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ECRE/ELENA LEGAL NOTE ON AGEING OUT AND FAMILY REUNIFICATION

**THE RIGHT OF UNACCOMPANIED CHILDREN WHO 'AGE OUT' TO
FAMILY REUNIFICATION IN LIGHT OF INTERNATIONAL AND EU LAW.**

ELENA

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The relevant moment for determining whether an applicant can be regarded as a child can have a profound impact on his or her ability to access and enjoy child-specific guarantees in practice, including regarding family reunification. When unaccompanied children reach the age of majority¹ pending the outcome of the asylum or family reunification procedure (a phenomenon commonly referred to as “ageing out”), they risk being considered as adults and thus being deprived of their rights as unaccompanied children.

This Legal Note first provides a brief overview of the “ageing out” issue in view of the number of unaccompanied children seeking asylum in the EU and the delays in asylum determination and family reunification procedures. Secondly, it briefly points to the guarantees for unaccompanied children in relation to family reunification under the Family Reunification Directive² and the Dublin III Regulation,³ which might be affected once a child reaches the age of majority. It then indicates the diverse administrative practices and case law among European countries on the decisive date for establishing an applicant’s age for family reunification purposes. Particular attention is given to the CJEU’s recent judgment in *A and S*,⁴ which is generally considered as a welcome step for the protection of the rights of unaccompanied children to be reunited with their families. Finally, this Legal Note relies upon international human rights law and EU law to reiterate that States are under the obligation to duly consider the best interests of the child in all actions concerning children, including in relation to their right to family life, even where a child “ages out”.

Further to research undertaken on national practices and case law from publicly available resources, information for this note has also been provided by the national coordinators of the European Legal Network on Asylum (ELENA).⁵

I. AGEING OUT: SAFEGUARDS FOR UNACCOMPANIED CHILDREN WITH AN EXPIRY DATE?

The specific needs and inherent vulnerability of children has led international human rights and EU law to accord special status to the child. This vulnerability is heightened when the child is in need of international protection, as recognised by the Committee on the Rights of the Child (UN CRC),⁶ the European Court of Human Rights (ECtHR)⁷ and the Court of Justice of the European Union (CJEU).⁸

Under international and EU law, the best interests of the child must be a primary consideration in all actions taken with regard to children.⁹ Accordingly, the EU asylum acquis has established specific provisions in order to safeguard the fundamental rights of unaccompanied asylum-seeking and refugee children, ranging from specific procedural guarantees to appropriate reception conditions.¹⁰

1. For this note’s purposes, the age of 18 is considered as the age of majority.
2. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, hereinafter “Family Reunification Directive”.
3. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), hereinafter “Dublin III Regulation”.
4. CJEU, Case C-550/16 A and S v Staatssecretaris van Veiligheid en Justitie, 12 April 2018.
5. We would like to thank the ELENA Coordinators in Austria, Finland, the Netherlands, Norway, Slovenia, Sweden and Switzerland for their contribution to this note.
6. 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, hereinafter “Joint GC No. 3 of the CMW and No. 22 of the CRC”, para. 3.
7. See, for instance, ECtHR, *Tarakhel v. Switzerland* [GC] (no. 29217/12), 4 November 2014, para. 99; *Mohamad v. Greece* (no. 70586/11), 11 December 2014, para. 86; *Popov v. France* (nos. 39472/07 and 39474/07), 19 April 2012, para. 91; *Rahimi v. Greece*, (no. 8687/080), 5 July 2011, para. 87; *M.S.S. v. Belgium and Greece* [GC] (No. 30696/09), 21 January 2011, para. 232; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (application no. 13178/03), 12 October 2006, para. 55.
8. CJEU, C-550/16 A and S, para. 58.
9. Convention on the Rights of the Child, Article 3; CRC, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration; Charter of Fundamental Rights of the European Union, Article 24.
10. See: European Commission, Communication from the Commission to the European Parliament and the Council on the protection of children in migration, April 2017, COM(2017) 211 final; EU Fundamental Rights Agency (FRA), Handbook on European law relating to asylum, borders and immigration, June 2014, pp. 217-221; and International Commission of Jurists (ICJ), FAIR (Fostering Access to Immigrant children’s Rights) Project, Training materials on access to justice for migrant children, 2018, available at <https://bit.ly/2Jb74JG>.

The right to family reunification, interpreted both as a self-standing right protected under EU law¹¹ and as the obligation that can arise when observing a child's right to family and private life,¹² is crucial to ensure that unaccompanied children fleeing persecution can enjoy family life where this is no longer possible in their country of origin or former residence. Without being reunited with their family, refugee and asylum-seeking children have poorer integration prospects and endure significant psychological suffering.¹³

Under the Dublin III Regulation, Member States must seek to reunite an asylum-seeking child with family members or relatives who are legally present in another Member State.¹⁴ Additionally, Member States shall take proactive, ex officio steps to trace the family of unaccompanied children.¹⁵ The Family Reunification Directive requires EU Member States to authorise the entry and residence of the parents of unaccompanied refugee children for the purpose of family reunification.¹⁶ For refugees who are over the age of eighteen, however, family reunification is limited to one's spouse and his/her unmarried, minor children.¹⁷ Therefore, it is apparent from these provisions that EU law has afforded additional guarantees to unaccompanied children in relation to family reunification and maintaining family unity.

In order to enjoy these guarantees, children must satisfy the two elements constituting the definition of an "unaccompanied minor": (1) being unaccompanied by or separated from the adult responsible by law or custom, and (2) being below eighteen years of age.¹⁸ The determination by national authorities of whether an applicant is indeed below the age of eighteen can, depending on the situation, be subject to a number of factors such as the result of an "age assessment" procedure¹⁹ and the date of reference to consider the applicant's age. For instance, an applicant can be underage at the day of the application for asylum or for family reunification but eighteen or older on the day the national authorities decide on that application.

Unaccompanied children who reach the age of majority may, as a result, experience an important change of legal regime and the loss of specific guarantees,²⁰ including those affecting their possibility to be reunited with their family. While the available literature helps to shed some light on the impact of turning eighteen on a child's psychological well-being, access to specific reception conditions and the enjoyment of procedural guarantees,²¹ there is little research on the impact of "ageing out" for a child's family reunification prospects.

The consequences of ageing out are different depending on the European country where the child resides²²

11. Family Reunification Directive, Article 10(3); CJEU, Case C-550/16 A and S, para. 43; CJEU, Case C-578/08 Chakroun, para. 41. See also: ECRE/ELENA, Information Note on Family Reunification for Beneficiaries of International Protection in Europe, June 2016, available at <https://bit.ly/2JwFLss>.
12. 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 in countries of origin, transit, destination and return, para. 27, hereinafter "Joint GC No. 4 of the CMW and No. 23 of the CRC". ECtHR, *Mugenzi v. France* (no. 52701/09), 10 July 2014, para. 44; *Tanda-Muzinga v. France* (no. 2260/10), 10 July 2014, paras. 74-76; *Jeunesse v. the Netherlands* (no. 12738/10), 3 October 2014, paras. 117-122; *Tuquabo-Tekle and others v. the Netherlands* (no. 60665/00), 1 December 2005, para. 44.
13. Red Cross EU Office and ECRE, *Disrupted flight: the realities of separated refugee families in the EU*, November 2014, available at <https://bit.ly/2ymwqPH>; Oxfam Ireland, Nasc and the Irish Refugee Council, *A family belongs together: Refugees' experiences of family reunification in Ireland*, March 2018; Refugee Council and OXFAM, *Safe but not settled: the impact of family separation on refugees in the UK*, January 2018.
14. Dublin III Regulation, Articles 6 and 8 and recitals 13-16.
15. Dublin III Regulation, Article 6(4); Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014 amending the Dublin III Regulation, Article 1(7) amending Article 12 of the Dublin III Regulation.
16. Family Reunification Directive, Article 10(3). Denmark, Ireland and the United Kingdom are not bound by this Directive.
17. Family Reunification Directive, Article 4.
18. Article 2(f) of the Family Reunification Directive; Article 2(j) of the Dublin III Regulation.
19. ECRE, AIRE Centre, Dutch Council for Refugees, *Third Party Intervention in case Darboe and Camara v. Italy* (application no. 5797/17), July 2017, available at <https://bit.ly/2gZDf19>; EU Fundamental Rights Agency (FRA), *Age assessment and fingerprinting of children in asylum procedures - Minimum age requirements concerning children's rights in the EU*, April 2018.
20. FRA, *Key migration issues: one year on from initial reporting*, October 2016; Joint European Union-Council of Europe Programme, *Workshop debriefing paper: The protection of separated or unaccompanied minors by national human rights structures*, October 2009, Chapter 4, pp. 57-59.
21. UNHCR, Council of Europe, *Unaccompanied and separated asylum-seeking and refugee children turning eighteen: what to celebrate?*, March 2014; FRA, *Separated, asylum-seeking children in European Union Member States*, December 2010, Chapter 4: Turning 18.
22. International Organisation for Migration, *Unaccompanied Minor Asylum-seekers: Overview of Protection, Assistance and Promising Practices*, 'Chapter 15 - Former UAMAS: what has changed?', December 2011; UNHCR, Council of Europe, *Unaccompanied and separated asylum-seeking and refugee children turning eighteen: what to celebrate?*, March 2014; and European Migration Network (EMN), *Policies, practices and data on unaccompanied minors in the EU Member States and Norway*, Chapter 6: Arrangements in the (Member) States for unaccompanied minors turning 18 years of age, May 2015.

and on the child's migration status.²³ For a child whose application for international protection has been rejected, turning eighteen may even mean becoming irregularly present in a Member State overnight.²⁴

The possibility of a child ageing out during the asylum procedure and/or before he or she had the chance to enjoy the special, child-specific guarantees for family reunification is not an uncommon phenomenon. The high number of unaccompanied children applying for asylum in the EU, the majority of whom are aged between 16 and 17 years old, combined with often lengthy asylum determination and family reunification procedures, makes ageing out more than a technicality for thousands of unaccompanied children.

To illustrate, in 2016, 63 300 unaccompanied children applied for asylum in the EU alone, out of which 43 677 (69%) were aged between 16 and 17 years old.²⁵ In 2017, 31 400 unaccompanied children applied for international protection, with 78% of them ageing between 16 and 17 years old.²⁶ Even though the duration of asylum determination and family reunification procedures depend on a variety of factors, available information indicates that there is a considerable likelihood that unaccompanied children close to the age of majority will have "aged out" before completing one or more of these procedures.²⁷

In Austria, for instance, unaccompanied children often wait for more than 15 months for a first instance decision on their asylum application,²⁸ while in Sweden the average processing time was 19.3 months at the end of 2017.²⁹ In other countries, severe delays in the processing of applications may affect applicants in general, including children.³⁰

II. DUBLIN III REGULATION AND THE CONSEQUENCES OF AGEING OUT FOR THE PURPOSES OF FAMILY REUNION

Under the Dublin III Regulation, Member States must reunite the child with family members or relatives who are legally present in another Dublin country, as long as this is in the child's best interest.³¹ Member States must also proactively and swiftly search for and/or take into account any information provided by the child with a view to facilitating the identification of the child's family members or relatives.³²

Article 7(2) of the Dublin III Regulation states that the responsible Member State "shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection". This provision should be interpreted in light of the primary consideration of respect for family life, which would require Member States to refer to the age of the applicant at the time he or she lodged the asylum application as the decisive date to consider him or her as an "unaccompanied minor" for the purposes of the Dublin III Regulation, even if the applicant reaches the age of majority while in the procedure. In spite of that, and as Chapter 4 of this Legal Note demonstrates, there is a lack of uniform practice at the national level with regard to the decisive date on which an applicant's age is determined for the purposes of applying the Dublin III Regulation.

23. European Migration Network (EMN), Policies, practices and data on unaccompanied minors in the EU Member States and Norway, Synthesis Report: May 2015, p. 33.

24. Ibid.

25. Eurostat, 63300 unaccompanied minors among asylum seekers registered in the EU in 2016, May 2017.

26. Eurostat, Over 31000 unaccompanied minors among asylum seekers registered in the EU in 2017, May 2018.

27. See, for instance, ECRE/AIDA, The length of asylum procedures in Europe, October 2016, available at <https://bit.ly/2LZvyDr>; ECRE/AIDA, The Dublin system in the first half of 2017 - Key figures from selected European countries, August 2017, available at <https://bit.ly/2wyxCg6>.

28. ECRE/AIDA, Country Report: Austria, 2017 Update, p. 51, available at <https://bit.ly/2tmJVfW>.

29. ECRE/AIDA, Country Report: Sweden, 2017 Update, p. 19, available at <https://bit.ly/2E20Sfw>.

30. ECRE/AIDA, AIDA Comparator: Asylum procedure, available at <https://bit.ly/2GLlgCD>.

31. Dublin III Regulation, Article 8.

32. Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014 amending the Dublin III Regulation, Article 1(7) amending Article 12 of the Dublin III Regulation.

III. FAMILY REUNIFICATION DIRECTIVE AND THE CONSEQUENCES OF “AGEING OUT”

Recognising that “family reunification is a necessary way of making family life possible”,³³ the EU legislators established a right to family reunification in EU law through the Family Reunification Directive.³⁴ Among other provisions, that Directive imposes on Member States the obligation to authorise the entry and residence for the purpose of family reunification of the parents of “unaccompanied minors” who were granted refugee status.³⁵ Unmarried, minor children shall also be authorised entry to reunite with their parents who are refugees recognised in the Member States.³⁶

Accordingly, the decisive date on which an applicant is determined to be a child or an adult can have an implication on his or her ability to be reunited with his or her family. It also follows from the existence of diverse national practices that, *de facto*, a child might be able to enjoy the right to family reunification in one State, but not in another.

IV. NATIONAL PRACTICES AND CASE-LAW

The national practices and domestic case law identified in this section demonstrates that the consequences of “ageing out” for the enjoyment of unaccompanied children’s right to family reunification under the Family Reunification Directive and/or family unity provisions under the Dublin III Regulation varies considerably from one European state to another.³⁷ With regard to family reunification, the information below was obtained prior to the CJEU’s judgment in *A and S* and may not reflect subsequent changes in the light of that judgment.

In **Austria**, the Supreme Administrative Court has found repeatedly that authorities should consider as decisive the child’s age at the time of the decision on the request for family reunification.³⁸ National authorities must decide on family reunification cases within six months, but the duration of the procedure in practice depends on a variety of factors, such as the workload of the authorities, the number of parties involved and the need for further documentation after submission.³⁹

In **Belgium**, the decisive date to consider a child’s age is the date of the submission of an application for family reunification.⁴⁰ In 2010, the Belgian Council for Aliens Law Litigation (CALL) ruled in a case concerning a child who attained the age of majority a few days after submitting a request for family reunification. It found that a decision on a family reunification request is of a declaratory nature, confirming the right of those who meet the criteria set out in the relevant legislation at the day of the request for family reunification. It concluded that considering the date of the decision as the decisive date to determine a child’s age would subject the recognition of a right to family reunification to the good will and swiftness of national authorities.⁴¹

In **Finland**, the 2010 amendment to the Aliens Act set as decisive the child’s age on the date a decision is taken on an application for a residence permit based on family ties.⁴² Before this amendment, an applicant had to be less than eighteen years old on the date of submission of the application.⁴³ It has been reported that many children who wish to be reunited with their family reach the age of eighteen before a decision on their

33. Family Reunification Directive, Recital 4.

34. Court of Justice of the European Union: Case C-578/08, Chakroun, 4 March 2010; Cases C-356/11 and C-357/11, O. & S., 6 December 2012; C-540/03 Parliament v Council 27 June 2006.

35. Family Reunification Directive, Article 10(3).

36. Family Reunification Directive, Articles 9-12.

37. Please note that this section is subject to publicly available resources and the information provided by the ELENA Coordinators and is, thus, not an exhaustive overview of national practices.

38. Austria, Supreme Administrative Court, Case Ra 2016/18/0253-0254, 21 February 2017, para. 4, available at <https://bit.ly/2slATg7>; Austria, Supreme Administrative Court, Case Ra 2016/20/0231, 26 January 2017, para 3, available at <https://bit.ly/2kBF7Mv>; Austria, Supreme Administrative Court, Case Ra 2015/21/0230, 28 January 2016, para. 2.1, available at <https://bit.ly/2LJFmRZ>.

39. EMN/IOM, Rainer Lukits, Family Reunification of Third-Country Nationals in Austria, December 2016, pp. 47-48; ECRE/AIDA, Country Report: Austria, 2017 Update, pp. 101-102.

40. EMN, Ad-hoc Query on Age Limit for Family Reunification, Compilation produced on 8 December 2009.

41. Belgium, Council for Alien Law Litigation (CALL), Decision no. 39 369, 25 February 2010, para. 4.2, available at <https://bit.ly/2xqRVyb>.

42. Finland, Ministry of the Interior, Aliens Act (301/2004, amendments up to 1152/2010 included), Section 38, available at <https://bit.ly/2v6QmEy>.

43. EMN, Ad-hoc Query on Age Limit for Family Reunification, op. cit.

application is taken.⁴⁴ Even if the time limit for the decision-making process in such cases is nine months, the average processing time has been longer in the past, reaching 414 days in 2014.⁴⁵ This increases the probability of a child “ageing out” before a decision is taken on the application for family reunification.⁴⁶

In May 2016, the Finnish Supreme Administrative Court found that, where a child reaches the age of majority during the family reunification process due to delays on the part of national authorities caused by actions outside of the applicant’s control, the child cannot see this request refused for the sole reason of coming of age.⁴⁷

Similarly, in May 2017, the Finnish Supreme Administrative Court ruled in a case concerning a child who applied for asylum in Bulgaria and later in Finland, and who reached the age of majority by the time the Finnish authorities analysed his case under the Dublin III Regulation. He was considered as an adult and a take-charge request to Bulgaria was issued. On a first instance appeal, the Administrative Court found that the applicant was no longer a child when applying the Dublin criteria, which meant that Bulgaria ought to be responsible for the asylum application. On an onward appeal, the Supreme Administrative Court reached a different conclusion: it found that the administrative authorities had to consider as decisive the age of the applicant at the time of the asylum application in Finland, and not at the time of the Dublin decision. It based its understanding on the general aims of the Dublin III Regulation (namely, the determination of a single Member State responsible for an asylum application) and the principle of legal certainty, as ruling otherwise would mean that responsibility could change during the processing of the application depending on the effectiveness of national procedures.⁴⁸

In **Germany**, the German Federal Office for Migration and Refugees (BAMF) stated in February 2018 that the date of the decision on a request for family reunification is decisive when establishing the applicant’s age.⁴⁹ This represents a change in practice as, in November 2016, the BAMF had advanced that the day of the application was in fact the decisive date.⁵⁰ This was also reported as being the case in 2009.⁵¹

In October 2017, the German Federal Constitutional Court indirectly addressed this issue in a case regarding a Syrian child who claimed that the two-year suspension⁵² on family reunification for beneficiaries of subsidiary protection constituted a disproportionate interference with his rights as he would reach the age of majority before the date the suspension ended and would, thus, be unable to enjoy his right to be reunited with his family in practice. The Federal Constitutional Court rejected the appeal. It ruled, *inter alia*, that children who are almost adults are generally less dependent on their parents than younger children and that this case did not differ significantly from that of other families.⁵³

On the specific issue of the decisive date to determine a child’s age when assessing an application for asylum, the Administrative Court of Hamburg ruled that this should be the date of the application.⁵⁴ The Administrative Court of Stuttgart went even further and considered the time at which national authorities became aware of the asylum application, regardless of whether a formal application has been lodged, as the decisive date.⁵⁵

In relation to the Dublin Regulation, the German Federal Constitutional Court ruled in 2015 that it was “immaterial” that an applicant had come of age after submitting the asylum application.⁵⁶ According to that Court, the Dublin II Regulation (applicable to the case in question) must take precedence over a national rule such as that contained in Article 77(1) of the German Asylum Act which requires that a “court shall

44. UNHCR, Legal and Protection Policy Research Series, Frances Nicholson, “The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, January 2018, pp. 204-205.

45. *Ibid.*

46. The Finnish authorities declared that they will comply with the *A and S* judgment as from the day of the ruling and legislative amendments will be envisaged. However, no official policy direction has been issued by the time of this publication.

47. Supreme Administrative Court of Finland, KHO 2016:79, 24 May 2016, available at <https://bit.ly/2JdRlBf>.

48. Supreme Administrative Court of Finland, KHO 2017:77, 9 May 2017, available at <http://bit.ly/2xyJTBm>. A summary of this decision is available in English at the European Database of Asylum Law (EDAL) at <http://bit.ly/2wfPKbM>.

49. Flüchtlingsrat Niedersachsen, Ablehnung von Familienasyl nach Erreichen der Volljährigkeit? Flüchtlingsrat rät zur Klage, March 2018.

50. *Id.*

51. EMN, Ad-hoc Query on Age Limit for Family Reunification, *op. cit.*

52. ECRE/AIDA, Country Report: Germany, 2017 Update, pp. 99-101.

53. Germany, Federal Constitutional Court, judgment of the First Chamber of the Second Senate, Case no. 2 BvR 1758/17, 11 October 2017, available at <https://bit.ly/2lXOWme>.

54. Germany, Administrative Court of Hamburg, Case no. 8A 1236/12, 5 February 2014, available at <https://bit.ly/2sm5Mjy>. This case concerned the consequences of aging out for the applicability of Article 23 of the recast Qualification Directive (maintaining family unity).

55. Germany, Administrative Court of Stuttgart, Case no. A 1K 7628/16, 22 September 2017, available at <https://bit.ly/2Jemrjz>.

56. Federal Administrative Court of Germany, BVerwG 1 C 4.15, 16 November 2015. The decision is available in English at <https://bit.ly/2MBW4ml> and in German at <http://bit.ly/2foW2CQ>.

base its decision on the factual and legal situation at the time of the last oral proceedings”⁵⁷. In this court’s interpretation, the Dublin II Regulation requires the day of submission of the asylum application as the decisive date for considering an applicant’s age.

In the **Netherlands**, the Dutch Immigration Service (IND) has considered the day of the application for family reunification as the decisive date for establishing an applicant’s age. Judicial bodies have, however, reached divergent conclusions on the matter.

In 2015, the Council of State upheld the IND’s practice.⁵⁸ It quashed a ruling of the District Court of Arnhem that considered the moment a refugee flees the country of origin as decisive in the determination of whether the applicant should be considered to be an unaccompanied child.⁵⁹ According to the Council of State, events taking place after the arrival of an applicant in a Member State can be taken into account when assessing if the applicant is an “unaccompanied minor”, including reaching the age of majority after arrival.

In 2016, the District Court of The Hague disagreed with the Council of State’s interpretation on the matter.⁶⁰ The case before the District Court concerned an Eritrean girl who applied for asylum in the Netherlands at the age of 17 but who was no longer below the age of eighteen at the moment she submitted her application for family reunification. Her application was denied by the Dutch Immigration Service. On appeal, the District Court made reference to the European Commission’s communication on guidance for application of the Family Reunification Directive⁶¹ stating that the right to family reunification is the general rule and that any deviation should be interpreted strictly. The District Court also considered it relevant to observe that the applicant had been granted asylum with retroactive effect from the date of the lodging of the asylum application. In its view, the age of the applicant should be determined by reference to the moment of entry into the territory of the Member State. However, due to the existence of divergent interpretation at the national level, the District Court stayed the proceedings and referred preliminary questions to the Court of Justice of the European Union. On 12 April 2018, the CJEU provided its authoritative interpretation on this matter in case C-550/16 *A and S*, which is analysed in the next section of this note.

In 2017, the District Court of The Hague ruled in a case regarding a Syrian child who submitted a request for family reunification in the Netherlands before a decision had been taken on his asylum application. His request was rejected at the first instance on the basis that he had to wait for a decision on his asylum application before requesting family reunification. On appeal, the District Court of The Hague considered that it was not necessary to wait for the CJEU’s ruling in *A and S* before ruling in this case. It argued that if the applicant had waited until he was granted the residence permit in order to apply for family reunification, he would have had his application rejected because he would no longer be a child at that time. Therefore, it sent the case back to the national authorities for a new decision.⁶²

In **Norway**, a circular from the Norwegian Directorate of Immigration establishes the child’s age at the time of the application for family reunification as the relevant date of reference.⁶³ In **Slovenia**, the relevant date is that of the day of the family reunification decision. This practice by the Slovenian administrative authorities was upheld by the Supreme Court in 2015.⁶⁴

In **Sweden**, the decisive date to assess if the applicant is an unaccompanied child in the application of the Family Reunification Directive is, again, the day of the decision.⁶⁵ However, in the application of the Dublin III Regulation the relevant date is the day of the submission of the asylum application.⁶⁶

In **Switzerland**, the decisive date is the date on which the request for family reunification was submitted. This

57. German Asylum Act, Section 77(1).

58. The Netherlands, Council of State, Case 201502485/1/V1, 23 November 2015, available at <https://bit.ly/2sic84s>; The Netherlands, Council of State, Case 201501042/1/V1, 23 November 2015, available at <https://bit.ly/2siDoPx>.

59. The Netherlands, District Court of Arnhem, Case no. AWB 14/28260, 26 February 2018.

60. The Netherlands, District Court of The Hague, sitting in Amsterdam, Case no. AWB 15/16253, 26 October 2016, available at <https://bit.ly/2JmeCFE>.

61. 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, COM(2014) 210 final, 3 April 2014.

62. The Netherlands, Court of The Hague, Case no. AWB 17/11415, 31 August 2017, available at <https://bit.ly/2H2TIP9>.

63. Norway, Directorate of Immigration, Circular RS 2010-118, Requirement for means of subsistence as a condition for being granted a family immigration permit – the Immigration Regulations Sections 10-8, 10-9, 10-10 and 10-11; cf. the Immigration Act Chapter 6.

64. Slovenia, Supreme Court, Administrative Department, Case no. VS1015207, 7 September 2015, available at <https://bit.ly/2J11SUC>.

65. EMN, Ad-hoc Query on Age Limit for Family Reunification, op. cit.

66. Information provided by the ELENA Coordinator in Sweden.

has been reiterated by the Swiss Federal Supreme Court in different rulings.⁶⁷

V. THE CJEU DECISION IN *A AND S*: CHILDREN WHO “AGE OUT” DURING THE ASYLUM OR FAMILY REUNIFICATION PROCEDURE RETAIN THEIR RIGHT TO FAMILY REUNIFICATION

On 12 April 2018, the CJEU ruled on case C-550/16 *A and S*⁶⁸ on the specific moment at which the condition of being “below the age of eighteen” must be satisfied for the purposes of enjoying the child-specific provisions under the Family Reunification Directive. During the proceedings, the Dutch government submitted that it was up to Member States to define that moment, the Polish government advanced that the decisive moment is when the decision on the application for family reunification is adopted, and the European Commission argued that this moment is when the application for family reunification is submitted. Ultimately, the CJEU ruled that the decisive date shall be the date of the application for asylum.⁶⁹

The CJEU reiterated that the Family Reunification Directive not only pursues the objective of promoting family reunification and granting protection to third country nationals, but seeks specifically to guarantee an additional layer of protection for those refugees who are unaccompanied children. It restated that Member States, when implementing that Directive, must act in accordance with the Charter of Fundamental Rights of the European Union, namely its Article 24(2) which imposes that the best interests of the child must be a primary consideration in all actions concerning children.

The CJEU recalled that the Family Reunification Directive establishes an intrinsic link between the right to family reunification and the granting of refugee status. However, it noted that the recognition of refugee status is a declaratory act, which means that after submitting an asylum application an applicant who fulfils the criteria of the recast Qualification Directive⁷⁰ has a subjective right to be recognised as having refugee status, even before the formal decision is adopted. The same reasoning is to apply to family reunification requests, meaning that one’s right to family reunification predates the formal decision on that request by national authorities, if in compliance with the criteria set out in the Family Reunification Directive.

This view, according to the CJEU, is upheld by the need to respect the principles of effectiveness, equal treatment and legal certainty. To make the right to family reunification depend on how quickly or slowly an asylum application is processed by national authorities would call into question the effectiveness of the Family Reunification Directive and would go against its ultimate aim: to promote family reunification and to grant specific protection to refugees in general and unaccompanied children in particular. It would also mean that two children of the same age who apply for asylum at the same time could have different chances of making use of the right to family reunification in practice. This would also make it entirely unforeseeable for an unaccompanied child to know whether he or she will be entitled to that right, contrary to the principle of legal certainty.

Therefore, the CJEU ruled that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and the introduction of an asylum application, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a “minor” for the purposes of the provisions under the Family Reunification Directive. The Court has established, however, that an application for family reunification in such cases must be made within a reasonable time: in principle, within three months of the date on which the child is granted refugee status.

Despite the overall welcome outcome of the ruling, *A and S* has also left a number of open questions. First, some argue that the “three month deadline” established by the CJEU could, if interpreted restrictively, hinder the retroactive effect of this ruling as, in practice, those who were wrongly deprived of their right to family

67. Switzerland, Federal Supreme Court, Case 2A.246/2002, 17 January 2003, para 1.2, available at <https://bit.ly/2Jbhvw7>; Switzerland, Federal Supreme Court, Case 2A.315/2002, 11 October 2002, para 2, available at <https://bit.ly/2L86g4Q>; Switzerland, Federal Supreme Court, Case 120 Ib 257, 30 September 1994, para 1(f), available at <https://bit.ly/2LIF9hR>.

68. CJEU, Case C-550/16 *A and S*, 12 April 2018.

69. See: VU Amsterdam, Migration Law Clinic, The relevant date for considering the age of unaccompanied minor refugees for the purpose of family reunification, January 2017, available at <https://bit.ly/2spUECu>.

70. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

reunification and who were granted refugee status more than three months before the ruling would fail to meet that deadline.⁷¹ It has been argued, however, that this deadline should not apply to those who were wrongly deprived of their family reunification rights before this ruling, as this would run counter to the principle of effectiveness.⁷² Second, by affirming that the date of entry in the territory of a Member State cannot be considered the decisive date to determine an applicant's age, the CJEU leaves open the possibility that children who arrive at a Member State but age out before having the opportunity to introduce their asylum application will not be able to enjoy the child-specific provisions under the Family Reunification Directive. This is particularly problematic in view of the difficulties asylum applicants face in effectively accessing the asylum procedure in many European countries, particularly at the borders and/or when detained.⁷³

VI. THE RIGHT TO FAMILY LIFE AND THE BEST INTERESTS OF THE CHILD: BEYOND THE CJEU'S JUDGMENT IN *A AND S*

It is too early to evaluate and report on the changes at the national level as a result of the CJEU's judgment in *A and S*, but Member States bound by the Family Reunification Directive will have to ensure that their practices are in line with the decision. This is so even before the relevant national legislation or policies are officially amended. While *A and S* concerns the provisions of the Family Reunification Directive specifically, one can argue that the CJEU's interpretation can be applied *mutatis mutandis* to other situations where the decisive date to determine an applicant's age can impact his or her access to specific provisions. For example, following the same logic of *A and S*, the decisive date to consider an applicant's age under the Dublin III Regulation should be the date of the asylum application, not of the decision.

Moreover, *A and S* is another reminder, in line with the CJEU's settled case law and the principle of effectiveness,⁷⁴ that Member States cannot make it impossible or excessively difficult to enforce rights derived from EU law, and that they must undertake measures to ensure they fulfil their obligations arising from the treaties or resulting from other provisions of EU law.⁷⁵ For instance, EU Member States must ensure that the rights of unaccompanied children under EU law, such as the right to family reunification under the Family Reunification Directive or the right to family unity under the Dublin III Regulation are practical and effective, not theoretical and illusory.

The CJEU decision also reiterated the States' obligations to ensure the best interests of children and to take account of their particular vulnerability in all decisions affecting children, which are well-established principles under international human rights law, particularly under the Convention on the Rights of the Child, to which all European states are bound.

The best interests of the child is a fundamental interpretive legal principle, a substantive right and a rule of procedure under international human rights law.⁷⁶ It shall be a primary consideration in all actions concerning children, including decisions regarding family reunification or generally affecting a child's family life.⁷⁷ It would run counter to this principle to negate the right of unaccompanied children to be treated as such, including with regard to decisions affecting possibilities to be reunited with their family in practice, for the sole reason that they have "aged out" after submitting their asylum application.

As mentioned before, the particular vulnerability of children in the context of migration is also widely recognised

71. S. Peers, *Childhood's End? The Court of Justice upholds unaccompanied child refugees' right to family reunion*, EU Law Analysis, 13 April 2018.

72. *Id.*

73. ECRE/ELENA Case Law Note on Access to the Territory and the Asylum Procedure, April 2017, available at <https://bit.ly/2qHYiWq>; ECRE, Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, pp. 42-47, available at <https://bit.ly/2uQ3dK7>; ECRE/AIDA, *Comparator: Asylum Procedure*, 2017 Update, available at <https://bit.ly/2GLlgCD>.

74. CJEU, Case C-338/13 Noorzia, 17 July 2014, para. 14; Case C-578/08, Chakroun, 4 March 2010, para. 64; Case C-127/08 Metock and Others, 25 July 2008, para. 93.

75. Article 4(3) of the Treaty on the European Union.

76. Convention on the Rights of the Child, Article 3(1); CRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration; CRC, Joint GC No. 3 of the CMW and No. 22 of the CRC, para. 27-33. See also, *Rahimi v. Greece* (No.8687/080), 5 July 2011, para. 108; *Neulinger and Shuruk v. Switzerland* [GC] (No. 41615/07), 6 July 2010, para. 135.

77. Joint GC No. 4 of the CMW and No. 23 of the CRC, para. 35; CRC, Joint GC No. 3 of the CMW and No. 22 of the CRC, para. 30.

under international law. The Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers have recognised that children may be in a situation of double vulnerability as children and as children affected by migration. This vulnerability is further enhanced in the case of unaccompanied children.⁷⁸ States must afford extensive and tailored protection in order to respond to children's particular vulnerability.⁷⁹

As regards children's right to family life, including if necessary by way of family reunification, States are required to act in a positive, humane and expeditious manner.⁸⁰ States shall ensure that administrative procedures, including time limits or discretionary powers, do not hinder the child's right to family reunification.⁸¹ Measures should be taken to avoid undue delays in migration/asylum procedures that could negatively affect the rights of children, including family reunification procedures.⁸² The Committee on the Rights of the Child has also affirmed that procedures should seek to facilitate family life and ensure that any restrictions are legitimate, necessary and proportionate.⁸³

The Committee on the Rights of the Child has also maintained that children who are close to the age of eighteen must be afforded the same protection provided to younger children.⁸⁴ Due to the impact that the transition to adulthood can have on the life of unaccompanied children,⁸⁵ the need of unaccompanied children close to the age of eighteen to be reunited with their family might be greater than ever.⁸⁶

In the same vein, the ECtHR has ruled that States have an obligation to ensure that applications for the purpose of family reunification are assessed in a speedy, flexible and effective manner.⁸⁷

VII. CONCLUSION

The decisive moment to determine if an applicant can be considered as an "unaccompanied child" can have an impact on that child's ability to enjoy their right to family life, and can also affect the level of protection that they receive. This is particularly problematic for children who are close to the age of majority, since they risk "ageing out" pending the outcome of the procedures they find themselves in, especially in view of the often lengthy asylum determination or family reunification procedures in some European countries.

The principle of the best interests of the child and the obligation to take account of the enhanced vulnerability of unaccompanied children are well-established under international law. In order to respect, protect and fulfil the fundamental rights of unaccompanied children, States must not negate their rights for the sole reason that a child has reached the age of majority pending the outcome of the asylum determination or family reunification procedure. Children close to the age of majority must be afforded the same standards of protection as other children.

The recent CJEU's decision in *A and S*, binding on the vast majority of EU Member States, reiterates these principles and confirms States' obligation to ensure that children who reach the age of majority after introducing their asylum application should be able to enjoy their right to be reunited with their parents if they are granted refugee status, in accordance with the Family Reunification Directive. The Court has made it clear that "ageing out" cannot be used to undermine unaccompanied children's rights under that Directive.

78. CRC, Joint GC No. 3 of the CMW and No. 22 of the CRC, paras. 3 and 40.

79. General Comment No. 14 (2013) of the CRC on the right of the child to have his or her best interests taken as a primary consideration; General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin; Joint GC No. 4 (2017) of the CMW and No. 23 (2017) of the CRC; Joint GC No. 3 (2017) of the CMW and No. 22 (2017) of the CRC.

80. Convention on the Rights of the Child, Article 10.

81. Joint GC No. 4 (2017) of the CMW and No. 23 (2017) of the CRC, para. 32.

82. *Id.*, para. 15.

83. *Id.*, para. 37.

84. Joint GC No. 4 (2017) of the CMW and No. 23 (2017) of the CRC, para. 3.

85. UNHCR, Council of Europe, Unaccompanied and separated asylum-seeking and refugee children turning eighteen: what to celebrate?, March 2014.

86. The CoE's Commissioner for Human Rights has called on States to reinforce the position of children in the family reunification process, including by considering them as children even if they age out during the asylum procedure. Council of Europe, Commissioner for Human Rights, Document thématique: Réaliser le droit au regroupement familial des réfugiés en Europe, para. 7.

87. ECtHR, *Mugenzi v. France*, Application no. 52701/09, 10 July 2014, paras. 48-62.