The Best Interests of the Refugee Child and Their Right to Family Reunification in Europe

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Summary: The paper gives an analysis of a legal framework of the best interests of the child principle applicable on EU member states when refugee children exercise their right to family reunification.[1] A legal analysis of the best interests of the child principle in the Convention on the rights of the child and relevant *soft law* documents is provided. It deals with the comparison of the regulation in the EU Charter of fundamental rights and the Convention on the rights of the child and an engagement of the Court of Justice of the EU with the Convention. Some practical examples of member states practices when applying Common European Asylum System legislation in the family reunification context are given, while assessing the compliance of these practices with the best interests of the child principle. Relevant case law of the CJEU and examples of national courts' decisions relating to interpretation of the best interests of the child principle are analysed to provide a complex legal framework of this matter.

Keywords: best interests of the child – Convention on the rights of the child – family reunification – refugee – subsidiary protection – international protection – Court of Justice of the EU – family reunification directive – recat dublin regulation – member states practice

1. Introduction

The principle of the best interests of the child is said to be one of the vaguest and most indefinite child's rights related principles of universal as well as regional international law. On one hand, the principle raises a lot of questions related to its interpretation and application. On the other hand, it is the vagueness that

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[1] The author uses the term refugee child(ren) in the material sense. It means this term includes all minors falling into the scope of the refugee definition stipulated in the 1951 Refugee Convention, regardless whether a formal decision on the refugee status has been made or not.

enables the priciple to be flexible and adaptable to various situations regarding child's rights. *"Flexibility comes at a price of vagueness."*[2] *Soft law* instruments issued by international organisations and by the European Union (hereinafter referred to as: EU) institutions have been created to help a better understanding of the priciple. At the level of universal international law, the guarantee that a primary consideration shall be given to answer the question – *what is best for the child?* – is laid down in article 3/1 of the Convention on the rights of the child (hereinafter referred to as: CRC). At the European Union (hereinafter referred to as: EU) level, we find the principle in the Charter of fundamental rights of the EU (hereinafter referred to as: EU Charter) – in its article 24/2. In relation to refugee children, the principle appears in secondary legislation of the Common European Asylum System (hereinafter referred to as: CEAS). The aim of the secondary legislation, as well as the CRC, is to protect the child from being separated from their parents. Should the child be separated, the legal instruments at issue protect the child by stipulating an obligation to states that family reunification shall take place in the shortest time period possible. The reunification of the refugee child with their parents is of a vital importance as the family represents a supportive environment. Such refuge facilitates the child to overcome the traumatizing experience they (have) faced in the country of origin, during flight or in the host country. A research has shown that post-traumatic stress disorder, depression and several anxiety disorders are the most common mental health problems refugee children face upon arrival in the host country.[3]

Lack of experience and the fact that a child is more prone to fall prey to physical and psychological strains than adults make the child vulnerable. Apart from this, the refugee child is vulnerable because of the situation they find themselves in. The protection of the family unity of the refugee child is therefore crucial. The imperative to protect children and prevent them from family separation collides with the practice of some EU member states. The states which have been mostly affected by the migration crisis have started to apply restricite policies on reunification of families of the third country nationals that have entered their territories since 2015. The states have the very right to control the (im)migration in(to) their territories, as this results from universal international law. However, the right is not absolute, especially when it comes to children. The margin of appreciation of states is limited and in particular situations when the refugee child is involved, the

[2] KHAZOVA, O. Interpreting and applying the bet interests of the child: the main challenges. In: Sormunen, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 27.

[3] VAN OS, C. The best interests of the child assessment with recently arrived refugee children. In: Sormunen, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 72.

competing interests of the individual/a group of individuals in exercising family life prevail over the interest of the state to control immigration to its territory. The EU member states have started to distinguish between persons who have been granted a refugee status and subsidiary protection beneficiaries, or have introduced limitations to the application of the preferential regime which was designed to facilitate family reunification bearing in mind the difficulties this part of a migrating population faces. However, they are bound by the EU legislation and by international law as well. In the first part of the paper the author focuses on the international legal framework of the states'obligations. The second part of the paper is devoted to the EU legislation and some examples of EU member states' interpretation and application of the best interests of the child principle in cases of family reunification when refugee children are involved.

2. Convention on the rights of the child

Convention on the rights of the child stipulates in its article 3/1 the obligation that *"in all actions concerning children[...]the best interests of the child shall be a primary consideration."*[4] This obliges courts of law, administrative authorities, legislative bodies, public and private social welfare institutions, as well as parents to apply the principle while taking actions.[5] The general comment no. 14 (hereinafter referred to as: GC14, general comment) issued by the Committee on the rights of the child (hereinafter referred to as: CRC Committee, Committee) in 2013 explains "actions" as all authoritative and non-authoritative decisions, failures to act, inactions or other measures directly or indirectly affecting children.[6] According to the Committee, the addressees of the obligation should take such actions that ensure a holistic[7] development of the child. While doing so, they should take into account short, medium and long term impacts of the actions on the child.[8] In the assessment and determination procedure, the individual

[4] Article 3/1 CRC, emphasis added.

[5] UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, p. 1)*, 29 May 2013, CRC /C/GC/14, p. 25. The Committee derives the duty from art. 18 CRC according to which parents have mutual responsibility for raising children. The responsibility to take care of child's best interests belongs to that kind of parents' responsibility as well.

[6] Ibid., p. 17, 19.

[7] The Committee means by the term *holistic* physical, mental, spiritual and moral psychological and social development. For further information see: *UN* Committee on the Rights of the Child (CRC), *General Comment No. 5 (2003) on General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, p. 4.

[8] Ibid., p. 4, 6, 16.

characteristics and specific circumstances of each case should be borne in mind. Application of the principle as a rule of procedure or an interpretative principle in cases of unclear interpratation of a provision should contribute to more effective use of the principle.

The concept of the principle is based on a presumption that the child is an object of protection, but a rights-holder as well, i.e. a subject having the right to be heard and to have their opinions taken into account[9] when providing the assessment and determination of the best interests. Adults (usually parents) act in the decision-making procedure merely because of lack of experience and judgement of the child. Thus they should act in a way that is *child-friendly* while giving the child the right to fully participate in the procedure and taking into consideration the views expressed by the child according to their age and maturity.[10]

Family unity of the child is guaranteed in articles 9 and 10. The horizontal application of the best interests of the child principle ensures that the family reunification article 10 talks about, should be in accordance with this principle as well. When talking about reunification of a separated family with a child/children, the states have the duty to deal with the family reunification applications *"in a positive, humane and expeditious manner."*[11] This obligation collides with the EU member states'practice as they have postponed the possibility to reunifity the families separated during the migration crisis in 2015 and 2016. According to this provision, the states should react quickly and enable the reunification in the shortest time possible. As the paper shows further, because of EU member states' concerns about the loss of the ability to control imigration to their territories, their governments have passed legislations that apper to be not compatible with this commitment, nor with the prohibition of discrimination of any kind that is stipulated in article 2/1 CRC.

As the separation of the child from their family is an *ultima ratio* measure, the best interests principle should be applied in all cases involving refugee children. To prevent a longer lasting separation and to protect the refugee child at the same time, article 22 stipulates the obligation to ensure appropriate protection and humanitarian assistance in the enjoyment of the rights the refugee child is entitled to. Co-operation with UN and other humanitarian organisations should

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9 The right of the child to be heard along with the bests interests of the child, the prohibition of discrimination and the right of the child to life and survival create four *umbrella provisions* of the CRC with horizontal application which contribute to a better application of other rights stipulated in the CRC.

10 ZERMATTEN, J. *Nejlepší zájmy dítěte v kontextu Úmluvy o právech dítěte: analýza textu a uplatňování Úmluvy.* In: Jílek, D. (ed.). *Cesty ke škole respektující a naplňující práva dítěte.* Brno-Boskovice: Česko-britská, o. p. s., 2013, p. 101.

11 Article 10/1 CRC, emphasis added.

facilitate to trace parents or other members of the child's family in order to reunite the family.[12]

The high prority of the family unity of refugee children is stressed also in two latest general comments. The CRC Committee emphasizes the need to take appropriate measures contributing to the family unity. Should the separation occur, the authority acting or making the decision resulting in a separation of the refugee child from their family has to give sufficient reasons for such an action. A mere general reasoning by public security is not considered as sufficient.[13] In other words, the Committee imposes a primary obligation on states parties to prevent from family separation. Should the separation occur, it has to be in the best interests of the child. If not, the reunification of the child should take place as soon as possible using all the legal instruments the CRC and other relevant documents give the states.

3. The EU perspective

At the primary level of the EU legislation, the best interests of the child principle set in the EU Charter bind public authorities and private institutions. Unlike the CRC, EU Charter does not explicitely name courts within the range of addressees of the obligation. However, there is no doubt that administrative courts deciding on family reunification matters of refugee children fall within the scope of "public authorities" addressees. The general comment no. 14 analysed above is a valuable source of interpretation which can be used also in cases of interpretative ambiguities when applying the principle stipulated in the EU Charter. The explanations relating to the EU Charter state that the principle in article 24/2 is based on article 3/1 CRC.[14]

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[12] Article 22 CRC.

[13] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4(2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration on Countries of Origin, Transit, Destination and Return,* 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, p. 27.

[14] European Union, *Explanations relating to the Charter of Fundamental Rights,* 14 December 2007. European Union, Official Journal of the European Union (2007/C 303/01), vol. 50, p. 25.

This proves that the EU law does not exist in a vaccum, but is affected by international law as well. If not the EU itself, then member states as they are parties to various conventions. The right to family life guaranted by article 7 EU Charter needs to be interpreted in accordance with the European Convention on Human Rights (hereinafter referred to as: ECHR). Interconnection of these two legal instruments arises from article 52/3 which states that the meaning and scope of the corresponding right shall be the same.[15] The protection given by the ECHR is a guarantee *de minimis*. Thus, the protection at the EU level can be more extensive.[16] The complexity of the legal framework is obvious from article 6/2 Treaty on the European Union since it anticipates accession of the EU to the ECHR.[17]

3.1. Secondary EU legislation – family reunification in the best interests of refugee children – theory v. practice

A more detailed regulation of the right to family reunification is found in the Common European Asylum System instruments – namely in Family reunification directive (hereinafter referred to as: FRD) and recast Dublin regulation (hereinafter reffered to as: DRIII). A brief overview is given to ensure a better understanding of practical cases which are described below.

3.1.1. Family reunification directive

FRD stipulates that third country nationals legally residing on the territory of EU member states have the right to reunify with their families applying a privileged regime in case they have been granted the refugee status. Such a provision may make an impression that the critical situation these find themselves in is sufficiently reflected. A closer look at the privileged regime reveals that member states are entitled to set limitations to the application of this regime. For instance, they may require of the refugee or their family member(s) applying for reunification to prove a sufficient and regular income, health insurance, adequate accommodation or compliance with integration measures in case the family reunification application is lodged after three months from being granted the refugee status.[18] The three months period has been criticised as a very short bearing in mind the circumstances. In many cases, it is impossible to gather all

[15] Article 52/3 EU Charter.
[16] Ibid.
[17] European Union, *Consolidated version of the Treaty on European Union*, 26 October 2012. European Union, *Official Journal of the European Union*, (2012/C 326/01), vol. 55, p. 19.
[18] Article 12/1 FRD.

the relevant official documents within this period and get to the embassy of the member state to lodge the family reunification application. For example, there is no German embassy in Kabul. It was closed after being severely damaged in an attack on 31st March 2017. Since then new applications for visa for family reunification purposes have to be submitted to one of the German embassies in India or in Pakistan.[19]

The EU member states mostly affected by the migration crisis have started to introduce these limitations and continuously keep on applying their restrictive policies when it comes to family reunification of refugees. According to the EU Fundamental Rights Agency (hereinafter referred to as: FRA) annual report, seven EU member states made legislative changes to family reunification in 2016. Five of them – Austria, Finland, Hungary, Ireland and Sweden – introduced the shorter period so that more favourable rules of chapter V of the FRD could be applied. Among other changes, two of these member states introduced a more restrictive notion of the term *family member* (including only nuclear family members) to narrow the application of the FRD.[20]

Germany and Sweden

The migration crisis in 2015 and 2016 created practical obstacles – for instance, the significant increase in number of family reunification applications caused that the waiting periods for an appointment to file such applications at German consulates in Turkey, Lebanon and Jordan reached a length of one year.[21] Germany also started to differentiate between beneficiaries of subsidiary protection and refugees in order to prevent from a massive influx of family members of migrants who had been coming to its territory since 2015. Based on a study carried out by the Council of Europe, from the estimated number of 800 000 persons who came to Germany in 2015, the vast majority of them was not able to formally apply for family reunification until March 2016.[22] The reason was very simple – a new legislation postponing family reunification of beneficiaries of subsidiary protection up to two years became effective at that time. When taking into consideration all periods applicable during the family reunification

[19] Informationsverbund Asyl und Migration. Criteria and conditions, Germany. [online]. Available at: http://www.asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and.

[20] European Union Agency for Fundamental Rights (FRA), *FRA Fundamental Rights Report 2017*, Luxembourg: Publications Office of the European Union, 2017, p. 135.

[21] Ibid.

[22] COSTELLO, C., GROENENDIJK, K., HALLESKOV STORGAARD, L. *Realising the Right to Family Reunification of Refugees in Europe.* Strasbourg: Council of Europe, June 2017, p. 34.

procedure, this group of beneficiaries of international protection might be separated for almost five years.[23]

Such a practice does not comply with the best interests of the child principle stipulated in article 5/5 FRD for two reasons. Firstly, the lengthy separation can severely disturb the family bond between the child and their parent(s) and while waiting for the reunification of refugees, the child might be endangered. One practical example is the case of *Tanda-Muzinga*, a congolese national legally residing in France – a refugee who applied for family reunification with his children and wife. Protracted procedures and inaction of French authorities caused that one of his minor daughter was raped and as a result became pregnant while waiting for three and a half years in Congo for the permission to enter and reside on the French territory and reunify with her father.[24] Even though it was an adult refugee who was applying for the reunification, the actions of the French authorities in terms of article 3/1 CRC and 24/2 EU Charter had a direct impact on the child in question. What is more, so lengthy separation is not in accordance with the obligation to proceed the family reunification application in an expeditious and positive manner laid down in article 10 CRC. Therefore, the French authorities did not act in compliace with the best interests of the child principle stipulated in article 24/2 EU Charter, 5/5 FRD and 3/1 CRC.

Secondly, the differentiation between the two groups of beneficiaries of international protection may be considered as discriminatory. Member states have started to misuse the fact that beneficiaries of international protection are not included in the personal scope of the FRD. The directive does not mention this group of third country nationals in need at all. Before the migration crisis, a lot of member states had the same legal regulation for refugees and beneficiaries of international protection. But when the crisis started, member states reacted to the mass influx by implementing different legal regimes for each of the categories. Among others, Germany and Sweden adopted temporary legislative measures excluding the subsidiary protection beneficiaries from family reunification.[25] According to the Swedish legislation effective since 2016, the beneficiaries of subsidiary protection are not entitled to family reunification. Exceptions include situations if Sweden was to breach its international commitments by not allowing to reunify the family – e.g. if the family member is in an exceptionally serious

[23] LAUBACH, B. *Subsidiary Protection instead of Full Refugee Status Complicates Family Reunification* [online]. Available at: http://legal-dialogue.org/subsidiary-protection-instead-full-refuegee-status-complicates-family-reunification

[24] European Court of Human Rights, *Tanda-Muzinga v. France*, application no. 2260/10, judgement from 10 June 2014.

[25] European Union Agency for Fundamental Rights (FRA), *FRA Fundamental Rights Report 2018*, Luxembourg: Publications Office of the European Union, 2018, p. 131.

medical condition or is a victim of human trafficking.[26] This temporary regulation is effective until July 2019.[27]

When the German legislator introduced the restrictive legislation on beneficiaries of subsidiary protection in March 2016, it should have ceased in two years, i.e. in March 2018. However, the new law enacted in March 2018 taking effect in August 2018 set another legal barrier in the reunification of subsidiary protection holders. A monthly quota of 1,000 relatives who shall be granted a visa to enter Germany on the grounds of family reunification has been applied.[28] Such laws are contrary to the best interests of the child principle. They do not promote the reunification as this is the objective of the FRD according to the Court of Justice of the EU's (hereinafter referred to as: CJEU) case *Chakroun*. The margin of appreciation member states have should not undermine the objective of the FRD that is to promote promote the effectiveness of family reunification,[29] especially if children are involved.

The CJEU is rather reserved in its case-law in terms of reference to the CRC. It has found other ways of interpreting the best interests of the child principle, especially the EU Charter or ECHR.[30] Some authors say that its reservation is a mere consequence of a lack of training and expertise when talking about children's rights.[31] On the other hand, we can not just simply state that there is no reference to the CRC at all. The CJEU avoids to deliver judgements solely grounded on the CRC. The reference to the CRC is more of a superficial nature. The reason might be such that the CJEU believes that it is national courts' task to supervise the compliace of national legislation and international treaties in terms of children's rights and to deliver judgements with the reasoning based on the violation of the CRC provisions.[32]

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[26] MIGRATIONSVERKERT, Swedish Migration Agency. *Residence permits for those granted subsidiary protection status* [online]. Available at: https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Residence-permits-for-those-granted-subsidiary-protection-status-.html

[27] COSTELLO, C., GROENENDIJK, K., HALLESKOV STORGAARD, L. *Realising the Right to Family Reunification of Refugees in Europe*. Strasbourg: Council of Europe, June 2017, p. 35.

[28] Informationsverbund Asyl und Migration. *Criteria and conditions, Germany* [online]. Available at: http://www.asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and

[29] CJEU, *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, judgement from 4 March 2010, p. 43.

[30] STALFORD, H. The CRC in Litigation Under EU Law. In: Liefaard, T., Doek, J. E. (eds.). *Litigating the Rights of the Childs: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*. London: Springer, 2015, p. 226–227.

[31] Ibid., p. 220–221.

[32] Ibid., p. 222, 227.

In 2006, in *European Parliament v. Council* case, the CJEU characterized the CRC as a primary reference point in assessing compatibility of EU law with children's rights.[33] The CJEU in this case also stated that member states have a possitive obligation to authorise family reunification in case all the conditions set in article 7/1 and chapter IV of the FRD are met.[34] The boundaries of the margin of appreciation that member states have were set in joint cases *O., S. and L.* The FRD and article 7 EU Charter should be interpreted strictly and respecting the best interests of the child principle stipulated in article 24/2 EU Charter.[35] The recent case of A. and S. v. Staatssecretaris van Veiligheid en Justitie confirmed the special position children and refugees have in the family reunification context. The CJEU stated that it is member states obligation to examine the applications for family reunification of children in accordance with the best interests principle. They must ensure family reunification of thses so that the objective of the FRD – i.e. promotion of family reunification – is observed.[36] If we read the judgement in conjunction with the judgement of the *Parliament v. Council* case, it seems that member states have no discretion[37] when it comes to refugee children, and the obligation to respect the best interests of the child appears to be rather absolute. Some may argue that such interpretation might be subject to misuse.

Assuimg that the principle is absolute, it can be easily misused by the parties involved in the case. On the other hand, if we look at the principle so as member states have a certain amount of margin of appreciation, this may leave room for manipulation – meaning that member states could use it to justify their restrictive policies.[38] Looking back at the time when the FRD was being adopted, the approach of member states to protection of human rights has not changed since then. The very first draft presented in 1992 appeared to be too binding.[39] Two more proposals were prepared before the final version of the FRD was adopted. The third proposal reflected member states diverging opinions on family reunification of third country nationals and was much less ambitious. When reading

33 CJEU, *European Parliament v. Council*, C-540/03, judgement from 27 June 2006, p. 37, 39.

34 Ibid., p. 43.

35 CJEU, *O. S. proti Maahanmuuttovirasto a Maahanmuuttovirasto v. L.*, joint cases C-356/11 and C-357/11, judgement from 06 Decemeber 2012, p. 76.

36 CJEU, *A. a S. v. Staatssecretaris van Veiligheid en Justitie*, C-550/16, judgement from 12. 4. 2018, p. 58.

37 CJEU, *European Parliament v. Council*, C-540/03, judgement from 27 June 2006, p. 60.

38 LLORENS, J. C. Presentation of General Comment No. 14: strengths and limitations, points of consensus and dissent emerging in its drafting. In: SORMUNEN, M. (ed.). The best interests of the child – A dialogue between theory and practice. Strasbourg: Council of Europe Publishing, 2016, p. 12.

39 HAILBRONNER, K. KLARMANN, T. Family Reunification Diretive 2003/86/EC. In: Hailbronner, K., Thym, D. (eds.). *EU immigration and asylum law: A commentary.* München: C. H. Beck, Second edition, 2016, p. 302.

the FRD, the divergence between member states interests is visible as there are a lot of provisions setting only a low level of protection. What is more, The United Kingdom, Ireland and Denmark are not bound by the FRD at all.[40] More favourable regimes are subject to willingness of each member state, so that it can adopt a higher level of protection in national legislation.[41]

Even though the EU provides protection of human rights, we can see from the stance member states took during the drafting procedure and from their reactions to the migration crisis, that human rights protection at the EU level is still only a supplementary protection enabling the four freedoms of internal market and the EU is still more an economic integration entity. But since the situation of refugee children is in many cases very dangerous, the interests of this particular group of the migrating population should override those of member states.

3.1.2. Dublin regulation

The FRD cannot be used in cases of family reunification of those who have applied for recognition as refugees and the final decision has not been delivered yet.[42] In these cases, the DRIII might be applicable. The DRIII establishes the criteria for examining and deciding on international protection applications. In cases of families, whose members are present in different EU member states and have applied for the international protection, the DRIII lays down conditions facilitating the family reunification. In comparison with the FRD, recognition of the best interests of the child (the DRIII states the best interests of the minor) in the DRIII is more extensive. Since the respect for family life is of a high priority, the DRIII stresses the importance of family unity and the best interests of the child principle. In cases of separate families residing in different member states, a thorough examination of the international protection application is ensured, if only one member state is responsible for examination of the applications of the single family. To achieve this, so called *family tracing* should take place. This means a closer co-operation of member states for the purpose of faster identification of family members of the unaccompanied child within the territory of the EU.[43] Besides the provisions in the preamble of the DRIII,[44] the best interests of the child/minor are one of the guarantees given by the DRIII to minors. Provided that it is in the best interests of the child, the member state responsible for examining

[40] Recital 17 of the FRD Preamble.
[41] HAILBRONNER, K., KLARMANN, T. Family Reunification Diretive 2003/86/EC. In: Hailbronner, K., Thym, D. (eds.). *EU immigration and asylum law: A commentary.* München: C. H. Beck, Second edition, 2016, p. 304–306.
[42] Article 3/2 a) FRD.
[43] Article 6/4 DRIII.
[44] Namely recitals 14, 15, 16 of the DRIII Preamble.

the international protection application is the one where the family member(s) of the minor is/are legally present and is able to take care of the child. In other words, article 8 DRIII facilitates the family reunification during the international protection application procedure using the best interests of the child principle to facilitate the reunficiation of the minor's family, so that the separation is as short as possible. The responsibility for examining the application is realised by the take charge request and in certain cases needs to be consented in writing by persons involved.[45] In case the take charge request is made, it should take no more than 5 months to decise on the request and to transfer the family member into the member state which accepts the responsibility for examining the application.[46]

Germany

According to the FRA annual report, Greece faced significant delays in joining family members in Germany in 2017. Family members who should have been transfered to Germany on the family reunification grounds had to wait for the transfer for 13-16 months from the date of registration. The waiting period of 8–9 months since Germany accepted the responsibility was not compliant with article 29 of the regulation. The provision states that the transfer should take place within the period of 6 months. As FRA report shows, only 221 of the 4560 applicants accepted in Germany had been transfered. What is more, 60 % of those waiting for the transfer were children.[47]

The case of an unaccompanied Syrian minor – an asylum seeker residing in Germany – is a good example of such a practice. His parents and three brothers applied for international protection in Greece. The German governement accepted the responsibility for examining applications of the child's family members residing in Greece. As the period for transfer of these was about to expire, the minor requested an interim measure to enforce the family reunification on the German territory. Legal representative of the minor asylum seeker presented evidence proving that German authorities had been determining the amount in which family reunification could take place in Germany. The bilateral agreement between Greek and German authorities on the number of persons transferred to Germany on family reunification grounds is not in accordance with the DRIII. Following the judgement of the CJEU in *Mengesteab*[48], the asylum court stated

[45] For instance – articles 9, 10, 16/1, 17/2 DRIII.

[46] For more information see articles 21, 22, 29 DRIII.

[47] European Union Agency for Fundamental Rights (FRA), *FRA Fundamental Rights Report 2018*, Luxembourg: Publications Office of the European Union, 2018, p. 131.

[48] CJEU, *Tsegezab Mengesteab v. Bundesrepublik Deutschland*, C-670/16, judgement from 26 July 2017.

that asylum seekers have a subjective right to be transferred within the period stated in the DRIII and no DRIII provision allows member states to enter into agreements limiting the numbers of transfers. On the contrary, member states are obliged to allow the transfer of persons and ensure that it takes place the quickest time possible. The German court[49] ordered the transfer of minor's family members within the DRIII six month period with a reasoning based on the best interests of the child principle and the right to family life.[50]

France and the United Kingdom

Another example of the best interests of the child application is that of three minor and one major dependent asylum seeker who resided in the French camp near Calais, called „Jungle". Due to delays of French authorities when applying the DRIII, these four asylum seekers asked the British authorities for a transfer to their territory as they had major siblings who had been granted a refugee status and who could have taken care of them. According to the facts about the situation in the refugee camp given by the persons in question, French authorities did not inform them on the possibility to apply for international protection, on their right to a legal representative, etc. Because of the mistrust they had of the French asylum authorities, they refused to apply for asylum in France and wanted to realise their right to family life from article 8 ECHR. They wanted to circumvent the Dublin system and sought family reunification with their relatives in the UK by sending informal letters to the authorities and willing to lodge the international protection applications after the tranfer to the British territory. In the letters sent to the British authorities, they explained their exceptional steps towards family reunification by stating that the practice of French asylum authorities was affected by political interests and there was a true doubt that the procedure about their potential applications would be lenghty and that the take charge request might not be submitted. As their legal representatives stated, reunifying with their family members in the UK via article 8 ECHR would be faster and enable a smoother recovery after all the traumatizing situations they had experienced.

The case was subject to proceedings before British courts of two instances. The first instance court approved the transfer stating that there would have been a violation of article 8 ECHR, if it had refused to allow the transfer. Altough the

[49] For further information see: Wiesbaden Administrative Court decision no. 6 L 4438 / 17.WI, from 15 September 2017.

[50] EDAL. *Dublin Family Reunification: neither subject to limits nor delay – Note on the Administrative Court Wiesbaden, decision from 15 September 2017* [online]. Available at: http://www.asylumlawdatabase.eu/en/journal/dublin-family-reunification-neither-subject-limits-nor-delay-note-administrative-court

appelate court was of a different opinion in terms of circumvention of the DRIII provisions, it did not order to transfer the persons at issue back to France since this would not be in their best interests.[51]

4. A Dutch pilot study – an inspirational example

The Study Centre for Children, Migration and Law in the Netherlands carried out a research to improve a methodology for the assessment of recently arrived children. The outcomes show that many of unaccompanied children experienced a severe distrust when talking to authorities. They did not want to talk about their lives, experiences they had faced, not even about their families.[52] As the article 10 CRC stipulates, the procedure about family reunification application should be expeditious. However, building trust with recently arrived refugee children takes some time and presence of different people involved in the procedures may cause confusion about their roles. Since they experience instability in their lives (among others the loss of their families), they need some time to accommodate in their new country of residence. Therefore it is important to give them time (the study shows that approximately 4 weeks are necessary for acclimation before the child is able to talk about their experiences),[53] inform them in a *child-friendly* way on their rights and on people's roles in the procedure. The trust-building process takes some time and involves a psychologist and a social worker as well. The study shows that it is important to let the child decide about certain things (e.g. a place of the interview, an option whether to bring the best friend with them, etc), to use other techniques (e.g. drawing) to express their feelings about traumatizing things, to meet with the child on more that one occasion, etc.[54] As the outcomes of the Study Centre's research reveal, the adjusted methods of the best interests of the child assessment have broght better outcome and enabled an easier communication with the refugee children. The more information the professionals have about the child, the more precisely

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51 For further information see: Judgement of the Royal Courts of Justice in case *Secretary of State for the Home Department v. ZAT and others* (C2/2016/0712) from 06 August 2016 and judgement of the Upper Tribunal of the United Kingdom, Immigration and Asylum Chamber in case *ZAT and others v. Secretary of State for the Home Department* (JR/15401/2015, JR/15405/2015) from 29 January 2016.

52 VAN OS, C., ZIJSTRA, E., KNORTH, E. J., POST, W., KALVERBOER, M. Methodology for the assessment of the best interests of the child for recently arrived unaccompanied refugee minors. In: Sedman, M., Sauer, B., Gornik, B. (eds.). *Unaccompanied Children in European Migraion and Asylum Prcatices – In Whose Best Interests?* Oxon: Routledge, 2018, p. 67.

53 Ibid., p. 71.

54 Ibid., p. 70.

they can predict the effects of the actions that are to be taken and decide what is in their best interests. To achieve this, well-trained professionals need to be engaged with the work with these children.[55] Van Hooijdonk expresses it well: *"... the background, knowledge and communicative skills of the individual who performs the best interests assessment may be more important than the tool that is used for the assessment... "*[56]

5. Conclusion

Comparing the application of the best interests of the child principle by EU member states, it is evident that there is no clear definition of the principle and it does cause problems. Authorities interpret the principle differently and the states' interests in the control of immigration into their territories still have an impact on the interpretation. As the British example illustrates, the concerns about far-reaching consequences, if giving a higher level of protection or creating new legal ways of family reunification possibilities, influence the member states application of the principle. EU restrictive policies are a setback in a full and effective application of the best interests of the principle. It needs to be accepted that it is not possible to elaborate a simple general interpretation of the priciple, since every situation is different. But the principle should be applied by the addressees of the obligation in the best possible way bearing in mind all the abovementioned methods. The best interests of the child is not a discretionary concept and the assessment and determination should be founded on objective criteria. As Llorens states: *"...the assessment and determination of the best interests of five different children should prompt us to make five different determinantions (given that no two children are alike in the same circumstances and in the same situation). But the assessment and determination of one child's best interests made by five adults individually in the adoption of a decision should arrive at the same result. "*[57]

[55] For more information, especially about the ELSA-recently arrived refugee child – case see: VAN OS C., ZIJSTRA, E., KNORTH, E. J., POST, W., KALVERBOER, M. Methodology for the assessment of the best interests of the child for recently arrived unaccompanied refugee minors. In: Sedman, M., Sauer, B., Gornik, B. (eds.). *Unaccompanied Children in European Migraion and Asylum Prcatices – In Whose Best Interests?* Oxon: Routledge, 2018, p. 59–81.

[56] VAN HOOJIDONK, E. Children's best interests: a discussion of commonly encountered tensions – A report by the Children's Rights Knowledge Centre. In: SORMUNEN, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 41.

[57] LLORENS, J. C. Presentation of General Comment No. 14: strengths ans limitations, points of consensus and dissent emerging in its drafting. In: Sormunen, M. (ed.). *The best interests of*

Such application of the priciple can be achieved only with the staff is well-trained on treating with children who have experienced traumatising situations, by providing child-friendly information and realising the right of the child to be heard via the child-friendly interview. It is important to predict potential consequences before the decision is made. The multidisciplinarity of the staff involved in the procedure is of a great importance as each of the persons is an expert in a different field and can contribute to the outcome of the decision-making process by their specific skills. A trained multidisciplinary team of professionals – i.e. a lawyer, a psychologist, a pedagogue, maybe medical or other professionals depending on the situation – taking into consideration the holistic development of the child and short/medium/long term impacts of the actions are a key to success.[58]

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[58] KHAZOVA, O. Interpreting and applying the best interests of the child: the main challenges. In: Sormunen, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 30.

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