have due regard

This article retraces this rich and ever-evolving ECJ case law by looking at how and for what purposes the Court uses (or does not use) references to Article 24(2) of the Charter on the best interests of the child in migration cases.⁶ The analysis is structured in four parts. After this short introduction, in the second part a chronological (section 2.1) and technical account (section 2.2) is given of the expansion of references made to the child's best interests in the broader case law of the ECJ. In the third part, an exploration is made of a range of diverse issues brought to the ECJ for interpretation in three areas of EU law: the Common European Asylum System (CEAS) (section 3.1), the Family Reunification Directive (section 3.2) and the Return Directive (section 3.3). The ECJ decisions are grouped by sub-topics, presented in chronological order and the content of every single case is recalled. This method makes it possible to trace the evolution of the use of references to the best interests of the child in the ECJ case law, allowing non-specialists of EU asylum and migration law to weigh and grasp the importance of Article 24(2) in this field of Union law.⁷ Despite the relevance of many judgments on the child's best interests concerning free movement or Union citizenship, the focus of the analysis in this article being EU migration law, only the cases are included that

to the best interests of minor children." Art. 5 of the Return Directive 2008/115/EC of the European Parliament and of the Council of 16 Dec. 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 2008, L 251/348, 98–107: "When implementing this directive, Member States shall take due account of (a) the best interests of the child."

6. As Art. 52(3) CFR requires the Charter's provisions to be interpreted in line with the corresponding provisions of the ECHR and the case law of the European Court of Human Rights (ECtHR), such jurisprudence is complementary. See Sormunen, "A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: What role for the best interests of the child?", 31 *Child and Family Law Quarterly* (2019), 249–268; Takács, "The threefold concept of the best interests of the child in the immigration case law of the ECtHR", 62 *Hungarian Journal of Legal Studies* (2021), 96–114; Leloup, "The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency", 37 *NQHR* (2019), 50–68; Sarolea, "L'intérêt supérieur de l'enfant dans les affaires de droit international privé devant la Cour européenne des droits de l'homme" in Barnich, Nuyts, Pfeiff and Wautelet, *Le droit des relations familiales internationales à la croisée des chemins* (Bruylant, 2016). Moreover, communications of the UN Committee on the Right of the Child are also relevant, as all EU Member States are party to the Convention on the Rights of the Child and most of them also ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. See Kalverboer et al., "The best interests of the child in cases of migration assessing and determining the best interests of the child in migration procedures", 25 *The International Journal of Children's Rights* (2017), 114–139. Other human rights jurisdictions and bodies can weigh in situations concerning migrant children and EU law.

7. For bibliographic references on Art. 24 CFR: Lamont, "Article 24 – The rights of the child" in Peers, Herve, Kenner and Ward, *The EU Charter of Fundamental Rights. A Commentary* (Bloomsbury Publishing, 2021); Gouttenoire, "Article 24 – Droits de l'enfant" in Picod, Rizcallah and Van Drooghenbroeck, *La Charte des droits fondamentaux de l'Union*

are at the intersection between migration law, free movement and Union citizenship, such as the *Chavez-Vilchez* ruling.⁸ The conclusion (section 4) discusses the main trends emerging from the case law while examining whether and how Article 24(2) of the Charter is an instrument for increased protection of the rights of migrant children and their families and whether it became, if not a general principle, a kind of safeguard principle for the genuine enjoyment of the substance of children's rights.⁹ The proposal considering the best interests of the child as a "safeguard" principle is advanced to distinguish it from a "general" or "fundamental" principle which, by reference to Article 6 TEU, acquires a specific meaning in EU law. Our analysis will show that the Court uses what we call a "safeguard principle" not necessarily as a general principle that should be applied in the interpretation of EU law, but as a kind of safety net that supplements EU secondary law texts when these do not sufficiently safeguard the "genuine enjoyment of the substance of the rights" of the child. Since the *Ruiz Zambrano* case, the ECJ has been using the "genuine enjoyment of the substance of the rights" formula to safeguard the substance of the rights of EU citizens in purely internal situations.¹⁰ As such, the best interests of the child become a further guarantee

européenne Commentaire article par article, 3rd ed. (Larcier, 2023), 691–716 Samobor, "Child's best interests – A Charter right or (only) a Charter principle?", 81 *Zbornik Znanstvenih Razprav* (2021), 177–199. Goldner Lang, "The child's best interests as a gap filler and expander of EU law in internal situations" in Ziegler, Neuvonen and Moreno-Lax (Eds.), *Research Handbook on General Principles of EU Law* (Elgar, 2022), 563–574.

8. A list of the ECJ rulings on the best interests of the child in Union citizenship and free movement cases is included in Annex 2. Some references to these and other rulings are made in this article, but they are not examined in detail. See *infra*, Case C-133/15, *Chavez-Vilchez*, EU:C:2017:354.

9. For bibliographic references on the broader topic of the best interests of the child and migration: Drywood and Stalford, "Coming of age? Children's rights in the European Union", 46 CML Rev. (2009), 143–172; Bhabha, Kanics and Senovilla Hernández (Eds.), *Research Handbook on Child Migration* (Elgar, 2018); Todres and King, *The Oxford Handbook of Children's Rights* (OUP, 2020); Grammaticaki-Alexiou, *Best Interests of the Child in Private International Law*, 412 *Collected Courses of the Hague Academy of International Law* (2020), 253–434; Bergamini and Ragni (Eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families* (Intersentia, 2019); Fulchiron (Ed.), *La famille du migrant* (LexisNexis, 2020); Dandoy and Willems (Eds.), *Les grands arrêts du droit au respect de la vie familiale* (Larcier, 2022); Bernard, Cresp and Ho-Dac (Eds.), *La famille dans l'ordre juridique de l'Union européenne* (Bruylant, 2020); Baby-Collin and Souiah, *Enfances et jeunesses en migration* (Le Cavalier Bleu, 2022); Fratea and Quadrani (Eds.), *Minori e immigrazione: quali diritti?* (Editoriale scientifica, 2015); Budzikiewicz et al. (Eds.), *Neue Impulse im europäischen Familienkollisionsrecht* (Nomos, 2021). See also ISEMI (*Intérêt supérieur de l'enfant en contexte migratoire*), information available at <uclouvain.be/en/research-institutes/juri/cedie/edem.html> (all websites last visited 18 Jan. 2023).

10. Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, para 42. For comments, see *infra* note 140. For more details on the concept of the "safeguard" principle in the context of EU private international law, see Carlier, "La jouissance effective de l'essentiel des droits, du toc ou du

of the respect for fundamental rights, and in particular – but not only – of the right to respect for family life. When there is no such need, because EU secondary law is clear enough, the Court will not always refer to Article 24(2) of the Charter.

This increased focus on the Charter is not unique to EU migration law, but common in other contexts in which children's rights are at stake.¹¹ For instance, under EU private international law, the recast of the Brussels II *bis* regulation – the Brussels II *ter* regulation – contains 37 references to the best interests of the child in recitals and articles against only 8 mentions in its predecessor regulation.¹² This broad increase of references to the best interests of the child is likely to have an impact on the Court's case law, although the implementation of this safeguard principle of the best interests of the child may vary from one area to another. For example, in private international law, when there is a disagreement between parents over child custody, determining the best interests of the child might appear more problematic than in other fields of EU law.¹³

2. The expansion of references to the interests of the child

After an initial period during which references to the best interests of the child in the ECJ case law were simply an implementation of the protection of family life, references to the EU Charter of Fundamental Rights now provide a more autonomous scope to the concern for the best interests of the child.

2.1. *The (best) interests of the child in the early case law*

The consideration of the (best) interests of the child first appeared in the ECJ's migration case law in 2006 when the European Parliament asked for the partial annulment of Directive 2003/86 on third-country nationals' right to family

roc? Réflexions sur un principe de sauvegarde en droit international privé de la famille", *Travaux du Comité français de droit international privé* (Pedone, 2023, forthcoming).

11. E.g. see Capone (Ed.), "Looking for the best interests of the child (BIC) in the least expected places: Can it really make a difference?", 89 *Questions of International Law* (2022), 1–5. Marimón, *La sustracción internacional de menores en el espacio jurídico europeo*, 1st ed. (Tirant lo Blanch, 2022).

12. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), O.J. 2019, L 178/1–115.

13. On this topic, see Lonardo, "The best interests of the child in the case law of the Court of Justice of the European Union", 29 MJ (2022), 596–614, at 598. Lonardo argues that when custody is disputed between the parents, "the interests of the two parents in conflict are at stake but . . . their lawyers make cases for different constructions of the best interests of the child, for how such interests are to be actually construed".

reunification.¹⁴ The European Parliament challenged the provisions which allowed the Member States to derogate from certain obligations laid down in the Directive because they were incompatible with fundamental rights.¹⁵ In reviewing the legality of the contested provisions, the Court found that they were consistent with fundamental rights requirements, mainly the right to respect for family life and the principle of non-discrimination on the grounds of age. The decision repeatedly refers to the best interests of the child (or minor children), including this as a “consideration of prime importance”.¹⁶ The Court also recalled that the Family Reunification Directive contains a specific provision – Article 5(5) – which requires the Member States to have due regard for the best interests of the child and that other provisions “must . . . be read in the light of the principles set out in Article 5(5)”.¹⁷ While the Member States enjoy a certain margin of discretion, they are still “obliged to examine the application [for family reunification] in the interests of the child and with a view to promoting family life”.¹⁸ Moreover, the Court stated that the principle of proportionality requires the Member States to analyse all the factors which play a role in an individual case, “with due regard to the best interests of minor children”.¹⁹

Two observations can be made with regard to this first ECJ case mentioning the best interests of the child in migration law. A first observation concerns the initial role played by the child’s best interests in the Court’s reasoning. The ECJ refers erratically to the child’s “interests” and the child’s “best interests” which are strictly linked to the right to family life. Respect for the child’s best interests does not represent an end in and of itself. This observation is consistent with the subsequent case law of the ECJ in other fields of Union law, including a case relating to the free movement of goods²⁰ and several cases on judicial cooperation in civil matters, such as parental responsibility and the right of custody in the event of the child’s unlawful removal.²¹ In this

14. Case C-540/03, *Parliament v. Council*. See Bulterman, “Case C-540/03, *Parliament v. Council*”, 45 CML Rev. (2008), 245–259; Carlier, “La libre circulation des personnes dans l’Union européenne”, (2007) *Journal des tribunaux – Droit européen*, 80–86, at 81.

15. The derogations concerned an integration requirement in Art. 4(1), an age limit to exercise the right to family reunification in Art. 4(6) and the possibility to introduce a waiting period before reunification in Art. 8 of the Family Reunification Directive.

16. Case C-540/03, *Parliament v. Council*, para 73. See also paras. 50, 58, 59, 63, 76, 84, 87, 90, 101 and 103.

17. *Ibid.*, para 87.

18. *Ibid.*, para 88.

19. *Ibid.*, para 101.

20. Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, EU:C:2008:85.

21. Case C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828; Case C-400/10 PPU, *McB*, EU:C:2010:582; Case C-211/10 PPU, *Povse*, EU:C:2010:400; Case C-403/09 PPU, *Detiček*, EU:C:2009:810; Case C-195/08 PPU, *Inga Rinau*, EU:C:2008:406.

early case law, the ECJ implicitly protected the best interests of the child through references to Article 8 ECHR on the right to respect for family life. This is also confirmed in early cases concerning Union citizens and their families.²² After 2010, more references to the Charter of Fundamental Rights were made by the Court.

This leads to a second observation which pertains to the legal value afforded to the Charter of Fundamental Rights. The ECJ used the Charter as an interpretative instrument even when it lacked binding force. The Court directly mentioned Article 24 of the Charter in the ruling, read in conjunction with Article 7 on the right to respect for family life; these are often cited together in subsequent case law although now references to Article 24(2) are also autonomous from Article 7 of the Charter.²³ This express reference to a Charter Article was the first of its kind and it gave the Charter a certain constitutional scope, virtually foreshadowing the importance it would later acquire in the Court's interpretation of EU migration law.²⁴ This was possible because the Family Reunification Directive was the first instrument of EU secondary law to contain, in its Preamble, an explicit reference to the Charter representing "an unequivocal endorsement of its relevance".²⁵

However, before and after this case, the ECJ has often ignored the best interests of the child in cases in which the unity of migrant families was a stake, such as *Zhu and Chen* or *Chakroun*.²⁶ Again, two reasons can be identified for this lack of references. First, the Charter was not yet binding when those early cases were decided. Second, the Court based its interpretation on the right to respect for family life and probably did not deem it necessary to reference the child's best interests. Heightened by the growing importance accorded to the Charter, the consideration of the best interests of the child is now becoming a principle of interpretation of EU secondary law.

2.2. *The EU Charter of Fundamental Rights as a turning point*

The importance of the EU Charter of Fundamental Rights evolved over time.²⁷ While the Court initially favoured a joint reading of the right to respect for

22. Case C-60/00, *Carpenter*, EU:C:2002:434; Case C-413/99, *Baumbast*, EU:C:2002:493.

23. Case C-540/03, *Parliament v. Council*, para 58. For subsequent case law see *infra* e.g. note 132, Case C-635/17, *E*, EU:C:2019:192, para 55.

24. Case C-540/03, *Parliament v. Council*, para 38.

25. Bulterman, *op. cit. supra* note 14, at 256.

26. Case C-200/02, *Zhu and Chen*, EU:C:2004:639, and Case C-578/08, *Chakroun*, EU:C:2010:117. See Carlier, "Case C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department*", 42 CML Rev. (2005), 1121–1131.

27. For bibliographic references, see *supra* note 9.

family life and the child's best interests, it later laid down a more explicit link between EU secondary law objectives and the implementation of Article 24 of the Charter. Today, the Court usually reinforces its interpretation on references based on recitals of directives or regulations on the child's best interests.²⁸ Looking at the context and at the fundamental objectives pursued by the relevant secondary law instrument, the ECJ would take the view that they respect the Charter's fundamental rights and that they seek to promote its application.²⁹ In addition, the Court would state that the child's best interests must be a primary consideration for the Member States when implementing the provisions of a certain directive or regulation that involves minors. This view is supported by the fact that the horizontal clauses included in secondary law enshrine the obligation to take into account the best interests of the child.³⁰ The Court also moved from requiring Member State authorities "to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned"³¹ to prescribing a "general and in-depth assessment of the situation . . . to determine the best interests of the child"³² Similarly, it moved from having "due regard"³³ to the best interests of the child to a "primary consideration" of the best interests of the child in the application of secondary EU law.³⁴ In other words, the best interests of the child initially appeared as one of the interests, among others, to be balanced in the proportionality test, mainly with respect for family life, and not as an objective in itself. Now the ECJ stipulates that the child's best interests must be taken into account "at all stages of the procedures" involving minors, providing the referring Court with a framework to assess whether the decision taken by the Member States' authorities complies with the obligation to take the best interests of the child into account.³⁵

Before the entry into force of the Lisbon Treaty, the Court stressed that the Charter of Fundamental Rights was not a legally binding instrument, but still

28. Recitals 13 and 16 of the Dublin Regulation, Recitals 9 and 22 of the Reception Conditions Directive, Recital 33 of the Procedures Directive, Recitals 18, 19, 27 and 38 of the Qualification Directive and Recital 22 of the Return Directive. E.g. Joined Cases C-273 & 355/20, *Bundesrepublik Deutschland (Family reunification with a minor refugee)*, EU:C:2022:617, para 39; Case C-19/21, *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)*, EU:C:2022:605, para 34; Case C-233/18, *Haqbin*, EU:C:2019:956, para 54.

29. See e.g. Case C-91/20, *Bundesrepublik Deutschland (Retention of family unity)*, EU:C:2021:898, para 55.

30. *In extenso*, see *supra* notes 5 and 28.

31. Joined Cases C-356 & 357/11, *O and S*, EU:C:2012:776, para 81.

32. Case C-441/19, *Staatssecretaris van Justitie en Veiligheid (Return of an unaccompanied minor)*, EU:C:2021:9, para 46.

33. Case C-540/03, *Parliament v. Council*, para 12.

34. Case C-648/11, *M.A. and others*, EU:C:2013:367, para 57.

35. *Ibid.*, para 44.

bore some legal relevance.³⁶ In later cases, the Court explicitly recalled that the observance of the Charter “is binding on the Member States”.³⁷ To complement its interpretation, the Court consistently refers to the Explanations relating to the Charter as well as to General Comment No. 14 of the UN Committee on the Rights of the Child.³⁸ Since all the Member States have ratified the UN Convention on the Rights of the Child, the ECJ explicitly stated that “Article 24 of the Charter . . . represents the integration into EU law of the principal rights of the child referred to in the Convention on the rights of the child” and that, therefore, it is necessary, when interpreting Article 24 of the Charter “to take due account of the provisions of that convention”.³⁹ In asylum cases, the Court also refers to UNHCR documents “particularly relevant in light of the role conferred on it by the Geneva Convention”.⁴⁰

3. A detailed account of the ECJ case law

Article 24(2) of the Charter places on Member States’ authorities a general obligation to take into consideration the best interests of the child in all actions related to children. Decisions might concern children directly or indirectly if they are addressed to members of their families or caregivers. Interpretative doubts expressed by domestic courts to the ECJ cover a range of diverse aspects of EU asylum and migration law. Three sub-fields are concerned by this case law: the different instruments composing the Common European Asylum System (CEAS), the Family Reunification Directive and the Return Directive.

36. Case C-540/03, *Parliament v. Council*, para 38.

37. Case C-193/19, *Migrationsverket*, EU:C:2021:168, para 34.

38. The text of the explanation reads as follows: “This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.” EU secondary law on migration and asylum contains explicit references to the 1989 UN Convention on the Rights of the Child such as Recital 13 of the Dublin Regulation, Recitals 9 and 18 of the Reception Conditions Directive, Recital 33 of the Procedures Directive, Recital 18 of the Qualification Directive, and Recital 22 of the Return Directive.

39. Case C-490/20, *V.M.A. v. Stolichna obshtina, rayo “Pancharevo”*, EU:C:2021:1008, para 63.

40. See Case C-112/20, *Belgian State (Return of the parent of a minor)*, EU:C:2021:197, paras. 37 and 38; Case C-91/20, *Bundesrepublik Deutschland*, para 56, by analogy with Case C-720/17, *Bilali*, EU:C:2019:448, para 57.

A cross-cutting issue emerging from this case law is the “relevant date” for assessing the “status” of the child as a minor.⁴¹ Should the child reach the age of majority during the decision-making procedure or during the court proceedings against a negative decision, the Court has repeatedly held that the relevant date is not the date of the Member States’ authorities’ decision, but the date on which the application was lodged by the child or by a family member.⁴² This interpretation is consistent with the objectives of EU asylum and migration law which include ensuring the best interests of the child, but also the equal treatment of applications, maintenance of family unity, the right to respect for private and family life, as well as the expedition of asylum or family reunification procedures.⁴³

Another element impacting the Court’s assessment of the best interests of the child is whether, in cases of families where at least one member is a third-country national, a child who is an EU citizen is involved. The presence of an EU citizen, even, and especially if he or she is a child, would then allow the Court to refer to the principle of free movement of EU citizens or to Union citizenship.⁴⁴

It is also worth noting that Articles 7 and 24(2) of the Charter are used together by the Court when maintaining family unity is in the best interests of the child, in particular in family reunification procedures or rules relating to bringing or keeping together family members of a beneficiary of international protection and under which protection status. On the contrary, unaccompanied minors, who are migrant children, might have compelling reasons in seeing their best interests assessed in instances which exclude their family situation. In those cases – when issues unrelated to family unity concern unaccompanied

41. See Case C-19/21, *Staatssecretaris van Justitie en Veiligheid*; Joined Cases C-273 & 355/20, *Bundesrepublik Deutschland*; Case C-279/20, *Bundesrepublik Deutschland (Family reunification with a child who has attained majority)*, EU:C:2022:618; Case C-768/19, *Bundesrepublik Deutschland (Family member)*, EU:C:2021:709; Joined Cases C-133, 136 & 137/19, *Belgian State (Family reunification – Minor child)*, EU:C:2020:577; Case C-550/16, *A and S*, EU:C:2018:248.

42. See Case C-768/19, *Bundesrepublik Deutschland*; Joined Cases C-133, 136 & 137/19, *Belgian State*; and Case C-550/16, *A and S*.

43. See Case C-550/16, *A and S*, para 58: an opposite interpretation would “frustrat[e] the objective pursued both by that directive and by Directives 2003/86 and 2011/95 of ensuring that, in accordance with Article 24(2) of the Charter of Fundamental Rights, the best interests of the child is in practice a primary consideration for Member States in the application of those directives” (emphasis added).

44. See Joined Cases C-356 & 357/11, *O and S*; Case C-82/16, *K.A. and others*, EU:C:2018:308; Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo (Residence for a family member – Sufficient resources)*, EU:C:2022:354.

minors – Article 24(2) of the Charter stands out as autonomous in both asylum and return procedures.⁴⁵

3.1. *Asylum*

The European Court of Justice has dealt on several occasions with the best interests of the child while interpreting instruments of the Common European Asylum System (CEAS), in particular the Dublin Regulations, the Reception Conditions Directive, the Procedures Directive and the Qualification Directive.⁴⁶

3.1.1. *Dublin transfers in or against the child's best interests*

The ECJ case law on the Dublin Regulation(s) includes two cases on the protection of unaccompanied minors (C-648/11 and C-19/21), one on the discretionary clause set out in Article 17 (C-661/17) and another on whether a Dublin transfer can be regarded as wrongful removal of the child (C-262/21). The Dublin III Regulation includes a horizontal clause in Article 6 which prescribes that “the best interests of the child shall be a primary consideration for the Member States with respect to all procedures provided for in this regulation”.⁴⁷ It also includes a special provision for unaccompanied minors in Article 8.

MA and others is one of the first judgments, in 2013, in which the Court referred to the child's best interests in asylum cases. It concerns subsequent applications for international protection lodged in two different Member States by unaccompanied minors with no family members legally present in the Union.⁴⁸ The children applied for asylum in the United Kingdom after having lodged a first application in Italy and the Netherlands respectively. In

45. See Case C-648/11, *MA and others*, and Case C-441/19, *Staatssecretaris van Justitie en Veiligheid*.

46. On the question of whether the CEAS complies with the rights of the child, see Smyth, *European Asylum Law and the Rights of the Child* (Routledge, 2014) and Whelan, *Reconceptualising Unaccompanied Child Asylum Seekers and the Law* (Routledge, 2022). See also Marchegiani, “The best interests principle's impact on decisions concerning asylum-seeking and refugee children” in Bergamini and Ragni, op. cit. *supra* note 9, pp. 39–54; Palladino, “La protezione dello straniero minore non accompagnato nel costruendo sistema comune d'asilo” in Fratea and Quadrani, op. cit. *supra* note 9. See also European Asylum Support Office (EASO), “Practical guide on the best interests of the child in asylum procedures” (2019).

47. Dublin III Regulation cited *supra* note 5.

48. Case C-648/11, *MA and others*. See Carlier, “Droit européen des migrations”, 3 *Journal de droit européen* (2014), 167–169, at 109; See Del Guercio, “Superiore interesse del minore e determinazione dello Stato competente all'esame della domanda di asilo nel diritto dell'Unione europea”, (2014) *Diritti umani e diritto internazionale*, 243–248; den Heijer, “Dublin, forumshoppen en de onbegeleide minderjarige”, 4 *Asiel & Migrantenrecht* (2013), 91–92.

the context of a domestic proceeding on the possibility of the children's transfer to the other Member States, the ECJ was asked to interpret the provision of the Dublin II Regulation which established that in the absence of a family member in the Union's territory, the Member State responsible is "the one in which the child has lodged his or her application for asylum".⁴⁹ While the referring Court suggested that the notion of "Member State in which the child has lodged the application" must be understood as the country of the *first* application, the ECJ took a different view.

The Court considered that in the event of subsequent applications lodged by unaccompanied minors in more than one Member State, the Member State responsible is that "in which the minor is present".⁵⁰ The ECJ also underlined that "unaccompanied minors form a category of particularly vulnerable persons" which requires that the length of the Dublin procedure should not be "prolong[ed] more than is strictly necessary", that "the specific procedural safeguards laid down for the protection of unaccompanied minors are respected" and that they have "prompt access to the procedures for determining refugee status".⁵¹ In other words, the Court established that children with no family members in the territory of the Union, in principle, should not be transferred to another Member State pursuant to the Dublin Regulation. Pointing out that "the child's best interests are to be a primary consideration", the Court's interpretation is consistent with fundamental rights as it refers expressly to Article 24(2) of the Charter.⁵²

The consequence of this ruling (C-648/11) is that, unlike adults, unaccompanied minors with no family members in the Union can technically choose their country of asylum, namely the country in which they are present.⁵³ This means that for unaccompanied minors – a "special" legal category of children and a particularly vulnerable category of asylum seekers – considerations linked to the best interests of the child, even regardless of

49. Art. 6(2) Dublin II Regulation of 18 Feb. 2003, now Art. 8(4) Dublin III Regulation.

50. Case C-648/11, *MA and others*, para 60.

51. *Ibid.*, paras. 55 and 61.

52. *Ibid.*, paras. 57, 58 and 59.

53. The Ukrainian crisis has created an exception for some adults. On 4 March 2022, the Council adopted the Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, O.J. 2022, L 7/1–6. The decision allows applicants to choose the country where they seek protection thus creating a new exception – also covering adults – to the rules on allocation of responsibility for asylum. Recital 15 of the Decision states that Member States have agreed that they will not apply Art. 11 Directive 2001/55/EC. See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, O.J. 2001, L 212/12–23.

family protection, prevail over the logic of the Dublin system. As a consequence, the Dublin III Regulation now expressly provides that “[i]n the absence of a family member, a sibling or a relative ..., the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor”.⁵⁴ But the Dublin Regulation does still not define which one is the Member State where the unaccompanied minor has lodged his or her application.

In the homonymous ruling in *M.A. and others* of 2019, the Court held that, in cases in which a minor is accompanying his or her parent who is an applicant for international protection, Article 20(3) of the Dublin III Regulation establishes “a presumption that it is in the best interests of the child to treat that child’s situation as indissociable from that of the parents”.⁵⁵ Although the presumption is rebuttable, respect for family life and, more specifically, preserving the unity of the family group is, as a general rule, in the child’s best interests. The referring Court focused on the interpretation of the discretionary clause set out in Article 17(1) of the Dublin III Regulation – which allows a Member State to examine an application for international protection, even if such examination is not its responsibility under the criteria laid down in the Regulation – with regard to the child’s best interests. The case followed the notification by the United Kingdom of its intention to withdraw from the Union. The ECJ upheld the view that, until the end of the transition period, the Brexit process had no influence on the United Kingdom’s obligations under the Dublin Regulation.⁵⁶ The Court maintained that States have an “absolute discretion” in the exercise of the option provided for in Article 17(1), that the discretionary clause is not subject to any particular condition and that “considerations relating to the best interests of the child can also *not* oblige a Member State to use that option and itself examine an application for which it is not responsible”.⁵⁷ No direct reference is made by

54. Art. 8(4) Dublin III Regulation.

55. Case C-661/17, *M.A. and others*, EU:C:2019:53, paras. 87 to 90. See Carlier and Lebouef, “Droit européen des migrations”, 3 *Journal de droit européen* (2020), 132–146, at 136; Gatta, “Brexit and Dublin: The Court of Justice clarifies the implications for the Dublin System of the process of withdrawal from the EU of the United Kingdom”, *Cahiers de l’EDEM* (March 2019); Aviat, “L’avenir incertain de la protection post-Brexit des demandeurs d’asile sous le régime des règlements Dublin”, (2019) *La Revue des Droits de l’Homme*; Hruschka, “Angekündigter Brexit und Dublin-Verfahren”, (2019) *Neue Zeitschrift für Verwaltungsrecht*, 301–302.

56. On the topic of the impact of Brexit on the rights of unaccompanied minors see Vitiello, “L’impatto della Brexit sui diritti dei minori stranieri non accompagnati”, 2 *Quaderni AISDUE* (2021), 19–50.

57. Case C-661/17, *M.A. and others*, para 71 (emphasis added).

the ECJ to Article 24(2) of the Charter, which does not even feature in the “legal context” section of the ruling.

In 2021, the Court dealt with the question of whether a Dublin transfer of a child to another Member State – following the child’s asylum application lodged by his mother on his behalf without the other parent’s consent – could amount to international child abduction following a complaint from the father who was separated from the child (C-262/21).⁵⁸ Sweden rejected as inadmissible the mother’s application for asylum for herself and the child and ordered the transfer of them both to Finland. Following the assessment required by Article 6(1) of the Dublin III Regulation, the referring Court found that the Dublin decision was in the child’s best interests. The Swedish authorities considered that the father posed a threat to the child and that, given the fact that they had no contact, a child-father separation for a certain period of time was not contrary to the child’s best interests. The ECJ considered that the mother could not be blamed for the Dublin transfer and that the transfer decision did not fall within the material scope of the Brussels II *bis* Regulation.⁵⁹ The ECJ’s interpretation is based on the assumption that the principle of legal certainty and the achievement of the objectives of the Dublin III Regulation would be undermined if “an applicant for international protection, such as the mother in the dispute in the main proceedings, should refrain from complying with a transfer decision on the ground that her conduct could be considered wrongful under the Brussels II *bis* Regulation”.⁶⁰ The key point of this ruling is that while the two EU legal instruments have clearly distinct objectives, their common one is to ensure the child’s best interests.

Finally, the Dublin III reform included derogations from the first entry criterion for the benefit of unaccompanied minors by adding to the notion of “family members” in Article 8(1) the applicant’s siblings and to the notion of “relative” in Article 8(2) “someone who can take care of the child . . . insofar

58. Case C-262/21 PPU, *A*, EU:C:2021:640. See Carlier and Frasca, “Droit européen des migrations”, 3 *Journal de droit européen* (2022), 131–148, at 146; Bumbaca, “CJEU rules on the interplay between Brussels II A and Dublin III”, *Conflict of laws* (14 Dec. 2021); Maoli, “Il trasferimento del minore in ottemperanza di una decisione adottata ai sensi del regolamento 604/203 (Dublino III) non è illecito e non costituisce sottrazione internazionale di minori”, *Aldricus* (6 Sept. 2021); Corneloup, “Demande de retour d’un enfant enlevé et principe de non-refoulement des réfugiés: lorsque la Convention de La Haye de 1980 rencontre la Convention de Genève de 1951”, (2021) *Revue critique de droit international privé*, 775–786.

59. Council Regulation (EC) 2201/2003 of 27 Nov. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, O.J. 2003, L 338/1–29.

60. Case C-262/21 PPU, *A*, para 52 (the translation is our own as, curiously, the text of this judgment is not available in English).

as this is in the minor's interest".⁶¹ In other words, members of the minor's extended family. The latter provision was the subject of the ECJ judgment in *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)*.⁶² The Court held that an unaccompanied minor who applies for international protection and wishes to reunite with one of his relatives legally present in another Member State has the right to a judicial remedy against the decision refusing a take charge request. The child wanted to reunite with his uncle – legally resident in the Netherlands – who was not a "family member" but a "relative who can take care of the child" according to Article 2(h) of the Regulation. The minor and his uncle were unable to challenge the decision based on the remedies provided for in Article 27(1) because, according to the Dutch Secretary of State, "the Dublin III Regulation does not provide for the possibility to challenge a decision refusing a take charge request".⁶³ Although it appears from a literal interpretation of Article 27(1) that the right to an effective remedy is envisaged only to challenge Dublin transfer decisions, the ECJ noted that a teleological interpretation suggests that an unaccompanied minor, applicant for international protection, should be able to challenge effectively decisions refusing a take charge request. The Court's interpretation of the provision, in light of Articles 7, 24 and 47 of the Charter, was largely based on the landmark decision in *Ghezelbash*.⁶⁴ The ECJ relied on the overall economy of the Dublin Regulation, including its context, objectives and evolution, and referred to its settled case law which established that rules of secondary EU law "must be interpreted and applied in compliance with fundamental rights".⁶⁵ Recital 39 of the Regulation demonstrates "the importance that EU legislature attaches to the full observance of the fundamental rights".⁶⁶ The minor's right to challenge a decision refusing the take charge request stems

61. Maiani, "The Dublin III Regulation: A new legal framework for a more humane system?" in Chetail, De Bruycker and Maiani (Eds.) *Reforming the Common European Asylum System* (Brill Nijhoff, 2016), pp. 99–142; Favilli, "La difficile costruzione di un sistema europeo comune di asilo", (2019) *Minori giustizia*, 33–41.

62. Case C-19/21, *Staatssecretaris van Justitie en Veiligheid*. See Pertsch and Nestler, "Law must be enforceable: Why the CJEU confirms remedies for family reunification within the EU and what it implies", *VerfBlog* (10 Aug. 2022); Klaassen, "A boost for family reunification through the Dublin III Regulation? The CJEU on the right to appeal refusals of take charge requests", *EU Law Analysis* (24 Oct. 2022).

63. Case C-19/21, *Staatssecretaris van Justitie en Veiligheid*, para 19.

64. Case C-63/15, *Ghezelbash*, EU:C:2016:409. See Carlier and Leboeuf, "Droit européen des migrations", 3 *Journal de droit européen* (2017), 110–119, at 114; Moffatt, "Judgments *Ghezelbash* and *Karim*", 30 *Journal of Immigration Asylum and Nationality Law* (2016), 284–285.

65. Case C-19/21, *Staatssecretaris van Justitie en Veiligheid*, para 33 and the case law cited.

66. *Ibid.*, para 34.

from Article 8(2) of the Dublin Regulation which is intended “to ensure full respect for the fundamental rights of unaccompanied minors” and must be read “in conjunction with Articles 7 and 24 of the Charter”.⁶⁷ The main point is that the uncle is a member of the minor’s “extended family” which is not covered by the right to family unity. However, the right to a judicial remedy against its refusal decision only belongs to the unaccompanied minor and not to the relative.⁶⁸ The Court also explained that the level of judicial protection of unaccompanied minors cannot vary depending on whether the applicant is subject to a transfer decision or to a decision refusing the take charge request. In both cases, the decisions can “undermine the right which the minor derives from Article 8(2) to be united with a relative who can take care of him”.⁶⁹

This series of judgments illustrates that the Dublin transfers can only be carried out if they are in the child’s best interests, mainly seen as an objective in itself. The Court made clear that the Member States are required to comply with the specific criteria for determining the State responsible for the asylum application of the minor “which must be applied in the child’s best interests and which are specifically intended to ensure that those interests are safeguarded in that procedure”.⁷⁰ From this more recent case law, it emerges that the consideration of the child’s best interests is a further guarantee of the applicability and effectiveness of the procedural safeguards envisaged for minors in EU asylum law.

However, in another 2022 case – *Bundesrepublik Deutschland (Child of refugees born outside the host State)* – the Court, in Grand Chamber, did not make any reference to Article 24(2) of the Charter in its interpretation of the Dublin Regulation.⁷¹ On the contrary, in his Opinion, Advocate General de la Tour proposed that the Court take an approach “based on the general principles on which [the Dublin Regulation] is based and, in particular, on the best interests of the child”, considering that this interpretation was “the simplest and the most respectful of the child’s interests, since it ensures the effectiveness of her rights under Article 18 of the Charter, by guaranteeing her effective access to the procedure for examining her application and its rapid

67. Ibid., paras. 46, 47 and 49.

68. Ibid., para 55.

69. Ibid., para 41.

70. Ibid., para 54.

71. Case C-720/20, *Bundesrepublik Deutschland (Child of refugees born outside the host State)*, EU:C:2022:603. See Néraudau, “La demande d’asile introduite par un mineur dans son État de naissance, qui n’est pas l’État qui a accordé le statut de réfugié à ses parents antérieurement, devra être examinée et ne pourra pas être rejetée pour irrecevabilité”, *Cahiers de l’EDEM* (Sept. 2022).

processing”.⁷² Rather than invoking the best interests of the child, the Court preferred to develop a merely technical solution, which in this case was still favourable to the child. As explained in the Introduction, this shows that the best interests of the child can also be seen, rather than as a “general” principle of EU law, as a kind of “safeguard” principle to be used when necessary, if technical solutions do not lead to a result already in line with the child’s interests.

3.1.2. *Extending international protection to a family member*

The next strand of judgments concerns more favourable standards retained or introduced by the Member States for the purpose of extending refugee or subsidiary protection status to the family members of a beneficiary of international protection, provided that this does not undermine the general objectives of the Qualification Directive 2011/95. Although the Directive does not require the Member States to ensure the automatic granting of a protection status to family members, the Court has consistently held that States have the latitude to implement more favourable rules in this regard, as shown by the following case law.

The *Ahmedbekova* case concerned applications for international protection lodged separately by members of the same family.⁷³ In its fifth question, the referring Court asked for an interpretation of the Qualification Directive 2011/95 and the Procedures Directive 2013/32 in light of Articles 7, 18 and 47 of the Charter and *taking into account the best interests of the child*.⁷⁴ In particular, the Court asked whether the two directives preclude applications for international protection lodged separately by members of a single family from being assessed in a single procedure or the assessment of one of those applications from being suspended until the conclusion of the examination of another of those applications. The child’s best interests did not play a role in the ECJ’s reasoning. The Court stated, “suffice it to note that regard must be had to the fundamental rights set out in that Charter in implementing the Qualification Directive and the Procedures Directive” and that fundamental rights “do not provide any further specific guidance” in answering the question.⁷⁵

The ECJ accepted that the Member States may establish more favourable standards than those set out in the Qualification Directive and held that, in

72. Opinion in Case C-720/20, *Bundesrepublik Deutschland (Child of refugees born outside the host State)*, EU:C:2022:219, paras. 65 and 72.

73. Case C-652/16, *Ahmedbekova*, EU:C:2018:801. See Carlier and Leboeuf, “Droit européen des migrations”, 3 *Journal de droit européen* (2019), 114–130, at 122.

74. The preliminary question is formulated as reported here, with no explicit mention to Art. 24(2) of the Charter by either the Bulgarian Court or the ECJ.

75. Case C-652/16, *Ahmedbekova*, para 64.

accordance with the principle of family unity, extending the recognition of refugee status to other family members does not run against the Qualification Directive. However, procedurally, the Directive requires an “individual assessment” and an “exhaustive examination” of the situation of each person separately, irrespective of the fact that several members of the same family have applied for asylum in the same Member State.⁷⁶ Although the Procedures Directive establishes the principle of individual examination of international protection applications, it leaves a margin of discretion to the Member States on “how to treat the potential interaction between applications from family members, which may, in part, concern identical facts or circumstances”.⁷⁷ While applications lodged by different family members can be “subject to measures intended to address any interaction between applications”, the Qualification Directive and the Procedures Directive “preclud[e] those applications from being subject to a single assessment”.⁷⁸

Building on the *Ahmedbekova* ruling, in *Bundesrepublik Deutschland (Retention of family unity)*, the Court reiterated that the Member States can retain or introduce more favourable standards for the purposes of extending a protection status to a family member of the beneficiary of international protection with a view to maintaining family unity.⁷⁹ The Court ruled that the grant to a minor child – who cannot claim a protection status on an individual basis – as a derived right of a parent’s refugee status is not contrary to the Qualification Directive. Although the Directive does not provide for such an automatic extension of a derived right to asylum to family members, the adoption of more favourable national rules is compatible with the Directive, provided that the child is not entitled to better treatment (i.e. by virtue of nationality or Union citizenship).⁸⁰ Taking full account of the child’s best interests, in the light of which Article 23(2) of the Qualification Directive “must be interpreted and applied”, the Court based its interpretation on the link between international protection and the maintenance of family unity, relying on UNHCR statements and on an interpretation of the provision in light of fundamental rights.⁸¹ The provision expressly requires the Member

76. *Ibid.*, para 58.

77. *Ibid.*, para 56.

78. *Ibid.*, para 65.

79. Case C-91/20, *Bundesrepublik Deutschland*. See Carlier and Frasca, *op. cit. supra* note 58, 131–148, at 137; Lohéide, “Granting asylum to family members with multiple nationalities – The choice-of-law implications of the CJEU’s Case C-91/20”, *Conflict of Laws* (29 Nov. 2021); Flamand, “Effectivité du principe de l’unité familiale des réfugiés : le choix du statut le plus favorable pour l’enfant”, *Cahiers de l’EDEM* (Feb. 2022); Colombo, “Come utilizzare bene i margini di manovra lasciati agli Stati membri dalla direttiva qualifiche? Estendendo ai familiari il riconoscimento della protezione internazionale”, *Blog DUE* (14 Jan. 2022).

80. Case C-91/20, *Bundesrepublik Deutschland*, para 54.

81. *Ibid.*, para 55.

States to ensure that family unity is maintained, by establishing certain benefits in favour of family members of a beneficiary of international protection.⁸²

Later, the Court dealt with the possibility of an adult claiming subsidiary protection, under domestic law, as the parent of a child who is a beneficiary of subsidiary protection.⁸³ *Bundesrepublik Deutschland (Family member)* concerns the criteria for determining the family relationship and, in particular, the relevant date for assessing the status of the child as a minor, a topic on which the Court has extensively ruled in refugee family reunification cases.⁸⁴ A child and his father lodged separate applications. While the child was still under the asylum procedure, the father arrived in Germany and applied for international protection as a family member. However, subsidiary protection status was granted to the child only when he had attained the age of majority, while the father's asylum procedure was still ongoing. The ECJ considered that the relevant date for assessing the status of the child as a minor is that on which the child's father applied for asylum, even if informally. Such an interpretation of the Qualification Directive is in line with Article 7 and Article 24(2) and (3) of the Charter and is also apparent from the terms of Recitals 18, 19 and 38 and Article 20(5) of the Directive, according to which "when Member States implement that directive, the best interest of the child must be a primary consideration to which they pay special attention and in the assessment of which they should take due account, *inter alia*, of the principle of family unity and the minor's well-being and social development".⁸⁵ Referring to a previous ruling, the Court stressed that the acquisition of the status of "international protection applicant" is not conditional on either the introduction or the registration of the application.⁸⁶

In *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)*, a third-country national who obtained refugee status in another Member State (Austria) lodged an application for international protection in Belgium where his children, who were beneficiaries of subsidiary protection, resided. One of the children was a minor.⁸⁷ The father's application was declared inadmissible on the basis of

82. Ibid., para 36 and the case law cited.

83. Case C-768/19, *Bundesrepublik Deutschland*. See Carlier and Frasca, op. cit. *supra* note 58, 131–148, at 138.

84. See *infra*.

85. Case C-768/19, *Bundesrepublik Deutschland*, para 38.

86. Case C-36/20 PPU, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, EU:C:2020:495. See Carlier and Leboeuf, "Droit européen des migrations", 3 *Journal de droit européen* (2021), 140–154, at 147.

87. Case C-483/20, *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)*, EU:C:2022:103. See Silga, "CGRA (C-483/20) and the absence

Article 33(2)(a) of the Procedures Directive because he already benefitted from protection in another Member State. The father already lived in Belgium with the child (a beneficiary of international protection and, prior to that, an unaccompanied minor), he was the sole parent of the nuclear family physically present in Belgium and he had been conferred parental responsibility for the child by Belgium. The preliminary question was whether, in light of the principles of family unity and of the child's best interests, the father should have been granted protection by the State in which his (minor) child had been granted protection. In other words, the referring Court asked if any exceptions exist which would require the Member States to examine the application for international protection even if a situation falls into the exhaustive list of grounds for declaring applications inadmissible. Such exceptions could "potentially [be] justified by the right to respect for family life and the need to take into account the best interests of the child".⁸⁸

In line with the case law arising from *Jawo* and *Ibrahim and others*, the only exceptions allowed by the ECJ are cases of systemic or generalized deficiencies in a Member State where there are "substantial grounds for believing that [the applicant] would face a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter" or "would be in a situation of extreme material poverty that does not allow him or her to meet his or her most basic needs ..., that undermines his or her physical or mental health or puts him or her in a state of degradation incompatible with human dignity".⁸⁹ On the contrary, if an applicant has already been granted international protection from a Member State where the living conditions would not expose him or her to a substantial risk of inhuman or degrading treatment or to live in a state of degradation incompatible with human dignity, his or her application can be deemed inadmissible on the basis of Article 33(2)(a).⁹⁰ According to the ECJ, in such cases, the need for international protection "as such ... is already satisfied in Austria".⁹¹ Most importantly, the ECJ held that "unlike protection against any inhuman or degrading treatment enshrined in Article 4 of the Charter, the rights guaranteed by Articles 7 and 24 of the Charter are not absolute in nature and

of an effective mutual recognition of positive asylum decisions: The 'elephant in the room'?", *EU Law Live* (15 March 2022); Ferri, "Lost in translation? Recenti spunti della giurisprudenza UE su status di rifugiato, mutua fiducia e diritti fondamentali", *BlogDUE* (22 March 2022); Di Pascale, "Quando il fato decide altrimenti. L'unità della famiglia dei titolari di protezione internazionale", *Eurojus* (8 Oct. 2020).

88. Case C-483/20, *Commissaire général aux réfugiés et aux apatrides*, para 26.

89. Ibid., paras. 31 and 32, referring to Case C-163/17, *Jawo*, EU:C:2019:218, paras. 85 to 90; Joined Cases C-297, 318, 319 & 438/17, *Ibrahim and others*, EU:C:2019:219, para 92 and paras. 89, 90 and 101.

90. Case C-483/20, *Commissaire général aux réfugiés et aux apatrides*, para 32.

91. Ibid., para 33.

may therefore be subject to restrictions under the conditions set out in Article 52(1) of the Charter”. Such an interpretation, added the Court, “make[s] it possible to ensure observance of the principle of mutual trust”.⁹²

In the second part of the ruling, the ECJ interpreted Article 23(2) of the Qualification Directive – which ensures that the family unity of beneficiaries of international protection is maintained – in light of Articles 7 and 24(2) and (3) of the Charter. The Court first stated that Article 23(2) does not provide for the extension of a derived right to international protection status to the family members of a beneficiary of international protection. However, that provision establishes “a certain number of benefits in favour of family members of a beneficiary of international protection”.⁹³ Among those, a right of residence should be granted, provided that the family member does not individually qualify for international protection. The Court noted that since the father’s application for asylum was declared inadmissible in Belgium, owing to his refugee status in Austria, he does not individually qualify for international protection in the first Member State and therefore he must be granted a right of residence.⁹⁴

Again this set of decisions, centred on the extension of international protection status to family members, reveals a trend toward broad references by the ECJ to the best interests of the child. It also shows that the best interests of the child is not necessarily seen as a mandatory “general” principle, but as a principle which might be subject to other principles, such as the principle of mutual trust. As a kind of “safeguard” principle, the best interest of the child is a subsidiary tool to ensure that children’s interests are met.

3.1.3. *Material reception conditions, human dignity and children’s vulnerability*

In the EU Strategy on the Rights of the Child, the European Commission noted that “children in migration, including child refugees, are very often exposed to risks of abuse and have suffered from extreme forms of violence ... before and/or after their arrival on the EU territory” and those migrant children residing in overcrowded or substandard reception facilities face mental health problems due to “uncertainties or degrading treatment in the country of arrival”.⁹⁵ Article 23(1) of the Reception Conditions Directive requires that “the best interests of the child shall be a primary consideration for Member States when implementing the directive’s provisions of this directive that

92. Ibid., paras. 36 and 37.

93. Ibid., para 39.

94. Ibid., para 41.

95. COM(2021)142 final, Commission Communication, “EU strategy on the rights of the child”, at pp. 9 and 13.

involve minors”.⁹⁶ An interpretation of this provision in light of Article 24(2) of the Charter can be found in the *Haqbin* ruling.⁹⁷ The case concerned the scope of the Member States’ right to determine the sanctions applicable in cases of a serious breach of the rules of accommodation centres as well as seriously violent behaviour of asylum seekers. The applicant – an unaccompanied minor – was temporarily excluded from material reception conditions, namely housing, food and clothing. The ECJ noted that while the Reception Conditions Directive leaves the Member States latitude in determining the applicable sanctions, any sanction “must be objective, impartial, reasoned and proportionate to the particular situation of the applicant” and it must “ensure a dignified standard of living”.⁹⁸ The measure was therefore deemed disproportionate by the Court as the withdrawal, even temporarily, of material reception conditions is incompatible with respect for human dignity. Moreover, the ECJ added that “in the case of an unaccompanied minor, those sanctions must, in light, *inter alia*, of Article 24 of the Charter of Fundamental Rights, be determined by taking particular account of the best interests of the child”.⁹⁹ Building on the factors relevant for the assessment of the child’s best interests listed in Article 23(1) of the Reception Conditions Directive, the ECJ specified that Member States must take into account “the minor’s well-being and social development, taking into particular consideration the minor’s background, such as safety and security considerations”.¹⁰⁰

The Court gave more weight to the concept of respect for human dignity than to the concept of vulnerability.¹⁰¹ Indeed, the Reception Conditions Directive provides that unaccompanied minors are considered “vulnerable persons” with special reception needs.¹⁰² While vulnerability can be taken into account for the assessment of the seriousness of the violation of the

96. Art. 23(2) of the Reception Conditions Directive provides certain factors that Member States shall take into account when assessing the best interests of the child, such as a) as family reunification possibilities; b) the minor’s well-being and social development, taking into particular consideration the minor’s background; (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; and (d) the views of the minor in accordance with his or her age and maturity.

97. Case C-233/18, *Haqbin*, para 56. Carlier and Leboeuf, op. cit. *supra* note 55, 132–146, at 141 ; Benoit-Rohmer, “Intérêt supérieur de l’enfant et hébergement des demandeurs d’asile”, 2 RTDE (2020), 301–240.

98. Case C-233/18, *Haqbin*, paras. 45 and 46.

99. Ibid., para 56.

100. Ibid., para 54.

101. The opposite was suggested by the Opinion of A.G. Campos Sánchez-Bordona in Case C-233/18, *Haqbin*, EU:C:2019:468.

102. Art. 21 Directive 2013/33, entitled “General principle”, provides that Member States are to take into account the specific situation of vulnerable persons, in particular minors and unaccompanied minors.

fundamental rights to human dignity, it is irrelevant for the assessment of the proportionality of the measure infringing the fundamental right (the sanction). In this case, the reference to Article 24(2) of the Charter works as a further interpretative principle beyond the non-negotiable baseline represented by human dignity which would be violated by the sanction of withdrawal of reception conditions.

The ECJ confirmed this position in a subsequent case in which the referring Court asked whether the same sanction of withdrawal of material reception conditions was proportionate in view of the fact that the person did not fall into the category of “vulnerable persons”, namely minors or unaccompanied minors.¹⁰³ The Court held that the considerations set out in the *Haqbin* judgment apply “to any applicant for international protection and not only to those applicants who are ‘vulnerable persons’ within the meaning of Article 21 of the [Reception Conditions] Directive”.¹⁰⁴ The argument of the lack of vulnerability of the asylum seeker put forward by the domestic court perfectly embodies the danger inherent in the legal use of the concept of vulnerability when it only addresses the most vulnerable persons (the unaccompanied minors) within a vulnerable group (minors) to the detriment of the “merely” vulnerable (adult asylum seekers).¹⁰⁵ The solution found by the ECJ, relying on human dignity and proportionality, is to be welcomed. It shows, once again, that the best interests of the child may be seen as a safeguard principle to be used if and when necessary.

Until now, the Court has been quite firm in reiterating that material reception conditions cannot be denied to asylum seekers, regardless of whether they are children or adults. On the other hand, as far as children are concerned, their vulnerability may point towards additional guarantees with regard to reception standards and need-based care, especially for unaccompanied minors who are deemed extremely vulnerable. This position is consistent with that of other bodies, such as the European Committee of Social Rights. The Committee, for instance, has recognized Greece’s failure to fulfil its obligations under the European Social Charter with regard to the rights of migrant children and the inadequate living conditions in the Greek

103. Case C-422/21, *Ministero dell’Interno (Withdrawal of material reception conditions)*, EU:C:2022:616. See Apatzidou “The inalienable right of asylum-seekers to a dignified standard of living”, *EU Law Live* (13 Sept. 2022).

104. Case C-422/21, *Ministero dell’Interno*, para 46.

105. On this topic, see Carlier, “Des droits de l’homme vulnérable à la vulnérabilité des droits de l’homme, la fragilité des équilibres”, 79 *Revue interdisciplinaire d’études juridiques* (2017), 175–204. On vulnerability see also Leboeuf, “The juridification of ‘vulnerability’ through EU asylum law: The quest for bridging the gap between the law and asylum applicants’ experience”, 11 *Laws* (2022), 45, 1–19 and the Horizon 2020 VULNER project (www.vulner.eu); Jakulevičienė, ‘Vulnerable persons in EU asylum legislation: central feature or necessity on the outskirts?’ in Tsourdi and de Bruycker (Eds.), *Research Handbook on EU Migration and Asylum Law* (Elgar, 2022), 225–242.

islands and in mainland Greece, including accommodation, needs-based care, access to health care and education, the lack of an effective guardianship system for unaccompanied minors, as well as the lack of special protection against physical and moral harm.¹⁰⁶

3.2. *Family reunification*

The Court interpreted the Family Reunification Directive in light of the best interests of the child on eight occasions.¹⁰⁷ Article 5 of the Family Reunification Directive 2003/86 provides that “when examining an application, the Member States shall have due regard to the best interests of minor children”.¹⁰⁸ One strand of cases concerns refugees’ family reunification – which is subject to more favourable conditions – as well as family reunification of beneficiaries of subsidiary protection. Persons benefiting from subsidiary protection do not enjoy those favourable conditions. However, under national law, the scope of those provisions can be extended to beneficiaries of subsidiary protection. A second strand pertains to cases in which children who are EU citizens are indirectly concerned by a matter of family reunification with a third-country national.¹⁰⁹ The Court has stated that the Charter requires Member States “to examine applications for family reunification in the interests of the children concerned and with a view to promoting family life”.¹¹⁰

106. ECSR, *International Commission of Jurists (ICJ) and European Council on Refugees and Exiles (ECRE) v. Greece*, complaint no. 173/2018, decision on the merits of 26 Jan. 2021.

107. On this topic, see Klaassen and Rodrigues, “The best interests of the child in EU family reunification law: A plea for more guidance on the role of Article 24(2) Charter”, (2017) *European Journal of Migration and Law*, 191–218; Smyth, “Family life and the best interests of the child in the field of migration” in Iglesias Sánchez and González Pascual (Eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021), pp. 119–138; Friedery, “Developments in family reunification cases before the CJEU”, 3 *Bratislava Law Review* (2019), 6–17; Rodrigues, “Human rights and the best interests of the child in European family reunification law” in Bergamini and Ragni, op. cit. *supra* note 9, pp. 55–74; Fratea, “Quando il diritto si scontra con la realtà: i minori migranti quali soggetti titolari del ricongiungimento familiare” in Fratea and Quadranti, op. cit. *supra* note 9; Schiffner, “New aspects in the family reunification procedure in the case-law of the Court of Justice of the European Union”, *Lectiones iuridicae* (2019), 142–156. See also Ioffe, “The right to family reunification of children seeking international protection under the Convention on the Rights of the Child: Misplaced reliance on *Travaux*?”, 20 *International Journal of Refugee Law* (2022), 1–26.

108. Family Reunification Directive cited *supra* note 5.

109. On this topic, see Berneri, *Family Reunification in the EU. The Movement and Residence Rights of Third Country National Family Members of EU Citizens* (Hart Publishing, 2017); Pataut, “Le citoyen européen et sa famille étrangère”, 4 *RTDE* (2013), 917–932.

110. The Court also referred to Art. 24 CFR in Case C-193/19, *Migrationsverket*, para 34, a case related to a refusal to renew a residence permit for the purposes of family reunification

3.2.1. *Refugees, age requirements, and the right to family reunification*

The first set of cases concerns, like the previous asylum procedure cases, the relevant date to determine the status of the child as a minor in refugee family reunification irrespective of whether the refugee is an unaccompanied minor who wants to reunite with his or her parents or a parent who wants to reunite with his or her child.¹¹¹ Different issues may arise in the interpretation of the age requirements if the child reaches the age of majority during the decision-making procedure or during the court proceedings against a decision rejecting the family reunification application. The Court generally accepts that the full right to family reunification is conferred by refugee status retroactively, provided that the family reunification application is lodged within three months of the date on which the minor was declared to hold refugee status.¹¹²

The first ECJ ruling on refugee family reunification and the best interests of the child was *A and S* which concerned the right of a refugee child to family reunification with his parents.¹¹³ The unaccompanied minor was below the age of 18 at the time of the application for international protection, but over 18 at the time of the decision granting him asylum which was followed by his application for family reunification. In order to determine whether the more favourable family reunification conditions for unaccompanied minors were met, the ECJ stated that the relevant date is that on which the child submitted the asylum application with a view to obtaining refugee status, the recognition of which is a declaratory act. The Court held that the determination of the relevant date must result from an autonomous and uniform interpretation of the Directive's provisions which make no express reference to the law of the Member State.¹¹⁴ It recalled the objectives pursued by the Family Reunification Directive, namely to promote family life and to give protection to third-country nationals and, in particular, children.¹¹⁵ It then explained that

on the ground that the applicant's identity could not be established with certainty. See Carlier and Frasca, *op. cit. supra* note 58, 131–148, at 141.

111. An account of this case law is offered by A.G. Collins in his Opinion in Case C-720/20, *Bundesrepublik Deutschland (Family reunification with a child who has attained majority)*, EU:C:2021:1030, para 44.

112. As required by Art. 12(1) of the Family Reunification Directive.

113. Case C-550/16, *A and S*. See Carlier and Leboeuf, *op. cit. supra* note 73, 114–130, at 126; Nicolosi, “Shedding light on the protective regime for unaccompanied minors under the Family Reunification Directive: the case of *A and S*”, 3 *European Papers* (2018), 1493–1502; Flamand, “La minorité ‘prolongée’ du MENA reconnu réfugié pour favoriser le regroupement familial”, *Cahiers de l’EDEM* (May 2018); Barbou Des Places, “Chronique Droit de l’asile et immigration – Priorité à la reconstitution de la vie familiale du réfugié mineur non accompagné”, (2019) RTDE, 175–198, at 195.

114. Case C-550/16, *A and S*, para 41.

115. *Ibid.*, para 44.

States' authorities are left with no discretion when authorizing the reunification of certain family members as they are subject to a "precise positive obligation to which a clearly defined right corresponds".¹¹⁶ The Court will use these same words in subsequent case law. In accordance with the principles of equal treatment and legal certainty, the ECJ then stressed the need for an identical and predictable treatment of all applicants who are in the same situation because they lodged their applications contextually.¹¹⁷ In this judgment, the Court used the best interests of the child indirectly, viewing this concept as a support to its interpretation, rather than its basis. The basis of the reasoning is the Directive's provision on unaccompanied minors' family reunification rules which gives clear rights to those children and leaves the Member States with no discretion. The Court stated that an opposite interpretation would have the effect of "frustrating the objective . . . of ensuring that, in accordance with Article 24(2) of the Charter of Fundamental Rights, the best interests of the child is in practice a primary consideration for Member States in the application of [the Family Reunification and the Qualification] directives".¹¹⁸

In *Belgian State (Family reunification – Minor child)*, the ECJ found the Belgian judicial practice of declaring an appeal against a decision refusing family reunification inadmissible for lack of interest in bringing proceedings contrary to the Family Reunification Directive (C-133/19).¹¹⁹ The inadmissibility decision was based on the circumstance that the minor had reached the age of majority in the course of the dispute. Since the appeal against the refusal of the application for family reunification was not examined on the merits, the Court considered the practice in violation of the right to effective judicial protection enshrined in Article 47 of the Charter. The status of the child as a minor must be assessed at the time the application is lodged and not at the time of the court proceedings. The Court extended the logic of the *A and S* ruling to the entire family reunification procedure. It also emphasized that the right to family reunification cannot be "dependent on random and unforeseeable circumstances, entirely attributable to the competent national authorities and courts of the Member State concerned" as

116. *Ibid.*, paras. 43 and 45.

117. *Ibid.*, para 60.

118. Case C-550/16, *A and S*, para 58.

119. Joined Cases C-133, 136 & 137/19, *Belgian State (Family reunification – Minor child)*. See Carlier and Leboeuf, *op. cit. supra* note 86, 140–154, at 151; Peers, "Family reunion, the rights of the child and effective remedies: Latest CJEU judgment", *EU Law Analysis* (28 July 2020); Jiménez Blanco, "Fecha de referencia para la fijación de la edad del extranjero y reagrupación familiar", 86 *La Ley Unión Europea* (2020); Flamand, "Regroupement familial: Effectivité des recours et garanties procédurales au nom de l'intérêt supérieur de l'enfant", *Cahiers de l'EDEM* (Aug. 2020).

this would lead to significant differences in the processing of applications for family reunification between the Member States and within a single Member State.¹²⁰

In August 2022, the Court ruled on twin cases, relying on the best interests of the child as a principle of interpretation. The first case concerned the family reunification of parents with a minor child who had been granted refugees status in a Member State and had come of age before the adoption of the decision on the parents' application for the purposes of family reunification.¹²¹ In assessing the minor status of the child, the Court held that the date of the decision on the application for entry and residence for the purpose of family reunification submitted by the applicant's parents is not decisive. Only the date of the application for asylum is relevant. The fact that the refugee was still a minor on that date did not constitute a "condition" for the purposes of family reunification, the non-compliance with which allowed the Member States to reject such an application.¹²² The Court clearly used the best interests of the child as a principle of interpretation stating that "the provisions of Directive 2003/86 must be interpreted and applied in the light of Article 7 and Article 24(2) and (3) of the Charter".¹²³ In addition, the Family Reunification Directive precludes national legislation under which the right of residence of the parents ends as soon as the child reaches the age of majority.¹²⁴

The second case concerned a child's family reunification with her father who had been granted refugee status in a Member State where the child had attained the age of majority before the granting of refugee status to the parent or the submitting of the family reunification application.¹²⁵ The Court held that the refusal to issue a visa for the purpose of family reunification of the daughter who had reached the age of majority in the course of the family reunification procedure with her father was contrary to the Family Reunification Directive. The child lodged the application for family reunification once her father was granted refugee status. She turned 18 in the period between the date of her father's application for international protection and the date on which he was granted refugee status. The ECJ stated that the relevant date is that on which the parent submitted the asylum application with a view to obtaining refugee status, the recognition of which – the Court recalled again – is a declaratory act, in such a way that refugees have

120. Joined Cases C-133, 136 & 137/19, *Belgian State*, para 43.

121. Joined Cases C-273 & 355/20, *Bundesrepublik Deutschland*.

122. *Ibid.*, para 47.

123. *Ibid.*, para 39.

124. *Ibid.*, para 52.

125. Case C-279/20, *Bundesrepublik Deutschland*. Kroeze, "Age and family ties in refugees' family reunification cases: A victory for children's rights", *EU Law Live* (3 Oct. 2022).

the “right to be recognized as such from the date of [the] application for refugee status”.¹²⁶

In accordance with the principles of equal treatment and legal certainty, the ECJ then stressed the need for an identical and predictable treatment of all applicants who are in the same situation because they lodged their applications contemporaneously. If that were not the case, Member State authorities would not be prompted to prioritize applications lodged by minors, thus denying children’s vulnerability and “jeopardizing the very rights of those minors to family reunification”.¹²⁷ The ECJ usually concludes that only such an interpretation makes the provision effective and is consistent with the objective pursued by the Directive as well as the requirements stemming from the fundamental rights protected by the EU legal order, in particular Article 7 and Article 24(2) and (3) of the Charter which require the Member States “to examine applications for family reunification in the interests of the children concerned and with a view to promoting family life”.¹²⁸ In both cases, the ECJ interpreted the notion of “real family relationship” within the meaning of Article 16(1)(b) of the Directive, clarifying that the legal parent/child relationship is not sufficient on its own. However, it is not necessary for the parent and the child to live under the same roof in order for that child to qualify for family reunification, nor can they be required to support each other financially.¹²⁹ Occasional visits and regular contact of any kind may suffice to demonstrate that those persons are reconstructing personal and emotional relationships and to establish the existence of a real family relationship.

The question of the age requirement also arose incidentally in a 2022 Dublin case in which the ECJ referred by analogy to the *A and S* judgment.¹³⁰

From this case law, it emerges that the relevant date to determine the status of the child as a minor is key to ensuring the respect of various principles of Union law, including the child’s best interests, equal treatment, legal certainty and the right to effective judicial protection. However, the family reunification application must be made within a reasonable time, namely within three months of the date on which refugee status was granted to the reuniting person.¹³¹

126. Case C-279/20, *Bundesrepublik Deutschland*, para 46.

127. *Ibid.*, para 43. See, by analogy, Case C-550/16, *A and S*, para 58 and the case law cited; and Case C-768/19, *Bundesrepublik Deutschland*, para 40 and the case law cited.

128. Case C-279/20, *Bundesrepublik Deutschland*, para 60.

129. *Ibid.*, paras. 68 and 69.

130. Case C-19/21, *Staatssecretaris van Justitie en Veiligheid*, para 25.

131. This was clarified by the Court in Case C-550/16, *A and S*, para 61: “it must be held that the application for family reunification made on the basis of Article 10(3)(a) of that directive must, in principle, . . . be submitted within a period of three months of the date on which the ‘minor’ concerned was declared to have refugee status”.

As for family reunification of beneficiaries of international protection, in the case *E*, the Court had to determine whether an application for family reunification, submitted by a beneficiary of subsidiary protection, could be rejected solely on the grounds that the applicant did not provide official documentary evidence to prove the existence of the family relationship.¹³² The Court considered that the lack of documentary evidence cannot be the sole reason for rejecting the application for family reunification and that the competent Member State authorities must make “a balanced and reasonable assessment of all the interests in play, taking particular account of the *interests of the children* concerned”.¹³³ Such a case by case assessment “where appropriate, pays particular attention to the interests of the children concerned . . . with a view to promoting family life”.¹³⁴ In this ruling, the ECJ gave indications on the factors which can influence “the extent and intensity” of the assessment, such as “the age of the children . . . , their circumstances in the country of origin and the extent to which they are dependent on relatives” including the particular difficulties that might be encountered before and after fleeing their country of origin.¹³⁵ Member States authorities can also be required – reading Article 11(2) of the Family Reunification Directive in light of Article 7 and Article 24(2) and (3) of the Charter – “to carry out the necessary additional checks, such as holding an interview with the sponsor”.¹³⁶

In November 2022, in the case *Belgian State (Refugee minor married)*, the Court also ruled on the right to family reunification of an unaccompanied refugee minor.¹³⁷ In this case, the issue at stake was no longer the interpretation of the minor’s age requirement, but the interpretation of the qualification of the minor as “unaccompanied”. This case shows how the best interests of the child could be interpreted differently in different areas of law, namely in private international law and in migration law. A Palestinian minor arrived in Belgium to join her spouse, whom she married in Lebanon when she was 15 years old. In Belgium, this marriage was not recognized on the ground that it was a child marriage, which was incompatible with public policy, pursuant to the relevant provisions of the Belgian Private International Law Code. Therefore, despite the fact that the two lived together, the authorities considered her as an unaccompanied minor at that time. Later, once the young

132. Case C-635/17, *E*. See Carlier and Leboeuf, op. cit. *supra* note 55, 132–146, at 142.

133. Case C-635/17, *E*, para 57 (emphasis added).

134. *Ibid.*, para 59.

135. *Ibid.*, paras. 59 and 79.

136. *Ibid.*, para 79.

137. Case C-230/21, *Belgian State (Refugee minor married)*, EU:C:2022:887; see Klasen, “The right to family reunification for married unaccompanied minors: An analysis of *X. v. Belgische staat* (C-230/21)”, *EU Law Live* (6 Dec. 2022).

woman was recognized as a refugee, her mother's visa application for family reunification was refused by the Belgian authorities on the grounds that the daughter is no longer a member of the nuclear family of her parents, because she is married. In other words, depending on the interests and the rights at stake, the Belgian authorities interpreted the marriage differently and, consequently, the rights of this young woman as an unaccompanied or married person. As a result, according to the interpretation of her marriage, her best interests could vary while her age as a minor, and therefore as a child at the time of reference, does not vary.

The Court focused its analysis solely on the right to family reunification and held that Article 10(3)(a) of Directive 2003/86, which set more favourable conditions for refugees who are unaccompanied minors, imposes on Member States "a specific positive obligation to authorize . . . the family reunification of first-degree relatives of the sponsor in the direct ascending line" and "does not specifically provide that a refugee minor must be unmarried for . . . the purposes of family reunification".¹³⁸ Besides this literal interpretation, the systemic and teleological interpretations show that the right to family reunification granted to unaccompanied refugee minors is not subject to a margin of discretion on the part of the Member States, nor to the conditions laid down for any other refugee, adult or minor, wishing to reunite with these same family members. It must be interpreted and applied in light of Article 7 and Article 24 (2) and (3) of the Charter, and in accordance with the principles of equal treatment and legal certainty. By clearly answering the first question of the referring court by saying that, for the purposes of family reunification with a refugee, an "unaccompanied minor" can be a married minor, the Court no longer has to deal with the second question asking if a refugee minor whose marriage contracted abroad is not recognized for public policy reasons can be regarded as an "unaccompanied minor" for the purpose of family reunification. In other words, the Court had no need to deal with the inconsistencies of the Belgian authorities, which considered the young woman either as unmarried, for the purposes of her personal status, or as married, for the purposes of family reunification. On the contrary, Advocate General Szpunar did affirm in his Opinion, for the sake of completeness, that "a Member State's refusal to recognize a marriage involving a minor for public policy reasons whilst accepting that that marriage is effective as regards the right to family reunification would be contrary both to the objective of family reunification and that of the prevention of forced marriages".¹³⁹ By this approach, the Advocate General ensures that the child's best interests are

138. Case C-230/21, *Belgian State (Refugee minor married)*, paras. 28 and 29.

139. Opinion in Case C-230/21, *Belgian State (Refugee minor married)*, EU:C:2022:477, para 58.

safeguarded in all circumstances and areas of law, refusing to accept *à la carte* interpretations depending on the rights and interests at stake.

Once again, it appears from this series of cases that the ECJ makes broad references to the best interests of the child, but mainly views it as a safeguard principle, a support to its interpretation. This is precisely and expressly confirmed by the second set of family reunification decisions which lie at the intersection between Union citizenship and EU migration law, particularly in purely internal situations.

3.2.2. *At the intersection between Union citizenship and EU migration law*

The second set of cases is about children who are static EU citizens indirectly concerned by a matter of family reunification with a third-country national who asks for a residence permit, as a derived right, as a family member of an EU citizen. This means that this case law is not directly concerned with the application of the Family Reunification Directive (2003/86), because the family member who allows for the right of residence is an EU citizen, nor with the EU Citizenship Directive (2004/38), because this EU citizen did not make use of his or her freedom of movement, making this a purely internal situation. Until 2011, the Court considered that these situations fall within the competence of the Member States and their national migration law, and did not concern EU law. Since the *Ruiz Zambrano* case and thanks to a series of interpretations based on the *effet utile* of Article 20 TFEU, the Court has been more inclined to inquire into purely internal situations when the enjoyment of the substance of the rights attached to the status of Union citizen is at stake.¹⁴⁰ Provided that a relationship of dependence with the parent exists, this is the case when fundamental rights are at issue, in particular the child's best interests.¹⁴¹

The *O and S* cases concerned the situation of children who were static Union citizens living in the territory of the Member State of which they were nationals with their mothers – third-country nationals.¹⁴² The mothers had a

140. Case C-34/09, *Ruiz Zambrano*. See Carlier, “La libre circulation des personnes dans et vers l’Union européenne”, 3 *Journal des tribunaux – Droit européen* (2013), 85–92, at 88; Hailbronner and Thym, “Case C-34/09, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011”, 48 *CML Rev.* (2011), 1253–1270; O’Brien, “*Acte cryptique?*: *Zambrano*, welfare rights, and underclass citizenship in the tale of the missing preliminary reference”, 56 *CML Rev.* (2019), 1697–1732.

141. Concerning the concept of dependency and a family link not legally recognized as such, but included in respect of de facto family life, see Case C-129/18, *SM (Child placed under Algerian kafala)*, EU:C:2019:248, paras. 68, 71 and 73. See Carlier and Van Malleghem, “Libre circulation des personnes dans l’Union européenne”, 4 *Journal de droit européen* (2020), 173–184, at 181.

142. Joined Cases C-356 & 357/11, *O and S*. See Carlier, “Droit européen des migrations”, 3 *Journal de droit européen* (2013), 103–114, at 106; Murphy, “At the periphery of EU Citizenship: C-356/11 *O, S and L*”, *The European Law Blog* (11 Jan. 2013); Barbou Des Places, “Pas

permanent right of residence and had been granted the children's sole custody. Changes in the composition of the families followed as the mothers remarried and new children (also third-country nationals) were born from those marriages. The mothers wanted to reunite with their partners, the fathers of the second children (also third-country nationals). The question was whether parents who are not the biological fathers of static EU citizens (the first children of their wives) could be considered "family members". According to the ECJ, "in law, there [was] no obligation either for [the mothers] or for the [EU] citizens dependent on them to leave the territory of that Member State or the European Union as a whole".¹⁴³

The core of the issue is the concept of "dependency" which could be the subject, in itself, of another study.¹⁴⁴ Such as in other cases of Union citizenship in purely internal situations from *Ruiz Zambrano* onwards, the Court examined the preliminary questions from the perspective of the Union citizens. However, the ECJ also found that the Family Reunification Directive was applicable in situations such as those in question, despite the fact that the domestic court did not ask any question concerning the Directive.¹⁴⁵ The applications for residence permits on the basis of family reunification were lodged in the Member State of origin of the Union citizens, but the right of residence of the new spouses was refused on the ground of lack of sufficient resources. The Court stated that the decision refusing family reunification must be examined "in conjunction with the obligation to have regard to the child's best interests, recognized in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents".¹⁴⁶ While the Member States enjoy a certain margin of discretion, Article 7(1)(c) of the Directive does not allow Member States to refuse family reunification to a sponsor who proves that she has stable and regular resources which are sufficient to maintain herself and the members of her family. The provision "cannot be interpreted and applied in such a manner that its application would

de droit de séjour dérivé d'un citoyen européen pour un ressortissant d'un pays tiers", 2 *Revue Critique de Droit International Privé* (2014), 339–369.

143. Joined Cases C-356 & 357/11, *O and S*, para 50.

144. On the genuine enjoyment of the substance of the rights doctrine and the criterion of "dependency", see Hyltén-Cavallius, "The unfolding destiny of Union citizenship: From a fundamental status to a status of genuine substance", 24 *European Journal of Migration and Law* (2022), 430–461; Ferri and Martinico, "Revisiting the *Ruiz Zambrano* doctrine and exploring the potential for its extensive application", 27 *EPL* (2021), 685–706; van den Brink, "Is it time to abolish the substance of EU citizenship rights test?", 23 *European Journal of Migration and Law* (2021), 13–28.

145. Joined Cases C-356 & 357/11, *O and S*, paras. 60 and 61.

146. *Ibid.*, para 76.

disregard the fundamental rights set out in the Charter”.¹⁴⁷ The Charter requires the Member States “to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive”.¹⁴⁸ As noted by Koen Lenaerts with regard to the “stone by stone approach”, “the Member States are required to strike a balance between the interests of the children concerned and the promotion of family life, and the margin of appreciation enjoyed by national authorities”.¹⁴⁹ This particular case shows that, at that time, EU secondary migration law offered better protection for family life than the EU primary law on citizenship. While the former could be read in light of the Charter, the latter would only apply after a strict determination of the scope of application of Article 20 TFEU.¹⁵⁰ In the cases of *O and S*, considerations related to the child’s best interests play a role because of the applicability of the Family Reunification Directive and not thanks to the case law on purely internal situations, making respect for fundamental rights dependent on which instrument of EU law is triggered, as the Charter is only binding on the Member States when they are implementing Union law.¹⁵¹ The fact that Union law (the Family Reunification Directive) is applicable to the case makes the Charter applicable too.

In 2017, the *Chavez-Vilchez* case considerably modified this approach.¹⁵² Allowing the inclusion of purely internal situations in EU citizenship law, the Court conferred an important role to the best interests of the child as enshrined in the Charter of Fundamental Rights. The ECJ had to determine whether third-country nationals, mothers of static EU citizens, could derive a right of residence from Article 20 TFEU.¹⁵³ The approach of the Dutch authorities was that even if the mothers were forced to leave the Union, the children could stay in the Netherlands with their fathers, who were EU citizens, without the risk of

147. *Ibid.*, para 77.

148. *Ibid.*, para 82.

149. Lenaerts, “International comparative jurisprudence EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”, 1 *International Comparative Jurisprudence* (2015), 1–10.

150. Carlier, *op. cit. supra* note 142, 103–114, at 106.

151. Art. 51 CFR determines the field of application of the Charter.

152. Case C-133/15, *Chavez-Vilchez*. See Carlier and Renaudière, “Libre circulation des personnes dans l’Union européenne”, 4 *Journal de droit européen* (2018), 141–151, at 146; Staiano, “Derivative residence rights for parents of children who are EU citizens under Article 20 TFEU: *Chavez-Vilchez*”, 55 *CML Rev.* (2018), 225–241; van Eijken and Phoa, “The scope of Article 20 TFEU clarified in *Chavez-Vilchez*: Are the fundamental rights of minor EU citizens coming of age?”, 3 *EL Rev.* (2018), 949–970.

153. Ironically, of all the eight families concerned, only the Chavez-Vilchez family had circulated within the EU, moving back and forth from the Netherlands to Germany.

the children being deprived of the enjoyment of the substance of the rights conferred on them by their EU citizenship. The key point of this case was how to measure the dependence of the child who is an EU citizen on each parent – the EU citizen and the third-country national – in order to determine which parent was “the primary carer of the child”.¹⁵⁴ If it is found that there is “a relationship of dependency between the child and the third-country national parent”, the refusal of the right of residence to that parent could result in the child being obliged to leave the territory of the Union.¹⁵⁵ The ECJ held that Member States authorities must take into account Article 7 of the Charter, read in conjunction with Article 24(2), as part of that assessment. In particular:

“account must be taken, *in the best interests of the child concerned*, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium”.¹⁵⁶

The authentic paradigm shift of the *Chavez-Vilchez* case is the fact that the Charter, and in particular the child’s best interests, no longer represented a tool to interpret EU law, but a way to trigger its application. In French, one could say that the Charter is no longer just a “*clé de lecture*” for EU law, but is also a “*clé d’entrée*” into EU law. It allowed the ECJ to intervene in purely internal situations that in principle fall outside the scope of Union law. Without the assessment of respect for fundamental rights, including the child best interests, the situation will not come under Union law. After *Chavez-Vilchez*, the Charter itself, and the best interests of the child in particular, can trigger the protection of Article 20 TFEU.

Later, in a May 2022 ruling – *Subdelegación del Gobierno en Toledo (Residence for a family member – Sufficient resources)* – the ECJ clarified the notion of dependence in light of the best interests of the child.¹⁵⁷ The Court held that a relationship of dependency capable of justifying the grant of a

154. Case C-133/15, *Chavez-Vilchez*, para 70.

155. *Ibid.*

156. *Ibid.*, para 71 (emphasis added). This is one of the few cases in which the ECJ engages with the content of the best interests of the child giving indications to the referring Court on how to undertake such an assessment. Paras. 70, 71 and 72 are often cited in subsequent case law. See e.g. Case C-82/16, *K.A. and others*, para 71; Case C-221/17, *Tjebbes and others*, EU:C:2019:189 (para 45); Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*, para 67.

157. Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*. See Gines, “‘We are family’: The Court of Justice adds another piece to the *Zambrano* puzzle”, *EU Law Live* (17 May 2022); Migliorati, “Articolo 20 TFUE e diritto di soggiorno derivato: un’analisi

derived right of residence to the parent, who is a third-country national, of a minor, who is a Union citizen, is presumed where that parent lives on a stable basis with the other parent, who is a Union citizen. Such assessment must:

“take account of the right to respect for family life, as stated in Article 7 of the Charter . . . to be read in conjunction with the obligation to take into consideration the best interests of the child, recognized in Article 24(2) of the Charter, which encompasses the child’s right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, as enshrined in Article 24(3) of the Charter”.¹⁵⁸

That relationship of dependency exists where a minor, who is a Union citizen, would be forced to leave the territory of the European Union in order to follow his or her third-country national parent who is forced to leave that territory following the refusal of a derived right of residence to his or her other minor child who is a third-country national.

This set of case law shows a new facet of the best interests of the child in EU migration law in particular, and perhaps in EU law in general, owing to the expanding role of the Charter of Fundamental Rights. Thanks to this kind of “constitutional” role of the Charter, the primary consideration of the best interests of the child is raised to a higher level. The consideration of the best interests of the child remains a safeguarding principle, but is no longer used only to interpret or complement EU secondary law. It becomes a principle for safeguarding the protection of the status of EU citizens who are in a situation of dependency. It makes it possible to bring into EU law a situation which, in principle, is not covered by EU law. Similarly to the principle of the best interests of the child, this protection of the status of EU citizens is also a form of safeguard principle for the EU citizens and their foreign family members. For the time being, this extension of the Charter’s role is exceptional and limited to cases where young EU citizens are involved. However, it also concerns cases in which the residence of third-country nationals is at stake and, therefore, cases that also fall under migration law. The combination of the two principles – the best interests of the child and the protection of the status of EU citizens – gives new importance to the Charter, a real constitutional position. At the same time, this constitutional importance raises another question: will such a role for the Charter continue to expand in the future, and if so, should it be limited to safeguarding the best interests of the child who is

delle cause XU e QP”, *Blog DUE* (10 June 2022); Réveillère, “Chronique. Citoyenneté de l’Union européenne”, 3 RTDE (2022), 585.

158. Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*, para 66.

an EU citizen, or should it be extended to safeguard other fundamental rights or other categories of persons?

3.3. *Return*

The ECJ interpreted the Return Directive in light of Article 24(2) of the Charter on three occasions.¹⁵⁹ Similarly to the Family Reunification Directive, Article 5(a) of the Return Directive states that “when implementing this directive, Member States shall take due account of the best interests of the child”.¹⁶⁰ It is irrelevant whether the expulsion directly concerns the minor or the minor’s parents whose return will indirectly affect the child.¹⁶¹ Two of these cases (C-82/16 and C-112/20) also lie at the intersection between EU migration law and the free movement of persons as the concerned children were EU citizens, albeit static ones. The third case is the first decision in which the Court ruled on return decisions against third-country national unaccompanied minors (C-441/19).

3.3.1. *Return of family members of a child who is an EU citizen*

The Court first interpreted the Return Directive in light of the child’s best interest in the Grand Chamber judgment of *K.A. and others*.¹⁶² The case concerned several third-country nationals who were subject to return orders attached to an entry ban from the territory of a Member State. In order to prevent the enforcement of the return decision and the legal effects of the entry ban, the third-country nationals applied for a residence permit in the Member State that issued the order to leave, for the purpose of family reunification with a static EU citizen. Four of the applicants based their application on their status as parents of a minor EU citizen. The ECJ ruling arose from the Belgian practice of automatically rejecting applications for a residence permit, without examining their substance, based on the existence of an entry ban still

159. On this topic, see Collinson, “Beyond decisions about a child and decisions affecting a child in deportation cases”, 30 *The International Journal of Children’s Rights* (2022), 703–728; Padilla, “La directive retour: analyse critique sous l’angle du respect des droits fondamentaux et des droits de l’enfant”, 5 *Journal du droit des jeunes* (2009), 51–54.

160. Family Reunification Directive cited *supra* note 5.

161. This results from the Court’s interpretation in light of Art. 3(1) of the Convention on the Rights of the Child in Case C-112/20, *Belgian State*.

162. Case C-82/16, *K.A. and others*. See Carlier and Renaudière, “Libre circulation des personnes dans l’Union européenne”, 4 *Journal de droit européen* (2019), 166–175, at 173; Hyltén-Cavallius, “Who cares? Caregivers’ derived residence rights from children in EU free movement law”, 57 *CML Rev.* (2020), 399–432; Goldner Lang, “Extending the scope of EU law to internal situations: In the child’s best interests we swear, but not a step further”, *EU Migration Law Blog* (29 June 2018); Progin-Theuerkauf, “*K.A. and others* – The Zambrano Story continues”, *The European Law Blog* (22 May 2018).

in force. No assessment of family life, the child's best interests, or the existence of a relationship of dependency between the applicant and the Union citizen was carried out by the authorities. The Court held that Article 5 of the Return Directive precludes such an automatic rejection and that, while the effectiveness of the entry ban must be ensured, its implementation remains subject to respect for fundamental rights.¹⁶³ The Member States must assess whether a relationship of dependency exists between the Union citizen and the third-country national. When the Union citizen is a minor, such assessment must be based on consideration of all the specific circumstances, including which parent is the primary carer.¹⁶⁴ This remains true even if the relationship of dependency relied on by a third-country national in the application for residence comes into existence after the imposition of an entry ban, even if the entry ban has become final. In other words, whether the relationship is vertical or horizontal, a concrete assessment of all the circumstances of the case is required before depriving EU citizens of the right to enjoyment of their family life.¹⁶⁵

In *Belgian State (Return of the parent of a minor)*, also known as *M.A.*, the Court held that the best interests of the child (a Union citizen) must be taken into account at the time of the adoption of a return decision accompanied by an entry ban against the father (a third-country national) because this decision has "significant consequences" for the child.¹⁶⁶ Although it does not address the child directly, it affects her indirectly. The Court's interpretation is built upon the International Convention on the Rights of the Child and General Comment No. 14 of the Committee on the Rights of the Child, which states that "the best interests of the child must be taken into account in all decisions which directly or indirectly affect children".¹⁶⁷ In addition, the importance of taking the best interests of the child into account when adopting return decisions arises from the purpose of the Return Directive and from a number of its provisions which ensure the protection of fundamental rights, including the rights of the child and respect for family life.¹⁶⁸

163. Case C-82/16, *K.A. and others*, para 102.

164. *Ibid.*, para 71.

165. Carlier and Leboeuf, *op. cit. supra* note 73, 114–130, at 128.

166. Case C-112/20, *Belgian State*, para 36. See Carlier and Van Malleghem, "Libre circulation des personnes dans l'Union européenne", 4 *Journal de droit européen* (2022), 172–189, at 181; Cools, "L'affaire *M.A.*: la Cour réaffirme la portée large du principe de l'intérêt supérieur de l'enfant dans le contexte de la directive retour", *Cahiers de l'EDEM* (April 2021); Rondine, "L'allontanamento dei cittadini di Paesi terzi con figli di minore età cittadini dell'Unione e il principio del superiore interesse del minore alla luce della giurisprudenza della Corte e della sentenza nella causa C-112/20", 2 *Ordine internazionale e diritti umani* (2021), 456–461.

167. Case C-112/20, *Belgian State*, paras. 37 and 38 (emphasis added).

168. *Ibid.*, paras 40, 42 and 43.

The Court openly suggested that the referring court should check whether the father can be “granted a residence permit on Belgian territory pursuant to Article 20 TFEU” and that, in the absence of a residence permit, the father and the child, a Union citizen, “would be obliged to leave the territory of the European Union as a whole”.¹⁶⁹ The ECJ recalled its case law on purely internal situations and derived right of residence, including *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)* and *Chavez-Vilchez*.¹⁷⁰ Once again, it emphasized that in assessing the existence of a relationship of dependence between the father and the child:

“account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of the child’s emotional ties to each of his or her parents and the risk of separation from the third-country national parent for that child’s equilibrium”.¹⁷¹

The safeguarding of the child’s best interests is strongly reaffirmed as a central issue in the assessment of the infringement of the enjoyment of the substance of the rights of the Union citizen, even when the return decision does not address the child directly.

The exact scope of the genuine enjoyment of the substance of the rights, beyond the rights of the minor EU citizens, remains unclear. In both cases concerning EU minor citizens, the return order was accompanied by an entry ban, which would have hindered the parent from maintaining a relationship with the child in the EU territory. For this reason, the child’s best interests at all stages of the procedure in all decisions which directly or indirectly affect children prevent the enforcement of return decisions, in order to preserve the family life of the third-country nationals concerned, but only if they are family members of a Union citizen.¹⁷² Moreover, in the second case, it is the referring Court itself which asked explicitly, in the preliminary question, how the provisions of the Return Directive should be interpreted in conjunction with Article 24 of the Charter.

3.3.2. *Age criteria for the return of third-country national children*

In *Staatssecretaris van Justitie en Veiligheid (Return of an unaccompanied minor)*, the Court ruled on return decisions against unaccompanied minors

169. *Ibid.*, para 26.

170. Case C-836/18, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, EU:C:2020:11; Case C-133/15, *Chavez-Vilchez*.

171. Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, para 27.

172. Case C-112/20, *Belgian State*, para 38.

(third-country nationals) illegally staying in a Member State.¹⁷³ The ruling originated from the Dutch practice of issuing return decisions against unaccompanied minors solely on the basis of age, without an examination of the child's situation. If the minors were over 15 years old, a return decision would be automatically issued but not followed by removal measures until they turn 18. In the meantime, the children would not be granted a right of residence, placing them in a situation contrary to the child's best interests and "of great uncertainty as to his or her legal status and his or her future, in particular as regards his or her schooling, his or her link with a foster family or the possibility of remaining in the Member State concerned".¹⁷⁴ In affirming the fundamental nature of the rights of the child, the Court provided various clarifications.¹⁷⁵ Before adopting a return decision against an unaccompanied minor, the Member State must carry out a general and in-depth assessment of the situation of the unaccompanied minor, taking due account of the child's best interests at all stages of the procedure.¹⁷⁶ This includes inquiring as to the presence of a family member, a nominated guardian or adequate reception facilities in the State of return, as required by Article 10(2) of the Directive. In this case, the Court also noted that unaccompanied minors fall into the category of vulnerable persons within the meaning of the Directive and "cannot systematically be treated as an adult".¹⁷⁷

In this last group of cases, the Court upheld the refusal of any automatic decision-making by the Member States' authorities, whether based on the effect of an entry ban or on an age criterion. The best interests of the child must be at the core of the assessment of the individual situation of a child affected, directly or indirectly, by a return decision.

4. Conclusion: Towards a safeguard principle?

This article shows that in the ECJ case law related to migration, the once limited consideration of the best interests of the child enshrined in Article 24(2) of the Charter is now expanding. However, it must be underlined

173. Case C-441/19, *Staatssecretaris van Justitie en Veiligheid*. See Carlier and Frasca, op. cit. *supra* note 58, 131–148, at 145; O'Donnell, "Spotlight on the best interests of the child in returns of unaccompanied children & reflections for the new Pact on Migration and Asylum", *EU Migration Law Blog* (13 April 2021); Flamand, "Pas d'éloignement sans une solution durable réelle et effective pour le MENA", *Cahiers de l'EDEM* (Feb. 2021); Marletta, "Tra coloro che son sospesi: la Corte di Giustizia ed il rimpatrio dei minori stranieri non accompagnati", *ADiM Blog* (28 Feb. 2021).

174. Case C-441/19, *Staatssecretaris van Justitie en Veiligheid*, para 53.

175. *Ibid.*, para 45.

176. *Ibid.*, paras. 44, 46 and 48.

177. *Ibid.*, para 43.

that within this case law, there is still a stark contrast between decisions that refer to Article 24(2) of the Charter and those that do not.¹⁷⁸ Meanwhile, it is still rare that the ECJ truly engages with the exact meaning of the concept or with the factors to be taken into account in the assessment of the child's best interests.¹⁷⁹

First, the rulings presented in this article illustrate how the Court uses references to the best interests of the child to reinforce its interpretation of EU secondary law, as a further guarantee of the effectiveness of the procedural safeguards envisaged for minors in EU secondary law. The Court's erratic, yet more frequent, references to the UN Convention on the Rights of the Child as well as to General Comment No. 14 of the UN Committee on the Rights of the Child could have the effect of incorporating into the ECJ's interpretation of EU law the threefold definition of the child's best interest enshrined in Article 2(1) of the Convention on the Rights of the Child. While, in this definition, the consideration of the best interests of the child is "a substantive right, a fundamental and interpretative legal principle and a rule of procedure", it appears, for the time being, that the ECJ sees it mainly as an interpretative principle of EU secondary law and as a rule of procedure, but not (yet) as a substantive right or as a fundamental principle.¹⁸⁰

Second, the ECJ also uses references to Article 24(2) when it cannot sufficiently ground its reasoning (and, consequently, its decision) on specific provisions of secondary law. This second evolution is mainly evident in cases which include a proportionality analysis of a national measure which has an impact on the child's life and is built upon both a dependence link between the child and the adult and the child's best interests. The combination of the two concepts (dependency and the child's best interests) can prevent the effects of a national measure based on EU migration or asylum law which would violate the right to respect for private or family life (e.g. the execution of an order to leave).¹⁸¹ In those cases, the Court uses references to the best interests of the child to give substance to the child's right to family unity. As a consequence of this growing role played by the best interests of the child thanks to the Charter,

178. Examples of the Court's silence on the best interests of the child are Case C-652, *Ahmedbekova*; Case C-661/17, *M.A. and others*; and Case C-720/20, *Bundesrepublik Deutschland*. See also Case C-349/20, *Secretary of State for the Home Department (Refugee status of a stateless person of Palestinian origin)*, EU:C:2022:151, para 25.

179. Except in cases concerning the Reception Conditions Directive, but probably because it contains indications in that regard (see *supra* note 96) and in the judgment in Case C-133/15, *Chavez-Vilchez*, paras. 70, 71 and 72 (see *supra* note 152).

180. General Comment No. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para 1) CRC/C/GC/14, para 6.

181. Case C-82/16, *K.A. and others*; Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*.

the ECJ's scrutiny can now concern both direct and indirect violations of the child's best interests.

For the time being, the importance accorded by the ECJ to the Charter of Fundamental Rights probably finds its culmination in the *Chavez Vilchez* case.¹⁸² In that ruling, the Charter no longer represented a tool to interpret and complement secondary EU law, but a means to trigger the application of EU primary law, thus allowing the Court to intervene in purely internal situations. If this constitutional reading were to be confirmed, then the place given to the Charter would be more important than initially envisaged.

In the future, the ECJ will be confronted with the question of whether this increasing focus on the best interests of the child entails more positive or negative effects. The effects could be negative, or at least counter-productive, if one of the main consequences of the increased references to Article 24(2) would be to privilege a consideration of the best interests of the child in isolation, to the detriment of the interests of other vulnerable persons. This is shown by the case *K.A. and others* in which the criteria for assessing the concept of dependency are different in the case of child-parent relationships as compared to adult-adult relationships.¹⁸³ Alternatively, the effects could be positive if the attention given to the child's best interests could operate as a catalyst for the consideration of the "best interests" of other categories of vulnerable persons. These categories could include those who suffer from traditionally recognized forms of discrimination linked to disability, age or sexual orientation. In a broader sense, attention could be given to certain categories of migrants, including asylum seekers, who could be considered an *a priori* category of vulnerable persons in line with a position adopted by the European Court of Human Rights.¹⁸⁴ However, the Court made clear that in the most recent case law on reception conditions, asylum seekers most basic needs must be met and material reception conditions cannot be denied to them regardless of their more or less explicit forms of vulnerability, including the fact of being underage.¹⁸⁵

The ECJ must pursue the difficult task of achieving a fair balance between the risk of building a rigid hierarchy of vulnerabilities which isolates the best

182. Case C-133/15, *Chavez-Vilchez*.

183. Case C-82/16, *K.A. and others*.

184. ECtHR (GC), *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 Jan. 2011, para 251. The ECtHR "attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection"; Ferrero, 'La vulnérabilité est dans l'œil de celui qui regarde. La Cour européenne des droits de l'homme et le demandeur d'asile' in Ferrero and Neri (Eds.), *The European Judges Forced with Migrations* (Anthemis, 2022), 97–118.

185. Case C-422/21, *Ministero dell'Interno (Withdrawal of material reception conditions)*, EU:C:2022:616.

interests of the child – and, in particular, the best interests of unaccompanied minors – at the top of the pyramid, and the opposite risk of trivializing equality among vulnerabilities. From this point of view, it seems that the European Court of Justice, while pursuing its broad use of references to Article 24(2) of the Charter, often, and appropriately, does so not by regarding the best interests of the child as a general or fundamental principle that should apply *per se*, but as a safeguard principle which, if necessary, complements the texts in order to ensure the genuine enjoyment of the substance of the rights of the child when these cannot be sufficiently protected by technical rules.

Annex I. List of EU migration and asylum cases relating to the child's best interests analysed in this article.

ECJ judgment	Subject area(s)	Court
ECJ, C-230/21, 17 November 2022, <i>Belgian State (Refugee minor married)</i> , EU:C:2022:887	Family Reunification Directive	BE
ECJ (GC), C-720/20, 1 August 2022, <i>Bundesrepublik Deutschland (Child of refugees born outside the host State)</i> , EU:C:2022:603	Dublin Regulation	DE
ECJ (GC), 1 August 2022, C-19/21, <i>Staatssecretaris Van Justitie En Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)</i> , EU:C:2022:605	Dublin Regulation	NL
ECJ, 1 August 2022, C-279/20, <i>Bundesrepublik Deutschland (Family reunification with a child who has attained majority)</i> , EU:C:2022:618	Family Reunification Directive	DE
ECJ, 1 August 2022, C-273/20 and C-355/20, <i>Bundesrepublik Deutschland (Family reunification with a minor refugee)</i> , EU:C:2022:617	Family Reunification Directive	DE
ECJ, 5 May 2022, C-451/19 and C-532/19, <i>Subdelegación del Gobierno en Toledo (Residence for a family member – Sufficient resources)</i> , EU:C:2022:354	Family Reunification and Union citizenship	ES
ECJ (GC), 22 February 2022, C-483/20, <i>Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)</i> , EU:C:2022:103	Qualification Directive	BE
ECJ (GC), 9 November 2021, C-91/20, <i>Bundesrepublik Deutschland (Retention of family unity)</i> , EU:C:2021:898	Qualification Directive	DE
ECJ, 9 September 2021, C-768/19, <i>Bundesrepublik Deutschland (Family member)</i> , EU:C:2021:709	Qualification Directive	DE
ECJ, 2 August 2021, C-262/21 PPU, A, EU:C:2021:640	Dublin Regulation	FI

ECJ judgment	Subject area(s)	Court
ECJ, 11 March 2021, C-112/20, <i>Belgian State (Return of the parent of a minor)</i> , EU:C:2021:197	Return Directive	BE
ECJ, 14 January 2021, C-441/19, <i>Staatssecretaris van Justitie en Veiligheid (Return of an unaccompanied minor)</i> , EU:C:2021:9	Return Directive	NL
ECJ, 16 July 2020, C-133/19, C-136/19 and C-137/19, <i>Belgian State (Family reunification – Minor child)</i> , EU:C:2020:577	Family Reunification Directive	BE
ECJ, 13 March 2019, C-635/17, <i>E</i> , EU:C:2019:192	Family Reunification	NL
ECJ, 23 January 2019, C-661/17, <i>M.A. and others</i> , EU:C:2019:53	Dublin Regulation	IE
ECJ (GC), 12 November 2019, C-233/18, <i>Haqbin</i> , EU:C:2019:956	Reception Conditions Directive	BE
ECJ, 4 October 2018, C-652/16, <i>Ahmedbekova</i> , EU:C:2018:801	Qualification Directive	BG
ECJ (GC), 8 May 2018, C-82/16, <i>K.A. and others</i> , EU:C:2018:308	Return directive and Union citizenship	BE
ECJ, 12 April 2018, C-550/16, <i>A and S</i> , EU:C:2018:248	Family Reunification Directive	NL
ECJ, 6 June 2013, C-648/11, <i>MA and others</i> , EU:C:2013:367	Dublin Regulation	UK
ECJ, 6 December 2012, C-356/11 and C-357/11, <i>O and S</i> , EU:C:2012:776	Family Reunification and Union citizenship	FI
ECJ (GC), 27 June 2006, C-540/03, <i>Parliament v. Council</i> , EU:C:2006:429	Family Reunification Directive	N/A

Annex 2. List of additional cases relating to the child's best interests in other fields of EU law.

ECJ judgment	Court
ECJ (GC), 14 December 2021, C-490/20, <i>V.M.A. v. Stoliclhna obshchina, rayo "Pancharevo"</i> , EU:C:2021:1008	RO
ECJ, 2 September 2021, C-379/20, <i>Udlændingenævnet</i> , EU:C:2021:660	DK
ECJ (GC), 15 July 2021, C-709/20, <i>The Department for Communities in Northern Ireland</i> , EU:C:2021:602	UK
ECJ (GC), 26 March 2019, C-129/18, <i>SM (Child placed under Algerian kafala)</i> , EU:C:2019:248	UK
ECJ (GC), 12 March 2019, C-221/17, <i>Tjebbes and others</i> , EU:C:2019:189	NL
ECJ (GC), 10 May 2017, C-133/15, <i>Chavez-Vilchez</i> , EU:C:2017:354	NL
ECJ (GC), 13 September 2016, C-165/14, <i>Rendón Marín and CS</i> , EU:C:2016:675	ES
ECJ, 8 May 2013, C-87/12, <i>Ymeraga and Ymeraga-Tafarshiku</i> , EU:C:2016:819	LU
ECJ, 8 November 2012, C-40/11, <i>Iida</i> , EU:C:2012:691	DE
ECJ (GC), 8 March 2011, C-34/09, <i>Ruiz Zambrano</i> , EU:C:2011:124	BE
ECJ, 22 December 2010, C-491/10 PPU, <i>Aguirre Zarraga</i> , EU:C:2010:828	DE
ECJ, 5 October 2010, C-400/10 PPU, <i>McB</i> , EU:C:2010:582	IE
ECJ, 1 July 2010, C-211/10 PPU, <i>Povse</i> , EU:C:2010:400	AT
ECJ, 4 March 2010, C-578/08, <i>Chakroun</i> , EU:C:2010:117	NL
ECJ, 23 December 2009, C-403/09 PPU, <i>Deiček</i> , EU:C:2009:810	SI
ECJ, 11 August 2008, C-195/08 PPU, <i>Inga Rinau</i> , EU:C:2008:406	LT
ECJ, 14 February 2008, C-244/06, <i>Dynamic Medien Vertriebs GmbH v. Avides Media AG</i> , EU:C:2008:85	DE
ECJ (GC), 19 October 2004, C-200/02, <i>Zhu and Chen</i> , EU:C:2004:639	UK
ECJ, 11 July 2002, C-60/00, <i>Carpenter</i> , EU:C:2002:434	UK
ECJ, 17 September 2002, C-413/99, <i>Baumbast</i> , EU:C:2002:493	UK

