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The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter

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Abstract

The best interests of the child should be a primary consideration in all actions concerning children. This cornerstone of international children's rights has been codified in Article 24(2) of the Charter of Fundamental Rights of the European Union. In EU family reunification law, the best interests of the child are mentioned in Directive 2003/86/EC on the right to family reunification. However, in the case law of the Court of Justice of the European Union, this concept is not systematically applied in the various types of family reunification cases. In this contribution it is argued that, although the contexts of family reunification cases may be different, from the perspective of the diverse international obligations of the Member States, it would be preferable if the Court systematically involved the best interests of the child concept in all family reunification cases.

Keywords

Family reunification – best interests of the child – children's rights – EU citizenship – right to respect for family life

1 Introduction

In every measure affecting children, the best interests of the child should be a primary consideration. This principle, which is laid down in Article 3(1) UN Convention on the Rights of the Child (CRC), is one of the principles of interpretation of international children's rights.¹ In EU law it has been codified in Article 24(2) Charter of Fundamental Rights of the European Union (Charter). Within European family reunification law, the best interests of the child concept is often invoked² and is referred to in both legislation and case law.³ Most notably it was mentioned in the *MA* ruling of the Court of Justice of the European Union (CJEU), in which the transfer of unaccompanied minor asylum seekers was deemed incompatible with the best interests of the child.⁴ Therefore the Member State in which an application for asylum of an unaccompanied minor was submitted, is responsible for handling the asylum application.⁵ In family reunification law, the use of the best interests concept by the CJEU in interpreting the different instruments of EU family reunification law is less coherent.⁶ Even though Article 5(5) Directive 2003/86/EC ('Family Reunification Directive')⁷ states that Member States should have due regard for the best interests of the child, the principle is not referred to in every ruling

1 Bueren, G. van, *The International Law on the Rights of the Child*, (The Hague: Martinus Nijhoff, 1998), p. 45.

2 See, for an analysis of the role of the best interests concept in the case law of the European Court of Human Rights on Article 8 ECHR, Smyth, C., 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?', 17(1) *European Journal of Migration and Law* (2015) 70–103.

3 See for an analysis of the role of the best interests concept in EU asylum law, Smyth, C., *European Asylum Law and the Rights of the Child*, Research in Asylum, Migration and Refugee Law (London and New York, Routledge 2014). For an analysis of the role of the best interests concept in EU family unification law, see Klaassen, M., *The right to family unification: between migration control and human rights* (Leiden, E.M. Meijers Institute and Graduate School of Leiden Law School, 2015), Chapter 4.

4 CJEU, *MA*, BT, DA, C-648/11, ECLI:EU:C:2013:367. See, for further analysis, Arnold, S., M. Goeman & K. Fournier, 'The Role of the Guardian in Determining the Best Interest of the Separated Child Seeking Asylum in Europe: A Comparative Analysis of Systems of Guardianship in Belgium, Ireland and the Netherlands', 16(4) *European Journal of Migration and Law* (2014) 480.

5 In its proposal to amend the Dublin III Regulation, the European Commission seeks to overturn this with the objective of preventing secondary movements. See COM(2016)270 final.

6 Klaassen, 2015 (n. 3).

7 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

of the CJEU in cases concerning the interpretation of that Directive involving children.⁸ In other fields of EU law which deal with family reunification, the picture is even more obscure. In the early case law concerning the free movement of persons, explicit references to fundamental rights were made.⁹ However more recently the CJEU paid no attention at all to fundamental rights in free movement of persons cases. In the much debated *Ruiz Zambrano* ruling and in the subsequent jurisprudence of the Court, there is no reference whatsoever to fundamental rights in general and the best interests of the child in particular.¹⁰ This is surprising since the subject matter of this body of case law concerns the (citizenship) rights of minor EU citizens. The research question in this paper is what the role of Article 24(2) Charter in EU family (re)unification law is, and how this relates to (the obligations of Member States under) the CRC. In order to answer this question, the meaning of the best interests concept in the context of the right to family reunification is first assessed as a whole and also for the specific domain of EU family reunification law. After that, several levels of EU family reunification law are discussed, namely the Family Reunification Directive, the Citizenship Directive¹¹ and EU citizenship law. Lastly, the implications of the Article 24 Charter in the context of the family reunification of refugees and asylum seekers is sketched.

2 The Best Interests of the Child in EU Law

In order to assess the role of Article 24(2) Charter in EU family reunification law, in this section the context of Article 24(2) within the Charter is outlined.

⁸ See section 3.2. of this paper.

⁹ See for instance CJEU, *Baumbast and R.*, C-413/99, ECLI:EU:C:2002:493, para. 72. In *Zhu and Chen*, the CJEU does not refer to fundamental rights law (CJEU, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:639). AG Tizzano pointed out in his opinion that his proposal, which was largely followed by the Court, fully complied with the right to respect for family life and therefore it was not necessary to discuss it any further, implying that if a different conclusion were reached, it would be necessary to consider fundamental rights. See the opinion of AG Tizzano, CJEU, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:307, para. 130. For further analysis, see section 4.2 of this paper.

¹⁰ CJEU, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124.

¹¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

After that, it is ascertained what the obligation under Article 3(1) CRC entails, since this provision forms the basis of Article 24(2) Charter.¹² As this is a vast topic, which Smyth has characterised as ‘notoriously problematic’ and ‘one of the most amorphous and least understood of legal concepts’,¹³ several aspects of this provision are analysed. The purpose of this assessment is essentially to determine what the obligations of Member States arising from Article 24(2) Charter are, specifically in relation to Article 3(1) CRC and the other substantive provisions from that Convention.

2.1 *The Charter of Fundamental Rights of the EU*

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the EU acquired the status of primary EU law on equal footing with the treaties. Unlike human rights treaties like the ECHR, the scope of the Charter is limited. In Article 51(1) Charter it is laid down that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the EU and to Member States when they are implementing EU law. In *Åkerberg Fransson*, the CJEU held that Article 51(1) Charter must be understood as conforming the previous case law of the Court on the extent to which Member States are bound by EU law when implementing EU law.¹⁴ Therefore the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations where national legislation falls within the scope of EU law.¹⁵ In order to determine whether a national measure falls within the scope of EU law, one must determine whether there is a direct link between the impugned national measure and an EU obligation.¹⁶ In *NS*, the CJEU held that Member States are also bound by the Charter when they implement a discretionary competence laid down in secondary EU law.¹⁷ The national courts also have to comply with their obligations concerning the protection of the fundamental rights of migrants.¹⁸ It is specifically laid down in the Charter that

12 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), p. 10.

13 Smyth, 2015 (n. 2), p. 71.

14 CJEU, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 18.

15 *Ibid.*, para. 21. Hancox points out that it is still not crystal clear what the notion of the implementation of EU law exactly entails. Hancox, E., ‘The meaning of “implementing” EU law under Article 51(1) of the Charter: *Åkerberg Fransson*’, 50 *Common Market Law Review* (2013) 1430.

16 *Åkerberg Fransson*, *supra* n. 14, para. 28–29.

17 CJEU, *N.S. and others*, C-411/10, ECLI:EU:C:2011:865.

18 *Ibid.*, para. 94.

none of its provisions extend the field of application of EU law or has the ability to establish a new power or task for it.¹⁹ Many of the Charter provisions resemble a provision from the ECHR, and in so far as this is the case, must be interpreted in line with the corresponding provision and the case law of the ECtHR.²⁰ Nevertheless, Article 52(3) shall not prevent Union law providing more extensive protection.

Article 24(2) Charter codifies the best interests of the child concept as enshrined in Article 3(1) CRC in EU law. The text of the provision is more concise than in the CRC: '*In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*' Unlike the CRC, courts are not mentioned, but should be considered as public authorities.²¹ According to the Explanation relating to the Charter Article 24 is based on Articles 3 (best interests), 9 (unity of family), 12 (participation) and 13 (expression) of the CRC.²² In Article 24 Charter, two other children's rights are highlighted. Article 24(1) states that children have the right to protection and care necessary for their well-being and have the right that their views are taken into consideration. Article 24(3) establishes that every child has the right to maintain a personal relationship and direct contact with both his or her parents on a regular basis.

Article 24 Charter has been referred to by the CJEU a number of times. Most notably, the Court has held that transfers of unaccompanied minors in the context of the Dublin Regulation are not in line with Article 24(2) Charter, as it is not in the minor's best interests to be transferred to another Member State.²³ Article 24 Charter was also referred to by the CJEU in several family reunification cases, which are discussed below. Besides the Charter, the protection of children's rights is stated as one of the objectives of the EU in Article 3 TEU. This indicates the importance the legislature attached to the protection of children's rights.

As there is limited jurisprudence on Article 24 Charter—which is based on Article 3(1) CRC—that latter provision is analysed below.

19 Article 51(2) Charter.

20 Article 52(3) Charter.

21 See Peers, S., T. Harvey, J. Kenner & A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart, 2014), p. 687.

22 Explanations relating to the Charter of Fundamental Rights, OJ 2007/C 303/02.

23 CJEU, *MA, BT, DA*, *supra* n. 4.

2.2 *UN Convention on the Rights of the Child*

The best interests of the child concept is laid down in Article 3(1) CRC:

[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

All elements of this provision can be the topic of extensive discussion, which are all relevant in the context of EU family reunification law. A question of particular relevance is whether an immigration decision constitutes an action concerning children in the context of Article 3(1) CRC. The Committee on the Rights of the Child has held in numerous Concluding Observations that:

[...] [T]he best interests of the child is understood, appropriately integrated and implemented in all legal provisions as well as in judicial and administrative decisions [...] that have direct and indirect impact on children.²⁴

It can safely be assumed that a decision on the lawful residence of a child in the territory of a state should be considered as an action which has a direct impact on children. Also, immigration decisions that are primarily directed against parents have an indirect impact on children. Immigration decisions affecting other family members—like siblings or grandparents—might, depending on the context of the case, also have a direct or indirect impact on children.

A second issue which arises is whether the best interests concept applies to situations in which there are different types of immigration proceedings taking place simultaneously. If the best interests of the child are taken into account by a Member State within the context of determining whether an immigration decision violates fundamental rights, must it also be taken into account in a decision on the applicability of EU law in a particular case? On this issue the wording of Article 3(1) is quite clear. ‘In all decisions affecting children’ can only mean that the principle applies in all decisions, even in situations in which the best interests of the child had already been assessed. Similar reasoning can be applied concerning sequential immigration decisions. If the best interests were assessed in a procedure at a particular moment in time, nothing in the text of the provision or in the comments by the Committee suggests that

24 See for instance Committee on the Rights of the Child, Concluding Observations Finland, 2005, UN Doc. CRC/C/15/Add.272, para. 21.

it should not be assessed again in a subsequent immigration decision. In fact, as the passing of time plays an important role in the development of a child, it is likely that the mere elapsing of time influences the outcome of the best interests of the child determination. The fact that the legal context of a subsequent immigration decision might be different—a first decision might concern the application for a residence permit while a subsequent decision could concern a deportation decision—does not alter the content of the obligation to take the best interests of the child into account.

A third issue which is relevant to discuss is who should take the best interests of the child into account in immigration decisions. In Article 3(1) it is stated that the best interests of the child should be taken into account by ‘social welfare institutions, courts of law, administrative authorities or legislative bodies’. In immigration decisions, it is usually the immigration service acting on behalf of the responsible administrative authority which takes individual immigration decisions. Such bodies should be regarded as ‘administrative authorities’. Typically, after an initial decision has been taken, an applicant has the right to mount a legal challenge to this decision.²⁵ The judicial body that handles this legal challenge should be regarded as a court of law within the context of Article 3(1). This means that this body has the obligation to consider the best interests of the child. The fact that at a different time in the procedure concerning the immigration decision the responsible administrative authority has already taken the best interests of the child into account, does not diminish the obligations the court of law has on this point. Any reasoning limiting the competence of a court of law in taking the best interests of the child into account is incompatible with Article 3(1), as this provision explicitly states that both administrative authorities and courts should take the best interests of the child into account.

The issues discussed above concern the scope of application of the best interests of the child concept. The content and meaning of this concept is a completely different issue. The essential questions with regard to the best interests of the child in family reunification law are how to determine what is in the best interests of the child and how much weight should be afforded to this concept. Both these issues are discussed below.

With regard to the meaning of the best interests concept, two general approaches can be identified in the literature. The first approach is based on the welfare of a child and involves an assessment of whether a particular decision

25 See for example Article 18 Family Reunification Directive.

serves the welfare of the child.²⁶ This approach was severely criticised for being normative²⁷ and offering insufficient guidance to decision makers.²⁸ On a more fundamental note, Smyth argues that a welfare-based understanding of the best interests concept contradicts the purpose of the CRC to make children the bearers of individual rights.²⁹ She follows General Recommendation 14 of the Committee on the Rights of the Children³⁰ and advocates a rights-based approach based on the premise '*that there is an intimate connection between the best interests of the child and the rights of the child.*'³¹ Thus, the best interests concept should be understood as an umbrella provision for the rights of the child laid down in the Convention. According to Smyth and in conformity with General Comment 14,³² the best interests concept can have three distinct functions: (1) to be an interpretative device for other substantive rights, (2) to serve as a bridge between two rights, and (3) to serve as a mediator when there is a conflict of rights. These different functions of the best interests of the child concept will be used in Section 6 to evaluate what the potential is of the best interests concept in EU family reunification law.

With regard to how much weight should be afforded to the best interests of the child, it must be noted that immigration law is an odd man out since determining that a certain situation is in the child's best interests does not mean that a right of residence exists for the child or his or her parents. Traditionally, states hold the sovereign right to control the entry and residence of foreign nationals in their territory. In the past decades, this state competence has somewhat declined with the proliferation of human rights and the increasing implications of EU law for domestic immigration law. However, children's rights are by no means a trump card to acquire some right of residence.³³ Instead, both in the

26 The origins of the approach can be traced back to pre-CRC common law traditions. For an overview, see Eekelaar, J., 'The Emergence of Children's Rights', 6(2) *Oxford Journal of Legal Studies* (1986) 161–182.

27 Parker, S., 'The Best Interests of the Child—Principles and Problems', 8(1) *International Journal of Law and the Family* (1994) 26.

28 Dolgin, J., 'Why has the Best Interests Standard Survived?: The Historic and Social Context', 16(1) *Child Legal Rights Journal* (1996) 2.

29 Smyth, 2014 (n. 2), p. 26.

30 Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 2013, UN Doc. CRC/C/GC/14.

31 Smyth, 2014 (n. 2), p. 26.

32 General comment No. 14, *supra* note 31, para 6.

33 See also ECtHR 8 March 2016, 25960/13 (*I.A.A. v. UK*), para. 46, in which the ECtHR explicitly refers to the idea that the assumption that children would be better off if they were

context of human rights law as well as in the context of EU law, a balance must be struck between the legitimate interest of the state to control immigration and the individual rights of the applicants. To determine how much weight should be afforded to the best interests of the child is outside the scope of the research question addressed in this paper.³⁴ Instead, in this contribution the role of Article 24(2) Charter in EU family reunification law is assessed in order to determine whether the Member States are offered sufficient guidance how that provision should be implemented in their national immigration law.

3 The Family Reunification Directive

3.1 *Negotiations and Directive*

Directive 2003/86/EC on the right to family reunification is the only instrument in international law that grants a clearly-defined subjective right to family reunification to applicants who comply with the conditions defined in the Directive. Initially received as a threat to fundamental rights, the Family Reunification Directive has developed into a minimum safeguard preventing Member States from placing further restrictions in their family reunification policies. Being one of the first instruments of the newly-acquired EU competence in the field of migration and asylum, the negotiation of the Directive took place in a highly politicised climate.³⁵ Furthermore, at the time of the negotiations, the Directive was adopted in a legislative procedure in which the role of the European Parliament was limited to consultation and unanimity was required among Member States. This resulted in difficult negotiations within the Council. The final result in 2003 was significantly different to the initial proposal by the Commission in 1999. However, the provision relating to the best interests of the child was not affected by this. Article 5(5) Family Reunification Directive reads:

living in the host state does not mean that this state is automatically required to admit the children concerned. On the other hand, in ECtHR 8 November 2016, 56971/10 (*El Ghatet v. Switzerland*), para. 46, the Court held that the best interests of the child must be placed at the heart of the considerations and crucial weight must be attached to it.

34 See Kalverboer, M.E., A.E. Zijlstra & E.J. Knorth, 'The Developmental Consequences for Asylum-seeking Children Living with the Prospect for Five Years or More of Enforced return to their Home Country', 11 *European Journal of Migration and Law* (2009) 41–67.

35 See Strik, T., *De Besluitvorming over asiel- en migratierichtlijnen: De samenwerking tussen nationaal en Europees niveau* (Den Haag, Boom, 2011), Chapter 3.

When examining an application, the Member States shall have due regard to the best interests of minor children.

This is a so-called horizontal clause meaning that all the provisions of the Directive should be read in line with this principle.

The Family Reunification Directive was the first instrument of EU law in which the Charter was referred to, despite that the Charter, at the time of the adoption of the Directive did not yet have binding force. In preamble 2 of the Directive it is stated that measures concerning family reunification should be adopted in conformity with the right to respect for private and family life as laid down in the ECHR and in the Charter.

3.2 Case Law

The European Parliament, which was only consulted during the negotiations of the Directive, challenged several provisions of the Directive before the CJEU.³⁶ The contested provisions all concerned stand-still clauses, allowing some Member States to retain certain domestic rules while not allowing other Member States to introduce such rules. Two out of the three contested provisions directly concerned children.³⁷ The CJEU did not annul the contested provisions because they do not oblige Member States to violate human rights. The Court explicitly referred to the best interests of the child concept, as laid down in Article 5(5) Directive and Article 24(2) Charter. By not annulling the (contested provisions of the) Directive the Court ensured that the Directive, which ensures at least some level of harmonisation, remained in force.

The other case in which the best interests of the child concept plays a role is *O, S. & L*.³⁸ This case concerned the family reunification of the partner of a third-country national lawfully residing in Finland. The sponsors in the case did not comply with the income requirement, which Member States are

36 CJEU, *Parliament v. Council*, C-540/03, ECLI:EU:C:2006:429.

37 Article 4(1) allows the Member States to retain integration measures for children older than twelve and article 4(6) allows the Member States to retain a maximum age for the family reunification of children of fifteen years. It must be noted that only Member States which had these requirements prior to the adoption of the Directive are allowed to implement them. See European Commission, Report from the Commission to the European Parliament and the Council on the application of the Directive 2003/86/EC on the right to family reunification, COM(2008)610 final, p. 5.

38 CJEU, *O, S. & L*, C-356/11 and C-357/11, ECLI:EU:C:2012:776. This case is also relevant in the context of the application of the *Ruiz Zambrano* doctrine. See para. 5.2. of this paper for the analysis of this aspect of the case.

allowed to impose under Article 7(1)(c) Family Reunification Directive.³⁹ Even though it was clear that the sponsors relied on social assistance, the Court chose to emphasise that Member States may not apply the implementation of an instrument of EU law in such a way that it disregards fundamental rights such as the right to respect for family life (Article 7 Charter) and the best interests of the child (Article 24(2) Charter). Even though the CJEU leaves it to the referring court ‘to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned’,⁴⁰ it suggests here that the denial of a residence permit would not be in accordance with the Directive.

In the other case law of the CJEU regarding the interpretation of the Family Reunification Directive, the CJEU did not refer to the best interests of the child concept.

The *Noorzia* case concerns the moment that an applicant for family reunification needs to comply with the age requirement.⁴¹ The Court held that it is in accordance with the Directive for Member States to require that the age requirement is complied with at the time of the application for family reunification. The Court based this conclusion on the assertion that the effect of such implementation does not contradict the purpose of the requirement, which is to prevent forced marriages and to promote integration in the host state.⁴² Despite that this particular case did not concern children, the CJEU could still have emphasised that the age requirement should be implemented in accordance with fundamental rights including the best interests of the child. By omitting such reasoning, it seems that Member States may require the age requirement to be fulfilled on the moment of lodging the application in all applications, disregarding the best interests of the child. In an application concerning children, it could very well be that a strict adherence to the age requirement to be fulfilled at the time of application would not be in accordance with the best interests of the child. Nevertheless, the CJEU chose not to refer to this in any way.

39 The income requirement was also the topic of the seminal *Chakroun* case. CJEU, *Chakroun*, C-578/08, ECLI:EU:C:2010:117. However, as this case did not involve children, the best interests of the child concept was not discussed. In this case the other horizontal provision of the Directive—Article 17 which obliges the Member States to take individual circumstances into account—played an important role.

40 *Ibid.*, para. 81.

41 CJEU, *Noorzia*, C-338/13, ECLI:EU:C:2014:2092.

42 *Ibid.*, para. 16.

Also in the *K. & A.* case, the Court refrained from referring to the best interests of the child concept.⁴³ The reason for this could be that the particular cases referred to the Court did not concern (minor) children. However, not mentioning the best interests concept ignores the fact that other cases concerning integration exams as an admission requirement potentially do involve children. The CJEU concluded that Member States may impose such a requirement under Article 7(2) Directive, but only to such an extent that it does not render the right to family reunification impossible or excessively difficult. In the Netherlands the requirement was only waived if a combination of exceptional circumstances applied. The Court found this implementation of Article 7(2) to be too strict. Nowhere in the ruling did the Court refer to the best interests of the child, nor for that matter to fundamental rights in general. This is surprising because in the early rulings on the interpretation of the Family Reunification Directive, the Court did refer to this and gave it an important role in its reasoning. In *K. & A.* the lack of reference to the best interests of the child principle indicates that the Court chooses to solve the question by referring to the effectiveness of the Directive and its objectives, and not by invoking human rights.

3.3 *Guidelines from the European Commission*

In 2014, the European Commission published a communication containing guidance on the interpretation of the Family Reunification Directive.⁴⁴ The Communication was a follow-up to a Green Paper in which the Commission asked all stakeholders to present their views on selected questions relating to the Directive.⁴⁵ In the Communication, the Commission provided its own interpretation concerning different provisions in the Directive.⁴⁶ It must be noted that the Communication is not legally binding.

At several points in the Communication, the Commission refers to the best interests of the child concept. With regard to the age requirement, the Commission states that Member States must take the best interests of the child into account on a case-by-case basis when imposing an age requirement. This

43 CJEU, *K. & A.*, C-153/14, ECLI:EU:C:2015:453.

44 COM(2014)210 final, Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification.

45 COM(2011)735 final, Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC).

46 See Klaassen, M., G. Lodder & P. Rodrigues, 'Groenboek gezinshereniging: geen herziening nodig, wel correcte implementatie', *Asiel & Migrantenrecht* (2012) 4–13.

as such is not at odds with the *Noorzia* case, in which the best interests of the child was not referred to. With regard to administrative fees that are charged for an application for family reunification—a topic that is not covered by the Directive—the Commission proposes that Member States, for the purpose of promoting the best interests of the child, should not require the payment of administrative fees in applications concerning minors. The Commission furthermore provides comments in a separate paragraph of the Communication on the best interests of the child in general. In this paragraph, the Commission summarises the findings from case law as analysed in the previous section of this paper.

4 The Citizenship Directive

The free movement of persons is one of the four fundamental freedoms within EU law. The CJEU has traditionally been a main propagator of the free movement of persons. The legal basis for the free movement of persons is dispersed in the Treaty. In Article 21 TFEU it is laid down that every citizen of the EU has the right to move freely and reside within the territory of the EU. Furthermore, a right to free movement can be derived from the free movement of workers (Article 45) and the free movement of establishment (Article 49).

4.1 *Directive 2004/38/EC and its Predecessors*

In Directive 2004/38/EC it is laid down that an expulsion may only be ordered against children if there are imperative grounds concerning public security.⁴⁷ This places children on an equal footing with EU citizens who have remained in a Member State for a period of ten years with the strongest level of protection against expulsion possible under the Directive. No case law by the CJEU exists concerning the expulsion of children. The case law existing on imperative grounds of public security in general suggests that the threshold is set at such a high level that it is difficult to imagine under what circumstances it would be allowed to expel a child under the Directive.⁴⁸

⁴⁷ Article 28(3)(b) Directive 2004/38/EC.

⁴⁸ See CJEU, PI, C-348/09, ECLI:EU:C:2012:300, and CJEU, *Tsakouridis*, C-145/09, ECLI:EU:C:2010:708 on respectively serious sexual offenses against children and serious drugs related offenses.

4.2 *Early Case Law*

There are several cases concerning the free movement of persons in which children were involved. In most of those cases, the Citizenship Directive was not applicable, but the Court based the right of residence of the (parents of the) children directly on a Treaty provision.

In *Carpenter*, the CJEU granted a derived right of residence to the Philippine national spouse of a United Kingdom national residing in his Member State of origin.⁴⁹ The applicant played an important role in the upbringing of the sponsor's children while the sponsor was providing services in other Member States. The CJEU held that the sponsor would not be free to exercise his fundamental freedom to provide services to another Member State if his spouse were not allowed to live with him.⁵⁰ Any restrictions in the exercise of the fundamental freedom to provide services must be compatible with other fundamental rights, including the right to respect for family life as laid down in Article 8 ECHR.⁵¹ The decision to deport the applicant would not strike a fair balance between the competing interests at stake.⁵²

The CJEU does not refer explicitly to the best interests of the child concept in this ruling, but instead bases its reasoning on Article 8 ECHR.⁵³ The manner in which the CJEU refers to fundamental rights, however, shows that when a case is within the scope of EU law, fundamental rights apply and restrictions on the exercise of the fundamental freedoms must be in accordance with fundamental rights.

A similar approach is taken by the CJEU in *Baumbast and R.* concerning the free movement of persons.⁵⁴ This case is a joined case of two separate disputes in which for different reasons the situation arose that the minor children had a right of residence in the United Kingdom but the parent(s) did not. The question addressed to the Court was essentially about the right of residence of the parent(s). The Court held that if the parents of the children who had a right of residence under EU law were refused residence, the children might be deprived of their right of residence.⁵⁵ Regulation 1612/68 (now Directive 2004/38/EC), on which the right of residence of the children is based, must

49 CJEU, *Carpenter*, C-60/00, ECLI:EU:C:2002:434.

50 *Ibid.*, para. 39.

51 *Ibid.*, para. 40.

52 *Ibid.*, para. 43.

53 The case precedes the Charter, so the CJEU could not have referred to that instrument instead.

54 *Baumbast and R.*, *supra* n. 9.

55 *Ibid.*, para. 71.

be interpreted in the light of the right to respect for family life as laid down in Article 8 ECHR.⁵⁶ According to the Court, refusing to grant a right of residence to the primary caretaker of a child with a right of residence based on EU law, infringes the right to respect for family life.⁵⁷ As in *Carpenter*, the Court did not explicitly refer to the best interests of the child, but still held that restrictions on the exercise of EU rights must respect Article 8 ECHR.

In *Zhu and Chen* the CJEU did not explicitly refer to fundamental rights like it did in *Baumbast and R*.⁵⁸ This case concerned a Chinese mother who gave birth to a child in Northern Ireland in the United Kingdom. As a result, pursuant to Irish nationality law, the child acquired Irish nationality. The child and her mother relied on the Irish nationality of the child to acquire a right of residence in the United Kingdom. The CJEU observed that Directive 90/364⁵⁹ does grant a right of residence to the dependent family members of an EU citizen, but not to the family members the EU citizen is dependent on.⁶⁰ However, as the right of the minor EU citizen to reside in the United Kingdom would be deprived of useful effect if his primary caretaker were not allowed residence, the right to freely move and reside within the territory of the EU in combination with the Free Movement Directive must be read in such a way that this caretaker must be in the position to reside with the child.⁶¹ Where this conclusion is the same as in *Baumbast and R*, in the latter case the Court extensively referred to fundamental rights in arriving at this conclusion.

More than ten years after *Chen*, the Court considered the principles established in the rulings discussed above again in *S. & G*.⁶² This case concerned two separate disputes concerning the right of residence of a third-country national family member with an EU citizen residing in his home Member State. In the case of *S.*, the sponsor was living and working in the Netherlands but preparing and conducting business visits to Belgium and was seeking the residence of his third-country national mother-in-law. In the case of *G.* the sponsor was living in the Netherlands but working for a Belgian company in Belgium and was seeking residence for his third-country national spouse. The Court held that Directive 2004/38/EC was not applicable because the sponsor resided in his Member State of origin. Both cases were however within the

⁵⁶ *Ibid.*, para. 72.

⁵⁷ *Ibid.*, para. 73.

⁵⁸ *Zhu and Chen*, *supra* n. 9.

⁵⁹ This Directive was later replaced by Directive 2004/38/EC.

⁶⁰ *Zhu and Chen*, *supra* note 10, para. 44.

⁶¹ *Ibid.*, para. 45.

⁶² CJEU, *S. & G.*, C-457/12, ECLI:EU:C:2014:136.

scope of the free movement of workers (Article 45 TFEU) as any EU national under an employment contract working in a Member State other than that of their place of residence falls within the scope of this provision.⁶³ The CJEU left it up to the domestic courts to determine whether the refusal of residence to the third-country national family member would dissuade the EU citizen from making use of his free movement of worker rights. The Court, however, did add that '[the] mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the Union citizen's spouse is not therefore sufficient in itself to constitute such a dissuasive effect'.⁶⁴ The CJEU refrains from making any reference to fundamental rights in this case. Considering that this case specifically concerns the right of a family to live together, it is surprising that the Court does not make a reference to the fact that Member States are under the obligation to respect family life. Article 7 Charter fully applies in this case and the domestic court must take it into account in making the final assessment.⁶⁵

4.3 *Implicit Recognition of the Best Interests Concept*

The best interests of the child concept was not mentioned explicitly in any of the cases discussed above. However, this does not mean that it did not play any sort of a role in the reasoning of the Court. In both *Chen* and *Baumbast & R.* the CJEU held that the right of the children to reside in the United Kingdom would be deprived of its useful effect if the primary caretaker were not allowed residence there. Deconstructing this premise shows that it is the right of the child to live with its primary caretaker which is the causal link with the useful effect of the right of residence of the child. The idea that a child cannot live on its own originated in the basic notion that a child should be with its parents.

5 Citizenship and Family Reunification

Since 2011 the case law of the CJEU on EU citizenship has also effectively been a source for family reunification law. The Court held in the seminal *Ruiz Zambrano* case that an EU citizen may not be forced to leave the territory of the EU. It has confirmed this aspect of citizenship rights in its subsequent case law. In all the cases until now, no reference was made to the best interests of the child concept. Below it is assessed whether the best interests concept

63 *Ibid.*, para. 39.

64 *Ibid.*, para. 43.

65 See CJEU, *N.S.*, *supra* n. 17, para. 94 and section 2.1 of this contribution.

should nevertheless be regarded as the driving force behind the reasoning in *Ruiz Zambrano*.

5.1 *The Ruiz Zambrano Ruling*

Traditionally, the CJEU has held that a situation in which there is no meaningful link with EU law falls outside the scope of EU law and therefore EU law is not applicable in such 'purely internal situations'.⁶⁶ This changed, however, after the Belgian Supreme Court referred questions for a preliminary ruling in the case of the *Ruiz Zambrano* family.⁶⁷ The case concerns the right of residence in Belgium of a Colombian family.⁶⁸ The parents and the oldest child arrived in Belgium where they unsuccessfully applied for asylum. While in Belgium, two more children were born. Since Belgian nationality law at that time provided Belgian nationality to children who would otherwise become stateless if they were not granted Belgian nationality, the two youngest children obtained the Belgian nationality. The Belgian Supreme Court asked the CJEU whether a right of residence can be derived for the parents of the Belgian and therewith EU national children in this case based on Article 18 TFEU (the prohibition of discrimination based on nationality), Article 20 TFEU (the establishment of EU citizenship for all citizens of the Member States) and Article 21 TFEU (the free movement of EU citizens in the Member States of the EU) read separately or in conjunction. After observing that Directive 2004/38/EC is not applicable in this case, the Court established that national measures which deprive EU citizens from the enjoyment of the substance of the rights conferred by virtue of their status of EU citizen are not permissible.⁶⁹ The right to move and reside freely within the territory of the EU is part of the substance of these rights. Accordingly, a measure which has the effect that an EU citizen is forced to leave the territory of the EU is not permissible. Based on this, the CJEU established that the refusal of the right to reside in Belgium for the parents of the minor EU citizens in this case would deprive the children from the enjoyment of the rights attached to their EU citizenship.⁷⁰

66 See for instance CJEU, *Morson*, C-35/82, ECLI:EU:C:1982:368.

67 See Eijken, H. van, *European Citizenship and the Constitutionalisation of the European Union* (Groningen, Europa Law Publishing, 2014), p. 192.

68 *Ruiz Zambrano*, *supra* n. 10. For a further analysis of this ruling, see for instance Elsuwege, P. van & D. Kochenov, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights', 13 *European Journal of Migration and Law* (2011) 443–466.

69 *Ruiz Zambrano*, *supra* n. 10, para. 42.

70 *Ibid.*, para. 44.

In its preliminary questions, the Belgian Supreme Court referred twice to Article 24 Charter. The CJEU, however, did not refer to fundamental rights in general and Article 24 Charter in particular at all. Instead, it based its entire reasoning on EU citizenship, creating the situation that in the determination of whether the parents of an EU citizen child can stay in the EU, children's rights do not play any (explicit) role.

5.2 *Subsequent Case Law*

The Court confirmed this approach with regard to the lack of referring to fundamental and children's rights in the subsequent case law. One of the cases of the *Dereci and others* ruling concerned a Turkish national who had entered Austria illegally after which he married an Austrian national with whom he had two children.⁷¹ The question addressed by the Court was whether he could derive a right of residence in Austria from the EU citizenship status of his two children. The Court repeated that EU citizens may not be forced to leave the territory of the EU. It then held that the fact that it may be desirable for economic reasons or in order to keep the family together is itself not sufficient to lead to a situation in which the EU citizen is forced to leave the territory of the EU.⁷² The Court held that in any case, whether or not there is a derived right of residence, there should be an assessment of whether the denial of residence is in accordance with fundamental rights.⁷³ If the situation at hand is covered by EU law, the Member State must examine whether a refusal of the right to residence would undermine the right to family and private life of Article 7 Charter. If the situation is not covered by EU law, the Member State must examine whether a refusal of right to residence would be in violation of Article 8 ECHR.⁷⁴ The Court presented this as an either/or issue, and left the decision in this particular case to the referring court. In the entire ruling, like in *Ruiz Zambrano*, the Court did not refer to the best interests of the child concept.

The principle point which is not addressed by the Court is how the referring Court should determine whether the EU citizen children of the applicant would be forced to leave the territory of the EU if their Turkish father is denied a right of residence. Would the children be in a situation in which they are forced to leave the territory of the EU if their Austrian mother decided to follow her husband to Turkey? Is the situation in which the children are separated from their father because they are deemed to be able to remain with their

71 CJEU, *Dereci*, C-256/11, ECLI:EU:C:2011:734.

72 *Ibid.*, para. 66.

73 *Ibid.*, para. 69.

74 *Ibid.*, para. 72.

mother in Austria while their father is forced to return to Turkey, in accordance with fundamental rights and is this situation covered by EU law? The referring court is left in the dark on these issues.

A further interesting case to discuss in this regard is *O., S. and L.*, discussed in Section 3.2 above in the context of the Family Reunification Directive.⁷⁵ This case concerned an application for family reunification by a third-country national sponsor to be joined by her new partner who was also a third-country national, where the resident sponsor had a child from a previous marriage who had Finnish and therewith EU nationality. The sponsor and her new partner in the case also had a common child, who did not acquire Finnish nationality.⁷⁶ The question which arose was whether a right of residence existed for the new partner of the sponsor based on the EU citizenship of her child. The dilemma the Court observed is that if the sponsor decided to take her child and live in the country of origin of her new partner, the ties between the Finnish child and her father would be ruptured. On the other hand, if the mother remained in Finland—which she is entitled to because of her residence permit there—she would rupture the ties between her youngest child and his father. Like in *Ruiz Zambrano* and *Dereci and others*, the central question was whether the EU citizen minor would be forced to leave the territory of the EU if the right of residence were denied to the new partner of his mother. According to the Court, the key to the answer to this question lies in the dependency of the EU citizen minor on the new partner of their mother. If the EU national child is dependent to such an extent on that new partner that he would be forced to leave the territory of the EU if that person were not allowed residence in Finland, a derived right of residence would exist for the new partner.⁷⁷ The Court allowed itself to suggest that, based on the information available, there might be no such dependency in the case at hand.⁷⁸

Like in *Ruiz Zambrano* and *Dereci and others*, there is no reference to the best interests of the child concept in the part of the ruling that concerns the question whether the EU citizen minor would be forced to leave the territory of the EU if the new partner of the mother did not acquire a derived right of residence. There is such reference in the part of the ruling that concerns the Family Reunification Directive. This raises an interesting question. If the applicant in this case made two different applications, assuming that this is possible in domestic law, the best interests of the child concept—being a fundamental right

75 *O., S. & L.*, *supra* n. 38.

76 In the reference, two domestic cases are joined. The facts of the cases are similar.

77 *Ibid.*, para. 56.

78 *Ibid.*, para. 57.

under EU law—would be taken into account in the application concerning the Family Reunification Directive, but would not be taken into account in the context of the application based on the *Ruiz Zambrano* doctrine. Apparently, for the applicability of the best interests of the child concept, it depends on what type of EU law is invoked.

5.3 *The Role of the Charter*

In the cases discussed above, the Court refrains from referring to fundamental rights in general and the best interests of the child principle in particular. The reluctance of the Court to consider fundamental rights in this case could be explained by the fear that a broad interpretation of attaching residence rights to the status of EU citizenship could have large implications for the Member States which would be detrimental for the legitimacy of the Court itself. However, the manner in which the Court attempts to limit the implications of the *Ruiz Zambrano* doctrine is not convincing and unnecessarily confusing. It could be argued that the Charter is not applicable to the determination of whether a child is forced to leave the territory of the EU if his or her parent(s) were denied the right of residence because this would mean that the Charter would extend the scope of EU law in this regard, which would not be in accordance with Article 51(2) Charter. This argument must however be rejected. The relevant question is whether a situation is covered by EU law. A situation is only within the scope of EU law, if this follows from either primary or secondary EU law. Pursuant to Article 51(2), the Charter is not able to extend the scope of EU law. It cannot be argued that on the basis of the Charter, a situation which is not within the scope of EU law by virtue of specific provisions in either the treaties or in secondary EU law, comes within the scope of EU law. However, if a Member State is implementing EU law, it is bound by the Charter.⁷⁹ Before *Ruiz Zambrano*, such cases were regarded to be a ‘purely internal situation’ in which EU law was simply not applicable. After *Ruiz Zambrano*, a Member State must ascertain that the denial of the right to residence to the parent(s) of an EU national would not result in that EU national being forced to leave the territory of the EU. The assessment of whether this is the case is only relevant within the context of EU law. This makes the determination of whether an EU citizen is forced to leave the territory of the EU an assessment which is within the scope of EU law. Holding that the Charter is applicable in such an assessment does not mean that the Charter is extending the scope of EU law. That was already done by the Court in *Ruiz Zambrano* based on the direct effect of

79 Article 51(1) Charter.

Article 21 TFEU. Holding that the Charter is not applicable in the determination of whether an EU national is forced to leave the territory of the EU is based on an incorrect interpretation of the Charter itself.

5.4 *Implicit Recognition of the Best Interests Concept*

As mentioned above, the Court does not refer to the best interests of the child concept in *Ruiz Zambrano* and the subsequent rulings. This is surprising considering that all these cases concern an EU national child whose parent(s) are threatened in their residence rights. It seems logical that, considering the fact that the best interests principle is not only codified in Article 24 Charter but that it is also the cornerstone of the CRC to which all EU Member States are bound, the best interests principle is involved in the assessment of whether a child is forced to leave the territory of the EU.

A closer consideration of the facts in *Ruiz Zambrano* however reveals that perhaps implicitly the best interests concept was in fact still the prevailing consideration. Why would the children of the *Ruiz Zambrano* family be forced to leave the territory of the EU if their parents were denied the right of residence in Belgium? Could they not stay in Belgium with someone else, for example with a foster family? Apparently it is so straightforward for the Court that the residence rights of children is illusory if their parent(s) are not allowed residence that it does not even consider this question. This begs the question on what the assumed necessity of the residence of the parents is based.

The answer to this question can only be that children have the right to be with their parents. The right to respect for family life is firmly rooted in human rights law. Furthermore, Article 9(1) CRC clearly states that a child may not be separated from his parents against his own will. The Court clearly considers that the right of residence of a child would be illusory if his parent(s) were not allowed residence. By doing so, it implicitly holds that a child belongs with his or her parents. Acknowledging this by actually including the best interests of the child principle in the determination of whether a child would be forced to leave the territory of the EU would be beneficial to shed light on the question of how to deal with families in which one parent of the parents of an EU national is also an EU national while the other parent is a third-country national.

5.5 *Remaining Challenges*

None of the cases discussed above deal with the question whether a derived right of residence exists in the situation that one of the parents is an EU national residing in his home Member State while the other parent is a third-country national. The Dutch Administrative High Court has referred questions for preliminary ruling concerning eight families of an EU national child with

one third-country national parent.⁸⁰ The case concerns different factual circumstances.

The reference to the Court shows that in each of the eight cases there are different reasons to question whether a child would be forced to leave the territory of the EU if his or her third-country national parent were denied residence in the Netherlands. In the first case the third-country national mother was forced to leave the home of the Dutch national father. In the second case, the Dutch father did not have his own accommodation and income. In the third case, the Dutch father lived in a special care housing arrangement as a result of which his child could not live with him. In the fourth case, the Dutch father had emigrated to Costa Rica and his current whereabouts were unknown. In the fifth case, at the request of the Dutch father, there was no contact between father and child. In the sixth case, there was contact between the Dutch father and his child, but the father was unable to pay child support because he did not have his own income. In the seventh case, the Dutch father, who took care of his child at the weekends, had a full-time job so he could not take care of his child during the week. In the eight cases, there was daily contact between the Dutch father and his child, but the father had declared that he was not willing to provide for the daily care of his child. This overview shows that there can be many reasons why an EU national parent is not able to take care of an EU national child, forcing the child to follow his or her third-country national parent were she to be deported.

In deciding how it should deal with such situations, the Court is tempted to explicitly consider the right to respect for family life and the best interests of the child of the children concerned in this example. Until now, the Court has left the actual decision of whether a child would be forced to leave the territory of the EU if a third-country national was denied residence in the Member State up to the referring domestic court to decide. In doing so, because the Court abstained from referring to fundamental rights, the only guidance provided by the Court is that the relevant question is whether a child would be forced to leave the EU. As the Court is now faced with a series of cases in which the question referred to the Court actually is whether these children would be forced to leave the territory of the EU, it is likely that it will provide more guidance on this pressing issue.

Advocate-General Szpunar makes the best interests of the child the starting point in his analysis of the questions referred to the Court.⁸¹ He argues that the mere fact that the Dutch father is present in the Netherlands does not

80 CJEU, *Chavez Vilchez*, C-133/15, ECLI:EU:C:2017:354. The judgment of the Court was delivered on 10 May 2017, after the final formatting of this submission.

81 CJEU, *Chavez Vilchez*, C-133/15, Opinion of Advocate-General Szpunar.

automatically mean that the child would be deprived of the genuine enjoyment of its rights as an EU citizen. This requires an analysis of the domestic courts of whether the removal of the third country national parent complies with the proportionality principle.⁸² In making the proportionality assessment, the Advocate General suggests that national interests concerning immigration, the rights of EU citizens, the best interests of the child and the rights derived from national family law must be taken into account.⁸³ He identifies the dependence between the third country national parent and the EU citizen child as the main element in the balancing of interests.⁸⁴

6 Refugees and the Right to Family Reunification

Refugees have specific needs relating to family reunification. Where for 'regular' applicants for family reunification, the argument can be maintained that the right to respect for family life can also be exercised in the country of origin, this can often not be expected from refugees. For that purpose, refugees are exempted to comply with substantive requirements to family reunification in the Family Reunification Directive. Due to a compromise during the negotiation of the Directive, this exemption does however not extend to holders of subsidiary protection. There are several issues relating to the family reunification of children for which Article 24(2) Charter is relevant. Firstly, it can take very long before a decision on an application for family reunification by a refugee is taken. Secondly, there are practical difficulties for children to enforce the proper application of the Dublin III Regulation.

6.1 *Lengthy Asylum and Family Reunification Procedures*

Especially for asylum seekers whose family members are left behind in dangerous areas, expeditious asylum and family reunification procedures are of specific importance. According to Article 10(1) CRC the application by a child or his or her parents to enter a State Party for the purpose of family reunification shall be dealt with in a positive, human and expeditious manner.⁸⁵ Both the Asylum Procedures Directive and the Family Reunification Directive provide

82 *Ibid.*, para. 95.

83 *Ibid.*, para. 96.

84 *Ibid.*, para. 97.

85 Furthermore, in case the child itself qualifies for international protection, states are required to take appropriate measures to ensure that appropriate protection and humanitarian assistance is provided. See Article 22(1) CRC.

for a maximum period to determine an application for asylum or family reunification. Article 31(3) Asylum Procedures Directive prescribes that an asylum procedure normally may not take longer than six months, but that this period may be prolonged with another nine months in case of a large number of simultaneous applications. Article 5(2) Family Reunification Directive lays down that the examination of an application for family reunification may not take longer than nine months. This means that an asylum seeker who qualifies for international protection may need to wait two years before a decision on family reunification is taken.⁸⁶ Of course this all depends on whether the Member States make use of the maximum periods prescribed by the directives. These relatively long periods for examining applications for asylum and family reunification may be an incentive for family members to attempt to travel irregularly to the Member State concerned. Furthermore, it could lead to a race to the bottom among the Member States: by increasing the duration of the processing of applications for asylum and family reunification, the Member States can create an unattractive reception climate aimed at discouraging asylum seekers to apply for international protection in a particular Member State. There has not yet been any case law on the length of procedures, partly because it is difficult to litigate the lengths of the procedure as these maximum examination periods are determined by the directives themselves. Nevertheless, the question can be raised whether the full use of the examination periods in both directives may lead to a situation which violates Article 24(2) Charter. The best interests of the child principle requires that it is determined in each application whether the (maximum) use of the examination period is in accordance with EU law.

6.2 *Enforcing the Dublin III Regulation*

According to the Dublin III Regulation,⁸⁷ the Member State in which family members have obtained or applied for international protection is responsible for handling the asylum procedures of other family members.⁸⁸ The presence

86 The ECtHR has held that Article 8 ECHR contains the positive obligation to examine applications for international protection within a short time in order to limit the precarious and uncertain situation asylum seekers find themselves in to a minimum. See ECtHR 13 October 2016, 11981/15 (*B.A.C. v. Greece*), para. 37.

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

88 Article 9 and 10 Dublin III Regulation.

of family members is the highest in the hierarchy of criteria in determining which Member State is responsible to examine an application for international protection. The Member States have the obligation to examine each application for international protection.⁸⁹ However, in practice it is sometimes difficult for minor asylum seekers to make an asylum claim and start the asylum procedure. The application of the family reunion clauses in the Dublin III Regulation is only triggered when a Member State makes a take charge request to another Member State. Without a take charge request, an individual asylum applicant does not have the right to initiate proceedings under the Dublin III Regulation. This creates a protection gap in which an individual applicant may be eligible for transfer under the Dublin III Regulation, but does not have the ability to enforce this. This situation is particularly problematic for minor asylum seekers with family members in another Member State who find themselves in a situation that the Member State of residence for one reason or another does not make a take charge request.

An example of such a situation occurred in the clandestine asylum camp near the French port of Calais, also referred to as 'The Jungle'. There were several minor asylum seekers who would qualify to be transferred to the United Kingdom if France would make a take charge request. However in the absence of such take charge request, these minors found themselves in a situation that they were unable to travel to the United Kingdom. Several minor asylum seekers sought redress against this directly in the United Kingdom on human rights grounds. On 20 January 2016, the UK Upper Tribunal held that the United Kingdom was under the positive obligation under Article 8 ECHR to allow the applicants to enter the United Kingdom to resume family life with their family members already present there. Subsequently, the applicants were allowed entry to the United Kingdom and were granted refugee status. On 2 August 2016 the Court of Appeal provided important nuances to the decision of the Upper Tribunal on points of law, however the minors which were granted a refugee status were allowed to remain. The Court of Appeal held that in principle applicants for international protection must first attempt to apply for protection and subsequently for a take charge request in the Member States in which they are present. Only after it is demonstrated that there is no effective way of proceeding in that Member State may a request be made in the United Kingdom itself.⁹⁰

89 Article 3(1) Dublin III Regulation.

90 *Secretary of State for the Home Department v ZAT & Ors (Syria)* [2016] EWCA Civ 810 (02 August 2016), para 95.

The solution found in ZAT is at odds with the system of the Dublin III Regulation, which takes the initiative of the Member States to make a take charge request as the starting point. However, Article 17(1) allows the Member States to examine each application for international protection it receives. This discretionary competence would normally be invoked by the Member States when an asylum seeker is already within its territory, but nothing in the Regulation suggests that a Member State is not allowed to assume responsibility over an asylum request when the asylum seeker is not yet present in the Member State. The CJEU held that Member States are also bound by the Charter when (not) exercising a discretionary competence under secondary EU law.⁹¹ Article 6(1) requires that the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation. ZAT provides a possible solution to minors which do not have any enforceable rights under the Regulation itself to be able to effectuate their rights based on Article 8 ECHR. It can however be argued that such solution—to a problem that is essentially caused by the operation of the Dublin III Regulation, should be found within EU law itself. In order to prevent a situation in which minors are prevented from access to justice and to make sure that Article 24(2) Charter is sufficiently safeguarded, this issue should be brought to the ECJ through a preliminary reference.

7 Obligations of the Member States and the CJEU under the CRC

The Family Reunification Directive, the Free Movement of Persons Directive and the direct effect of TFEU provisions are all sources of obligations based on EU law. However, the Member States are also bound directly by the CRC. In all actions concerning children, the best interests of the child should be a primary consideration.⁹² This means that, irrespective of the discussion of the meaning of Article 24(2) Charter within EU law, the Member States are also bound by the CRC when implementing EU law. The Member States should implement EU law in accordance with the CRC. This means that even if a consideration of children's rights is not required within the context of the relevant instrument of EU law, under the CRC the Member States, including legislative bodies and courts of law, are still required to make the best interests of the child a primary consideration. Considering that the obligations of the Member States under the discussed sources of EU law are not absolute—none of the

91 CJEU 21 January 2011, C-411/10, (*N.S.*).

92 Article 3(1) UN CRC. See the analysis in section 2 of this paper.

instruments discussed above oblige a Member State to reject an application for family reunification—it is entirely unproblematic that the Member States must act in accordance with the CRC when implementing EU law in the field of family reunification. The interaction of EU law and the CRC in domestic law is unproblematic because there are no conflicts of law. This does, however, mean that both sources of law cannot be regarded in isolation.

Even though the best interests of the child, as enshrined in Article 3(1) CRC, is one of the cornerstones of the Convention, it should be read in accordance with the other provisions of the CRC.⁹³ Currently, where the CJEU does make a reference to the best interests of the child, it is not linked to any other provision of the CRC. The best interests concept is mentioned in general terms—see the reference to the best interests concept in *Parliament v. Council*—but this is not further elaborated upon. As it remains unclear how the Member States should apply the best interests concept as an obligation arising from EU law, they do not have sufficient guidelines on how to implement this concept in national law.

One other line of reasoning is along Article 6(3) TEU, which obliges that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. Advocate-General Szpunar followed this route in his conclusion to the cases *Rendón Marin* and *CS*.⁹⁴ He refers to the case law of the ECtHR and concludes that it must be determined whether there are any exceptional circumstances that warrant a finding that the national authorities have failed to strike a fair balance between the competing interests, in particular the interests of the children in maintaining their family life of Article 8 ECHR in the Member State in question. The consequences which such a decision might have for the children must therefore be taken into account. In weighing the interests at stake, the best interests of the children must be taken into account. Particular attention must be paid to their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents. We have to note that the jurisprudence of the ECtHR with respect to the best interests of the child is based on Article 3(1) CRC which is incorporated in Article 8 ECHR according to the ECtHR in *Nunez*.⁹⁵

When the CJEU is answering preliminary questions concerning the *Ruiz Zambrano* doctrine, is there any reason the Court should not take Article 3(1)

93 General Comment no. 14, *supra* note 31, para. 16.

94 CJEU, *Rendón Marin* and *C.S.*, C-165/14 and C-304/14, ECLI:EU:C:2016:75, opinion of the Advocate-General Szpunar, para. 174.

95 ECtHR 28 June 2011, 55597/09 (*Nunez v. Norway*).

CRC into account? The ECHR constitutes general principles of EU law and as discussed before, Article 3(1) CRC is incorporated in Article 8 ECHR. The CJEU is not a member of the CRC, nor of the EU, but both should take general principles of Union law into account. If the Court is denying the applicability of Article 24(2) Charter because of its restricted perception of its judicial task, is there no obligation to take into account Article 3(1) CRC? The instructions of Article 3(1) CRC are also directed at 'courts of law' and are not limited to domestic courts.

8 Conclusion

Compared to other human rights instruments, children's rights are relatively new. The idea that children's rights play a role in immigration law is also rather new, although the CRC predates all EU immigration law. The Family Reunification Directive obliges Member States to take the interests of children into account and the obligation of Article 3(1) CRC is codified in Article 24(2) Charter. However, this does not automatically mean that the best interests of the child are a primary consideration in all family reunification cases. In this contribution, the role of the best interests of the child concept in EU family reunification law was assessed. It was observed that the Court does not systematically refer to the best interests of the child concept in all the different types of cases that, in one way or another, concern family reunification. This is problematic considering the increasingly important role of EU law in family reunification law. The EU Member States have obligations both under EU law and under the CRC. This means that when Member States are taking measures to implement EU law, like taking decisions in family reunification cases, they must do so in conformity with both EU law and the CRC. The EU as such is not bound by the CRC, but the fact that the CJEU does not systematically refer to the best interests of the child does not mean that Member States are not obliged to do so. In the area of the family reunification of refugees, there is a lack of access to justice, both with regard to the application of the Family Reunification Directive as with regard to the enforcement of the Dublin III Regulation. The CJEU could offer more guidance to Member States if it systematically involved the best interests of the child in all family reunification cases.