

# TRAINING MANUAL

## - MODULE 3 - THE RIGHT TO FAMILY REUNIFICATION FOR REFUGEES AND ASYLUM-SEEKING CHILDREN IN EUROPE



### Fostering Quality Legal Assistance in the Asylum Procedure



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## LEGISLATIVE CONTEXT: SECONDARY EU LEGISLATION OF THE CEAS (COMMON EUROPEAN ASYLUM SYSTEM)

A list of relevant secondary legislation of the CEAS is provided to facilitate first-hand reference to such measures. The most relevant provisions in respect of family reunification are contained in the *Reception Conditions Directive*, the *Dublin III Regulation*, the *Qualification Directive* and in the *Family Reunification Directive*. These are set out with commentary in the last section.

### RECEPTION CONDITIONS DIRECTIVE

- [Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013](#) laying down standards for the reception of applicants for international protection (*recast*)

### ASYLUM PROCEDURES DIRECTIVE

- [Directive 2005/85/EC of 1 December 2005 on minimum standards](#) on procedures in Member States for granting and withdrawing refugee status (Ireland and the UK have opted into this)
- [Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013](#) on common procedures for granting and withdrawing international protection (*recast*)

### QUALIFICATION DIRECTIVE

- [Directive 2004/83/EC of 29 April 2004 on minimum standards](#) for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Ireland and the UK have opted into this)
- [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*)

### DUBLIN REGULATION

- [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*) (*Dublin III Regulation*)

- [Commission Implementing Regulation \(EC\) No 1560/2003 of 2 September 2003](#) laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
- [Commission Implementing Regulation \(EU\) No 118/2014 of 30 January 2014](#) amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Ireland and the UK have opted into these)

## RETURNS DIRECTIVE

- [Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008](#) on common standards and procedures in Member States for returning illegally staying third-country nationals

## TEMPORARY PROTECTION DIRECTIVE

- [Directive 2001/55/EC of 20 July 2001 on minimum standards](#) for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

## AMIF REGULATION

- [Regulation \(EU\) No 516/2014 of the European Parliament and of the Council of 16 April 2014](#) establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC

## FAMILY REUNIFICATION DIRECTIVE (NOT PART OF THE CEAS)

- [Directive 2003/86/EC of 22 September 2003](#) on the right to family reunification

## SCHENGEN BORDERS CODE (NOT PART OF THE CEAS)

- [Regulation \(EU\) 2016/399 of the European Parliament and of the Council of 9 March 2016](#) on a Union Code on the rules governing the movement of persons across borders (codification)

## VISA CODE (NOT PART OF THE CEAS)

- [Regulation \(EC\) No 810/2009 of the European Parliament and of the Council of 13 July 2009](#) establishing a Community Code on Visas

## UNACCOMPANIED MINORS: CONTEXT

### 1. IDENTIFICATION

The initial identification of unaccompanied minors is not regulated under EU law. Frontex has however developed the *Vega Handbook: Children at Airports* (July 2015), which aims to increase border guards' awareness of children and situations of risk for children crossing the external air borders of the EU, unaccompanied or not.

The codified *Schengen Borders Code* of 2016 provides that member states shall ensure that the border guards are specialised and properly trained professionals, notably as regards vulnerable persons, such as unaccompanied minors and victims of trafficking. Annex VII sets out special rules for certain categories of persons, including minors. Member states must nominate national contact points for consultation on minors and inform the Commission thereof. Where there is doubt as to the safety and security of a minor, border guards must make use of the list of national contact points for consultation on the minor in question.

Two categories of vulnerable children are generally distinguished:

- “Unaccompanied children” (also called “unaccompanied minors”) are children under 18 years of age who have been separated from both parents and are not being cared for by an adult who, by law or custom, is responsible for doing so. The EU law definition of this concept includes a minor who is left unaccompanied after he or she has entered the territory of Member States (see the final section for such definitions set out in relevant EU secondary legislation).
- “Separated children” are defined as children under 18 years of age who are separated from both parents or from their previous legal or customary primary caregiver. Such children, although living with extended family members or other adults, may face risks similar to those encountered by unaccompanied refugee children.

[UNGA, A/56/333, 7 September 2001, para. 3.](#)

See the Report of the United Nations High Commissioner for Refugees, Questions relating to refugees, returnees and displaced persons and humanitarian questions: Protection and assistance to unaccompanied and separated refugee children

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## 2. AGE ASSESSMENT

It is sometimes necessary to perform an age assessment in order to assess whether a migrant is a minor and therefore in need of special protection. The grounds, timing and methods used across the member states for age assessment vary widely. The *Asylum Procedures Directive* and its recast provide some minimum safeguards for the benefit of asylum-seeking minors, including the need to obtain his/her and the guardian's consent to performing medical examinations, and the obligation to treat the person as a minor whenever the age assessment is inconclusive.

The following principles in respect of age assessment stem from such human rights documents as the CRC and the ECHR:

- a) age assessment procedures must only be ordered where truly necessary—if following the application of the principle of benefit of doubt, a serious doubt remains regarding the child's age; [see UN CRC, *General Comment No. 6*, para 31(A)].
- b) an age assessment procedure may only be carried out following the child's informed consent and only in the best interests of the child; [see UN CRC, *General Comment No. 14*].
- c) the methods of age assessment must be proportionate to the legitimate aim pursued, bearing in mind that the current methods can never lead to an exact identification of the age of a child;

### **European Asylum Support Office (EASO), *EASO Age assessment practice in Europe, December 2013*, p. 16.**

This is particularly crucial with regard to medical examinations performed to assess the age, which have sparked severe criticism amongst medical experts (see 'Health professionals should not participate in age determination until methods with acceptable scientific and ethical standards have been developed'; *International Society for Social Pediatrics and Child Health (ISSOP) Migration Working Group (2017)*, p. 2). It has been recognised that a number of age assessment methods have been criticised for a lack of scientific, empirical basis and reliability, producing a high risk of arbitrary results (see Ad hoc Committee for the Rights of the Child (CAHENF) – Drafting Group of Experts on Children's Rights and Safeguards in the Context of Migration (CAHENF-Safeguards), *Council of Europe member States' age assessment policies, procedures, and practices respectful of children's right*, Report prepared by Daja Wenke, draft 17 March 2017, para. 8, referencing the *Separated Children in Europe Programme Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, p.6-7, 16-18). Importantly, it has also been noted that a number of age assessment methods are invasive and may cause physical or mental harm to the person subject to them. Further, the UNHCR has cautioned States on the use and implications of age assessments in the asylum context (UNHCR, *Guidelines for International Protection, Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, paras. 75.

- d) to be proportionate, age assessment methods must not detrimentally interfere with the child's moral and physical integrity, and the competent expert or authority undertaking the age assessment procedure must be in a position to ensure the special needs, welfare and well-being of the child during the procedure; [see UN CRC, *General Comment No. 6* para. 31(A)].

- e) in order for children's rights under the Convention to be practical and effective rather than theoretical or illusory (*Artico v. Italy*, (No 6694/74), 13 May 1980, para. 12.), State Parties must ensure a child is appointed a competent guardian and a legal representative, as well as access to an effective remedy against an age assessment decision.

The negative consequences of an incorrect age assessment can constitute inhuman and degrading treatment under article 3 ECHR and a violation of the child's private life under article 8 ECHR. An erroneous age assessment denies children of the substantive and procedural rights they are entitled to under international and European law throughout the asylum procedure, which may adversely affect the outcome of the child's asylum claim (see UNHCR, *Guidelines No. 8*, paras. 65 and 75]. Amongst the most deleterious consequences is the improper accommodation of children with adults where they face a much higher risk of ill-treatment.

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### 3. GUARDIANSHIP

While article 24 of the *Reception Conditions Directive* and article 25 of the *Asylum Procedures Directive* provide for the appointment of a 'representative' (which is often interpreted as a legal representative) to an unaccompanied minor to assist in the submission and processing of an application for international protection, the European Commission's proposal for a new *Asylum Procedures Regulation* (COM(2016) 467 final) contains proposals for the appointment of a 'guardian'. The role of a guardian would be broader: to assist and represent an unaccompanied minor with a view to safeguarding the best interests of the child and his or her general well-being in the procedure for international protection. The proposed provisions seek to standardise guardianship practices to make sure that guardianship becomes prompt and effective across the Union.

The *Qualification Directive* provides that as soon as possible after the granting of international protection member states shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

The *FRA Handbook on Guardianship 2014* already provides guidance on ways to strengthen guardianship systems, setting out the core principles, fundamental design and management of such systems.

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### 4. DETENTION

Article 11 of the *Reception Conditions Directive* sets out safeguards in respect of the detention of vulnerable persons, such as minors and unaccompanied minors in particular. It provides that

unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, member states shall ensure that they are accommodated separately from adults.

It is also noteworthy that article 8(2) provides for the general safeguard that “when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively”.

Article 17 of the *Return Directive* provides that detention measures of children within the return procedure should be a “measure of last resort and for the shortest appropriate period of time”. It contains provisions in respect of the conditions of such detention.

*General Comment No. 6* of the Committee on the Rights of the Child, at para. 61 states that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.

Relevant caselaw on the detention of minors includes *Arslan* ([Case C 534/11](#)) (article 2(1) of the *Returns Directive*, must be interpreted as meaning that that directive does not apply to a third-country national while their application for international protection remains pending); *Mitunga v. Belgium*, (European Court of Human Rights, [App. n° 13178/03](#), 12 October 2006), the closed centre in which the applicant was detained was not suitable for the extreme vulnerability of an unaccompanied foreign minor); *Rahimi v. Greece*, (ECtHR, [App. n° 8687/08](#), 05 April 2011) (breach of article 3 and 5 ECHR on account of the authorities failure to give consideration to the unaccompanied minor’s individual circumstances when placing him in detention); *Housein v. Greece*, (ECtHR, [App. n° 71825/11](#), 24 October 2013), (the detention of an unaccompanied minor for two months, mostly in an adult detention centre, and without effective administrative review, violated the applicant’s rights under article 5(1) and article 5(4) ECHR).

Broadly, the following principles apply to the detention of unaccompanied minors in accordance with caselaw of the ECtHR (note furthermore that under article 53 ECHR, as regards EU member states, article 5(1) ECHR must be interpreted in a manner consistent with EU law obligations binding on States as a matter of national law).

- a) Under article 3 UNCR, the child’s best interests must not only inform all measures and decisions to which they may be subject, but also be a primary consideration when any such measures are being considered. Article 53 ECHR stipulates that the Convention rights must be construed in accordance with other international human rights obligations of States Parties, including the CRC. This is particularly important in relation to any deprivation of liberty where the primary consideration must be given to an individual child’s circumstances,



in light of his or her best interests. A comprehensive assessment of the best interests of the child will presumptively exclude any resort to detention for children, when the detaining measures are being contemplated not in the context of furthering the child's best interests but in the context of immigration control.

- b) The administrative detention of migrant children for immigration control purposes cannot fall within the scope of permissible detention under article 5(1)(d) ECHR, which is intrinsically linked with the child's educational supervision and protection needs. The administrative detention of migrant children will be arbitrary under article 5(1)(f) ECHR where the child's interests have not been a primary consideration in ordering the detention.
- c) Before any administrative measure is taken concerning unaccompanied children, the State must appoint a guardian and provide the unaccompanied children with access to appropriate information in a language they understand. If the State fails to appoint a competent guardian for an unaccompanied child and/ or access to information is not adequately guaranteed, the State has failed to meet the procedural safeguards designed to assess, and determine the child's best interests. Any detention without these safeguards being observed will not respect the best interests of the child, and the detention is tainted with arbitrariness, in violation of the right to liberty under article 5(1) ECHR.
- d) Non-effective or misleading communication or a fortiori the absence of any communication of the reasons why an individual child is being detained constitutes a violation of articles 5(2) and (4) even if the detention itself is not arbitrary.

A report of the FRA, *European legal and policy framework on immigration detention of children*, 2017, examines law and practice in the EU member states on the deprivation of liberty of children pending their removal against the applicable international human rights law framework. It places emphasis on the use of alternatives to detention in the EU.

[See also Council of Europe, Human Rights Comment, *High time for states to invest in alternatives to migrant detention*, Strasbourg, 31 January, 2017].

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## 5. FAMILY TRACING

The *Reception Conditions Directive* provides that member states shall start tracing the members of an unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made. The *Dublin III Regulation* provides that member states may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations.

The *Qualification Directive* then provides that if an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, member states shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, member states shall continue the tracing process where appropriate.

The FRA *Handbook on Guardianship* 2014 has underlined the role of guardians in family tracing procedures and for the identification and implementation of durable solutions for unaccompanied children, including through family reunification and Dublin procedures.

In July 2016, EASO published a *Practical Guide on Family Tracing* to support national authorities in establishing tracing processes. The publication includes a set of reference and guidance materials on the family tracing process.

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## 6. LEGAL STATUS

A study carried out by EMN in 2015 observed that while many provisions and measures are available for asylum-seeking unaccompanied children and those granted international protection, this is not always the case for non-asylum-seeking children. At present, the latter do not benefit from the same level of protection either in law or in practice. While the protections set out in this paper only apply to children who apply for international protection, there is an argument to contend that states have a broader obligation in respect of all unaccompanied minors, regardless of their residence status, to facilitate family tracing stemming from article 9(3) of the CRC: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

Article 24 of the Charter for Fundamental Rights of the EU reinforces the argument that children of any legal status are entitled to family reunification:

### The rights of the child

- a) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- b) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- c) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both, his or her parents, unless that is contrary to his or her interests.

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## 7. DURABLE SOLUTIONS

Identifying the most appropriate durable solution for an unaccompanied or separated child has a fundamental and long-term impact on the child's future. It therefore requires a careful balancing of many factors, which may involve different agencies and authorities. It should take account of the child's views, with due weight accorded to his or her age and maturity. In order to determine a durable solution, a best interests determination should be carried out based on an individual assessment of the circumstances of each child.

The *European Action Plan on Unaccompanied Minors* (2010 - 2014) identified the following as possible durable solutions: 1) return and reintegration of the unaccompanied minor in the country of origin; 2) solutions for facilitating integration in the member state of residence; and 3) resettlement. [Note, "Relocation" is an intra-EU responsibility sharing mechanism which is distinguishable from "resettlement" (from a third country)].

The term durable solution appears in a number of comments, reports and guidelines relating to unaccompanied minors. It is generally understood to mean, fundamentally, 'overcoming the situation of being unaccompanied or separated' (UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005)). It places the greatest weight on exploring options relating to family reunification, while considering the child's protection needs in line with their best interests.

The third section of this paper sets out the relevant legislative provisions under EU law relating to family reunification in the context of unaccompanied minors in the international protection system.

## PRINCIPAL LEGISLATIVE PROVISIONS WITH COMMENTARY

### [2012] ECR I 00000, judgement of 22 November, 2012)) and the right to an effective remedy under article 47

It should be recalled that **fundamental rights principles** will apply across the board in the application of EU law. A number of rights set out in the Charter of Fundamental Rights of the EU are relevant: the right to respect for private and family life under article 7, the right to equality before the law of article 20, the right to non-discrimination under article 21, the rights of the child under article 24, the right to good administration under article 41 (and acknowledged by the CJEU to be a broader principle of EU law applicable to national authorities (see *M.M v. Minister of Justice, Equality and Law Reform* (Case-277/11)),.

Relevant articles of the UNCRC include the following: the right to non-discrimination under article 2, the best interests principle under article 3, the right to know and be cared for their parents under article 7, the right to preserve their identity, including family relations under article 8, the right not to be separated from their parents under article 9, state obligations in respect of family reunification under article 10, the right of a child to be heard under article 12, the right to respect for private and family life under article 16, the recognition of the responsibilities of both parents for a child under article 18 and rights of unaccompanied minors seeking asylum under article 22.

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## 1. THE RECEPTION CONDITIONS DIRECTIVE APPLIES FROM THE MOMENT AN UNACCOMPANIED MINOR APPLIES FOR INTERNATIONAL PROTECTION IN A MEMBER STATE OF THE EU.

In assessing the best interests of the child, member states must in particular take due account family reunification possibilities. The following are key provisions of this Regulation:

### Article 23 - Minors

(1) The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors ...

(2) In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

- a) family reunification possibilities;
- b) the minor's well-being and social development, taking into particular consideration the minor's background;
- c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- d) the views of the minor in accordance with his or her age and maturity....

(3) Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.

**The Committee on the Rights of the Children, in its 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 CRC) underlines, at para. 6, that the child's best interests is a threefold concept: (a) a substantive right, (b) a fundamental, interpretative legal principle, (c) a rule of procedure (assessing and determining the best interests of the child require procedural guarantees).

Important case law interpreting this principle of the best interests of the child in the immigration sphere includes *Jeunesse v. The Netherlands (App. No. 12738/10)*: "109 ... the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight."

**R (TS) v SSHD [2010] EWHC 2614 (Admin)**: "36. In summary, the effect of the statutory guidance is that when a decision maker discharges an immigration and /or asylum function he should regard the need to safeguard and promote the welfare of the child in question as a primary consideration unless there are cogent reasons which justify a different approach."

**ZH (Tanzania)(FC) v. Secretary of State for the Home Department [2011] UKSC 4 (1st February, 2011)**: "33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations."

## **Article 24 - Unaccompanied minors**

(1) Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

...

(3) Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety ...

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## **2. THE DUBLIN III REGULATION APPLIES FROM THE MOMENT AN UNACCOMPANIED MINOR APPLIES FOR INTERNATIONAL PROTECTION IN A MEMBER STATE OF THE EU.**

The maintenance of family unity is the primary binding criterion for determining the member state responsible for determining the substantive application. The following are key provisions of this Regulation:

### **Recitals**

(13) In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural

guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.

(16) In order to ensure full respect for the principle of family unity and for the best interests of the child ... When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.

## **Article 2 - Definitions**

- a) 'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States: when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;
- b) 'relative' means the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law;
- c) 'minor' means a third-country national or a stateless person below the age of 18 years;
- d) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States;
- e) 'representative' means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Regulation with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out its duties in respect of the minor, in accordance with this Regulation;

## **Article 6 - Guarantees for minors**

(1) The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

(2) Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file including the specific

leaflet for unaccompanied minors.

This paragraph shall be without prejudice to the relevant provisions in Article 25 of [the Procedures] Directive 2013/32/EU [Guarantees for unaccompanied minors].

(3) In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development;

(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;

(d) the views of the minor, in accordance with his or her age and maturity.

(4) For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.

To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations.

The staff of the competent authorities referred to in Article 35 who deal with requests concerning unaccompanied minors shall have received, and shall continue to receive, appropriate training concerning the specific needs of minors.

(5) With a view to facilitating the appropriate action to identify the family members, siblings or relatives of the unaccompanied minor living in the territory of another Member State pursuant to paragraph 4 of this Article, the Commission shall adopt implementing acts including a standard form for the exchange of relevant information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

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### CHAPTER III - CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSIBLE

#### **Article 7 - Hierarchy of criteria**

(1) The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

(2) The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.

(3) In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that



such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.

### **Article 8 - Minors**

(1) Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.

(2) Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.

(3) Where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.

(4) In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

#### **MA, BT, DA v Secretary of State for the Home Department (Case C 648/11, June 2013)**

51. With regard to the context of the second paragraph of Article 6 of Regulation No 343/2003, it must be noted that the expression 'first lodged his application' used in Article 5(2) of that regulation has not been repeated in the second paragraph of Article 6. Moreover, Article 6 refers to the Member State 'where the minor has lodged his or her application for asylum', whereas Article 13 of that regulation expressly states that 'the first Member State with which the application for asylum was lodged shall be responsible for examining it' ...

55. Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State ...

57. Those fundamental rights include, in particular, that set out in Article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration ...

On those grounds, the Court (Fourth Chamber) hereby rules:

The second paragraph of Article 6 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an



asylum application there is to be designated the 'Member State responsible'.

### **Secretary of State for the Home Department v ZAT & Ors [2016] EWCA Civ 810**

This case concerned unaccompanied minors from Syria in the Calais camp in France who sought to enter the UK to join their siblings who had already been granted refugee status. Although the applicants had not applied for asylum in France and therefore did not come within the scope of the Dublin III Regulation, the particular circumstances of the case meant that failing to do so would lead to a disproportionate interference with their right to respect for family life under article 8 ECHR.

On appeal, the Court of Appeal concluded that the Upper Tribunal had erred in its approach to the Dublin III Regulation in light of article 8 ECHR. According to the court, an application for entry by an unaccompanied child, without first invoking the relevant Dublin III Regulation in France, could “only be justified in an especially compelling case”. This was only the case where the applicants “can show that the system of the Member State that they do not wish to use, in this case the French system, is not capable of responding adequately to their needs”. In the particular circumstances of the case, the evidence was unlikely to meet the required threshold of “an especially compelling case” in order to completely bypass the initial procedural stage of the Dublin procedure on the grounds of article 8 ECHR.

**Article 9 - Family members who are beneficiaries of international protection ...**

**Article 10 - Family members who are applicants for international protection ...**

**Article 16 - Dependent persons ...**

**Article 17 - Discretionary clauses**

(1) By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation ...

### **C. K., H. F., A. S. v Republika Slovenija (Case C 578/16 PPU, 16 February 2017)**

On those grounds, the Court (Fifth Chamber) hereby rules:

1. Article 17(1) of Regulation (EU) No 604/2013 ... must be interpreted as meaning that the question of the application, by a Member State, of the ‘discretionary clause’ laid down in that provision is not governed solely by national law and by the interpretation given to it by the constitutional court of that Member State, but is a question concerning the interpretation of EU law, within the meaning of Article 267 TFEU.

2. Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that:

– even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of Regulation No 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article;

– in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that article;

– it is for the authorities of the Member State having to carry out the transfer and, if necessary, its courts to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned by taking the necessary precautions to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person’s state of health. If, taking into account the particular seriousness of the illness of the asylum seeker concerned, the taking of those precautions is not sufficient to ensure that his transfer does not result in a real risk of a significant and permanent worsening of his state of health, it is for the authorities of the Member States concerned to suspend the execution of the transfer

of the person concerned for such time as his condition renders him unfit for such a transfer; and  
– where necessary, if it is noted that the state of health of the asylum seeker concerned is not expected to improve in the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned, the requesting Member State may choose to conduct its own examination of that person's application by making use of the 'discretionary clause' laid down in Article 17(1) of Regulation No 604/2013.

Article 17(1) of Regulation No 604/2013, read in the light of Article 4 of the Charter of Fundamental Rights of the European Union, cannot be interpreted as requiring, in circumstances such as those at issue in the main proceedings, that Member State to apply that clause.

#### **Administrative Court of Hannover, case no. 1 B 5946/15, 7 March 2016**

A member state may derogate from Article 3(1) of the Dublin III Regulation by examining an application for international protection despite the fact that the member state is not responsible for the examination according to the criteria laid down in that Regulation.

When assessing article 17(1) of the Dublin III Regulation (the discretionary clause), the Federal Office for Migration and Refugees must give priority to the best interest of the child and the right to respect of family life. Furthermore, the Federal Office must take due account of the possibility of family reunification in accordance with Article 6 (3) (a) of the Dublin-III-Regulation.

In the event that an application for international protection allows for family reunification and also safeguards the best interests of the child, there is no room for discretion by the Federal Office in making an assessment under Article 17 (1) of the Dublin-III-Regulation.

Although Article 17 (1) Dublin-III-Regulation determines the responsibility of the Member States to examine applications for international protection, it governs not only the relationship between the Member States but also serves to protect fundamental rights. Thus, it also aims at the protection of the individual and provides for a subjective right, which can be enforced in a court of law.

#### **Article 27 - Remedies**

(1) The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

#### **Mehrdad Ghezlbash v Staatssecretaris van Veiligheid en Justitie (Case C 63/15, 7 June 2016)**

53. A restrictive interpretation of the scope of the remedy provided in Article 27(1) of Regulation No 604/2013 might, inter alia, thwart the attainment of that objective by depriving the other rights conferred on asylum seekers by that regulation of any practical effect. Thus, the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — failing, for example, to take account of the information provided by the asylum seeker — to be subject to judicial scrutiny.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 27(1) of 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, read in the light of recital 19 of the regulation, must be interpreted as meaning that, in a situation such as that in the main proceedings, an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation, in particular the criterion relating to the grant of a visa set out in Article 12 of the regulation.

**Tsegezab Mengesteab v Bundesrepublik Deutschland (Case C 670/16, 26 July 2017)**

On those grounds, the Court (Grand Chamber) hereby rules

1. Article 27(1) of 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, read in the light of recital 19 thereof, must be interpreted as meaning that an applicant for international protection may rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of that regulation, even if the requested Member State is willing to take charge of that applicant.
2. Article 21(1) of Regulation No 604/2013 must be interpreted as meaning that a take charge request cannot validly be made more than three months after the application for international protection has been lodged, even if that request is made within two months of receipt of a Eurodac hit within the meaning of that article.
3. Article 20(2) of Regulation No 604/2013 must be interpreted as meaning that an application for international protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation, and as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority.

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THE COMMISSION OF THE EUROPEAN UNION HAS SET OUT THE DETAILS OF HOW THE DUBLIN REGULATIONS MUST BE IMPLEMENTED IN A NUMBER OF IMPLEMENTING REGULATIONS. RELEVANT PROVISIONS OF COMMISSION REGULATION (EC) NO 1560/2003 AS AMENDED BY COMMISSION IMPLEMENTING REGULATION (EU) NO 118/2014 ARE AS FOLLOWS:

**Article 12 -Unaccompanied minors**

(1) Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests. Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.

This field includes such EU secondary legislation as the Brussels I recast Regulation (EU) No 1215/2012 on jurisdiction, recognition and enforcement; Brussels IIa Regulation (EC) No 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; the Service of documents Regulation (EC) No 1393/2007 and the Taking of evidence Regulation (EC) No 1206/2001.

(2) The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003 shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer.

(3) With a view to facilitating the appropriate action to identify the family members, siblings or relatives of an unaccompanied minor, the Member State with which an application for international protection was lodged by an unaccompanied minor shall, after holding the personal interview pursuant to Article 5 of Regulation (EU) No 604/2013 in the presence of the representative referred to in Article 6(2) of that Regulation, search for and/or take into account any information provided by the minor or coming from any other credible source familiar with the personal situation or the route followed by the minor or a member of his or her family, sibling or relative.

The authorities carrying out the process of establishing the Member State responsible for examining the application of an unaccompanied minor shall involve the representative referred to in Article 6(2) of Regulation (EU) No 604/2013 in this process to the greatest extent possible.

(4) Where in the application of the obligations resulting from Article 8 of Regulation (EU) No 604/2013, the Member State carrying out the process of establishing the Member State responsible for examining the application of an unaccompanied minor is in possession of information that makes it possible to start identifying and/or locating a member of the family, sibling or relative, that Member State shall consult other Member States, as appropriate, and exchange information, in order to:

- (a) identify family members, siblings or relatives of the unaccompanied minor, present on the territory of the Member States;
- (b) establish the existence of proven family links;
- (c) assess the capacity of a relative to take care of the unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State.

(5) Where the exchange of information referred to in paragraph 4 indicates that more family members, siblings or relatives are present in another Member State or States, the Member State where the unaccompanied minor is present shall cooperate with the relevant Member State or States, to determine the most appropriate person to whom the minor is to be entrusted, and in particular to establish:

- (a) the strength of the family links between the minor and the different persons identified on the territories of the Member States;
- (b) the capacity and availability of the persons concerned to take care of the minor;
- (c) the best interests of the minor in each case.

(6) In order to carry out the exchange of information referred to in paragraph 4, the standard form set out in Annex VIII to this Regulation shall be used.

*Standard form for the exchange of information on the family, siblings or relatives of an unaccompanied child in a Dublin procedure pursuant to article 6(5) of Regulation (EU) No 604/2013. This comprises Part A (data to be fill by the requesting member state e.g. data regarding the child; reasons for the request for information such as “the views of the child”) and Part B (data to be filled by the requested member state e.g. concerning the presence of the person on the territory of the requested member state; evidence of capacity to take care of child).*

## ANNEX II - (REFERENCES ARE TO ARTICLES OF REGULATION (EU) NO 604/2013)

### LIST A - MEANS OF PROOF

I. Process of determining the State responsible for examining an application for international protection

1. Presence of a family member, relative or relation (father, mother, child, sibling, aunt, uncle, grandparent, adult responsible for a child, guardian) of an applicant who is an unaccompanied minor (Article 8)

Probative evidence

- written confirmation of the information by the other Member State;
- extracts from registers;
- residence permits issued to the family member;
- evidence that the persons are related, if available;
- failing this, and if necessary, a DNA or blood test.

Member states have an obligation by virtue of article 8 ECHR to process applications for family reunion involving children in a positive, humane and expeditious manner with appropriate proactive steps. In a UK case, MK, IK & HK v Secretary of State for the Home Department (JR/2471/2016, UKUT 29 April 2016), the Tribunal found that the Home Office was unlawful in refusing the ‘take charge’ request, first by renegeing on their investigation duties on the possibility of DNA testing of the applicants in France and second in rejecting the possibility of allowing the children’s entry to the UK for DNA testing purposes. It also found an explicit and implicit duty of investigation under the Dublin Regulation.

### LIST B - CIRCUMSTANTIAL EVIDENCE

I. Process of determining the State responsible for examining an application for international protection

1. Presence of a family member (father, mother, guardian) of an applicant who is an unaccompanied minor (Article 8)

Indicative evidence [This indicative evidence must always be followed by an item of probative evidence as defined in list A.]

- verifiable information from the applicant;
- statements by the family members concerned;

- reports/confirmation of the information by an international organisation, such as UNHCR.

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## ANNEX XI - INFORMATION FOR UNACCOMPANIED CHILDREN WHO ARE APPLYING FOR INTERNATIONAL PROTECTION PURSUANT TO ARTICLE 4 OF REGULATION (EU) NO 604/2013

We have given you this leaflet because you have expressed the need for protection and you told us you are less than 18 years of age. If you are less than 18 years old, you are considered to be a child. You will also hear the authorities refer to you as a 'minor', which means the same as child. The 'authorities' are the people responsible for making a decision on your claim for protection ...

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### 3. THE QUALIFICATION DIRECTIVE RECAST SETS OUT CERTAIN RIGHTS OF UNACCOMPANIED MINORS ONCE THEY HAVE BEEN GRANTED INTERNATIONAL PROTECTION IN A MEMBER STATE.

These rights include the right to have a guardian or representative appointed, to have their family traced and, if their family members are present in the same member state but do not qualify for international protection, to have such family members granted residence permits and other benefits. Relevant provisions of this Directive are as follows:

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## CHAPTER VII - CONTENT OF INTERNATIONAL PROTECTION

### Article 20 - General rules

...

(5) The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

### Article 31 - Unaccompanied minors

(1) As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

(2) Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

...

(4) As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

(5) If an unaccompanied minor is granted international protection and the tracing of his or her family

members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

(6) Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

#### **Article 23 - Maintaining family unity**

(1) Member States shall ensure that family unity can be maintained.

(2) Member States shall ensure that family members [defined as those already in the member state] of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member ...

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## 4. THE FAMILY REUNIFICATION DIRECTIVE SETS OUT RIGHTS TO FAMILY REUNIFICATION

For unaccompanied minors who have been granted refugee status or who otherwise hold a residence permit issued by a Member State for a period of validity of one year or more and have reasonable prospects of obtaining the right of permanent residence.

Relevant provisions of this Directive are as follows:

#### **Recital**

(4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.

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## CHAPTER I GENERAL PROVISIONS

### **Article 1**

The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

### **Article 2**

For the purposes of this Directive:

... (c) "sponsor" means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;



(d) "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry;

... (f) "unaccompanied minor" means third country nationals or stateless persons below the age of eighteen, who arrives on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States.

### **Article 3**

(1) This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

(2) This Directive shall not apply where the sponsor is:

(a) applying for recognition of refugee status whose application has not yet given rise to a final decision;

(b) authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status;

(c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

(3) This Directive shall not apply to members of the family of a Union citizen.

The wording of the exclusion in article 3(2)(c) is equivocal. Subsidiary protection existed as a concept under international law, notably as a result of certain caselaw of the ECtHR (see such cases as Soering v. United Kingdom, App. No. 14038/88; Vilvarajah v. United Kingdom, App. Nos. 13163, 13164, 13165, 13447, 13448/87; Chahal v. United Kingdom, App. No. 22414/93; D v. United Kingdom, App. No. 30240/96), before it was introduced into EU law, by way of the initial Qualification Directive 2004/83/EC. It is notable that the Family Reunification Directive 2003/86/EC preceded Directive 2004/83/EC. This exclusion refers to "a subsidiary form of protection in accordance with international obligations" and so it is arguable that it does not exclude subsidiary protection under EU law, introduced subsequently. However, the express provisions in respect of refugees in Chapter V would not seem to apply.

The judgment of the CJEU in respect of a preliminary reference lodged on 26 June 2017, which remains pending, in the case Staatssecretaris van Veiligheid en Justitie, K. and B. (Case C-380/17), may shed further light on this.

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## **CHAPTER II FAMILY MEMBERS**

### **Article 4**

(1) The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following



family members:

*[This article sets out a list of family members who may apply to join a sponsor but does not include provision for family members of unaccompanied minor sponsors. This seems to be for financial reasons as a sponsor must satisfy the conditions set out in article 7].*

...

(2) The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

- (a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;
- (b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

*[These dependency provisions are not sufficiently broad to accommodate unaccompanied minors as sponsors].*

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### CHAPTER III SUBMISSION AND EXAMINATION OF THE APPLICATION

#### Article 5

(1) Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

(2) The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 [public order grounds] and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary ...

(3) The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.

By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.

...

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

#### Article 7

(1) When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has: [(a)

accommodation regarded as normal ...; (b) sickness insurance ... ; and (c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family].

(2) Member States may require third country nationals to comply with integration measures, in accordance with national law.

With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.

### **Article 8**

Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.

In respect of unaccompanied minors, concerns have been raised as to the compatibility of the permissible time requirements under article 8 with article 9(1) CRC (States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child) and 10(1) CRC (In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner). A derogation exists in respect of refugee sponsors however – see article 12(2).

## **CHAPTER V FAMILY REUNIFICATION OF REFUGEES**

### **Article 10**

(1) Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees [integration condition where child over the age of 12].

(2) The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.

(3) If the refugee is an unaccompanied minor, the Member States:

(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);

(b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

This is the only provision which allows for family reunification for unaccompanied minor sponsors. There is an argument to contend that a failure to provide for greater possibilities of family reunification for unaccompanied minor sponsors, notably in respect of those granted subsidiary protection, breaches the rights to equal treatment and non-discrimination under the Charter. Any difference in treatment must pursue a legitimate aim and be justified and proportionate to that aim. In *Alo and Osso*, (Joined Cases C-443/14 and C-444/14, CJEU, Grand Chamber, 1 March 2016), the CJEU observed the stated intention of the EU legislature, in recitals 8, 9 and 39 of Directive 2011/95 to establish a uniform status for all beneficiaries of international protection and to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which were necessary and objectively justified. In his Opinion, Advocate General Cruz Villalon made express reference to the principle of equal treatment or non-discrimination, which required “that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.

The ECtHR has found that immigration status is included as one of the prohibited grounds of discrimination within the non-exhaustive concept of ‘other status’ in article 14 ECHR (*Hode and Abdi v. the United Kingdom*, App. No. 22341/09) and that in order for a claim to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations, though the comparator groups need not be identical (*Clift v. the United Kingdom*, App. No. 7205/07). In light of this interpretation of article 14 ECHR, alongside article 21 of the Charter, and given subsidiary protection holders have been brought within the scope of the Qualification Directive, it is arguable that measures that differentiate between categories of international protection holders are discriminatory. The argument that any difference in treatment amounts to permissible more favourable treatment of refugees would not seem to pass muster as beneficiaries of subsidiary protection and refugees have similar protection needs, especially as regards family reunification possibilities.

## **Article 11**

(1) Article 5 shall apply to the submission and examination of the application, subject to paragraph 2 of this Article.

(2) Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.

## **Article 12**

(1) By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members referred to in Article 4(1), the evidence that the refugee fulfils the requirements set out in Article 7.

Without prejudice to international obligations, where family reunification is possible in a third country with which the sponsor and/or family member has special links, Member States may require provision of the evidence referred to in the first subparagraph.

Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status [(a) *accommodation regarded as normal ...*; (b) *sickness insurance ...* ; and (c) *stable and regular resources which are sufficient to maintain himself/herself and the members of*

*his/her family*].

In any particular case, this 3-month time-frame may not be sufficient in practical terms to enable an applicant to “prepare and bring an effective action” (the CJEU established this as a minimum threshold in respect of the time-frame for an asylum appeal in *Samba Diouf* (Case C-69/10)). The CJEU has held that both time limits and their application to an individual case need to be reasonable and proportionate (see *Pontin* (C-63/08); see also a judgment of the ECtHR, *Tuquabo-Tekle v. The Netherlands*, App. no. 60665/00).

(2) By way of derogation from Article 8, the Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her.

In as far as the time requirements of article 8 would still apply to beneficiaries of subsidiary protection (and if unaccompanied minors were found to be entitled to be sponsors), this not only seems to breach the right to non-discrimination, but would also seem liable to undermine article 8 ECHR and the right to family unity. The ECtHR has found that family reunification procedures need to guarantee promptness, flexibility and effectiveness to ensure compliance with the right to respect for family life (see *Mugenzi v. France*, App. no. 52701/09; *Tanda Muzinga v. France*, App. no. 2260/10 and *Senigo Longue v. France*, App. no. 19113/09).