LUISS

Dipartimento di Giurisprudenza

Cattedra di EU Internal Market

The evolution of European Court of Justice and European Court of Human Rights' case-law: towards a best interest of the child approach

Chiar.mo Prof.
Daniele GALLO

RELATORE

Chiar.ma Prof.ssa
Alessandra ZANOBETTI

CORRELATORE

Domitilla D'Erme
Matr. 132353

CANDIDATO

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Introduction

The purpose of this dissertation is to analyze the European protection of family, deriving from the recognition of the right to family reunification, its evolution in the relevant case-law and the and the achievements in this field. On the basis of family reunification, it has been possible to lay the foundation for the protection of the family as well as for the safeguard of the best interest of the child.

Family is one of the most important pillars of culture and society, that may be one of the reasons that justifies the recognition and the protection granted by several European and International legal instruments.

As known, the fundamental relevance for the life of the individual has been affirmed since 1948 in the Universal Declaration of Human Rights in Article 16.3, according to which *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State"* as well as in the Convention on the Rights of the Child, who defines the family as "*the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community*"[1]

Such right has been reaffirmed in the following years through various instruments –that is the reason why we will emphasize that fundamental rights which are strictly linked to it are granted a "multilevel" protection- but the two leading provisions that will be scrutinized in the first chapter are contained in the EU Charter of Fundamental Rights at Article 7 as well as in the European Convention on Human Rights at Article 8.

It has to be emphasized that this discipline has been build up throughout the years, due to the fact that, initially, the European Community was born for improving the Internal Market and, hence, for economic reasons.

Gradually –in the light of the need for workers to move from one Member State to another and with the creation of the European citizenship- also the person and the rights to which everyone is entitled started to be taken into account and the concept of the protection of the family began to make headway.

[1] Preamble of UN Convention on the Rights of the Child, entered into force in 1990

A crucial role is constantly played by the two Judicial Bodies that, pursuant to their respective prerogatives, have ensured a judicial protection of the aforementioned family rights at European level: the European Court of Justice and the European Court of Human Rights.

Thanks to their judgments, it has been possible to lay the groundwork for the adoption of a common framework on such a sensitive issue, which is represented by the enactment of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, that amended Regulation (EEC) N. 1612/68 and repealed the previous Directives on this matter, as well as by Council Directive 2003/86 on family reunification.

This latter represents the first instrument adopted by the Council after the amendment to the TEU brought by the 1997 Amsterdam Treaty in the field of asylum and immigration and it sets out the conditions for being granted the right to family reunification for third country nationals, who legally reside in a Member State.

The analysis will mainly revolve around on the children, because the safeguard of family life is even more important when there are children involved, who are more in need of care, support and protection by their parents, due to their age and development.

But why is family reunification so important? In the words of the Directive 2003/86 on family reunification, *"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*[2]*"*

However, EU competence in this field is limited and Member States prefer to retain their powers in such a sensitive matter, basing their need on Article 4.2 of the Treaty on European Union, which states that "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member*

[2] Council Directive 2003/86 on the right to family reunification, preamble.

State." Thus, it will be described how to deal with this matter by balancing EU competence with the Member States' sovereignty.

Furthermore in the second chapter, through the judgments on which we will focus on, it will be showed the evolution made by the two judicial Bodies –the European Court of Justice and the European Court of Human Rights- in the field of family and, consequently, in family reunification; in fact, starting from 1980s, it will be analyzed the first Strasbourg Case regarding expulsion[3] that can be considered as the first awareness by the Court of a non compliance with Article 8 of the European Convention on Human Rights.

In addition, it will be showed how did the Courts reasoned in deciding cases concerning long-term immigrants convicted of criminal offences and on how to balance their conduct with the right to respect for private and family life, by applying the so-called *Boultif Criteria* which is a sort of test that judges have to take into consideration in delivering their judgments, concerning aspects such as the nature and seriousness of the offence committed by the applicant as well as the applicant's family situation.

Besides this assessment, it must be bear in mind that the derogations that are expressly allowed in those circumstances concern public policy, public security and public health. This means that at all times the State must strike a fair balance between the competing interests of the individual and the community as a whole.

It should be underlined that a major step forward in the recognition of the best interest of the child has been represented by four leading judgments of the Court of Justice [4], which prioritized the ties that children had with EU territory instead of considering the fact that their parents were no longer entitled to remain in the host Member State.

Thus-from these judgments onward- the question that has begun to arise was whether provisions of Directive 2003/86 were lawful and in compliance with fundamental rights, as well as if the discretion left to Member States had to be narrowed or not.

Instead, the third chapter has been assigned the function of describing the Italian Legislation on this topic, by virtue of the fact that Italy preceded the adoption of the Directive on family reunification with the enactment of *Turco-Napolitano* and *Bossi-*

[3] Application no. 10730/84 Berrehab v. The Netherlands

[4] Namely: Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department; Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department; Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi; Case C-256/11 Murat Dereci and others v Bundesministerium für Inneres that will be further discussed in the second chapter.

Fini laws and was, therefore, considered as a model for Europe. Moreover, through the analysis of the decisions held by Italian Courts, we will see whether Italy could be still considered as a model for Europe, as well as its implementation of the Directive into the domestic legal order.

Finally, the fourth chapter will dwell on the proposals raised by the European Commission to the stakeholders for a reform of Directive 2003/86. In fact, as abovementioned, it has been called into question the discretion left to the Member States on the implementation of the Directive and it has been remarked the urgency for a uniform set of rules throughout the EU territory, due to the fact that nowadays family reunification has been one of the main reasons for immigration into the EU and there is therefore the need of managing such flux of immigrants in a manner consistent with the protection of fundamental rights, notably regarding the respect for family life and the principle of the best interests of the child.

Chapter I

"The European protection of the family: the interplay of the Treaty on European Union, the Charter of Fundamental Rights and the European Convention on Human Rights"

1. The protection of the family in Europe: the evolution of a multilevel protection

The aim of this section is to present the evolution of the right to family reunification and its implications in safeguarding the protection of the family at a European level. In fact such right is strictly related to the protection of fundamental rights and it is enshrined in Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights, as well as being guaranteed by the provision set out in Article 6 TEU [5]. As known thanks to this latter norm, the EU Charter of Fundamental Rights has been assigned the same legal value of the Treaties, so it is binding for all the Member States. Therefore, it is necessary a preliminary scrutiny of these norms, in order to understand their importance and application in the protection of the family and, consequently, in family reunification.

Actually, the possibility of shaping individuals' right to family reunification finds its legal framework into the broadening of EU's competences, which led the EU to encroach fields that were not expressly attributed to it.

[5] Article 6 TEU: "1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

In addition, with the entry into force of the Charter of Fundamental Rights of the EU and after Lisbon Treaty, the European Union has inserted the protection of children's rights in its main scopes, as we will see in Article 3 of TEU [6], a concept already set in Article 24 of the EU Charter of Fundamental Rights. [7]

In the present chapter, it will be also given an overview on the corollaries of these rights, pointing out the existing interconnection among these principles; starting from the concept of European citizenship –whose notion, as interpreted by the ECJ, is crucial and it has been clarified with Directive 2004/38 on the right to move and reside freely within the territory of the Member States- we will see that this latter Directive is applicable to all EU dynamic citizens[8], while the right to family reunification needs to be highly interpreted by the European Court of Justice. In fact, it will be underlined that the ECJ has activated a "double erosion's national competences" process in the field of family law and immigration, meaning that the EU right to family reunification is actually able to limit Member States' powers on the matter of entry and stay of third country nationals who possess the qualification of EU citizens' family members.[9] Finally, we will examine in detail the relevant case-law of the two Judicial Bodies that could be considered the keepers of these fundamental rights and the dialogue between them: The European Court of Human Rights and the European Court of Justice.

2. What does "family reunification" mean?

The right to family reunification is an essential part of EU law. It may be considered as a recognized reason for immigration, because of the presence of one or more family

[6] Article 3 TEU "[…]*It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. […]"*

[7] *Article 24 Charter of Fundamental Rights of the European Union "1. 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.*
2.In all actions relating to children, whether taken by public authorities or private institutions, the child"s best interests must be a primary consideration.
3. 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."

[8] The concept of static and dynamic citizens will be further explained in par. 2.1

[9] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi*.", Bari, Cacucci, 2012, p. 7

members in a certain Country; it therefore enables the rest of the divided family or only specific members of the family to join one's relative to that Country as well.

Thus, it may involve marriage migration, but also minors.

In a general and broader sense, family reunification also plays an important role for the refugees, as it is a key factor for their integration [10].

Over these years, family reunification has contributed to raise application requests for immigration into the EU, this because it enables people, who already reside in a Member State, to be joined by their family members; so its primary aim is to preserve the family unit and to promote social cohesion.

In the European integration process, a key role has been assumed by the realization of a common market of the factors of production which are, respectively: goods, work, services and capitals. [11]

Such principle has been reaffirmed by the European Court of Justice (ECJ), which stressed that "*the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited*"[12].

In Internal Market, the free movement of persons has always been conceived as functional to an employed or self-employed working activity; in fact, the Treaty identified nationals of a Member States who moved to another Member State, for being employed or self-employed, as the sole beneficiaries of the right to free movement, due to the fact they were exercising their right of establishment or freedom to provide services.

In order to grant the effectiveness of the freedom of movement for workers, it became apparent to deal with other fields that are not strictly linked to economic matters, as for instance family law. [13]

Hence the legislation on the free movement of workers in the Economic Community can be considered as the forerunner of the actual protection of family members.

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[10] UNHCR, Note on the integration of refugees in the European Union (UNHCR, 2007).

[11] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi*.", Bari, Cacucci, 2012, p. 45.

[12] Case C-49/89 Corsica Ferries France v Direction Générale des douanes françaises, par. 8

[13] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi*", Bari, 2012, p. 47

This is due to the fact that the right to work and to establish in another Member States is strictly linked to that of engaging in one's own displacement relatives; that is the reason for the introduction of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 - which has been adopted to enable the objectives laid down in Articles 48 and 49 of the Treaty of Rome- on freedom of movement for workers within the Community, which provided to govern rights addressed to worker's relatives.

In this Regulation, it is noteworthy to mention Article 10, which grants the right for the spouse and its descendants under the age of 21 to establish with a EU worker on the territory of another Member State [14].

Moreover, in paragraph 2, Member States are bound to facilitate the admission of the other categories of relatives that are not included in par.1, if they are dependant or live under his roof in the country whence he comes.

Thus relatives of a EU worker can enjoy the same rights deriving from those belonging to the latter, as an expression of freedom of movement. [15]

Concerning the notion of "spouse", the Court has affirmed that it can only include a marital relationship [16].

Unfortunately, only in few cases families can travel together to ask for asylum, as the conflicts tend to split the families. The urgency of family reunification resides in the fact that migrants leave relatives that are in danger, that is the reason why there is the need to speed up family reunification [17].

The recognition and the treatment of the right to family reunification gather together legal guarantees concerning the protection of the family, in a certain legal system; but a different mechanism operates in the adoption of dispositions on family reunification in derived law. In fact, in the EU order, the creation of such a right mirrors the necessity of favoring –at the beginning- the integration of EU workers and later of all the EU

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[14] Article 10 Reg 1612/68 "*1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse*."

[15] From an International perspective, art 34 of the Geneva Convention on Refugees obliges Member States to facilitate refugees' integration and this has been reiterated by the United Nations High Commissioner for the refugees, who affirmed that the possibility of being rejoined to their family members is an essential priority for the refugees, when they reach a new country.

[16] Case C-59/85 State of The Netherlands v Ann Florence Reed par 15.

[17] "*Disrupted flight, the realities of separated refugee families in the EU*" (ECRE, 2014) ; ECRE, Information note on family reunification for beneficiaries of international protection in Europe (ECRE, 2016)

citizens, with the aim of realizing objectives related to the functioning of the internal market [18].

The protection given to EU citizen's relatives seems not to be a corollary of family law, as this competence does not belong to the EU order as this latter only offers an incidental protection of the family and family relationships.

The possibility of thinking about a right to family reunification finds its framework in the expansion of the European competences, which lead the EU to encroach policy sectors that originally were not belonging to EU.

For this purpose, it should be noted that at the beginning the European Community was much more oriented to economic matters, rather than social issues: that is the reason why, initially, EU did not have any competence in this field.

But this matter has brought Member States to be too much sovereign on these issues, so they offer resistance when it was asked to limit their powers in such a delicate field, in which loads of differences can be found in all the Member States legislations.

In fact, even the notion of "family" can assume different meanings depending on the Member State, as it is influenced by the progressive transformations that led to the distortion of the concept of "core family"[19].

Looking at the current versions of the Treaties, the topics pertaining family law are not covered by EU competences, neither expressly nor in a derived way. In addition Member States, while there were amendments to Lisbon Treaty, clearly expressed their will of making it difficult for the EU of dealing with family law.

Actually, in the TFEU it can be found the possibility of adopting binding acts in "judicial cooperation in civil matters"; this limits the EU action in the realization of the principle of mutual recognition of judiciary and extra judiciary decisions and, for this purpose, may include the adoption of measures aiming at promoting the compatibility of applicable rules to conflicts of law in the Member States.

So, at least in theory, this field still belongs to the Member States as it is part of their national identity that the EU shall respect [20].

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[18] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 3

[19] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 4

[20] Art 4.2 TEU "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of*

National identity which is founded on the capability for Member States to impress their own politics, especially in delicate matters such as family law, as it is strictly linked to values belonging to each Member State.

But recently, the doctrine has recognized that the EU has realized an enlargement of its competence on family law based on 3 factors: a) the realization of the free circulation of people as a fundamental freedom of the EU; b) the growth in protecting fundamental rights; c) the harmonization in international private law and procedural law. [21]

Especially, taking into account family reunification, the first two mechanisms have been used. In fact, the dispositions concerning family reunification have been introduced when the Community was still oriented in a economic way, with the ratification of Regulation n. 1612/68 as an instrument of integration of working citizens after their movement to another Member State. [22]

Then, with the introduction of Directive 2004/38 applicable to all EU citizens, the recognition of the rights protected by the directive were only attributed to dynamic citizens and the ECJ has played an important role in its interpretation. In fact the ECJ has started a process of "double erosion" of national competences, in the field of family law and immigration, here the EU is capable of limiting national competences on entry and residence of third country nationals which possess the qualification of "relatives of EU citizens".

Basically, in addition to the aforementioned norms contained in the Treaties, we should distinguish different sources that are now in force on family reunification [23]: provisions contained in Secondary law [24], that can also apply to family members who hold the nationality of a third country; these rules have been recently replaced by Directive 2004/38 EC which has granted more extensive rights, such as a permanent residence right after 5 years of lawful residence for family members, irrespective of their nationality. Moreover, it is also relevant Directive on the right to Family Reunification

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regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State"

[21] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi*.", Bari, 2012, p. 6

[22] Ibid.

[23] Groenendijk K., "*Family Reunification as a Right under Community Law*" in "*European Journal of Migration and Law*", vol. 8, 2006, p. 215.

[24] Such as Regulation 1612/68 on freedom of movement for workers within the Community, which is no longer in force.

2003/86 which has been adopted after a three years negotiation. Member States had two years in order to implement the principles enshrined in this directive into their legislation; after this period individuals can rely on the directly applicable provisions of the Directive before the administrative bodies and the courts in 22 Member States.

This Directive does not apply in Denmark, Ireland or the UK.

Another important role has been played by the case-law of the European Court of Justice, which interpreted and expanded the freedom of movement of workers over the last fifteen years. An example can be found in *Torun judgment* [25], in which the Court ruled for the admission of family members of Turkish workers who, after three years or after having completed their secondary education in the host country, have a permanent residence right that is capable of being lost on two grounds: very limited public order grounds or for having left the country for a long time without legitimate reason. This applies not only to admitted family members but also to children born in the host country. Furthermore, it was provided the right to equal treatment in labor relations, access to education, scholarship and to the protection of a standstill, and it was prohibited the introduction of new restrictions regarding access to employment and residence rights. So with this clause it has been provided a strong protection from new restrictive immigration policies. [26]

These sources are complementary, so they let to third country nationals the choice of deciding on which they want to rely.

The issue is that these three sets of rules do not yet cover all cases of family reunification. One category of family reunification is not covered, which is the "family reunification of Union citizens who have *not* used their freedom of movement". So this means that Member States are still free to make their own rules with regard to the family reunification of this group.

To sum up, the addressees of this Directive can be identified in: [27] a) Spouse's sponsor; b) Minor children of the sponsor and of his/her spouse, including those who have been adopted (in order to comply with international legislation); c) Minor children, including

[25] Case C-502/04 Ergün Torun v Stadt Augsburg.

[26] Groenendijk K., "*Family Reunification as a Right under Community Law*" in "*European Journal of Migration and Law*", vol. 8, 2006, p. 216.

[27] Surace A., " Il *ruolo della Corte di Giustizia nella tutela della vita familiare*" in " *ADIR- L'altro diritto*", cap. 4, 2006.

those who have been adopted, of the sponsor if he's the only to be in charge of their custody; d) Minor children, including those who have been adopted, of the spouse.

It follows that, as it is stated by the Directive, the entry and residence of other relatives such as direct in ascending line, adult unmarried children or the partner of the sponsor who is in a stable and long-lasting relation, depend from the discretion left to the Member States. [28]

3. A comparison between Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights

Before being codified, the right to private and family life had been recognized as a general principle of EU law in the Case "*Commission v Germany*" [29].

In EU law, the means that have been used in order to protect the family can be found, first of all, in Article 7 of Nice Charter which states that "*everyone has the right to respect for his or her private and family life, home and communications*".

This provision is the equivalent that can be found in Article 8 of the European Convention on Human Rights (ECHR) , that primarily focuses on individual autonomy; the word "communication" has replaced the previous one "correspondence", in order to take into account the contemporary technological development.

In fact in the preliminary works it has been chosen to dedicate Article 7 to the right to respect for private and family life for being aligned to Article 8 ECHR; at the beginning this provision was thought to have a different content from Article 8, but in the end it was elected to ensure a consistent interpretation between the two norms, in order to equally bind every Member State of the EU[30], even if the European Court of Justice has reminded that the ECHR "*does not constitute, as long as the European Union has not*

[28] Surace A., " *Il ruolo della Corte di Giustizia nella tutela della vita familiare*" in " *ADIR- L'altro diritto*", cap. 4, 2006.

[29] Judgment of the Court of 18 May 1989. Case 249/86. Commission of the European Communities v Federal Republic of Germany.

[30] Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p. 163.

acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law. [31]"

Article 7 has been inserted since one of the first versions of the Charter even though, during the drafting, its content was split into two different provisions[32]; the former stated that "*everyone has the right to respect for his privacy, his honor, his home and the confidentiality of his communications*", while the latter concerned the right to respect for family life, the right to marry and the protection of the family.

This choice has not been confirmed in the current version of the Charter, due to the fact that the substance of the article regarding the right to marry and to found a family has been spread into different dispositions.

Taking into consideration the roots of the Charter, it should be noticed that some National Constitutions have contributed to guide its editors.

In fact, Article 22 of the Belgian Constitution, Article 26 of the Portuguese Constitution and Article 18 of the Spanish Constitution all have an impact on the norms concerning the right to respect for private and family life [33].

The notion of "private life" has been conceived in a very extensive way from the European Court of Human Rights; by refusing to give it an exhaustive meaning, the Court has considered that it should cover the physical, psychological and moral integrity of human being, its physical and social identity, but also the right of a personal development and the right of establishing and maintaining relations with other people and the rest of the world [34].

In its case law, the ECJ has provided to be in line with Strasbourg Court's rulings, in fact it has recognized that the right of respecting private life touches natural persons as well as legal persons [35] and that it overcomes the purely personal sphere for reaching professional and commercial one. The ECJ has also acknowledged that the protection of

[31] Case C-617/10 Åklagaren v Hans Åkerberg Fransson, par 44.
[32]Martinico G., "*Art. 7 Rispetto della vita privata e della vita familiare"* in "*Carta dei Diritti fondamentali dell'Unione Europea*", Milano, 2017, p. 117.
[33] Ibid.
[34] Application no. *38816/07,* Dadouch v. Malta
[35] Case C-450/06 Varec SA v État belge, par 48.

private life should grant the right not to reveal one's state of health [36], the nature of one's relations and one's work.

Another field of application of Article 7 regards the right to one's reputation, but by remarking that the right to private life cannot be invoked from individuals "*in order to complain of a loss of reputation which is the foreseeable consequence of his own actions, such as the commission of a criminal offence"* as *"the right to protection of private life guaranteed by Article 8 of the ECHR cannot prevent the disclosure of information which, like that whose publication is envisaged in the present case, concerns an undertaking's participation in an infringement of EU law relating to cartels, established in a Commission decision adopted on the basis of Article 23 of Regulation No 1/2003 and intended to be published in accordance with Article 30 of that Regulation.* [37]

Also the name and the surname of an individual, due to the fact that they contribute to constitute his identity and private life, are equally protected by Article 7 of the Charter.

In fact EU law objects to national measures that, without a reasonable justification, impede to a EU citizen the possibility of: a) making recognize in a Member State a surname recognized by another Member State b) the use of noble title [38] c) the recognition and transcription of one's surname in an alphabet different from the one in the host Member State, as all this situations may cause some serious inconveniences to private and professional spheres.

Furthermore, Article 7 of the Charter covers the right of respecting sexual orientation, that the European Court of Human rights has provided to include in the field of article 8 ECHR. [39]

At the beginning, the ECJ was accused of having a case law not in favor of same-sex couples, due to the fact that in Case *D. v. Council* the ECJ has refused to let a homosexual couple enjoy the fund for married couples, so later it had to change its view.

In fact, with Regulation 723/2004 this fund has been extended to all the non-married - but in a stable relationship- workers, by also comprehending same sex couples.

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[36] Case C-404/92 X v Commission of the European Communities, par 23.

[37] Case T-341/12 Evonik Degussa GmbH v Commission par 125-126

[38] Case C-208/09 Ilonka Sayn-Wittgenstein v the Court

[39] Bartole S., De Sena P., e al., "*Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*", Padova, 2012, p. 8.

Concerning another field of application, the ECJ has considered that Member States shall have regard to Article 7 of the Charter, in choosing the means for verifying the allegations for asylum of a suppose homosexual, as it was stated in *A., B., C v. Staatssecretaris van Veiligheid en Justitie*[40], "*it is for the competent authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter"* [41]and in paragraph 65 *"In relation, in the third place, to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter."*

Article 7 grants the right to the respect for the home; over the years the ECJ has comply with the European Court of Human Rights' case law and has extended the notion also to the workplaces of natural and legal persons [42].

After the substitution of the term "communication" with "correspondence", for complying with Article 8 ECHR and for being aligned with technological progress, the ECJ has stated that all the interceptions, [43]recording and seizure of communication of a natural or legal person constitutes an interference in the private life as granted by Article7.

Therefore this protection covers both private communications than professional or commercial ones [44], while Article 8 of the ECHR extends its scope to the protection of personal data.

Article 7 of the Charter is strongly linked to Article 9 on the right of marriage and to create a family and to Article 33 on the right to family and professional life.

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[40] Joined Cases (C-148/13), (C-149/13), (C-150/13) A., B., C v Staatssecretaris van Veiligheid en Justitie,
[41] Joined Cases C-148/13 to C-150/13 par. 54
[42] Case C-94/00, Roquette Frères SA, par 29.
[43]Martinico G., "*Art. 7 Rispetto della vita privata e della vita familiare"* in "*Carta dei Diritti fondamentali dell'Unione Europea*", Milano, 2017, p 120.
[44] Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p.171.

Moreover, the case law has pointed out the connection of Article 7 to Article 24 of the Charter, which is on the right of the child.[45]

Even though the European Union does not have the competence of ruling over family rights, in the end it has led to grant the right to family life for ensuring the effectiveness of the right to free circulation and of residence recognized to individuals.

In particular, this Article takes into consideration migration and determines rights and duties for the Member State in dealing with this sensitive issue. The fact of denying the entry of a person in its territory or that of expelling someone, are likely to undermine right to family life of the individual concerned.

Thus a Member State can authorize the entry of a person in its territory in order to let him enjoy the right to family reunification. [46]

The extension of the group of people concerned as well as the ways and the conditions of this reunification are determined case by case by the norms on family reunification; Directive 2004/38, which is applicable to EU citizens who reside in another Member State, obliges Member States to grant similar rights to their spouse, their registered partners, direct and dependent descendants of less than 21 years and to direct ascendants.

Subsequently in *Metock* judgment [47] the Court, in referring to the right of family life, has rejected a restrictive concept of "spouse" in family reunification matters and stated that national legislation can't reserve this right only to spouses who had lived in another Member State.

Directive 2003/86 has provided to regulate the modalities of the right to family reunification of third country nationals, legally residing on the territory of a Member State. This directive includes a "subjective right" and makes compulsory for Member States to authorize family reunification of some of the family members of the regrouped family, without any margin of appreciation.

Moreover, the ECJ has stressed the fact of imposing an individual exam to every pending request, by taking into account in a reasonable and balanced way the concrete circumstances and interests involved, as the Court Stated in *Chakroun* judgment "*Since*

[45] Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p. 172

[46] Bartole S., De Sena P., e al., "*Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*", Padova, 2012.

[47] Case C-127/08 Metock and Others v. Minister for Justice, Equality and Law Reform.

the extent of needs can vary greatly depending on the individuals, that authorization must, moreover, be interpreted as meaning that the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant. That interpretation is supported by Article 17 of the Directive, which requires individual examination of applications for family reunification[48].

Article 7 of the Charter obliges the Member States to examine applications for reunification with a view to promoting family life [49]; if a Member State decides to exclude someone from its territory -where his close relatives live- it can constitute an infringement of the right to respect for family life which is enshrined in Article 8 ECHR[50].

The decision of expelling an individual, according to what is stated in Article 28.1 of Directive 2004/38, for reasons linked to public order and public policy entails a case by case exam, for proving the gravity of his menace as well as the necessity and proportionality of the removal measure, by always taking into consideration the impact this latter could have on its private life and on his relatives [51].

Those measures may also affect third country nationals, but in such cases the right to respect for family life stated in Article 7 of the Charter can, in the framework provided by the EU norms relating to these situations, contribute to a recognition of a derived right of residence.

This matter can be dealt through the right to family reunification contained in Directive 2003/86, so in the light of a derived right open to third country national pending application. [52]

The ECJ recent case law has discussed over the eventual obligation belonging to Member States of granting this right to stay to third country nationals -that cannot

[48] Case C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken, par 68
[49] Case C-558/14 Mimoun Khachab v Subdelegación del Gobierno en Álava par 28
[50] Joined Cases C-482/01 and C-493/01 par 98
[51] Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p. 176.
[52] Martinico G., "*Art. 7 Rispetto della vita privata e della vita familiare"* in "*Carta dei Diritti fondamentali dell'Unione Europea*", Milano, 2017, p.123

benefit from an autonomous right to reside- in order to ensure the effectiveness of these rights also to them. [53]

This right should be granted under certain circumstances, even though the Court aims to verify in a strict manner if and whenever such measure which provides for the expulsion of a person is necessary for ensuring the effectiveness of the right to stay for a EU citizen.

In other words, the family proximity of a third country national with an EU citizen has to be evaluated for verifying if it really is an exceptional measure to an individual that, otherwise, could have not enjoyed the right of autonomous staying in the Member State concerned [54].

In certain situations, the effectiveness of the freedom of movement which is enjoyed by EU citizens imposes the recognition of a derived right to stay to his family members, which are third country nationals. In fact, those aspect has been highlighted by the ECJ in *Carpenter* judgment[55], in which the Court has considered that the expulsion from United Kingdom of a Philippine married to an English Citizen, residing in UK, constitutes a harm to their family life and that it could have been considered as an unjustified obstacle to the freedom to provide services.

The respect for family life assumes the protection of the family in its unity, so what is protected is the actual living together of spouses and parents with their children.

The European Court has clarified that, in order to determine whether a situation constitutes "family life", a number of factors may be relevant, like for instance "*whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means*."[56]

Even if Member States may impose some conditions before allowing family reunification, like requiring the sponsor to have adequate accommodation, sufficient resources and health insurance, domestic measures that hinder to the mutual enjoyment of family life constitutes an interference with Article 8 of the ECHR.

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[53] ECRE, "*Disrupted flight, the realities of separated refugee families in the EU*",2014

[54], Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p 177.

[55] Case C 600/00 Mary Carpenter v Secretary of State for the Home Department.

[56] European Court of Human Rights, X, Y and Z v. United Kingdom Appl. No. 21830/93, par. 36.

Notwithstanding, the European Curt has accepted in several cases that the removal of a child from his/her family environment is proportionate to the aim of protecting the child in a situation of risk.

The derogations that are allowed in those circumstances concern public policy, public security and public health. [57]At all times the State must strike a fair balance between the competing interests of the individual and the community as a whole. The case *Biao v. Denmark* illustrates that national discretion in first admission rules is limited by the prohibition of discrimination. [58]

It is remarkable that the judgments of the ECJ has led to apply Article 7 in conjunction with Article 24 on the best interest of the child, as it has been stated by the Court in *McB Case* [59]; the ECJ also underlined the need for the Member States to strike a balance between the interests of the children concerned and the promotion of family life with the margin of appreciation enjoyed by national authorities.

Recently, the ECJ has recalled Article 7 of the CFREU in order to stress the necessity of taking into account the respect for fundamental rights and proportionality principle - as well as the best interest of the child- in deciding for expulsion of one's parent, by making possible for the Member States to derogate from those principle, relying on the safeguard of the public policy and public security [60].

What is stated in Article 7 of the Charter of Fundamental Rights can be compared to Article 8 of the European Convention on Human Rights. Looking at the rights contained in the ECHR, there are two provisions relating to the protection of the family: Article 8 and Article 12. This latter one prescribes that "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*" while Article 8 is more specific on the right to family reunification and concerns the respect for family life in addition to private life, residence and correspondence.

The Court has never given a clear meaning of those notions, but it has clarified it in its case law [61]and it has provided to enlarge this concept by starting to include different situations from non-married couples to same-sex couples –which fell under the notion

[57] Synthesis Report – Family Reunification of TCNs in the EU plus Norway: National Practices
[58] European Court of Human Rights, *Application no. 38590/10*, Biao v. Denmark
[59] Case C-400/10 J. McB. v L. E.. par. 60
[60] Case C-165/14 Alfredo Rendón Marín v Administración del Estado par. 66 and 81
[61] Palladino R., "*Il ricongiungimento familiare nell'ordinamento europeo*", Bari, 2012.

of “private life”- and by starting to relying on different criteria such as the length of their relationship and sons presence[62].

The Court has defined the scope of Article 8 broadly, even when a specific right is not set out in the Article . Furthermore, the ECJ has provided to interpret and to widen the meaning of “family life” in order to keep pace to the social changes linked to the natural evolution of society habits. The primary aim of Article 8 is to safeguard against arbitrary interferences with private and family life, home, and correspondence by a public authority [63].

Even though the object of Article 8 is actually that of protecting the individual against interference by the public authorities, States are not bound to refrain from such interference: in addition to this primarily negative endeavor, there could also be positive obligations inherent for an effective respect for private life.

These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The principles applicable to assessing a State’s positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance. [64]

Where the case concerns a negative obligation, the Court must assess whether the interference was consistent with the requirements of Article 8 paragraph 2, namely in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society.

In a very large number of cases, when the Immigration and Naturalisation Service refuses a request for stay or terminates the stay based on a residence permit, it has to assess whether this decision contravene to Article 8 ECHR; so it can grant a residence permit based on Article 8, if it finds that the decision would breach Article 8. [65]

Relevant case law has been produced by the CJEU, the ECtHR and domestic courts on the interpretation and application of the provisions of Family Reunification Directive.

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[62] Application no. 21830/93 Case of X,Y and Z v. United Kingdom.

[63] European Court of Human Rights, “*Guide on Article 8 of the European Convention on Human Rights*”, 2019.

[64] Ibid.

[65] Vargas Gómez-Urrutia M., “*De Estrasburgo a Luxemburgo: lugares comunes,encuentros y desencuentros en el derecho a la reagrupaciónfamiliar*”, in “*Migraciones y desarrollo*”, 2006, pp. 585.

A crucial judgment has been *European Parliament v Council of the European Union*[66], which requested the annulment of some optional provisions of the Directive, but the Court ruled that Member States have to apply those optional clauses in accordance with Union Law. Moreover, the Court pointed out that the Directive has established a subjective right to family reunification and imposed positive obligations on Member States to promote family reunification.

In addition, the Court has underlined that Member States are not allowed to make a distinction between family reunification and family formation, with the exception of more favorable rules for family reunification provided by the Directive.

Given the very wide range of issues that private life encompasses, cases that may fall under this notion have been grouped into three broad groups to provide some means of categorisation, namely: (i) a person's physical, psychological or moral integrity, (ii) his privacy and (iii) his identity and autonomy [67].

For what concerns the first category, the Court has stated that Article 8 imposes on States a positive obligation to grant their citizens the effective right to respect for their physical and psychological integrity and that this obligation could involve the adoption of definite measures, including the provision of an effective and accessible means of protecting the right to respect for private life; this statement can be found in judgment *Airey v. Ireland*[68], in which the Court assessed that "*Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto*" [69].

It is important to underline that Article 8 does not grant the right to entry and reside in a Country different from the one in which one's holding citizenship, but the measures relating to the entry, the stay or expulsions of foreigners can affect the rights protected in it[70].

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[66] Case C-540/03 European Parliament v Council of the European Union, this judgment will be analyzed in depth in the following chapter

[67] European Court of Human Rights, "*Guide on Article 8 of the European Convention on Human Rights*", 2019.

[68] *Application no. 6289/73* Airey v. Ireland

[69] Other examples can be found in Application no. 32555/96, Roche v. United Kingdom, par.162 or case McGinley and Egan v. United Kingdom, par 101.

[70] Vargas Gómez-Urrutia M., "*De Estrasburgo a Luxemburgo: lugares comunes,encuentros y desencuentros en el derecho a la reagrupaciónfamiliar*", in "*Migraciones y desarrollo*", 2006, pp. 588, And "Bartole S., De Sena P., e al., "*Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*", Padova, 2012

This can principally happen in cases in which there is no recognition of a residence permit to a member of a family; consequently, on the one hand the respect of this right may determine the emergence of negative obligations, whenever it denies the possibility for Member States to expel an individual from its territory or, on the other hand, of positive obligations any time it asks to the State to let the individual to entry in its territory and to legally reside. Hence Article 8 imposes to find a fair balance between one's rights and the necessity of checking migration flux and the respect for public policy [71], by always respecting the national margin of appreciation, that has to be evaluated using the proportionality test. Moreover, even when the need for the protection of public policy has to be sacrificed for granting the rights contained in Article 8, by imposing the admission or the stay of a third country national on the territory of the Member State concerned, the Charter does not ensure the concession of a certain kind of residence permit (e.g. permanent, temporary, for family reunification reasons etc), as the only relevant aspect is that of the grant of the right to private and family life, without any constraint on the means used for obtaining that result [72].

4. The notion of European Citizenship and the rights that it encompasses

In order to analyze these provisions in the field of family reunification, it is necessary to define the concept of EU citizenship. It has been introduced with Maastricht Treaty and currently its meaning is clarified in Article 9 TEU and in Article 20 TFEU, which states that "*Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*"

While in par. 2 are listed rights and duties that Citizens of the Union shall have, such as "*the right to move and reside freely within the territory of the Member States" or "the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular*

[71] Application no. 46410/99 Üner v. The Netherlands, par.54.

[72] Martinico G., "Art. 7 Rispetto della vita privata e della vita familiare**"** in "*Carta dei Diritti fondamentali dell'Unione Europea*", Milano, 2017, p. 119

authorities of any Member State on the same conditions as the nationals of that State"[73].

But, in the field of family reunification, is Article 21 TFEU that -together with Directive 2004/38- is at the core of ECJ case law on this issue, as paragraph 1 of this provision states that "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect*".

EU citizenship is one of those legal statuses which– being a derivative supranational legal status produced by a Union that is founded on the principle of conferral [74] – is not yet considered as part of fundamental rights. [75]

The dependence of any EU citizenship rights claims on the division of competences between the EU and the Member States undeniably demonstrates the limits of EU citizenship. This because, usually, the division of competences between the EU and the Member States follows what is defined as a cross-border or internal market logic.

Starting from the fact that the Directive 2004/38 is only addressed to "dynamic citizens" (that, as aforementioned) is a quality belonging to those who have moved from a Member State to another) it has to be clarified how it is possible for "static citizens" (who are those that have never cross the borders of their own territory) to enjoy the same rights as the former. [76] First of all, the case law has assigned to European citizenship the qualification of "fundamental status" of Member States' citizens "*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*." [77]

Such a configuration has started to extend the rights recognized by the EU regardless of the necessity of qualifying European citizens as workers or provider of services.

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[73] Article 20 TFEU

[74] The principle of conferral is a fundamental principle of European Union law. According to this principle, the EU is a union of member states, and all its competences are voluntarily conferred on it by its Member States.

[75] Kochenov D., "*EU Citizenship: Some systemic constitutional implications*" in "*European Papers*", vol. 3, 2018, p 1063

[76] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi*.", Bari, 2012, p. 97.

[77] Case C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, par. 31

On the assumption that European citizenship does not have the scope of enlarging Treaties' competence *ratione materiae* even to national situations that are not linked to Community law [78], issues that don't possess this cross-border element remain in the competence of Member States and are not susceptible of application by Community law.

This means that, among the rights that are accorded to European citizens, this of the free circulation is to be considered as a distinguishing feature and as a precondition for the pursuit of other linked rights, as it has the capability of conferring to Member States' citizens rights in other Member States of the Union [79].

4.1 The Concept of "reverse discrimination"

Legal scholars have long been aware of the problem of *"reverse discrimination*" in family reunification matters, in which there is a discrepancy between national and EU legislation and this splitting up of competences leads to a situation where citizens living in their own country (who are subject to national legislation) are disadvantaged with regard to family reunification, compared to mobile Europeans living in the same place (who are subject to EU free movement legislation) [80].

Scholars who have observed this phenomenon usually point out that reverse discrimination is problematic from the perspective of legal certainty and equal treatment and should be eliminated.

The fact is that EU law, however, does not provide for any direct means of doing so, because it goes beyond its competence, and that judicial intervention cannot fully resolve reverse discrimination.

The necessity of the existence of a cross-border element that can create a liaison with EU law represents the basis for the "*reverse discrimination*". With this term it is meant the inequalities of treatment that may occur among citizens of a Member State - that remain in their territory- and those who move from a Member State to another.

[78] Case C-192/05 K. Tas-Hagen and R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad.
[79] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 101.
[80] Staver A., "*Free Movement and the Fragmentation of Family Reunification Rights"* in "*European Journal of Migration and Law*", vol. 15, 2013, p. 70.

Disparities which are caused by the non application to the former of the free circulation rules, on account of the applicability of domestic rules, that in practical terms are more restrictive than those provided by the Treaties. [81]

These different rules create a reality where Union citizens that are unable to prove a link with EU law may sometimes be subjected to stricter rules on family reunification in comparison to third country nationals that are lawfully residing in the territory of the Union. This is difficult to accept in light of principles such as legal certainty, equality and the protection of fundamental rights, as abovementioned. [82]

As a consequence, the only suitable remedies for tackling these discriminations can be found in the legislative instruments drawn up by national legal systems.

Static EU citizens sometimes not only face stricter family reunification conditions than migrants and nationals of other Member States; they may also be in a less advantageous position in comparison to third country nationals residing lawfully in the territory of a Member State.

In fact, this category can benefit from the conditions laid down in Directive 2003/86 on the right to family reunification within the Union or from other provisions included in international agreements. This Directive applies to third-country nationals holding a residence permit for at least one year likelihood of obtaining permanent residence and it explicitly excludes family members of Union citizens from its scope of application.

It lays down detailed requirements for the exercise of the right to family reunification such as evidence of normal accommodation, sickness insurance and sufficient resources to maintain the family. [83]

Conditions for reunification vary by country and may include income, housing and age requirements.

[81] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi.*", Bari, 2012, p. 103.
[82] Van Elsuwege P., Kochenov D., "*On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*" in "*European Journal of Migration and Law*", vol. 13, 2011, pp. 450
[83] Article 7 (1) of Directive 2003/86

4.2 Effectiveness and limits of granted rights

As we have seen, there are various situations that may involve the application of Article 7 of the Charter of Fundamental Rights, as the expressions of private and family life seem to have a wide field of application. In fact, this provision may entail a vast variety of matters in which intimate relationship as well as physical and mental integrity are taken into consideration.

Considering Article 7 of the European Charter together with Article 8 ECHR, it may seem that the limitations to these rights are the same. But, if we look at Article 7, the Charter is confined to situations that can fill into the field of EU rights; in fact the ECJ has stated that whenever Article 7 is not susceptible of application, Article 8 ECHR should be invoked or other international Conventions which bind Member States. [84]

The interpretation given to Article 7 seems to demonstrate the fact of being invoked for challenging the validity of derived norms. In these cases, the ECJ proves to examine the compatibility with private life on the basis of the Charter, which is founded on Article 52.1 "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"* rather than on Article 8.2 ECHR which states "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*" [85]

In practical terms, this issue seems to be only theoretical as it is apparent that the ECJ combines its case law with the one belonging to the ECtHR and clearly takes inspiration from it, in particular in examining the necessity and proportionality of the fundamental rights' infringements.

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[84] Vargas Gómez-Urrutia M., "*De Estrasburgo a Luxemburgo: lugares comunes,encuentros y desencuentros en el derecho a la reagrupaciónfamiliar*", in "*Migraciones y desarrollo*", 2006, pp. 590.

[85]Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p. 181.

The effectiveness of the rights enshrined in Article 7 comes into play for the reason that they prevail as interpretation parameters of derived rights norms, which must be read and applied in their light. [86]

This principle is much more evident in the derived rights norms which govern a theme related to these concerned rights. For instance the right to respect for family life imposes a derived right interpretation in order to grant the effectiveness of the right to family reunification [87].

Hence Member States shall respect fundamental rights as granted by EU rights in the cases in which they decide to ground their decision on derived rights norms, rather than applying national legislation after having transposed secondary law. [88]

Fundamental rights as granted by Article 7 of The Charter are equally taken into consideration by the ECJ in different ways, in the application framework of primary norms and on the evaluation of the compatibility of national legislation with EU legislation.

Fundamental Rights protection constitutes an object of general interest which is susceptible of justifying a breach to freedom of movement or to Article 21 TFEU [89].

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86 Case C 131/12 par 68. "*The Court has already held that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter*"

87 Case C 578/08 par 44 "[..]*that measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. The Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter. It follows that the provisions of the Directive, particularly Article 7(1)(c) thereof, must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. It should be added that, under the first subparagraph of Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter, as adapted at Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1), which has the same legal value as the Treaties*."

88 Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p. 182.

89 Art 21 TFEU *1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

From another perspective, the case law has proved that a national measure which could jeopardize the right to respect for family life and for private life may be considered, in reason of their dissuasive effect, as an obstacle to the right to freely move.

5. The role of the European Court of Justice and European Court of Human Rights in the protection of the family

The relation between the CJEU and the ECtHR has evolved over time, going through phases of separation, confrontation, and comity.

The adoption by the European Union of a Charter of Fundamental rights is thought to have strengthen the fields covered by Luxembourg Court to solve issues related to human rights.

On this topic, there are different views which counter pose those in favor of monism (according to which there should be only one organ that deals with human rights) and those who opt for the dualism.

The supporters of a pluralist view believe that the coexistence of these two judicial bodies, which are both competent on human rights issues, will have the aim of increasing efficiency on the protection of these rights. [90]

Traditionally, the European Court of Human Rights is competent from its origins to rule on Human Rights, while the European Court of Justice has been brought, through case law, to deal more and more frequently with fundamental rights.

According to some scholars, this shared competence for ensuring Human Rights in Europe is complex and self-defeating; in fact, in Europe, some of them propose for a simplification and unique competence on fundamental rights and are in favor of centralizing it to the ECJ (monistic approach)

On the other hand, part of the doctrine proposes the coexistence of these two Courts for ensuring a better effectiveness on the fundamental Rights protection (dualistic approach).[91]

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[90] Carlier J.Y., "*La Garantie Des Droits Fondamentaux en Europe: pour le respect des compétences concurrentes de Luxembourg et de Strasbourg*" in "*Revue québécoise de droit International*", vol. 13, 2000, p. 37.

[91] Toth A.G., "*The European Union and Human Rights: The Way Forward*" in " Common Market Law Review", Issue 3, *1997*, pp. 491–529

The evolution of Luxembourg and Strasbourg Courts case law has been affected both by an internal dynamic and by external issues.

Considering Luxembourg Court, at the beginning -for what concerns freedom of movement- there was the necessity of ensuring free circulation of self-employed and employed workers as well as service suppliers. The ECJ case law has led to an enlargement of the freedom of movement: *ratione materiae* and *ratione personae*. So the object that shall be protected is the equality in free circulation itself. [92]

What has to be condemned are not only obstacles to free movement based on the nationality, but also indirect discriminations founded, for instance, on the residence or all the indistinctly applicable measures addressed to everyone with the aim of safeguarding the general interest. In this latter case, a clear example can be found in *Bosman* Judgment [93]; Bosman was a Belgian football player who was denied the possibility of playing for a French Club because, in order to comply with internal football association rules, the fee for his transfer had to be paid by the transferor club. As he was a professional football player, Bosman was equated with workers, so he had not been discriminated on the basis of his nationality, due to the fact that this measure was applicable to all football players.

In delivering its judgment, the ECJ provided for the abolition of such fees because "*the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State" [94]* and that "*Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned*".

The second enlargement concerns individuals; freedom of movement has been extended to different categories like students and family members of workers even if they did not have the nationality of a Member State.

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[92] Carlier J.Y., "*La Garantie Des Droits Fondamentaux en Europe: pour le respect des compétences concurrentes de Luxembourg et de Strasbourg*" in "*Revue québécoise de droit International*", vol. 13, 2000, p. 43.

[93] Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman

[94] Ibid.

Subsequently, with the ratification of Paris Treaty in 1951, the fundamental rights of the people are part- from 1970s- of the general principles of EU law and are safeguarded by the ECJ [95]. But the most important change has been brought by the European Convention of Human Rights, that has played a significant role by being directly recognized by Luxembourg Court. The first specific reference by Luxembourg Court to the Convention should be found in *Nold* Judgment, in which the ECJ ruled that in searching for the common constitutional standards, it would look to the Treaties and Conventions and, in particular, to the ECHR [96].

Afterwards, the Court defined the ECHR as "guidelines which should be followed within the framework of Community law". [97] This has led to the shared competence of Luxembourg and Strasbourg Court on issues like security and justice, that unavoidably had a repercussion on immigration and asylum affairs. [98]

So, since the ECJ first relied on the Strasbourg Regime, such reliance has conquered more importance than its reliance on the case law of any other national or international legal regime or tribunal, including that of the International Court of Justice and the WTO Appellate Body.

The same reasoning may be applied for Strasbourg Court but, differently from the ECJ, the former has been based on the application of the European Convention on Human Rights.

In this case, the internal dynamic has led to consider the Convention as a "living law" and as a " *constitutional instrument of European public order"*[99].

The ECHR represents a rights protection standard agreed upon by all European Union Member States and, even though it has not been signed by the EU, the Convention

[95] Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

[96] Harpaz G., *"The European Court of Justice and its relations with the European Court of Human Rights: the quest for enhanced reliance, coherence and legitimacy"*, in "*Common Market Law Review*", n.46, 2009, p. 108. And Fabbrini F., Larik J., *"The Past, Present and Future of the relation between the European Court of Justice and the European Court of Human Rights"* in "*Yearbook of European Law*", vol. 35, 2016, p.149.

[97] Case C-36/75, *Roland Rutili* v. *Minister for the Interior.*

[98] Carlier J.Y., "La Garantie Des Droits Fondamentaux en Europe: pour le respect des compétences concurrentes de Luxembourg et de Strasbourg" in "Revue québécoise de droit International", vol. 13, 2000, p. 48

[99] Application no. 15318/89 Loizidou v Turkey par.75

provides a natural starting point for discussing Community-wide human rights protection. [100]

Therefore, the reliance on the Strasbourg Regime is also characterized by a deferential approach, with which the ECJ follows, in most relevant cases, the judgments of the Strasbourg Court.[101]

5.1 The arise of conflicts between the two Courts

In the 1990s, some discrepancies between the fundamental rights case law of the two Courts appeared even if, later, the ECJ went so far as to amend its own case law in response to judgments adopted by its counterpart. [102]

Correspondingly, the ECtHR has relied upon ECJ case law to adapt its interpretation of the ECHR.

One example of the divergent interpretations problem erupted in a pair of cases brought before the ECJ and the ECHR, that resulted in opposing interpretations of ECHR Article 8 [103].

In 1989, the ECJ ruled in *Hoechst AG v. Commission* that ECHR Article 8 did not apply to companies. Three years later, in *Niemietz v. Germany*[104], the European Court of Human Rights held that Article 8 might apply to certain business premises or activities.

These divergences on Article 8 interpretations merited particular concern because the EC Commission already enjoyed wide powers in competition law.

In its judgments, even though the ECtHR demonstrates deference to the CJEU, the former does not mention very often Luxembourg Court, although this has changed in the post-Charter years.

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[100] Wetzel J., "*Improving Fundamental Rights Protection in the European Union: resolving the conflict and confusion between Luxembourg and Strasbourg Court*" in "*Fordham Law Review*", vol. 71, 2003, p. 2824.

[101] Harpaz G., "*The European Court of Justice and its relations with the European Court of Human Rights: the quest for enhanced reliance, coherence and legitimacy*", in "*Common Market Law Review*", n.46, 2009, p. 110.

[102] Krommendijk J., Glas L.*, "From Opinion 2/13 to Avotin¸s: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts*" in "*Human Rights Law Review*", 2017, pp. 569.

[103] Wetzel J., "*Improving Fundamental Rights Protection in the European Union: resolving the conflict and confusion between Luxembourg and Strasbourg Court*" in "*Fordham Law Review*", vol. 71, 2003, p. 2843.

[104] Application no. 13710/88 Niemietz v. Germany

Such a low number of references is not astonishing, because the ECJ could use Strasbourg case law as an inspirational source for its fundamental rights protection. It is only in 2000s that the ECtHR has started to give more importance to the ECJ and in fact its references to the latter seemed to be increasing.[105]

In addition to this judicial dialogue through jurisprudence, the two Courts also interact at bilateral meetings that are organized alternately in Luxembourg and Strasbourg once or twice a year, in which the judges discuss issues that are of concern to both Courts. Other interactions include invitations to give speeches, for example, on the occasion of the opening of the judicial year, conferences of joint interest, phone conversations and even private meetings. [106]

5.2 How to solve this conflict between the two Courts?

In order to preserve the rectitude of the two international judicial orders, Europe must solve the conflict and confusion resulting from the courts' superposition jurisdictions.

Above all, a solution would lead to better preserve rights protection for individuals within the European Union. Two remedies would completely eliminate overlapping jurisdiction: (1) reexamining EU accession to the ECHR, making the Strasbourg Court supreme in the fundamental rights' sphere and (2) creating a link between the two courts in order to eliminate divergent rulings. [107]

So, in practical terms, there is the necessity of amending both EU Treaties and ECHR, so that one Court is not dependant from the other.

These two solutions seem to be the only options that would eradicate the problem.

It was thought in 2013 that, finally, the EU and ECHR institutions had reached an agreement on the accession of the EU to the ECHR, which would have redefined the

[105] Ibid.

[106] Butler G., " *A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights*" in "*Utrecht Journal of International and European Law*", 2015.

[107] Wetzel J., "*Improving Fundamental Rights Protection in the European Union: resolving the conflict and confusion between Luxembourg and Strasbourg Court*" in "*Fordham Law Review*", vol. 71, 2003, pp. 2845.

relations between the two Courts, but in 2014 the ECJ found the draft accession agreement in Opinion 2/13 [108] to be incompatible with EU law [109].

In this judgment, the Commission asked the Court whether the Draft Agreement on Accession of the EU to the European Convention on Human Rights was compatible with Article 6.2 TEU, but the ECJ held that the EU could not accede to the Convention because "*even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law*" [110] and because it would have been allowed for a second dispute resolution mechanism among member states, against the Treaties. [111]

Failure by the EU to accede to the ECHR has left gaps in the Convention's protection, due to the fact that claims against Community organs cannot be brought before the European Court of Human Rights in Strasbourg. [112]

It could thus be interpreted as an illustration of the increasing Charter centrism and the tendency of the ECJ to autonomously interpret the Charter, without any reference to the ECHR and its case law.

After Opinion 2/13, the ECJ has therefore chosen to rely exclusively on the Charter in several judgments, even though there are some in which the case law of the ECtHR still plays an important role. [113]

Hence the ECHR only defines minimum standards, leaving national authorities free to set higher protection levels, while on the other hand Community law limits the ECJ's competence to national legislation in line with EU law.

Still, any ECJ failure to guarantee the minimum standards established by the ECHR would leave no remedy available to EU citizens.

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[108] The Commission asked the Full Court whether, in its view, the Draft Agreement on Accession of the EU to the European Convention on Human Rights was compatible with the Treaties.
The Court of Justice held that the EU could not accede to the ECHR under the Draft Agreement. It held the Agreement was incompatible with TEU article 6(2).

[109] Fabbrini F., Larik J., *"The Past, Present and Future of the relation between the European Court of Justice and the European Court of Human Rights"* in "*Yearbook of European Law*", vol. 35, 2016, p. 146.

[110] Opinion 2/13 par. 194

[111] Randazzo A.,"*Quali prospettive per la tutela dei diritti per effetto della prevista adesione dell'Unione Europea alla CEDU?*" in "*La tutela Dei Diritti Fondamentali tra CEDU e Costituzione"*, Milano, 2017, p.353

[112] Wetzel J., "*Improving Fundamental Rights Protection in the European Union: resolving the conflict and confusion between Luxembourg and Strasbourg Court*" in "*Fordham Law Review*", vol. 71, 2003, p. 2825.

[113] Krommendijk J., Glas L., "*From Opinion 2/13 to Avotin¸s: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts*" in "*Human Rights Law Review*", 2017, p. 574.

For concluding, actually children's rights have a central role in the assessments by both the CJEU and the ECtHR; in the EU Article 8 ECHR is relevant when the Family Reunification Directive cannot be applied, as it offers the strongest right in the EU. Article 8 ECHR has also been influential in the development of legislation and policy on family reunification.

On the other hand, Article 7 includes various situations that may involve its application and another interpretation given by the Court considers this provision to protect the right to a healthy environment, the right to health and the right for a minority of living according to its personal common standards. [114]

6. The protection of the family in the field of judicial cooperation in civil matters: the rise of a shared competence

After having illustrated the core provisions on the protection of the family, it is essential to understand the division of the competence between Member States and the EU and to point out the extent of EU competence on this matter.

Traditionally, family law has always belonged to Member States and the EU was not entitled to exercise any competence in this field[115].

In fact, neither any norm in the founding Treaties, nor in the project for establishing a European Constitution [116] or in the norms introduced by Lisbon Treaty provided for the transferring of these competences from the Member States to the EU.

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[114] Cariat N, "*Article 7. Respect de la vie privée et familial*" in"*Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*", Bruxelles, 2018, p. 165.

[115] In the present dissertation we are going to focus on the evolution of the right to family reunification and on the creation of the best interest of the child principle, therefore all the other international private law issues, such as separation and divorce, related to family law will not be taken into consideration.
However, it should be remarked that the broadening of EU competences has also invested immigration sector -which was traditionally a field attributed to the Member States' exclusive competence- thanks to the interpretation provided by the ECJ in its judgments, such as with *Akrich* case. On this issue, which concerned immigration as well as the right to entry and stay for the third country national spouse of a EU citizen, see Zanobetti A., "*Il ricongiungimento familiare fra diritto comunitario, norme sull'immigrazione e rispetto del diritto alla vita familiare" in "Famiglia e Diritto",* 2004, pp. 552-557.

[116] An attempt for establishing a common European Constitution dates back to 2003, in which it was proposed a Constitutional Treaty for the European Union with the aim of simplifying the decision-making process and of conferring to the EU and its institutions more powers. It has never been adopted because it had been ratified only by 18 Member States.

Member States national legal systems were anchored on their own cultural and social models in the field of family relationships and this led to diverging principles throughout the EU and to a difficulty in deciding how to deal with those who want to create a family in a Member State different from their native one. Thus, in order to solve the conflicts among different legal system, there was the necessity of drawing up *ad hoc* norms at an international level.

It should be remarked that all the previous founding Treaties of the EU did not contain any reference to the family -except for Article 67.5 TEC[117]- and, therefore, there was any mention to the attribution of exclusive or shared competences to EU institutions[118].

As noted previously, such lack of interest was due to the fact that the EU was more focused on realizing economic aims, rather than on family law. On the other hand, Member States were reluctant to give up their sovereignty in this field, in which there were anchored all the cultural, ethic and religious traditions that characterize each Member State.

Hence, the Member States have always retained their powers in this field and have also solved problems concerning family relationship characterized by transboundary elements on their own. [119]

However, from the 1990s onwards we have assisted to a progressive broadening of competences in family law field; but, it is after the adoption of Lisbon Treaty that the European Union has a shared competence with the Member States in the field of freedom, security and justice, in which the EU had been entrusted by the Treaties to develop judicial cooperation in civil law –thus, including the family- in cross border situations. [120]

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[117] Article 67.5 TEC "[…]*5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:*
- the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this article, Community legislation defining the common rules and basic principles governing these issues,
- the measures provided for in Article 65 with the exception of aspects relating to family law."

[118] Queirolo I., Schiano di Pepe L., "*Lezioni di diritto dell'Unione Europea e relazioni familiari*", Chapter IV "*La famiglia nell'azione della Comunità e dell'Unione Europea: la progressiva erosione della sovranità statale*",Torino, 2014, p. 164.

[119] Queirolo I., Schiano di Pepe L., "*Lezioni di diritto dell'Unione Europea e relazioni familiari*", Chapter IV "*La famiglia nell'azione della Comunità e dell'Unione Europea: la progressiva erosione della sovranità statale*",Torino, 2014, p. 164.

[120] Direzione generale delle politiche interne. Dipartimento tematico C: diritti dei cittadini e affari costituzionali.,"*Quale base giuridica per il diritto di famiglia? Prospettive per il futuro*",

The key provisions can be identified in Article 81 TFEU, in which the EU competence in the field of judicial civil cooperation shall comprehend measures granting *"(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff"*[121] as well as in Article 67 TFEU, according to which in this field the EU shall respect fundamental rights, the different legal systems and the different legal traditions of the Member States[122]. Such norm has simply the function of reaffirming- in the context of realizing an area of freedom, security and justice- what the Treaty on European Union states in its preamble, namely that European integration has to respect *"the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."*

So, it is no wonder that it is expressly mentioned in Article 4.2 of the TEU that *"[…]The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State […]"*[123]

In addition, it should be recalled that either the previous Treaty on European Community or the current TFEU qualify the judicial cooperation in civil field –and, in

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http://www.europarl.europa.eu/document/activities/cont/201301/20130110ATT58892/20130110ATT58892IT.pdf

[121] Article 81 par.2 TFEU

[122] Queirolo I., Schiano di Pepe L., "*Lezioni di diritto dell'Unione Europea e relazioni familiari*", Chapter IV "*La famiglia nell'azione della Comunità e dell'Unione Europea: la progressiva erosione della sovranità statale*",Torino, 2014, p. 165.

[123] Queirolo I., Schiano di Pepe L., "*Lezioni di diritto dell'Unione Europea e relazioni familiari*", Chapter IV "*La famiglia nell'azione della Comunità e dell'Unione Europea: la progressiva erosione della sovranità statale*",Torino, 2014, p. 166

particular, the creation of an area of freedom, security and justice- as an area in which EU institutions are granted a shared instead of an exclusive competence; it means that EU's action has always to respect proportionality and subsidiarity[124] principle.

The specific procedural arrangements through which the European Union is entitled to adopt legislative acts in matters of shared competence –and, therefore, in the field of family law- are provided by Protocol 2 of Lisbon Treaty, which set up a supervisory power from National Power on EU acts.

In fact, this Protocol lays down limits to EU powers which may lead to infer that EU does not have a significant impact in family law.

However, despite the norms of the Treaties, European Institutions' competence has been gradually broadened and a clear example of such interference in this field is the case-law regarding family law.

It can be concluded that EU competence was born from an economic point of view, always relating to the Internal Market.

Gradually, the EU and the Court of Justice have started to intervene in the field of family law, until arriving to exercise a noteworthy influence in it. We have seen it with the adoption of Directive 2004/38 on the right to move and freely reside in the EU territory for EU citizens, but it shall be highlighted another intervention of the EU in the field of family law, which was addressed to third country nationals: the adoption of Directive 2003/86.

7. A brief overview on the two main legal basis for family reunification: Directive 2003/86[125] and Directive 2004/38 [126]

As it has already been pointed out in the previous paragraphs, the right to family life is enshrined in the Treaties and also enjoys protection under international law.

124 According to this principle, the European Union does not take action (except for the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty.

125 Directive 2003/86on the right to family reunification for third country nationals

126 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

In order to understand all the judgments that are going to be analyzed in the following chapters, few words about these two Directives shall be said.

With the adoption of Directive 2004/38[127], detailed rules on the rights of free movement and residence of EU citizens and their third country national family members in other Member States have been provided. In fact, before the entry into force of the TEU, the right to reside was linked to the pursuance of an economic activity, but with the introduction of the EU citizen status it was recognized the right to freely move and reside into Member States' territories[128]. According to the Court, the right to free movement and residence shall now be anchored to the right to citizenship, instead of being linked to the pursuance of an economic activity. From this perspective, it has been adopted the 2004 Directive, which repealed the previous norms on the issue and had as its aim the creation of a unitary legal system for the right to freely move and reside in the EU Member States. Namely, this Directive lays down: a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members b) the right of permanent residence in the territory of the Member States for Union citizens and their family members c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

While the addressees of Directive 2004/38 are: a) EU citizens and their non-EU family members, who can reside in another Member State for up to three months with a valid passport or identification document b) workers and self-employed people, who can reside in another Member State for longer than three months, as well as students if they have sufficient resources and if they are covered by health insurance c) family members of the aforementioned people.

Therefore, with reference to family members, the citizens Directive attributes to them the right to join the EU citizen in the Member State in which he/she is moving, along with the right to an equal treatment in that State.

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

[128] See *supra Baumbast* judgment Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department

The rights guaranteed by the Directive should be restricted only on the grounds that are specifically mentioned in it, such as public policy, public security and public health.
However, every Member State shall –before ordering an expulsion on the aforementioned grounds- take account of considerations such as the length of residence in its territory of the individual concerned, his/her age, state of health and the cultural integration into the host Member State. In addition, with this Directive has also been affirmed the prohibition of expulsion for Union citizens or their family members who possess the right to permanent residence, unless there are serious law infringements on the grounds of public policy and public security.
With particular regard to children, in Directive 2004/38/EC it is laid down that an expulsion may only be ordered against them if there are imperative grounds concerning public security[129]. Therefore, children enjoy the strongest level of protection against expulsion possible under this Directive and, in fact, there is no existing case law of the ECJ concerning children's expulsion.[130]
In the EU, Luxembourg Court had recognized the right for EU citizens to be joined by their family members when moving to another Member State –therefore, by recognizing this right only to those who were not in a "purely internal situation", which cause the issue of reverse discrimination[131] but the problem was that the right to family reunification was confined to EU citizens.
However, such right to family life had not been equated yet with the right to family reunification, which can be considered as a corollary to the right to family unity and to the right to found a family[132].
Therefore, Directive 2003/86 has been conceived for being in compliance with these rights, in order to ensure the free movement of persons but –at the same time- "*in conjunction with flanking measures relating to external border controls, asylum and*

[129] Article 28.3 (b) of Directive 2004/38
[130] Klaassen M., Rodrigues P., "*The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter*" in "*European Journal of Migration and Law*", vol. 19, 2017, p. 203
[131] On the concept of reverse discrimination *supra* at paragraph 2.2
[132] Wiesbrock A., "*The right to family reunification of third-country nationals under EU law. Is Directive 2003/86/EC in compliance with the ECHR?*" in "*Human Rights and International Legal Discourse*", vol. 5, 2011, p. 139.

immigration, and for the adoption of measures relating to asylum, immigration and safeguarding the rights of third country nationals"[133].

It has been adopted on the basis of current Article 79 TFEU[134] (ex Article 63 TEC), but due to the fact that its provisions are characterized by a minimum level of harmonization by Member States and that it is a field belonging to the exclusive competence of Member States, some difficulties in reaching an agreement among all of them emerged.

According to Article 3.1 of Directive 2003/86 "*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*"; therefore, the right to family reunification shall not apply to those who are residing temporarily into a Member State's territory or that do not have any chance of renewing their permit.

Moreover, in Article 3.3, it is expressly stated that this Directive shall not apply to EU citizens' family members as they can benefit from Directive 2004/38.

Hence, the addressees are: *"(a) the sponsor's spouse; (b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a*

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[133] Council Directive 2003/86/EC preamble

[134] Article 79 TFEU*:" 1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.*

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a)the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

(b)the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c)illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed".

decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations; (c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement. The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married."[135]

In order to be granted the right to family reunification, the applicant shall fulfill a number of potential requirements and –in establishing these latter- Member States enjoy a wide margin of appreciation concerning, for instance, minimum age, integration requirements and resource conditions.

This discretion has levied criticism on the compatibility of Directive 2003/86, that has been challenged by the European Parliament claiming its inconsistency with the right to family life and the right to non discrimination under the European Convention on Human rights as well as under international law. [136]

However, since the authorisation of family reunification is the general rule, derogations must be interpreted strictly. In fact, the discretion left to the Member States shall not be used in a way that would undermine the objective of the Directive, which is to promote the right to family reunification. At the same time, this right can be restricted and beneficiaries are obliged to obey the laws of their host country. For instance, in cases of fraud or abuse, the Member States shall take action in the interests of the community.

"Finally, the Directive must be interpreted and applied in accordance with fundamental rights and, in particular, the right to respect of private and family life the principle of non-discrimination, the rights of the child and the right to an effective remedy, as

[135] Article 4.1 Directive 2003/86

[136] Wiesbrock A., "*The right to family reunification of third-country nationals under EU law. Is Directive 2003/86/EC in compliance with the ECHR?*" in "*Human Rights and International Legal Discourse*", vol. 5, 2011, p. 140.

enshrined in the European Convention of Human and the EU Charter of Fundamental Rights"[137].

But all these aspects will be dealt more in depth in the following chapters.

[137] COM/2014/0210 final Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification

Chapter II

The Best Interest of the Child principle as developed by the European Court of Justice and the European Court of Human Rights

1. The development of the "Best Interest of the child"

The best interest of the child principle is anchored in Article 24.2 of the Charter of Fundamental Rights of the EU and one of its main functions is that of guiding the judge towards a decision which will ensure the protection of children's rights concerned.

In EU law it is difficult to give a proper definition of this issue, for the reason that it is a concept which is in constant evolution. Therefore, it is up to the Judicial Bodies to portray it and to always ensure an appropriate interpretation.

This section will analyze the most significant case-law of the Court of Justice and of the Court of Human Rights and their interplay that led to build up some principles in dealing with such a sensitive matter.

As aforementioned, at the beginning of the European Community and until 90s, the "person" – and, consequently, the child- was not particularly emphasized by EU law, due to the fact that the Community was born for an economic enhancement; therefore EU legislation was focused on provisions concerning goods and capitals rather than paying the due attention to human rights and to the protection of the family.

Moreover, when the European Community has started to deal with children, its aim was always that of safeguarding the proper functioning of the internal market.

Before Lisbon Treaty, the EU has developed the matter by generally referring to the "*acquis communautaire*", which comprises all the EU's treaties and laws, declarations and resolutions, international agreements and the judgments of the Court of Justice, as

well as action of the EU Governments in the area of Justice and Home Affairs and the Common Foreign and Security Policy[138].

With the enactment of the EU Charter of Fundamental Rights, this latter has established that EU policies directly or indirectly affecting children must be designed, monitored and implemented taking into account the best interests of the child [139].

The provision contained in Article 24 of the Charter [140]is basically a repetition of Article 3.1 of the UNCRC [141] and states that the best interests of the child are to be a primary consideration.

The fact that the drafters of the Charter have provided that the best interests are to be a primary considerations has led to criticism because the economic interests of the EU are in general accorded much weight than the human rights under consideration [142].

2. Strasbourg perspective on family reunification and human rights.

2.1 Berrehab v. The Netherlands: when does the expulsion of a family member constitute a breach of Article 8?

Starting from 1980s, the freedom of sovereign States to govern alien's presence on their territory came under pressure; in a large number of cases, Strasbourg Court held that

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[138] A notion of such a concept can be found in Miller V., "*The EU's Acquis Communautaire*" Standard Note in "*International Affairs and Defence Section*", 2011, p.2.

[139] Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, "*EU Framework of Law for Children's Rights"*,2012, p. 19.

140 Article 24 of the Charter of Fundamental Rights of the European Union: "*1. 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.*
2. In all actions relating to children, whether taken by public authorities or private institutions, the child''s best interests must be a primary consideration.
3. 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."

[141] Article 3 UN Convention on the Rights of the Child "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

[142] McGlynn C., "*Rights for Children: The Potential Impact of the European Union Charter of Fundamental Rights*" in "*European Public Law*", Vol. 8, 2002, p. 395

States continue to be bound by human rights obligations when deciding on the entry and stay of foreigners. [143]

Berrehab v. the Netherlands [144] is generally remembered as the first Strasbourg Case regarding expulsion and the first in which the Court found that a removal of a family member had constitute a breach to article 8 of the European Convention on Human Rights [145].

In fact, differently from the previous judgments, this application shall not be considered as inadmissible because this case concerns a father whose divorce from his Dutch wife meant that he was denied the possibility of both continuing residing in the Netherlands and, consequently, of keeping in touch with his daughter, rather than being invoked by criminals.

More in detail, Mr Berrehab was married to a Dutch woman and therefore got a permission to stay in the Netherlands for the aim of enabling him to live with his Dutch wife, along with a work permit. In 1979 they divorced and in the same year their daughter was born; the problem was that Mr Berrehab was refused the application for the renewal of his residence permit, for the reason that he was no longer living with his wife and thus a renewal would have been against the public interest. As requested of application, the Court held that the interference with family life had been disproportionate; in fact it observed that the case concerned the expulsion, following the breakdown of his marriage with a Dutch national, of "*a person who had already lawfully lived in the Netherlands for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint" [146]*.

In these circumstances, the "*disproportion between the means employed and the legitimate aim pursued*" meant that Article 8 had been violated [147].

[143] Lawson R., "*Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, Parliament v. Council*" in "*European Constitutional Law Review*", vol. 3, 2007, p. 325.
[144] Application no. 10730/84 Berrehab v. The Netherlands
[145] Dembour M. B.," *When humans become migrants : study of the European Court of Human Rights with an inter-American counterpoint*", chapter VI, 2015
[146] Application no. 10730/84 Berrehab v. The Netherlands par. 29
[147] Ibid.

2.2 Uner v the Netherlands: how to deal with long-term immigrants convicted of criminal offences?

On the other hand, *Uner v The Netherlands* [148] is the first case brought before the European Court of Human Rights concerning the expulsion of a long-term immigrant convicted of criminal offences. The issue that was submitted to the Court was whether the expulsion of immigrants that were born or raised in a Contracting State could infringe the right to respect for private and family life protected by Article 8 of the ECHR. [149]

Independently from their length of stay in a Member State, they always remain immigrants and therefore susceptible to expulsion measures if convicted of criminal offences so long as not interfering with the right to respect for private and family life.

Since ages, the European Court of Human Rights has been asked lots of applications in order to assess whether the expulsion of an integrated alien convicted of a criminal offence constituted a breach of Article 8 [150].

In dealing with those cases, the European Court of Human Rights has decided to take into consideration applicants' individual circumstances in each expulsion case, instead of using objective criteria like the severity of the offences committed, so this has produced as a result differences in treating the applications.[151]

Judge Martens produced a dissenting opinion in *Boughanemi* judgment and proposed for an assimilation of the legal position of integrated aliens with those of nationals.

The same reasoning has been adopted by some of the Member States, who have prohibited the expulsion of immigrants born in their territory and who have adopted policies for considering equal aliens born or raised in the host state and nationals.

In Recommendation 1504 of 2001, the Parliamentary Assembly has stated that expulsion could not be inflicted to those who were born or brought up in the host

[148] Application no. 46410/99

[149] *Steinorth C., "*Üner v The Netherlands *: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life*" in "*Human Rights Law Review*", vol. 8, 2008, p. 185

[150] See, as an example, Application no. 22070/93 Boughanemi v. France.

[151] *Steinorth C., "*Üner v The Netherlands *: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life*" in "*Human Rights Law Review*", vol. 8, 2008, p. 186

country and that "*only particularly serious offences affecting state security' could justify the removal of long-term immigrants who had entered the host State at a later age*" [152].
As abovementioned, this judgment represents the first case of expulsion of a long-term immigrant.
The applicant of this judgments is Mr Uner, who was living in the Netherlands since he was 12 years old and that in the following years has married a Dutch National and had two children, both of them with Dutch nationality.
Following convictions for violent offences and a breach of the peace, Mr Uner was convicted of manslaughter and assault, so the Minister of Justice decided to withdraw his permanent residence permit and to expel him for ten years. The applicant claimed that this measure was not complying with Article 8 ECHR, due to the fact that he had been separated from his partner and children. In the balance of interests at stake, the EctHR decided to apply the criteria established in 2001 Judgment *Boultif v Switzerland*, known as "Boultif Criteria". [153]
Concerning this Criteria, what the Court has to take into account for delivering its judgment are the following aspects:
-the nature and seriousness of the offence committed by the applicant;
-the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;

[152] Parliamentary Assembly of the Council of Europe, Recommendation 1504 (2001) on the Non-expulsion of long-term immigrants par 7 and 11
[153] Application no. 54273/00 Boultif v. Switzerland,

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled
- the solidity of social, cultural and family ties with the host country and with the country of destination.

In fact, Strasbourg Court applies a sort of test in order to determine if that specific case constitutes an infringement of Article 8 or not: a) does the applicant enjoy family life? B) is there a situation which requires respect from the immigration authorities? C) has there been an interference? D) is the interference justified (i) is it in accordance with the law? (ii) in pursuit of a legitimate aim? (iii) is it necessary in a democratic society? [154]

For assessing this latter point, the Court applies a proportionality test and tries to find a balance between the right to respect for family life and the interests of the State; this proportionality test is based on Boultif Criteria[155].

All those factors have to be taken into consideration in cases concerning migrants that are likely to be expelled following a criminal conviction.

In delivering its judgment, the Court also provided to explicit two criteria that can be derived from *Boultif* case, that are respectively 1) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled 2) the solidity of social, cultural and family ties with the host country and with the country of destination. [156]

But, more in detail, how did the Court apply Boultif criteria in the case concerned?

First and foremost, the Court had no doubts on the fact that Mr Uner had strong ties with the Netherlands, as he lived for a considerable length of time in the territory and he subsequently went on to found a family there [157].

But the applicant lived with his partner and his first-born son for a short period, while he has never lived together with his second son, "*so the disruption of their family life*

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[154] Milios G., "*The application of the European Convention on Human Rights to the case of Leonarda Dibrani*

[155] Another application of Boultif Criteria can be found, for example, in *Akrich* judgment in which it was necessary to verify whether the expulsion order was laid down by law, if it had as its aim the safeguard of the national security and whether it was necessary in a democratic society.
See Zanobetti A., "*Il ricongiungimento familiare fra diritto comunitario, norme sull'immigrazione e rispetto del diritto alla vita familiare"*, in "*Famiglia e diritto*", 2004, p. 556

[156] Application no. 46410/99 Üner v. The Netherlands par. 58

[157] Application no. 46410/99 Üner v. The Netherlands par. 62

would not have the same impact as it would [have had] if they had been living together as a family for a much longer time". [158]

Furthermore, even though the applicant came to the Netherlands when he was young, the Court was not convinced on the fact that, at the time he was returned to that country, he no longer had any social and cultural ties with Turkish society.

The real problem was that, even if Mr Uner said that he had acted on self-defence, the Court remarked that the offences of manslaughter and assault committed by the applicant were of a very serious nature, that cannot justify the fact that he had two loaded guns on his person.

In addition, at the time the exclusion order became final, the applicant's children were still very young– six and one and a half years old respectively – and thus of an adaptable age. Provided that they have Netherlands nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there. Despite the practical difficulties for his Dutch partner in following the applicant to Turkey, in the particular circumstances of the case the family's interests were outweighed by nature of the applicant's offences. [159]

Hence, in the end, the Court made a fair balance between the interests of public order and those of the applicant, in the light that the exclusion order is limited to ten years; therefore, there was no breach of Article 8.2.

3. The Court of Justice's achievements in the field of the best interests of the child

The leading judgments from the Court of Justice in this field can be considered the following rulings: *Baumbast*[160], *Chen*[161], *Zambrano*[162] and *Dereci*[163].

[158] Application no. 46410/99 Üner v. The Netherlands par 62
[159] Application no. 46410/99 Üner v. The Netherlands par 64
[160] Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department
[161] Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department.
[162] Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi.
[163] Case C-256/11 Murat Dereci and others v Bundesministerium für Inneres

These four judgments have in common that the child protection has been taken into account by focusing on the concept of citizenship, rather than on the best interests which had not been achieved yet[164].

Starting from *Baumbast* judgment, the Court of Justice held that Article 12 of the Regulation on Freedom of movement for workers [165] must be interpreted as meaning that the child of a migrant worker has a right of residence if he or she wishes to attend educational courses in the host Member State, even if the migrant worker has no longer the residence permit or works in that Member State. That right of residence extends also to the parent who is the child's primary caretaker.

Therefore Luxembourg Court drew as a conclusion that non-economically active EU citizens can be granted residence rights directly on the basis of Treaty citizenship provisions and that children who have attended education in another Member State- following the exercise of free movement rights of one of their parents- shall continue to enjoy such a right to education even after the parents have given up their economic free movement activities. [166]

In order for the children right to education to be rendered meaningful, parents- who are children's primary caretakers- are entitled to enjoy the right to continue residing with those children in the host Member State.

This last remark has signified a vast expansion of the scope of application and overall weight of family rights under free movement law.

In *Chen*, who was born in Northern Ireland, the child had been able to obtain Irish nationality on the basis of local legislation and by simply circulating in the United Kingdom for being attributed to a right of residence to her and to her Chinese mother[167],because to refuse Mrs Chen a right to reside with her daughter in the United

[164] Another example of ECJ's continuous extensive interpretation in the field of family reunification can be found in *Akrich* judgment, in which it is recalled the right to family life as provided by Article 7 of Nice charter and Article 8 of the European Convention on Human Rights. On this matter see Zanobetti A., *Il ricongiungimento familiare fra diritto comunitario, norme sull'immigrazione e rispetto del diritto alla vita familiare*" in "*Famiglia e Diritto*", 2004, pp. 552-557

[165] Article 12 of the Regulation (EEC) No 1612/68 "*The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory."*

[166] De Somer M., Vlnk M., "*Precedent and fundamental rights in the CJEU's case law on family reunification immigration*" in "*European integration Online Papers*", vol. 19, 2015, p. 19

[167] Gallo D., "*Développements récents en matière de citoyenneté européenne et regroupement familial*", in "*Revue de droit de l'Union Européenne*", 2012, p. 104.

Kingdom would render the child's right of residence totally ineffective [168] and would have also constituted discrimination on grounds of nationality.

In this judgment it was granted to the minor, covered by an adequate health insurance and dependant by her parent –third country national, but with sufficient resources so that she was not a cost for the host Member State- a residence permit of an indefinite period on the Member State's territory.

Therefore, Luxembourg Court determined that, when a Member State imposes requirements on individuals seeking citizenship and these are met, it is not possible for a Member State to then challenge that entitlement when the mother and the child apply for residence. Thus, the ECJ confirmed that a Member State cannot refuse a right of residence to a parent who is the carer of a child who is an EU citizen, as this would deprive the child's right of residence of any useful effect.

In this specific case, the ECJ's decision was inspired by the necessity of avoiding to deprive the children of an "*effet utile*" her right to stay. [169]

The third relevant judgment is *Zambrano*; according to the Court, "*citizenship of the Union requires a Member State to allow third country nationals who are parents of a child who is a national of that Member State to reside and work there, where a refusal to do so would deprive that child of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union*"[170].

Differently from the previous judgments, here the Court has held that this requirement shall apply even if the child is "static", so even if he has never exercised his right to free movement within the territory of the Member State. [171]

In fact, after observing that Directive 2004/38/EC was not applicable in this situation, the ECJ established that national measures which deprive EU citizens from the enjoyment of the substance of the rights conferred by virtue of their status of EU citizen are not permissible: the right to move and freely reside within the territory of the EU is part of the substance of these rights.

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[168] Case C-200/02 Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department, Conclusion.

[169] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 129.

[170] Court of Justice of the European Union, Press Release No 16/11, Judgment in Case C-34/09 Ruiz Zambrano v Office national de l'emploi, Luxembourg, 8 March 2011

[171] Gallo D., "*Développements récents en matière de citoyenneté européenne et regroupement familial*", in "*Revue de droit de l'Union Européenne*", 2012, p.107

In the light of that, a measure which has the effect that an EU citizen is forced to leave the territory of the EU is not permissible.

Based on this, Luxembourg Court established that the refusal of the right to reside in Belgium for the parents of the minor EU citizens in this case would deprive the children from the enjoyment of the rights connected to their EU citizenship. [172]

But still, in the much debated *Zambrano* ruling and in the following jurisprudence of the Court, there is no reference to fundamental rights in general and the best interests of the child in particular[173].

In fact, in *Zambrano* there were mentioned preliminary rulings which had to ascertain whether the provisions contained in the TFEU on the EU citizenship should be interpreted as conferring to the ascendant - third country national, who is in charge of his children since their early age- a residence permit in the Member States where the latter hold the citizenship and in which they reside, as well as an exemption from the work permit in that Member State. [174]

Hence, in this ruling Luxembourg Court totally disregarded the traditional cross-border requirement, by preparing the ground for an extensive interpretation of EU norms in order to include also situations that would previously be considered as "purely internal situations", thus not covered by the aforementioned provisions.[175]

The last mention to be made concerns *Dereci* judgment: Mr Dereci is a Turkish national, who entered to Austria illegally and married an Austrian national by whom he had three children, that are still minors and Austrian nationals.

Similarly to the previous judgments, the main question that arose was: " *Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse and minor children are Union citizens – residence in the Member State of residence of the spouse and children, who*

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[172] Klaassen M., Rodrigues P., "*The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter*" in "*European Journal of Migration and Law*", vol. 19, 2017, p. 207.

[173] Klaassen M., Rodrigues P., "*The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter*" in "*European Journal of Migration and Law*", vol. 19, 2017, p. 193.

[174] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 128.

[175] De Somer M., Vlnk M., "*Precedent and fundamental rights in the CJEU's case law on family reunification immigration*" in "*European integration Online Papers*", vol. 19, 2015, p. 23

are nationals of that Member State, even in the case where those Union citizens are not dependent on the national of a non-member country for their subsistence?" [176]

In other words, the pending question was whether it could be possible to extend the right of residence of EU citizens to their non-EU family members, by virtue of the aforementioned principle of *effet utile* of Union citizenship, which prohibits the adoption of any State action restricting -or that is likely to restrict- the effective enjoyment of the rights of Community citizens [177].

It can be remarked that *Dereci* is characterised by a strong emphasis on the interpretation of the law, rather than on its application to the facts of the case: indeed, the Court was more interested in providing further guidance on the interpretation of the "*Zambrano principle*", rather than applying this principle to the case at stake.[178]

The Court analyzed that the facts of the case are covered neither by Directive 2003/86 - because such a measure does not apply to the family members of Union citizens- nor by Directive 2004/38, which only applies to Union citizens who have moved across borders and which rely on it in a Member State other than that of their nationality.

However, the Court merely observed that the fact that a situation does not satisfy the abovementioned requirements, does not mean that a Member State may not be obliged to permit third-country nationals to reside in its territory, since this may amount to a violation of human rights and, in particular, of the right to the protection of family life.[179] But still, as in *Zambrano*, the Court made no reference to the best interests of the child concept. [180]

From all these rulings, it can be concluded that, in order for a situation to fall within the scope of these sets of provisions it must either a) involve the exercise of, and a restriction on, inter-State movement, *or* b) involve the application of a measure which has the effect of depriving EU citizens of the genuine enjoyment of the substance of their EU citizenship rights.

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[176] Case C-256/11 Murat Dereci and others v Bundesministerium für Inneres par. 35 (a)

[177] Perez P. J., "*El controvertido derecho de residencia de los nacionales turcos en la Unión Europea: la STJUE de 15 noviembre 2011 (asunto Dereci)*" in "*Cuadernos de Derecho Transnacional*", vol. 4, 2012, p. 261

[178] Tryfonidou A., "*Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy*" in "*European Public Law*", vol. 18, 2012, p. 505

[179] Ibid.

[180] Klaassen M., Rodrigues P., "*The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter*" in "*European Journal of Migration and Law*", vol. 19, 2017, p. 208

More specifically, the free movement provisions appear to still require proof of an obstacle to inter-State *movement*, in order to apply. While on the other hand, Article 20 TFEU focuses on the idea that Union citizens should be free to enjoy the rights granted to them by EU law; thus, any situation which involves a measure that deprives them of the genuine enjoyment of the substance of their rights, falls within the scope of that provision, even if there is no cross-border element and all its fact remain within the territory of a single Member State. [181]

4. Parliament v. Council: the dispute on the alleged inconsistency of the Directive with the fundamental human rights

Finally, in 2003, Council Directive 2003/86/EC was adopted. The legal basis was Article 63(3)(a) of the EC Treaty and it determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

Such Directive also allows for many derogations, *inter alia* the one contained in Article 4.6 *"By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification".* Moreover, it lays down the conditions on how to exercise this right to family reunification for those who legally reside in EU and are third country nationals, by imposing some obligations.

In this ruling, the European Parliament argued that those derogations were not respecting fundamental rights and asked for their annulment before the ECJ [182].

[181] Tryfonidou A., "*Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy*" in "*European Public Law*", vol. 18, 2012, p. 511

[182] Bulterman M., "*Case 540/03 Parliament v. Council*" in "*Common Market Law Review*", Issue I, vol 45, 2008, p. 245

More in detail, the European Parliament asked the Court to annul the final subparagraph of Article 4.1 [183], Article 4.6 [184] and Article 8 [185] of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

What has been held by the ECJ is relevant especially for the fact that touches the relationship between immigration norms provided by the European legal system and the protection of fundamental rights; in addition, it shows the divergences between the need of protecting family life – whose family reunification constitutes its principal expression- and the prerogatives of Member States which want to control migratory flow of third country nationals in their territory. [186]

The problems that arose in this judgment[187] were, first of all, that the ECJ had to clarify the new concepts introduced by the Directive, for the purpose of ensuring their uniform application in the EU for verifying if they were in harmony with fundamental rights protected in the European Union, due to the fact that those measures were able to affect individuals' position.

The first question that was asked to the Court was on the possibility of challenging the lawfulness of provisions of a Directive that do not impose to Member States to take specific action, but that authorize them to legislate on the topic in their national law.

According to Advocate General Kokott, the request of the Parliament for a partial annulment of the Directive shall be declared inadmissible, for the reason that any

[183] […] "*By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive*." […]

[184] […] "*By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification*"

[185] *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."

[186] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 160.

[187] Case 540/03 Parliament v. Council

finding that the contested provisions were not complying with general principles of EU law should result in the annulment of the Directive *in toto* [188].

In addition, the Advocate General pointed out that the most relevant Treaties concerning human rights were not providing a general right to family reunification, that is the reason why Member States enjoy a great margin of discretion when deciding on the matter of residence on their territories; it is only in peculiar circumstances that the protection of family life takes precedence and obliges Member States to allow family reunification on their territories.

In the AG's opinion, the test that should be done for verifying if these contested provisions are in compliance with human rights is to check if they leave sufficient room for the Member States to be applied in consistency with human rights.

For instance, Article 4.1 and Article 4.6 should be read in parallel with Article 5.5 of the Directive -which provides for the respect of the best interests of the minor in examining an application- and Article 17 "*Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family*."

However, the ECJ stated that the application for annulment does not concern an act of the institutions, but it did not ruled on the partial annulment because it found it necessary to consider the substance of the case [189].

Moreover, in determining the rules of law in whose light the Directive's legality may be reviewed, it listed different texts that should be taken into account in order to assess the legality of the Directive [190].

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[188] Bulterman M., "*Case 540/03 Parliament v. Council*" in "*Common Market Law Review*", Issue I, vol 45, 2008, p. 247.

[189] Bulterman M., "*Case 540/03 Parliament v. Council*" in "*Common Market Law Review*", Issue I, vol 45, 2008, p. 248.

[190] Martin D., "*Comments on N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo (Case C-470/04 of 7 September 2006), European Parliament v. Council(Case C-540/03 of 27 June 2006) and Tas-Hagen and Tas (Case C-192/05 of 26 October 2006"* in "European Journal of Migration and Law", vol. 9, 2007, pp. 145.

First of all, the ECJ stressed the observance and the respect for fundamental rights, that are part of the general principles of the law and whose observance is ensured by the Court, with the application of Article 6 of the TEU.

Other references were made to the International Covenant on Civil and Political Rights and to the Charter of Fundamental Rights of the European Union.

Differently from previous cases in which the Court was asked to interpret the European Convention, in this judgment the ECJ was asked to review the validity of a Community law act, even though it is Maastricht Treaty to give jurisdiction to the Court in checking such validity.

The ECJ also relied on Article 8 of the ECHR and referred in detail to the principles applicable to family reunification as set out by the European Court of Human Rights in *Sen v. the Netherlands*, such as the fact that Article 8 may create positive obligations for the respect of family life and that –in enjoying their margin of appreciation- Member States have to balance the individual interests as well as those of the Community [191] and that it is up to the Member State concerned to decide the requirements for the entry and stay of immigrants, as Article 8 does not impose any general obligation to the Member States. [192]

Thus, after having recalled the relevant provisions and the case law, the Court concluded that "*These various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of*

[191] Application n 31465/96 Sen v. The Netherlands Par. 31 "*Article 8 [of the ECHR] may create positive obligations inherent in effective "respect" for family life. The principles applicable to such obligations are comparable to those which govern negative obligations. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation*" and that *"(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. (b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. (c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory."*

[192] Application n 31465/96 Sen v. The Netherlands, par. 36 *"(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. (b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. (c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory."*

appreciation when they examine applications for family reunification. Going beyond those provisions, Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorize family reunification of certain members of the sponsor's family, without being left a margin of appreciation" [193].

As stated by the Court, all the provisions contested by the European Parliament have a limited margin of appreciation for the States that is not different from that accorded to them by the European Court of Human Rights in its case law.

Hence, as Advocate General Kokott had already pointed out, the Court relied on Article 5.5 and 17 for interpreting the other provisions of the Directive. In other words, the Member States must ensure the observation of the principles contained in these two articles when they wish to make use of the derogations. [194]

This means that what is stated in Article 4.1, which allows Member States to ask for an integration requirement for children over 12 years old arriving independently from the rest of their family, does not infringe the right to respect for family life, as the fact of asking for integration's conditions is not in violation of Article 8 ECHR, as well as choosing the age of 12 years because this criterion corresponds to a phase in the life of a minor when integration in another environment is capable of giving rise to more difficulties. [195]The same reasoning has been used concerning Article 4.6 that imposes to Member States the obligation of examining the application of a minor child over 15 years old in the interests of the child and with a view of promoting family life. [196]

Regarding Article 8, differently from the Advocate General's opinion, the ECJ has stated that this norm is not in contrast with human rights, as it does not authorize Member States to automatically reject applications for family reunification because "*duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and that a*

[193]Case C-540/03 European Parliament v Council of the European Union Par. 59 and 60

[194] Bulterman M., "*Case 540/03 Parliament v. Council*" in "*Common Market Law Review*", Issue I, vol 45, 2008, p. 250

[195] Bulterman M., "*Case 540/03 Parliament v. Council*" in "*Common Market Law Review*", Issue I, vol 45, 2008, p. 250

[196] Case C-540/03 European Parliament v Council of the European Union par 88.

waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors." [197]

The ECJ concluded with a reiteration of Member States' obligations not to infringe fundamental rights while implementing family reunification directive.

Basically, the Court agreed with his Advocate General, with the exception on the interpretation of Article 8; in fact, according to Advocate General, Article 8 is not compatible with human rights, as it allows Member States to introduce rules on waiting periods but without providing for exceptions in difficult situations. On the contrary, the ECJ admits this waiting period but by taking into consideration all the relevant factors[198].

In addition, the importance of this judgment resides in the fact that – for the first time- the Court explicitly refers to the EU Charter of Fundamental Rights and this is not of any practical relevance, because the ECJ observed that the same right to respect for private and family life is recognized in Article 7 of the Charter and this imposes to read it in conjunction with Article 24 EU Charter , that provides for the obligation to have regard to children's rights.

Thus, in summary, Luxembourg Court has adopted an interpretation of the Directive that has overcome any doubt on how to guarantee a full compliance with fundamental rights; this has been made possible by doing a systematic reading of the entirety of EU provisions and by stressing the existence of positive obligations for Member States, that shall be adapted to their discretionary power in the field of entry and residence of aliens. This way of thinking has permitted to the Court to assume that the contested provisions leave to the Member States a limited power of disposal, which should be considered equal to that recognized to the European Court of Human Rights in its rulings concerning family reunification.

In conclusion, the identification of the existence of positive obligations imposed by the directive to the Member States allows the ECJ to interpret the margin of appreciation left to the Member States as legitimate, as it can be compared to that left by Article 8.2 of the Convention. [199]

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[197] Case C-540/03 European Parliament v Council of the European Union par 99

[198] Case C-540/03 European Parliament v Council of the European Union par 99

[199] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, , 2012, p. 161.

The interpretation adopted by the Court has raised some doubts in the doctrine, particularly for the reason that this orientation seems to reduce the duty of the European legislation in ensuring the respect for fundamental rights, given that if the European norms do not preclude to Member States the possibility of an interpretation in line with those rights, it should not be considered as unlawful. [200]

The exam conducted by the ECJ was not intended to directly verify the compliance of the Directive with the fundamental rights, but it wanted to ascertain whether it left to Member States sufficient room to let them able to apply these rights properly. [201]

5. *Chakroun* Judgment: narrowing the discretion left to the Member States in family reunification

Strictly related to what the ECJ had stated in *Parliament v Council* is *Chakroun* judgment; it consists of a request for a preliminary ruling from a Dutch judge and regards a provision of Dutch legislation which imposed a higher income requirement for being recognized the possibility of having the right to family reunification, if the family ties with one's spouse had been formed subsequently to one's entry in the Netherlands.[202] This judgment is noteworthy because its aim is to clarify the field of application of Directive 2003/86 and to restrict the wide margin of appreciation left to the Member States in its application.

Therefore, first of all the ECJ provides to recall what had already held in *Parliament v Concil* and clarified that "*Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family*

[200] See, as an example, Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi.",* Bari, 2012, p. 163.

[201] Adinolfi A., "*Il ricongiungimento familiare nel diritto dell'Unione Europea"in "Diritti umani degli immigrati",* Napoli, 2010, p. 132.

[202] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi*.", Bari, 2012, p. 162.

reunification of certain members of the sponsor's family, without being left a margin of appreciation" [203].

Besides, "*since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.*" [204]

In addition, it should be highlighted the fact that the ECJ points out the necessity that measures relating to family reunification shall be adopted in accordance with the obligation to protect the family and to respect family life, which is enshrined in EU and international legislation.

Specifically, on the assumption that "*The Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter. It follows that the provisions of the Directive, particularly Article 7(1)(c) thereof, must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. It should be added that, under the first subparagraph of Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter, as adapted at Strasbourg on 12 December 2007, which has the same legal value as the Treaties.*"[205]

As observed by the doctrine, from the interpretation given by the ECJ is apparent an orientation that is aiming to draw from the directive some particularly relevant ties, giving to the Court a very broad margin of appreciation in assessing the effectiveness of limits to the right to family reunification in national legal orders. [206]

Basically, the Court highlights the interference that European norms may have towards national legislations, as well as getting closer the directive on the family reunification with the one on the free movement of persons; in fact, in this specific case, Luxembourg Court applies the same principles that are implemented with reference to EU citizens.

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[203] Case C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken par 41.
[204] Case C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken par 43
[205] Case C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken par 44
[206] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi.*", Bari, 2012 p. 164

This was the same approach that had started to emerge in *Parliament v Council*, in which the Court – in recognizing the right to family unit as a fundamental principle- had recalled some previous judgments related to EU citizens' relatives [207], in order to decrease differences in treating cases concerning EU citizens and third country nationals.

Differently from *Parliament v. Council*, the Court's attitude in *Chakroun* judgment is more tangible and can be noticed in par. 59, which states that "*Article 2(d) of the Directive defines family reunification without drawing any distinction based on the time of marriage of the spouses, since it states that that reunification must be understood as meaning the entry into and residence in the host 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*".

Furthermore, the Court endorses this interpretation by using as a parameter fundamental rights, especially by checking the compliance with Article 8 of the Charter of Fundamental Rights and Article 7 of Nice Charter, that do not provide for any distinction on the circumstances and on the moment in which a family is being constituted.

In the end, Luxembourg Court expressly applies - by making use of the analogy- principles contained in *Metock* judgment that lead to narrow the margin of appreciation of the Member States, in order not to jeopardize the aims of the directive as stated by the EU legislator, which are in compliance with fundamental rights of the Union. [208]

As a matter of fact, the ECJ has clarified that *"Having regard to that lack of distinction, intended by the European Union legislature, based on the time at which the family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive*" [209].

As a result of this case, the difference in approach between family formation and family reunification has been abolished in the Netherlands.

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[207] See, as an example, Case C 600/00 Carpenter

[208] Palladino R., "*Il diritto al ricongiungimento familiare dei cittadini europei. Il diritto al ricongiungimento familiare e i diritti dei familiari dei cittadini di paesi terzi."*, Bari, 2012, p. 165.

[209] Case C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken par. 64.

6. O., S. & L., Joint Cases C-356/11 and C-357/11 : the need to promote family life

The Court of Justice added to its guiding principles also one which derives from *O., S. & L.*[210]; in fact in this judgment it is stated that the interpretation of the provisions of the Directive should not deprive them of their effectiveness and that, above all " *States must examine applications in the interest of children and with a view to promote family life*". These joined cases concerned the right of a third country national to derive a right of residence from his spouse's Union citizen child, despite the lack of sufficient resources.[211]

In fact these applications involved two third country nationals in the same situation; both had moved to Finland, they had married Finnish men and had two children, who were holding Finnish nationality. When they divorced, both women received custody of their children and, subsequently, had another child when they got remarried to a third country national. This time the child was given the mother's nationality and, afterwards, husband's applications for residence permits were refused due to the lack of sufficient means of subsistence.

Hence, the questions that were brought before the Court in the first application were: a) whether Article 20 TFEU [212]precludes a third country national from being refused a residence permit due to the insufficient resources in a situation in which the spouse has custody of a child - who is a citizen of the Union- while the third country national is not the child's parent and does not have the custody of the child; b) in case of negative

[210] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L

[211] Murphy C., "*At the Periphery of EU Citizenship: C-356/11 O, S and L*

[212] Article 20 TFEU" 1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States;
(b)the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
(c)the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
(d)the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

answer to the first question, if the effect of Article 20 TFEU has to be assessed differently if the third country national who does not hold residence permit, his spouse and the child this latter has in custody and who possess Union citizenship live together.[213]

While in the second application the questions were:

1.Does Article 20 TFEU preclude a third country national from being refused a residence permit because of lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union and the third country national is not the child's parent, does not have custody of the child, and does not live with his spouse or with the child?

2. If the answer to Question 1 is in the negative, must the effect of Article 20 TFEU be assessed differently if the third country national who does not have a residence permit, and does not live in Finland, and his spouse have a child, in their joint custody and living in Finland, who is a third country national?' [214]

Following the earlier line of cases, the Court held that in these cases the Directive on Citizenship could not apply, as the Union citizens had not exercised their right of free movement and, therefore, were considered as "static citizens" and so were not covered by the concept of "beneficiary" within the meaning of article 3.1 [215] of Directive 2004/38 [216], meaning that their family members and them cannot rely on that directive.

Subsequently, after having recalled the rules established in *Zambrano* and *Dereci* judgments [217], the ECJ left to the national Court to decide whether "the genuine enjoyment of the substance of rights" had been deprived. [218]

Then the Court followed to make some distinctions between this case and *Zambrano*; in fact the dependency of the minor EU citizen on the third country national asking for

[213] European Database of Asylum Law https://www.asylumlawdatabase.eu/en/content/cjeu-judgment-joined-cases-c-35611-and-c-35711-o-s-maahanmuuttovirasto-and

[214] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L., par 33

[215] 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

[216] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L. par 42

[217] Such as the fact that Zambrano and his spouse could not be denied residence and work permits only because their children –who had Belgian Nationality- had never exercised their freedom of movement and therefore that denial would have the effect of depriving the Union citizen the genuine enjoyment of the substance of the rights conferred by their status as EU citizens.

[218] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L. par. 45

residence had been reaffirmed, but in *Zambrano* that dependency would have led to the leaving of the children, forced to accompany their parents.

Differently, in the present judgment, Finnish children were not "legally, financially or emotionally dependant" on their step-fathers. In addition, their mothers who had them in custody already had permanent residence, so the denial of the residence permit to the step-father would have not obliged the EU citizens to leave.

The Court so concluded that *"it must be stated that Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain."* [219]

Afterwards, following the opinion of its Advocate General, the Court ruled that the right to family life was a separate consideration, to be addressed in the context of applicable fundamental rights provisions. [220]

In fact, Luxembourg Court established that the third country nationals mothers had to be considered as sponsors within the meaning of Article 2 (c) of the Family Reunification Directive [221].

Therefore, there was the necessity of ensuring family reunification, as the Directive imposes an obligation on States to authorize it, even though it may be subject to compliance with certain conditions such as proving sufficient resources [222].

Despite there is such a requirement, it must be pointed out that "*it is the resources of the sponsor that are the subject of the individual examination of applications for*

[219] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L. par. 58

[220] Murphy C., "*At the Periphery of EU Citizenship: C-356/11 O, S and L*",

[221] "*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"*

[222] Art 7.1 (c) of Dir 2003/86 "*stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.*

reunification required by that directive, not the resources of the third country national for whom a right of residence is sought on the basis of family reunification" [223].

So the ECJ affirmed, in this present case, that "*Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union"*[224], due to the fact that Article 7.1 (c) of Directive 2003/86 shall not be interpreted and applied in such a manner that its application would infringe fundamental rights set out in the Charter.

Therefore the Court asked to the national judges to apply the provisions of the Family Reunification Directive taking as a guide Articles 7, 24.2 and 24.3 of the Charter, in order to make a balanced and reasonable assessment of the interests at stake , paying attention to the interest of the children concerned and by avoiding any undermining of the objective and effectiveness of that directive [225].

Consequently the Court stressed that the national judge shall safeguard Charter rights when applying national and EU law and shall weight the competing interests.

On these grounds[226], the ECJ concluded that *"Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain."*[227]

Hence, applications for residence permits on the basis of family reunification are covered by Directive 2003/86; Member States have the faculty of requiring additional

[223] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L. par. 72.
[224] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L. par. 78
[225] Murphy C., "*At the Periphery of EU Citizenship: C-356/11 O, S and L***"**
[226] See also Gallo D., "*Développements récents en matière de citoyenneté européenne et regroupement familial*", in "*Revue de droit de l'Union Européenne*", 2012, par. 2 "*Le nouveau critère Zambrano: la privation de la jouissance effective de l'essentiel des droits conférés par le statut de citoyen de l'Union, en tant que condition nécessaire pour l'application du droit de l'Union européènne"*
[227]Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L Par 82

conditions than those laid down by such Directive, but they always have to examine applications for family reunification in the interests of the children concerned and with a view of promoting family life.

We may say that, differently from the previous Cases on which the Court had relied on, this judgment diverges because the ECJ went beyond citizenship provisions -whose compliance was requested by the National Court- by including them back into the regime which governs the reunification of third country nationals. [228]

7. MA & Others v. UK: the best interest of the child under Dublin Regulation

Another worth mentioning judgment of the European Court of Justice in 2013 clarified the position of unaccompanied children, subject to Dublin II Regulation [229].

In *MA & Others v. UK* [230] three children applied for asylum in the UK after having previously lodged asylum claims in the Netherlands and Italy.

The UK Court of Appeal submitted a preliminary reference question on Article 6 of the Regulation[231], for a clarification on the rule applicable to determine the Member State which must examine the asylum application lodged by a child.

Hence, the Court was asked to make clear which State was responsible for a child's asylum claim in situations where the child in question has lodged claims in more than

[228] Murphy C., "At the Periphery of EU Citizenship: C-356/11 O, S and L"

[229] Council Regulation (EC) No 343/2003. The aim of this Regulation is to identify as quickly as possible the Member State responsible for examining an asylum application, and to prevent abuse of asylum procedures; it establishes the principle that only one Member State is responsible for examining an asylum application. The objective is to avoid asylum seekers from being sent from one country to another, and also to prevent abuse of the system by the submission of several applications for asylum by one person.

[230] Case C-648/11 MA, BT and DA v Secretary of State for the Home Department. It should be remarked that this judgment had been delivered when it was still pending the recast for Dublin Regulation, which aimed at reducing Member States' discretion under the Dublin System for building a more sustainable Common Asylum Policy.

[231] Dublin II Regulation, Regulation (EC) No 343/2003 of 18 February 2003 Article 6"*Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.*

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

one Member State and has no family members present in the territories of Member States.[232]

First of all, it shall be remarked that –also in this judgment- the Court held that the child's best interest shall be a primary consideration in all decisions under the Dublin II Regulation [233], in pursuance of Article 24 of the Charter of Fundamental Rights.

In fact, Luxembourg Court stated that *"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."*[234]

In other words, this means that unaccompanied children who claim asylum in a Member State cannot be removed to another State pursuant to the Dublin Regulation.

In addition, it shall be remarked that it was the first time that the Court has interpreted secondary EU law in light of Article 24 of the Charter, after becoming a legally binding instrument under the Lisbon Treaty[235]and clarified this provision, as the lack of uniformity left children in a precarious situation depending on where they claimed asylum.

In doing so, the ECJ has extended the scope of the Dublin criterion of examination of a family asylum application, by relying on humanitarian grounds and by giving a broad meaning to the humanitarian provisions of the Regulation.[236]

It may be concluded that, therefore, Dublin II Regulation shall only be applied in a manner which safeguards the rights of the child under EU primary law.

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[232] Hennessy M., "Best interests of the child and the Dublin System (C-648/11)" https://europeanlawblog.eu/2013/08/06/best-interests-of-the-child-and-the-dublin-system-c-64811/

[233] Dublin II Regulation it is no longer in force, as it has been replaced by REGULATION (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (Dublin III Regulation)

[234] Case C-648/11 MA, BT and DA v Secretary of State for the Home Department par. 55

[235] Hennessy M., "*Best interests of the child and the Dublin System (C-648/11)*" https://europeanlawblog.eu/2013/08/06/best-interests-of-the-child-and-the-dublin-system-c-64811/

[236] Mitsilegas V., "*Solidarity and Trust in the Common European Asylum System*" in "*Comparative Migration Studies*", vol. 2, 2014, p. 197

8. A & S judgment[237]: the ECJ's interpretation of Directive 2003/86

The present judgment covers the interpretation of the first part of Article 2 (f) of Directive 2003/86 [238].

Before analyzing the ECJ's reasoning, it is noteworthy to stress the fact that many Member States have considerably restricted family reunification rights over these years and this has been confirmed by the Council of Europe's Commissioner for Human Rights [239].

As a matter of fact, there is a large number of obstacles which affects the chances of success for refugees who wish to reunite with their families, especially if they are minor. [240] Such a problem is more emphasized when a minor attains the age of majority during the asylum procedure, who will be consequently subject to stricter reunification requirements.

In this preliminary ruling is asked to the Court to define which is the relevant moment to be taken into consideration for qualifying the minor age of the unaccompanied refugee that, after being recognized worthy of international protection, wants to benefit from the more favorable regime of Directive 2003/86, as established in art 10.3 [241].

This application concerned the situation of a 17 year old Eritrean girl who –after arriving unaccompanied in the Netherlands- lodged an application for asylum. She turned 18 after four months, so during the procedure of asylum; the Netherlands gave

[237] Case C-550/16 A and S v. Staatssecretaris van Veiligheid en Justitie

[238] Directive 2003/86 Article 2(f)"*unaccompanied minor' means third country nationals or stateless persons below the age of eighteen, who arrive 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."*

[239] Council of Europe Commissioner for Human Rights, Human Rights Comment "*Des lois restrictives empêchent le regroupement familial*"

[240] *Nicolosi S., "Shedding Light on the Protective Regime for Unaccompanied Minors Under the Family Reunification Directive: The Case of A and S" in "European Papers", vol 3, p. 1497*

[241] Directive 2003/86 Article 10.3. *"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."*

her a residence permit, valid for five years, with retroactive effect from the date on which her application for asylum was submitted [242].

The issue was that when she asked for a residence permit for her parents and her minor brothers, in order to exercise her right to family reunification she had already turned 18 years old, so the Secretary of State rejected her application and the claim against this decision was declared inadmissible. [243]

On the one hand, the applicants argued that, in order to determine who can be qualified as "unaccompanied minor", it shall be taken into account the date of entry in the Member State while, on the other hand, the Secretary of State believes that the relevant criterion is the date of the application for family reunification.

In asking the Court for a preliminary ruling, the national judge already stressed that in judgment *Minister van Buitenlandse Zaken v K, A*[244] the *Raad van State* had already held that if a third country national turned 18 years old after his/her entry into the Member State's territory, it should be assessed if he/her can be granted the right to family reunification.

Thus, Luxembourg Court was asked to determine whether an unaccompanied child who arrives in a Member State, who lodges a request for international protection and who is granted the refugee status after attaining 18 years old is still entitled to a right to family reunification pursuant to Article 10.3 (a) of Directive 2003/86.

In delivering its judgment, as already done in *Chakroun* and *O, S &L*, the ECJ recalled the primary purposes and principles of the Directive, such as the fact of promoting family reunification, providing special protection to refugees and unaccompanied minors and to observe the principles of equal treatment and legal certainty [245].

According to the Court " *For the purposes of interpreting that provision, it should be noted that, in accordance with the need for a uniform application of EU law and the principle of equality, a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must*

[242]*Babicka K., "CJEU Confirms that EU law on Family Reunification should be accessible and effective for unaccompanied children* http://opiniojuris.org/2018/04/25/cjeu-confirms-that-eu-law-on-family-reunification-should-be-accessible-and-effective-for-unaccompanied-children/

[243]Le sentenze della Corte di Giustizia dell'Unione Europea rilevanti in materia di asilo analizzate da Asilo in Europa http://www.asiloineuropa.it/wp-content/uploads/2018/10/A-e-S-c.-Staatssecretaris.pdf

[244] Case C-153/14, Minister van Buitenlandse Zaken v K, A

[245]*Babicka K., "CJEU Confirms that EU law on Family Reunification should be accessible and effective for unaccompanied children* http://opiniojuris.org/2018/04/25/cjeu-confirms-that-eu-law-on-family-reunification-should-be-accessible-and-effective-for-unaccompanied-children/

normally be given an autonomous and uniform interpretation throughout the European Union, and that interpretation must take into account, inter alia, the context of the provision and the objective pursued by the legislation in question" [246]

As Article 2 (f) and 10.3 (a) do not make any reference to national law or Member States, the intention of the legislator was to exclude any discretion at national level with regards family reunification for unaccompanied refugee minors.

On this basis, the Court considered that there are provisions in Directive 2003/86 expressly referring to national law, like for instance Articles 5 (1) [247] and 11 (2) [248] and thereby concluded that if the EU legislature intended to leave the Member States with some discretion in order to decide when the condition of a child being 'below the age of eighteen' would be satisfied, it would have included an express reference in that context too. [249]

Furthermore, the Court highlighted that *" taking into account the fact that the duration of an asylum procedure may be significant and that, in particular in periods of substantial surges in applications for international protection, the time limits laid down in that regard by EU law are often exceeded, to make the right to family reunification depend upon the moment when that procedure is closed would be likely to deny a substantial proportion of refugees who have submitted their application for international protection as an unaccompanied minor from the benefit of that right and the protection that Article 10(3)(a) of Directive 2003/86 is intended to confer on them*."[250].

Subsequently, starting from Article 2 (f), the Court points out a crucial point on the ratio of the norm: before the definitely recognition of the refugee status, it is impossible to know whether the applicant will have the right to be granted of the more favorable regime of family reunification.

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[246] Case C-225/16 Mossa Ouhrami Par 38

[247] Directive 2003/86 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*"

[248] Directive 2003/86 Article 11.2"*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*."

[249] Case C-550/16 A and S v. Staatssecretaris van Veiligheid en Justitie. Par 42

[250] Case C-550/16 A and S v. Staatssecretaris van Veiligheid en Justitie. Par 57

Therefore, the Court believes that it is impossible to preclude access to family reunification application to unaccompanied minor refugees that, during the procedure, reached 18 years old, as it is stated in par. 55 of the judgment.[251]

As in its previous case-law, the Court recalled the principle of legal certainty, because *" that interpretation would have the consequence of making it entirely unforeseeable for an unaccompanied minor who submitted an application for international protection to know whether he or she will be entitled to the right to family reunification with his or her parents, which might undermine legal certainty"*[252] if the decisive moment taken into consideration would be the date when she submitted the application for family reunification.

Whereas, according to the Court, taking as a reference point the date of the lodge of the application of asylum request in order to identify the minor age of the refugee is able to ensure an identical and foreseeable treatment to refugees who had applied for international protection at the same moment. [253]

In this way, the eventual admissibility of the application for family reunification will depend on the promptness of the people concerned and will not be depend from public authorities, as it has been stressed in par. 60. [254]

But this does not mean that the application can be lodged without any time limit, as the Court expressly stated that the request, in order to be considered as admissible, shall be submitted within 3 months from the recognition of refugee status and it is up to the national competent authorities to process applications for international protection within the shorter delay possible, in order to comply with the rights protected by the Charter of

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[251] *"In those circumstances, to make the right to family reunification under Article 10(3)(a) of Directive 2003/86 depend upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority, would call into question the effectiveness of that provision and would go against not only the aim of that directive, which is to promote family reunification and to grant in that regard a specific protection to refugees, in particular unaccompanied minors, but also the principles of equal treatment and legal certainty."*

[252] Case C-550/16 A and S v. Staatssecretaris van Veiligheid en Justitie. Par 59

[253]Le sentenze della Corte di Giustizia dell'Unione Europea rilevanti in materia di asilo analizzate da Asilo in Europa http://www.asiloineuropa.it/wp-content/uploads/2018/10/A-e-S-c.-Staatssecretaris.pdf

[254] "*taking the date on which the application for international protection was submitted as that by reference which it is appropriate to assess the age of a refugee for the purposes of Article 10(3)(a) of Directive 2003/86 enables identical treatment and foreseeability to be guaranteed for all applicants who are in the same situation chronologically, by ensuring that the success of the application for family reunification depends principally upon facts attributable to the applicant and not to the administration such as the time taken processing the application for international protection or the application for family reunification*"

Fundamental Rights of the EU as well as the objectives of Family Reunification Directive.

In concluding its reasoning, the Court clarified the reasons why it rejected the interpretation given by the Dutch government.

First and foremost, the Court held that the date of entrance in a Member State shall not be taken into consideration, as the right to family reunification depends from the recognition of international protection that, in its turn, derives from the lodge of an asylum application.

At the same way, it cannot be considered as relevant the date in which the request for family reunification is submitted, which can be asked only after the full approval of refugee status. In such a case, in fact, the positive outcome of the application would depend on the fastness of asylum procedure, rather than on circumstances attributed to the refugee. [255]

That is the reason why the fact that the applicant has turned 18 is not relevant for the application of family reunification, taking as its legal basis Article 10.3 (a) of Directive 2003/86.

Then, in the end, Luxembourg Court clarified that Article 2 (f) of the Directive 2003/86 shall be read in conjunction with Article 10.3 (a) and interpreted as meaning that a third country national which is below the age of 18 at the moment of his/her entry into a Member State's territory and reaches the age of majority during the asylum procedure, must be regarded as a "minor" for the purposes of that provision.

This decision is in accordance with the obligation that imposes to Member States to take the best interests of the child as a primary consideration when there are acts involving the child. As we have seen, States have positive obligations in order to grant children's effective enjoyment of their right to respect for family life. [256]

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[255] Par.63 *"As regards, second, the date on which the application for family reunification is submitted and the date on which it is decided, it suffices to recall that it is clear in particular from paragraph 55 of this judgment that the right to family reunification laid down in Article 10(3)(a) of Directive 2003/86 cannot depend on the moment at which the competent national authority formally adopts the decision recognising that the sponsor has refugee status. However, that would be precisely the case if one of those dates were taken to be decisive, given that, as observed in paragraphs 50 to 51 of this judgment, the sponsor may only submit an application for family reunification after the adoption of the decision recognising his or her refugee status."*

[256] *Babicka K., "CJEU Confirms that EU law on Family Reunification should be accessible and effective for unaccompanied children"* http://opiniojuris.org/2018/04/25/cjeu-confirms-that-eu-law-on-family-reunification-should-be-accessible-and-effective-for-unaccompanied-children/

This duty has been imposed under both EU and international law, as it has been stressed by the UN Committee on the Rights of the Child and the UN Committee on the Rights of Migrant Workers in their "Joint General Comment on children in the context of international migration" [257].

Thus, as provided by EU Charter, the best interests of the child have to be taken into consideration and respected, together with the right to private and family life and the prohibition of discrimination [258].

In its decision, the Court safeguards children's fundamental rights to be reunited with their parents and denied Member States discretion on the topic.

Moreover, the ECJ links the process of the enjoyment of refugee status with the right to family reunification and sees with suspect any administrative delays when processing applications from unaccompanied minors asking for international protection, because such delays may be used with the scope of voiding the right to family reunification [259]; so the Court wants to protect unaccompanied minors against the inattention of national competent authorities.

Differently from the Court, the European Commission had a different view on the matter and held that the decisive moment should have been the time when the person applies for reunification [260], by issuing in 2014 the Interpretative Guidelines for the Family Reunification Directive; in these Guidelines, the Commission specified that

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[257] 32. "*Under article 10 of the Convention on the Rights of the Child, States parties are to ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents. When the child's relations with his or her parents and/or sibling(s) are interrupted by migration (in both the cases of the parents without the child, or of the child without his or her parents and/or sibling(s)), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification*"

[258] "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

[259] Bartolini S., "*The Right to Family Reunification of Unaccompanied Minor Asylum Seekers before the Court of Justice of the EU*" https://europeanlawblog.eu/2018/05/07/the-right-to-family-reunification-of-unaccompanied-minor-asylum-seekers-before-the-court-of-justice-of-the-eu/

[260] Case C-550/16 A and S v. Staatssecretaris van Veiligheid en Justitie Par 30"*A and S consider that that question calls for an answer in the affirmative, whereas the Netherlands and Polish Governments and the European Commission take the opposite view. More specifically, the Netherlands Government submits that it is for Member States to define the relevant moment for determining whether a refugee must be regarded as an unaccompanied minor within the meaning of Article 2(f) of Directive 2003/86. Conversely, the Polish Government and the Commission consider that that moment may be determined on the basis of that directive. According to the Commission, that moment is when the application for family reunification is submitted, whereas, for the Polish Government, it is when the decision on that application is adopted"*

criteria and conditions set up by Member States cannot be discriminatory and must be transparent and clearly specified in national legislation.

In conclusion, this latter ruling has constituted a strong contribution to the clarification of the aim of the Directive 2003/86, by providing –at the same time- guidance as to the protective regime for refugees who are unaccompanied minors.

In fact the Court has held that this protection shall be extended beyond the maturity age if the person concerned accesses the territory of a Member State, then submits an application for the refugee status before being eighteen and consequently is successful in its application, thanks to this extensive interpretation. [261]

It should be noted that the Court in these judgments has confirmed its view on the matter of family reunification since *Parliament v Council* – and so after the adoption of the Family Reunification Directive -at a time in which the co-decision procedure did not apply to migration and asylum area and which was very criticized because it granted a wide margin of appreciation to Member States; it has been therefore necessary the ECJ's intervention in the analyzed judgments to establish some limitations to States' margin of appreciation. [262]

9. An insight to the approach of the ECJ in its recent rulings

In its case law, the Court of Justice has continued to guide the Member States towards the best interpretation to be given to EU law. [263]

An example of this continuous attention from the ECJ can be found in *Bajratari* judgment [264], in which the Court had the opportunity to clarify the "sufficient resources" condition required by Article 7.1 (b) of Directive 2004/38, as well as reinforcing the right to free movement granted to EU citizens.

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[261] Nicolosi S., *"Shedding Light on the Protective Regime for Unaccompanied Minors Under the Family Reunification Directive: The Case of A and S"* in *"European Papers"*, vol 3, p. 1493

[262] *Babicka K., "CJEU Confirms that EU law on Family Reunification should be accessible and effective for unaccompanied children"* http://opiniojuris.org/2018/04/25/cjeu-confirms-that-eu-law-on-family-reunification-should-be-accessible-and-effective-for-unaccompanied-children/

[263] In this paragraph, it will be analyzed a recent judgment delivered by the Court in October 2019.
I decided not to take into consideration other decisions from the ECJ –either from 2013 to 2016 and from 2016 to 2019- as there were no significant innovations brought by Luxembourg Court to the issue of the best interest and family reunification other than the aforementioned cases.

[264] Case C-93/18 Ermira Bajratari v Secretary of State for the Home Department

This decision concerned the right of a third country national –mother of two minor Union citizens- to reside in Northern Ireland as, according to UK authorities, the woman could not claim a derived right of residence for the reason that the requirements set out in Article 7.1 (b) of Directive 2004/38 were not fulfilled[265].

Even though the father of these children did place resources at their disposal, UK authorities argued that such resources could not be taken into consideration for the purpose of the Directive, because they were deriving from employment carried out unlawfully after the expiry of his residence card and work permit. [266]

The question referred to Luxembourg Court were: *"(1) Can income from employment that is unlawful under national law establish, in whole or in part, the availability of sufficient resources under Article 7(1)(b) of [Directive 2004/38/EC]? (2)If "yes", can Article 7(1)(b) [of that directive] be satisfied where the employment is deemed precarious solely by reason of its unlawful character?"*[267]

Above all, the Court relied on two key aspects to support its decision: the wording of Article 7.1 (b) and proportionality principle.

For what concerns the first argument, the ECJ held that the wording of Article 7 does not require that only resources deriving from lawful employment can be considered, because *" That provision merely requires that the Union citizens concerned have sufficient resources at their disposal to prevent them from becoming an unreasonable burden on the social assistance system of the host Member State during their period of residence, without establishing any other conditions, in particular as regards the origin of those resources."*[268]

In addition, the Court stated that since " *the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) Directive 2004/38 must be construed in compliance with the limits imposed by*

[265] Article 7.1 (b) Directive 2004/38 "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: […]b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State […]

[266] Haag M., "*Case C-93/18 Bajratari – Unlawful Employment and the Right to Free Movement*" **https://europeanlawblog.eu/2019/10/07/case-c-93-18-bajratari-unlawful-employment-and-the-right-to-free-movement/**

[267] Case C-93/18 Ermira Bajratari v Secretary of State for the Home Department par. 17

[268] Case C-93/18 Ermira Bajratari v Secretary of State for the Home Department par. 34

EU law and the principle of proportionality"[269]; hence, it can be noticed that this is a clear reference to *Baumbast* judgment [270].

Moreover, as there are several provisions in Directive 2004/38 that allow Member States to act in the event of a loss of financial resources in order to protect its social welfare system [271], the introduction of a further requirement "*would constitute a disproportionate interference with the exercise of the Union citizen minor's fundamental rights of free movement and of residence under Article 21 TFEU, in so far as that requirement is not necessary for the achievement of the objective pursued."*[272]

Thus, to draw a preliminary conclusion, it may be observed that the ECJ has taken into account the realities and difficulties of migration and that it has developed –in its subsequent case-law- the principles stated in *Chen* and *Zambrano* judgments and it also went a step further in the child's protection; in fact, the Court stated that EU children do not have to prove personal financial resources and even that Member States are not entitled to assess how those resources were acquired, as income acquired from unlawful employment shall be included into the "sufficient resources requirement".[273]

[269] Case C-93/18 Ermira Bajratari v Secretary of State for the Home Department par. 35
[270] Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department. Par. 91
[271] Haag M., "*Case C-93/18 Bajratari – Unlawful Employment and the Right to Free Movement*" https://europeanlawblog.eu/2019/10/07/case-c-93-18-bajratari-unlawful-employment-and-the-right-to-free-movement/
[272] Case C-93/18 Ermira Bajratari v Secretary of State for the Home Department par. 42
[273] Haag M., "*Case C-93/18 Bajratari – Unlawful Employment and the Right to Free Movement*" https://europeanlawblog.eu/2019/10/07/case-c-93-18-bajratari-unlawful-employment-and-the-right-to-free-movement/

Chapter III

EU implications on national legal systems: the Italian system as a model legislation in the protection of the family

1. A brief overview on Italian Legislation

This section will focus on the changes in the field of family reunification brought by the laws in Italy, in order to land to the Implementation of Directive 2003/86 which had been transposed into Italian Law with Legislative Decree n.5 of 2007.

The reason why we will concentrate on Italian Legislation is that it had been defined by scholars as a "model for Europe" [274], due to the fact that Italy had anticipated the legislative intent of the Directive on family reunification by enacting law *Turco-Napolitano* in 1998 and law *Bossi-Fini* in 2002, that will be analyzed in depth throughout this chapter.

In addition, the evolution of the Italian legislation and its adherence with EU norms will be showed through the examination of three relevant judgments, but by always taking into account the guiding principles provided by Strasbourg Court and the European Court of Justice, as well as by the Italian Supreme Court[275].

Italy, as it is part of the Council of Europe, is bound to the European Convention on Human Rights and ,in addition, it also has to comply with the norms of the Charter of Fundamental Rights of the European Union, on the grounds that all EU Member States cannot contravene to the provisions contained in the Charter.

It follows that Italy is bound both to Nice Charter – in particular, concerning this field, to Article 7- and to the EU Convention on Human Rights (hence, to Article 8) when dealing with family law[276].

[274] See as an example, Basso P., Perocco F., in "*Gli immigrati in Europa*"

[275] It is necessary to examine a case provided by the Italian Supreme Court, as its main function is to ensure the observance and the uniform interpretation of the law, as well as the unity of national subjective law.

[276] Italy has to comply with these provisions by virtue of the fact that, according to article 117 of the Italian Constitution, in exercising its law-making power it has to respect Community and International obligations

But it should be pointed out that the Italian Constitution had preceded EU norms on the protection of the family as it is demonstrated by Article 29 [277], 30 [278] and 31 [279] .

The analysis of the present chapter will be carried out on the basis of EU law and on the duties which bound Italy for the compliance with family reunification norms, as well as on the guidelines provided by the judgments of the ECJ and the ECtHR.

It should be pointed out that this fundamental right is also taken into consideration *vis à vis* the legislation on immigration, as it is equally enshrined in Article 29 Legislative Decree n.286[280] of 1998, which is still in force even though it has been subject to

[277] Article 29 Italian Constitution" *La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sull'uguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare"*

[278] Article 30 Italian Constitution " *E` dovere e diritto dei genitori mantenere, istruire ed educare i figli, anche se nati fuori del matrimonio. Nei casi di incapacità dei genitori, la legge provvede a che siano assolti i loro compiti."*

[279] Article 31 Italian Constitution "*La Repubblica agevola con misure economiche e altre provvidenze la formazione della famiglia e l'adempimento dei compiti relativi, con particolare riguardo alle famiglie numerose. Protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo*"

[280] Article 29 D. Lgs. 25 luglio 1998, n. 286 "*1. Lo straniero puo' chiedere il ricongiungimento per i seguenti familiari:*
a) coniuge non legalmente separato;
b) figli minori a carico, anche del coniuge o nati fuori del matrimonio, non coniugati ovvero legalmente separati, a condizione che l'altro genitore, qualora esistente, abbia dato il suo consenso;
c) genitori a carico;
d) parenti entro il terzo grado, a carico, inabili al lavoro secondo la legislazione italiana.
2. Ai fini del ricongiungimento si considerano minori i figli di eta' inferiore a 18 anni. I minori adottati o affidati o sottoposti a tutela sono equiparati ai figli.
3. Salvo che si tratti di rifugiato, lo straniero che richiede il ricongiungimento deve dimostrare la disponibilita':
a) di un alloggio che rientri nei parametri minimi previsti dalla legge regionale per gli alloggi di edilizia residenziale pubblica, ovvero, nel caso di un figlio di eta' inferiore agli anni 14 al seguito di uno dei genitori, del consenso del titolare dell'alloggio nel quale il minore effettivamente dimorera';
b) di un reddito annuo derivante da fonti lecite non inferiore all'importo annuo dell'assegno sociale se si chiede il ricongiungimento di un solo familiare, al doppio dell'importo annuo dell'assegno sociale se si chiede il ricongiungimento di due o tre familiari, al triplo dell'importo annuo dell'assegno sociale se si chiede il ricongiungimento di quattro o piu' familiari. Ai fini della determinazione del reddito si tiene conto anche del reddito annuo complessivo dei familiari conviventi con il richiedente.
4. E' consentito l'ingresso, al seguito dello straniero titolare di carta di soggiorno o di un visto di ingresso per lavoro subordinato relativo a contratto di durata non inferiore a un anno, o per lavoro autonomo non occasionale, ovvero per studio o per motivi religiosi, dei familiari con i quali e' possibile *attuare il ricongiungimento, a condizione che ricorrano i requisiti di disponibilita' di alloggio e di reddito di cui al comma 3.*
5. Oltre a quanto previsto dall'articolo 28, comma 2, e' consentito l'ingresso, al seguito del cittadino italiano o comunitario, dei familiari con i quali e' possibile attuare il ricongiungimento.
6. Salvo quanto disposto dall'articolo 4, comma 6, e' consentito l'ingresso, per ricongiungimento al figlio minore regolarmente soggiornante in Italia, del genitore naturale che dimostri, entro un anno dall'ingresso in Italia, il possesso dei requisiti di disponibilita' di alloggio e di reddito di cui al comma 3.
7. La domanda di nulla osta al ricongiungimento familiare, corredata della prescritta documentazione, e' presentata alla questura del luogo di dimora del richiedente, la quale ne rilascia copia contrassegnata con timbro datario e sigla del dipendente incaricato del ricevimento. Il questore, verificata l'esistenza dei

various modifications, like the *Bossi-Fini* law of 2002 n. 189, legislative decree 5/2007, legislative decree 160/2008 and lastly by Law 94/2009 *Pacchetto sicurezza*. [281]

On 21/10/2008 it has been published in the *Gazzetta Ufficiale* the legislative Decree 160/2008, which amended and embedded legislative decree 5/2007 implementing family reunification Directive 2003/86, as well as legislative decree 3/2007 implementing Directive 2003/109 on the long-term resident status of third country nationals.

Both these Directives have their legal basis on Article 63 as amended by Amsterdam Treaty in 1997[282]; this norm attributes the power to the Community of adopting measures related to entry and residence conditions, besides the procedures for granting

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requisiti di cui al presente articolo, emette il provvedimento richiesto, ovvero un provvedimento di diniego del nulla osta.

8. Trascorsi novanta giorni dalla richiesta del nulla osta, l'interessato puo' ottenere il visto di ingresso direttamente dalle rappresentanze diplomatiche e consolari italiane, dietro esibizione della copia degli atti contrassegnata dalla questura, da cui risulti la data di presentazione della domanda e della relativa documentazione.

9. Le rappresentanze diplomatiche e consolari italiane rilasciano altresi' il visto di ingresso al seguito nei casi previsti dal comma 5."

[281] Savi C.*,"Le regroupement familial en Italie. Une législation de plus en plus restrictive qui s'inscrit dans un contexte plus général de fermeture des frontières européennes"* in "*Italies. Les mouvements migratoires entre réalité et représentation*", 2010, p. 253.

[282] Article 63 TEC: "*The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:*
(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
(b) minimum standards on the reception of asylum seekers in Member States,
(c) minimum standards with respect to the qualification of nationals of third countries as refugees,
(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;
(2) measures on refugees and displaced persons within the following areas:
(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;
(3) measures on immigration policy within the following areas:
(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,
(b) illegal immigration and illegal residence, including repatriation of illegal residents;
(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.
Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.
Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above."

long-term visa and residence permits, including those issued with the aim of family reunification.

Tampere Council [283], in defining the common policy on immigration and asylum, affirmed the necessity of granting an equal treatment of third country nationals who legally reside in Member States' territory.

It also stressed the opportunity of a more incisive policy for granting the same rights and duties of EU citizens, in order to equally consider the legal status of third country nationals and Member States' citizens.

If we look at these two Directives, it can be noticed that there is undoubtedly a will of harmonizing the existing rules in the Member States, but in a gradual way [284].

This aim emerges from various profiles, such as the clause according to which such Directives only set minimum harmonization rules, but do not impede to Member States the adoption of more favourable rules; furthermore, the latter always enjoy a wide margin of appreciation and this let them limit or exclude rights, or let them introduce additional conditions for the best exercise of these rights.

2. From *Turco-Napolitano* Law to the current legislation on family reunification

This law [285] has, for the first time in Italy, regulated in a significant way the condition of unaccompanied third-country minors.

In fact, the previous *Legge Martelli* [286]only contained some marginal dispositions that did not affect the protection and defence of minors, including foreigners.

Consistently with the objective of integration, *Turco-Napolitano* law introduced some important principles: the prohibition of expulsion for minors under the age of eighteen [287]; the attribution of the residual possibilities of expulsion to the Juvenile Court [288]; the

[283] Tampere European Council of 1999 on common EU asylum and migration policy

[284] Di Pascale A., Pastore M., "*Il recepimento delle direttive sul ricongiungimento familiare e sui soggiornanti di lungo periodo*" in "*Diritto, immigrazione e cittadinanza*", fascicolo 1, Milano, 2007, p. 2

[285] L. 6 Marzo 1998 n.40, converged into the Consolidated Act on Immigration of 1998

[286] L. 28 febbraio 1990, n. 39, that governed some aspects of Immigration in Italy.

[287] Article 19 D. Lgs 286/98 "1. *In nessun caso puo' disporsi l'espulsione o il respingimento verso uno Stato in cui lo straniero possa essere oggetto di persecuzione per motivi di razza, di sesso, di lingua, di cittadinanza, di religione, di opinioni politiche, di condizioni personali o sociali, ovvero possa rischiare di essere rinviato verso un altro Stato nel quale non sia protetto dalla persecuzione.*

right to family unity and the primacy, in the relative proceedings, of the best interest of the child. [289]

And the subsequent implementing regulation established that minors, who were not expelled, were granted a residence permit "for minors" by the police commissioner.

In theory, in Italy –before the amendments made to the Treaties- we could already find norms protecting family reunification (and, in particular, minors) as in 1991 Italy ratified New York Convention on the Right of the Child, which should had helped to meet the concerns on the application of its norms and of other International Agreements, in addition to those regarding the Italian Constitution or the criminal code which had to safeguard the third country minor in the same ways as Italian minors. [290]

However, there were doubts on how to admit foreigners in the schools, on how to regulate their access to employment or to healthcare and social services, due to the fact that Italy had not yet clear dispositions on this issues; this led to undermine the rights enshrined in the aforementioned dispositions.

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2. Non e' consentita l'espulsione, salvo che nei casi previsti dall'articolo 13, comma 1, nei confronti: a) degli stranieri minori di anni diciotto, salvo il diritto a seguire il genitore o l'affidatario espulsi; b) degli stranieri in possesso della carta di soggiorno, salvo il disposto dell'articolo 9; c) degli stranieri conviventi con parenti entro il quarto grado o con il coniuge, di nazionalita' italiana; d) delle donne in stato di gravidanza o nei sei mesi successivi alla nascita del figlio cui provvedono."

[288] Article 31 D. Lgs 286/98 *"1. Il figlio minore dello straniero con questi convivente e regolarmente soggiornante e' iscritto nel permesso di soggiorno o nella carta di soggiorno di uno o di entrambi i genitori fino al compimento del quattordicesimo anno di eta' e segue la condizione giuridica del genitore con il quale convive, ovvero la piu' favorevole tra quelle dei genitori con cui convive. Fino al medesimo limite di eta' il minore che risulta affidato ai sensi dell'articolo 4 della legge 4 maggio 1983, n. 184, e' iscritto nel permesso di soggiorno o nella carta di soggiorno dello straniero al quale e' affidato e segue la condizione giuridica di quest'ultimo, se piu' favorevole. L'assenza occasionale e temporanea dal territorio dello Stato non esclude il requisito della convivenza e il rinnovo dell'iscrizione.*

2. Al compimento del quattordicesimo anno di eta' al minore iscritto nel permesso di soggiorno o nella carta di soggiorno del genitore ovvero dello straniero affidatario e' rilasciato un permesso di soggiorno per motivi familiari valido fino al compimento della maggiore eta', ovvero una carta di soggiorno.

3. Il Tribunale per i minorenni, per gravi motivi connessi con lo sviluppo psicofisico e tenuto conto dell'eta' e delle condizioni di salute del minore che si trova nel territorio italiano, puo' autorizzare l'ingresso o la permanenza del familiare, per un periodo di tempo determinato, anche in deroga alle altre disposizioni della presente legge. L'autorizzazione e' revocata quando vengono a cessare i gravi motivi che ne giustificavano il rilascio o per attivita' del familiare incompatibili con le esigenze del minore o con la permanenza in Italia. I provvedimenti sono comunicati alla rappresentanza diplomatica o consolare e al questore per gli adempimenti di rispettiva competenza.

4. Qualora ai sensi del presente testo unico debba essere disposta l'espulsione di un minore straniero, il provvedimento e' adottato, su richiesta del questore, dal tribunale per i minorenni."

[289] Miazzi L., "*Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda*" in "*Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia",* Milano, 2010, p. 10.

[290] Turri G. C., "*Minori stranieri non accompagnati: dalla legge Turco-Napolitano alla Bossi-Fini*" in " *Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia*", Milano, 2002, p 59.

In addition, it was at stake also minors' expulsions, as there were often ordered illegitimate expulsions for the reason that a minor can be taken in custody only from his/her parents or to his/her guardian.

In Italy, provided that a "left-alone" minor is necessarily under protection [291], the return to the custody can be provided by the judge.

Another problem that arose was the right of the minor to stay in Italy, especially after turning 18 years old.

We will see that only on this last matter the law *Bossi-Fini* had an impact, by providing that the residence permit may be released only if no decision of expulsion has occurred and –at the moment in which they become adults- unaccompanied minors were staying on Italian territory since at least three years and were part of at least two years of a social integration project. [292]

In this law it was expressly stated a prohibition of expulsion of minors, unless there were exceptional circumstances that had to be evaluated by juvenile judge and unless their parents were not expelled from the territory.

What is contested in this law is the fact that it provided for an expulsion of the minors in the two abovementioned circumstances, but it seemed unlawful and illegitimate to equate the expulsion of a minor to the one provided for adults, as the State's duty of protecting and taking care of the child shall prevail over the State's interest of expulsion.

Nonetheless, the effectiveness of the prohibition of expulsion did not last too much.

In fact, after a few months from the entry into force of such law, the Government – delegated by the Parliament to set all the necessary measures for the application of the

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291 Article 343 Italian Civil Code "*Se entrambi i genitori sono morti o per altre cause non possono esercitare la responsabilità genitoriale, si apre la tutela presso il tribunale del circondario dove è la sede principale degli affari e interessi del minore .*

Se il tutore è domiciliato o trasferisce il domicilio in altro circondario, la tutela può essere ivi trasferita con decreto del tribunale

Article 402 Italian Civil Code "*L'istituto di pubblica assistenza esercita i poteri tutelari sul minore ricoverato o assistito, secondo le norme del titolo X, capo I di questo libro , fino a quando non si provveda alla nomina di un tutore, e in tutti i casi nei quali l'esercizio della responsabilità genitoriale o della tutela sia impedito. Resta salva la facoltà del giudice tutelare di deferire la tutela all'ente di assistenza o all'ospizio, ovvero di nominare un tutore a norma dell'articolo 354.*

Nel caso in cui il genitore riprenda l'esercizio della responsabilità genitoriale, l'istituto deve chiedere al giudice tutelare di fissare eventualmente limiti o condizioni a tale esercizio"

[292] Turri G. C., "*Minori stranieri non accompagnati: dalla legge Turco-Napolitano alla Bossi-Fini*" in "*Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia*", Milano, 2002, p. 60.

Law- reintroduced the assisted return, which was an administrative measure with no jurisdictional control more than the granting of authorization [293].

This measure was considered unlawful for the reason that the Government authorized himself to reintroduce the assisted return, despite the law was setting that minors could stay into Italian territory, without prejudice to the power of expulsion granted to the judicial authority.

The matter of constitutional illegitimacy had been brought before the *Tar di Trento,* but it was rejected by reason of the fact that the enabling act to the Government was very wide, so did not contravene Article 76 of the Italian Constitution [294].

The implementing Regulation of the law introduced the residence permit for minors as well as establishing the Committee for Foreign minors, that was competent for removals.

It is noteworthy that in the first position paper on foreigners, the Government -by outlining the principal aims concerning immigration- affirmed that the minors shall be the very protagonists of the integration process. But actually, this did not happen at all.[295]

In fact, in the assisted return procedure juvenile judicial authorities were not taken into consideration even though, in our judicial system, they are tasked with assessments, implementation and protection of minor's interests.

Thus, all the procedure dealing with the assessment on the status of the foreign unaccompanied minor and of execution of the assisted return was carried out without the involvement of juvenile judges. In other words, the best interests of the minor (such as the interest to work, to study and to have a better life) are not taken into account and cannot prevail over their expulsion. [296]

Therefore, if there is no interest to guarantee, there is no need to neither involve judicial organs nor to hear the minor, as it was up to the Committee for foreign minors to detect and to realize their interests.

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[293] Turri G. C., "*Minori stranieri non accompagnati: dalla legge Turco-Napolitano alla Bossi-Fini*" in "*Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia*", Milano, 2002, p. 60.

[294] Article 76 Constitution " *L'esercizio della funzione legislativa non può essere delegato al Governo se non con determinazione di principi e criteri direttivi e soltanto per tempo limitato e per oggetti definiti*."

[295] Miazzi L., "*Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda*" in "*Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia",* Milano, 2010, p. 12

[296] Ibid.

In order to fill the gaps and to solve the problems that law *Turco-Napolitano* has caused, the right-wing majority proposed a new law on immigration: the so called *Bossi-Fini*.

2.1 The subsequent *Bossi-Fini* Law

The draft law that led to the approval of *Bossi-Fini* law [297] had as its aim the revision of the legislation on immigration and aimed at substituting the previous *Turco-Napolitano* law.

As on the Italian territory there were several minors, the solution that was adopted by this law was to take them into consideration and to guarantee their staying, but as workers; hence they were not seen as persons to be protected anymore, but as manpower.

For this reason, the law established that unaccompanied minors, after turning 18 years old, could remain in Italy as workers if they fulfilled two conditions: a) they at least had resided into the territory for three years; b) they had participated for at least two years to a project for social integration, organized by the Committee for foreign minors [298].

Furthermore, the possibility of family reunification was very narrowed as it was limited for parents [299]and abolished for relatives up to the third degree unable to work [300].

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[297] L. 2002, n. 189

[298] Article 25 l. 2002 n.189 "*1. All'articolo 32 del testo unico di cui al decreto legislativo n. 286 del 1998, dopo il comma 1 sono aggiunti i seguenti:*

«1-bis. Il permesso di soggiorno di cui al comma 1 può essere rilasciato per motivi di studio, di accesso al lavoro ovvero di lavoro subordinato o autonomo, al compimento della maggiore età, semprechè non sia intervenuta una decisione del Comitato per i minori stranieri di cui all'articolo 33, ai minori stranieri non accompagnati che siano stati ammessi per un periodo non inferiore a due anni in un progetto di integrazione sociale e civile gestito da un ente pubblico o privato che abbia rappresentanza nazionale e che comunque sia iscritto nel registro istituito presso la Presidenza del Consiglio dei ministri ai sensi dell'articolo 52 del decreto del Presidente della Repubblica 31 agosto 1999, n. 394.

1-ter. L'ente gestore dei progetti deve garantire e provare con idonea documentazione, al momento del compimento della maggiore età del minore straniero di cui al comma 1-bis, che l'interessato si trova sul territorio nazionale da non meno di tre anni, che ha seguito il progetto per non meno di due anni, ha la disponibilità di un alloggio e frequenta corsi di studio ovvero svolge attività lavorativa retribuita nelle forme e con le modalità previste dalla legge italiana, ovvero è in possesso di contratto di lavoro anche se non ancora iniziato.

1-quater. Il numero dei permessi di soggiorno rilasciati ai sensi del presente articolo è portato in detrazione dalle quote di ingresso definite annualmente nei decreti di cui all'articolo 3, comma 4".

[299] Article 23 Law 2002 n. 1891. *All'articolo 29 del testo unico di cui al decreto legislativo n. 286 del 1998, sono apportate le seguenti modificazioni:*

a) al comma 1:

1) dopo la lettera b) è inserita la seguente:

In addition, the implementing Regulation of *Bossi-Fini* law mentions another form of residence permit of "social inclusion" that refers to the conditions provided by article 32.

Another relevant instrument for the safeguard of the foreign minor is article 31 of the Legislative Decree n. 286 of 1998 on Immigration[301]. It provides that the *Tribunale per i Minorenni*, for serious reasons related to the psychophysical development of the child, taking into account his or her age and health conditions, may authorise the entry or stay of a family member for a specific period of time, even by way of derogation from the provisions in force. This rule, like all the others concerning minors, must be interpreted in the light of the principle stated in Article 28 paragraph 3 of the Consolidated Act on Immigration [302], which refers to the best interests of the child in proceedings in which the right to family unity is at stake.

«b-bis) figli maggiorenni a carico, qualora non possano per ragioni oggettive provvedere al proprio sostentamento a causa del loro stato di salute che comporti invalidità totale»;

2) alla lettera c), sono aggiunte, in fine, le seguenti parole: «qualora non abbiano altri figli nel Paese di origine o di provenienza ovvero genitori ultrasessantacinquenni qualora gli altri figli siano impossibilitati al loro sostentamento per documentati gravi motivi di salute»;

3) la lettera d) è abrogata;

b) i commi 7, 8 e 9 sono sostituiti dai seguenti:

«7. La domanda di nulla osta al ricongiungimento familiare, corredata della prescritta documentazione compresa quella attestante i rapporti di parentela, coniugio e la minore età, autenticata dall'autorità consolare italiana, è presentata allo sportello unico per l'immigrazione presso la prefettura-ufficio territoriale del Governo competente per il luogo di dimora del richiedente, la quale ne rilascia copia contrassegnata con timbro datario e sigla del dipendente incaricato del ricevimento. L'ufficio, verificata, anche mediante accertamenti presso la questura competente, l'esistenza dei requisiti di cui al presente articolo, emette il provvedimento richiesto, ovvero un provvedimento di diniego del nulla osta.

8. Trascorsi novanta giorni dalla richiesta del nulla osta, l'interessato può ottenere il visto di ingresso direttamente dalle rappresentanze diplomatiche e consolari italiane, dietro esibizione della copia degli atti contrassegnata dallo sportello unico per l'immigrazione, da cui risulti la data di presentazione della domanda e della relativa documentazione.

9. Le rappresentanze diplomatiche e consolari italiane rilasciano altresì il visto di ingresso al seguito nei casi previsti dal comma 5».

[300] Pepino L., "*La legge Bossi-Fini. Appunti su immigrazione e democrazia*", in "*Diritto, immigrazione e cittadinanza*", fascicolo 3, Milano, 2002, p. 10

[301] Consolidated Act on Immigration, adopted with D. Lgs. N. 286 of 1998

[302]Article 29 of the Consolidated Act on Immigration " *1. Il diritto a mantenere o a riacquistare l'unita' familiare nei confronti dei familiari stranieri e' riconosciuto, alle condizioni previste dal presente testo unico, agli stranieri titolari di carta di soggiorno o di permesso di soggiorno di durata non inferiore a un anno, rilasciato per lavoro subordinato o per lavoro autonomo ovvero per asilo, per studio o per motivi religiosi.*

2. Ai familiari stranieri di cittadini italiani o di uno Stato membro dell'Unione Europea continuano ad applicarsi le disposizioni el decreto del Presidente della Repubblica 30 dicembre 1965, n. 1656, fatte salve quelle piu' favorevoli della presente legge o del regolamento di attuazione.

3. In tutti i procedimenti amministrativi e giurisdizionali finalizzati a dare attuazione al diritto all'unita' familiare e riguardanti i minori, deve essere preso in considerazione con carattere di priorita' il superiore interesse del fanciullo, conformemente a quanto previsto dall'articolo 3, comma 1, della

The judges have given a variant interpretation of that provision, opening it up to interpretations in which health has been taken into account not only as the physical well-being of the subject, but also as a condition in which the child's growth is encouraged.

The Court of Cassation, on the other hand, has always provided restrictive interpretations, focusing only on health situations, excluding that social and educational integration and friendly relationships could justify the authorization, since the minor can follow the parent expelled from the Italian territory.

It has therefore limited the application of the rule to exceptional cases that cannot take on the character of normality and stability, avoiding that de facto situations become legal situations.[303]

First of all, it should be pointed out that the rule in question does not directly regulate family reunification and, therefore, does not replace Article 29 of the Consolidated Act on Immigration, which governs it.

It concerns the sole interest of the child to have adequate protection when he or she is in situations that may seriously compromise his or her psychological and physical well-being. It is an expression of that general principle which aims to guarantee - regardless of the prerequisites for reunification- the right of the child to be educated within the family whenever a different solution may cause him/her harm.

The Supreme Court interprets it, instead, in the light of Article 29, as a different and exceptional possibility, putting the rationale of the defence of frontiers before the needs of the child to live in the community where he is adequately developing his personality. Even perfect integration into the welcoming place is not considered as an important element from which infer that, by eliminating this situation, enormous harm is done to the child. [304]

Convenzione sui diritti del fanciullo del 20 novembre 1989, ratificata e resa esecutiva ai sensi della legge 27 maggio 1991, n. 176."

[303] Campanato G., "*La tutela internazionale del minore straniero e l'intervento del giudice italiano*" in "*Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia"*, Milano, 2006, p. 40

[304] Campanato G., "*La tutela internazionale del minore straniero e l'intervento del giudice italiano*" in "*Minori giustizia: rivista interdisciplinare di studi giuridici, psicologici, pedagogici e sociali sulla relazione fra minorenni e giustizia"*, Milano, 2006, p. 41.

We may highlight that the only innovation that such a law has provided for is the one contained in Article 25, which established the conditions for unaccompanied minors for remaining in Italy, after turning 18 years old.
But it seemed that this law had threatened fundamental principles of solidarity and humanity, even though the changes were less radical than those promised before the adoption of *Bossi-Fini* law.
In fact, it can be concluded that the focus of this law was on the necessity of manpower for the State, which could legitimize the entry and the reunification of the families; hence, we were still far from reaching that degree of humanity and solidarity necessary for complying with the principles enshrined in the Convention and in the Charter of Fundamental Rights, whose aim is to guarantee the right to family reunification and to facilitate third country nationals' integration in a new Country.
These are the reasons why Italian Legislation was not sufficient and there was the need of a change: the chance came with the enactment of Directive 2003/86.

2.2 The changes brought by the Directive on family reunification to Italian Legislation

As aforementioned, in Italy there are two Legislative Decrees that have provided to transpose Directive 2003/86 and 2003/109 -concerning the status of third-country nationals who are long-term residents- which are respectively n. 5 and 3 of 2007.
First and foremost, these two Decrees have introduced important modifications to the Consolidated Act on immigration, especially on the beneficiaries of such rights.
For what concerns the notion of *spouse,* it has been eliminated with Legislative decree 5/2007 the phrase "*not legally separated*" – but it has been reintroduced with legislative decree n. 160/2008 [305], which includes an additional condition: the spouse shall be over 18 years old [306]- while for minor children it has been deleted the phrase

[305] "Modifiche ed integrazioni al decreto legislativo 8 gennaio 2007, n. 5, recante attuazione della direttiva 2003/86/CE relativa al diritto di ricongiungimento familiare"
[306] Savi C.*,"Le regroupement familial en Italie. Une législation de plus en plus restrictive qui s'inscrit dans un contexte plus général de fermeture des frontières européennes"* in "*Italies. Les mouvements migratoires entre réalité et représentation*", 2010, p. 253

"dependant from their parents" and in the same article it is stressed that "*minor age shall exist at the moment in which the application is submitted.* "[307]

Such a specification is very important, in order to avoid that the length of the proceedings can undermine the grant of the right to family reunification. [308]

The Legislative Decree of 2008 introduced in Article 29 of the Consolidated Act on Immigration a paragraph which provides that, in the event that it is impossible to provide certain proof of the family ties (paternity and maternity) or age of the persons concerned (minors, adults and parents) by means certificates issued by the competent foreign authorities (either in the absence of a certificate or in the event of doubts as to its authenticity), the Italian diplomatic and consular representations will give a decision on the basis of a DNA test carried out at the expense of the persons concerned.

This provision has been criticized [309], firstly because, since it constitutes an interference in the private and family life of individuals, it is contrary to international human rights provisions and secondly because it risks to generalize such checks even in the absence of well-founded doubts.

However, the time limits for the family reunification procedure are already long, the costs involved are high and some countries do not easily carry out DNA tests.

This is therefore an additional obstacle to the exercise of the right to family reunification.

But the *favor* towards minor children, that should have inspired the Decree, can be found in two norms; in Article 29.3 b it is provided that if the reunification concerns two or more children under the age of 14, the level of income required for the exercise of the right may not, however, exceed twice the minimum social security allowance [310].

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[307] Article 29.2 Consolidated Act on immigration "*Ai fini del ricongiungimento si considerano minori i figli di età inferiore a diciotto anni al momento della presentazione dell'istanza di ricongiungimento. I minori adottati o affidati o sottoposti a tutela sono equiparati ai figli"*

[308] Di Pascale A., Pastore M., "*Il recepimento delle direttive sul ricongiungimento familiare e sui soggiornanti di lungo periodo*" in "*Diritto, immigrazione e cittadinanza*", fascicolo 1, Milano, 2007, p. 12"

[309] See, as an example, Savi C.*,"Le regroupement familial en Italie. Une législation de plus en plus restrictive qui s'inscrit dans un contexte plus général de fermeture des frontières européennes"* in "*Italies. Les mouvements migratoires entre réalité et représentation*", 2010 p.260

[310] Article 29.3 b consolidated Act on immigration[…] "*Per il ricongiungimento di due o più figli di età inferiore agli anni quattordici è richiesto, in ogni caso, un reddito non inferiore al doppio dell'importo annuo dell'assegno sociale. Ai fini della determinazione del reddito si tiene conto anche del reddito annuo complessivo dei familiari conviventi con il richiedente" […]*

In the second norm concerned, which is Article 29.6, in the event that the Juvenile court authorizes the adult foreigner to stay in Italy in accordance with Article 31.3 of the Consolidated Act, a residence permit is issued for "minor care", which "*enables work to be carried out*", although not being convertible into a work permit. [311]

As regards the proceeding, the competence belongs to the *Sportello Unico per l'immigrazione* –which is responsible for issuing the authorization within 90 days from the application- and it is necessary that the applicant only submits documentation relating to the requirements of income and housing; whereas examination of the documentation proving "family relationship, marriage, minor age or state of health" is delegated to the consular authority at the next stage of the examination of the visa application.

Another remark that can be made is that de facto unions were excluded from the recognition of the right to family reunification (possibility provided for in Article 4.3 of the Directive) [312].

But overall, in any case, the regulations in force - as amended by Legislative Decree 5/07 - appear to be in accordance with the provisions of the Directive and indeed in several aspects more favourable.

Mentions shall be also made to long-term residents asking for a residence permit. To the latter, Directive 2003/109 recognizes the right –which is limited and able to be derogated- to reside in the territory of another Member State even for periods that go beyond three months and even for working reasons.

The modification has also touched the reasons for denying or withdrawing the permanent residence permit; the new Article 9 bis has been introduced to regulate the treatment in Italian territory to foreigners holding an EC residence permit issued from another Member State and to their relatives. The long-term resident recognised in

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[311] Article 29.6 Consolidated Act on Immigration "*Al familiare autorizzato all'ingresso ovvero alla permanenza sul territorio nazionale ai sensi dell'articolo 31, comma 3, è rilasciato, in deroga a quanto previsto dall'articolo 5, comma 3-bis, un permesso per assistenza minore, rinnovabile, di durata corrispondente a quella stabilita dal Tribunale per i minorenni. Il permesso di soggiorno consente di svolgere attività lavorativa ma non può essere convertito in permesso per motivi di lavoro."*

[312] Article 4.3 Directive 2003/86/EC "*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 unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons."*

another Member State of the Union may in fact move to Italy for periods of more than three months to exercise an economic activity, to attend training or education and for any other lawful purpose, provided that he has health insurance and 'non-occasional means of subsistence', determined at the rate of the double of the minimum amount provided, for being exempted from the contribution to health care expenditure [313].

The condition of family members of the long-term sponsor's, who exercises the right of residence by moving to Italy, is regulated by Art. 9-bis.3 in a way that appears more restrictive than what it is provided by Directive. 2003/109. While in fact the latter provides at Article 16.1[314] that, when the family "*was already united in the first Member State*", the family members -which fall within the concept set out in Article 4.1 of Directive 2003/86 (spouse and children minors) - are authorised to accompany or join the long-term resident, Article 9-bis.3 provides that, for the purposes of the authorisation of stay in Italy, the family members must prove that they have *"resided as family members*" of the sponsor in the first Member State.

The difference between the two formulations is evident, since the first one refers to the fact that the family unit was already constituted in the first Member State, irrespective of the residence status enjoyed by the members of the family, while the second one seems to specifically refer to the residence status.

3. Strasbourg Court decisions on Italian Judgments concerning family reunification

3.1 "*Maria Case*"

Maria is a Belarus and orphan child, so she had been put in a home for orphan children and she was declared in state of adoptability.

[313] Di Pascale A., Pastore M., "*Il recepimento delle direttive sul ricongiungimento familiare e sui soggiornanti di lungo periodo*" in "*Diritto, immigrazione e cittadinanza*", fascicolo 1, Milano, 2007, pp 16-17.

[314] Article 16.1 Directive 2003/109/EC "*When the long-term resident exercises his/her right of residence in a second Member State and when the family was already constituted in the first Member State, the members of his/her family, who fulfil the conditions referred to in Article 4(1) of Directive 2003/86/EC shall be authorised to accompany or to join the long-term resident."*

She came to Italy for a therapeutic stay addressed to children who came from Chernobyl territory and, through the non-governmental organization *Liguria Mare,* she was addressed to family *Giusto*, residing in Italy.

From summer 2003, Maria continuously spent 3 months in that family and also 2 months during winter; for their part, the couple regularly visited her in Belarus.

Due to the close relationship that they had built with the child, the spouses –as Maria was in state of adoptability- started the procedure for obtaining the Inter-country adoption and were assessed with suitability to adopt. [315]

But the proceeding was interrupted after the Belarus' government decision of blocking all the inter-country adoption procedures and it was necessary Italy's intervention for ratifying a protocol with Belarus [316]. With such protocol Belarus engaged itself to complete in 3 months more than 150 pending proceedings for the adoption of minors coming from Minsk, including that concerning Maria.

This commitment was not respected, as in the expiring date only 40 proceedings were completed and not the one from the Italian Couple.

The spouses lodged two complaints before the *Tribunale per i minorenni di Genova*[317]: a procedure for adoption and one for granting the protection of the minor from the risk of possible abuse. More precisely, the first complain concerned the fact that Belarus did not respect the Protocol and also that they were asking for the adoption, by reason of the fact that the couple already was granted the suitability for adopting.

In the same period, the *Tribunale per i Minorenni di Torino* was dealing with a case of another child coming from the same institute as Maria and it was ascertaining if minors were abused .

The *Tribunale per i Minorenni di Genova,* after having assessed that there were abuses in that institute, provided for Maria's custody before the couple and it notified the action to Belarus authorities, by pointing out that the measure had been adopted in compliance

[315] Carpaneto L., " *La tutela della famiglia nell'ambito della CEDU. Il caso di "Maria"* in "*Diritto di famiglia e Unione Europea*", 2008, p. 151

[316] Protocollo di collaborazione tra la Commissione per le Adozioni Internazionali presso la Presidenza del Consiglio dei Ministri della Repubblica Italiana e il Ministero dell'Istruzione della Repubblica di Belarus in materia di adozioni dei cittadini minorenni della Repubblica di Belarus da parte dei cittadini della Repubblica Italiana del 12/12/05

[317] It is an ordinary judicial organ, which is competent in the administrative, civil and criminal field for proceedings concerning minors.

with Article 9 of the Hague Convention [318], which had been ratified by Italy in 1980 and which constitutes the essential pillar in minors protection; in addition, this Convention can be applied even if a Member State had not ratified such convention, as it happened for Belarus.

But, even if there was evidence of the abuses suffered by Maria –such as cigarette burns and contusions- the *Tribunale per i Minorenni di Genova* declared the application as inadmissible, because it was necessary a ruling from Belarus authority. The tribunal also dismissed the request for an urgent intervention coming from Articles 9 and 10 of the Hague Convention[319], for the reason that the same facts were still subject to investigations in a separate and pending proceeding.

The couple lodged a complaint to the Court of Appeal against the *Tribunale per i Minorenni di Genova* that provided for the return of the child, by invoking the grounds of a) a misapplication of The Hague Convention; b) the unfairness of the measure at first instance, that did not take into consideration the mental and physical health of the minor, that would have suffered from her return to Belarus; c) the omitted involvement of Maria, who had not been heard from the Tribunal d) the violation of New York Convention on the rights of the child.

On these grounds, the spouses asked for the revocation of the action and for Maria's custody, as well as for the establishment of a support program lasting one year.[320]

The Court of Appeal did not accept this application and pointed out that: a) there was no violation of Article 9 of the Hague Convention, because there was no urgency in the proceeding b) Belarus had already ratified New York Convention on the rights of the child, so all their judicial measures were in compliance with the best interests of the

[318] Article 9 of the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. "*In all cases of urgency, the authorities of any Contracting State in whose territory the infant or his property is, may take any necessary measures of protection. When the authorities which are competent according to the present Convention shall have taken the steps demanded by the situation, measures taken theretofore under this Article shall cease, subject to the continued effectiveness of action completed thereunder*."

[319] Article 10 of the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants *"In order to ensure the continuity of the measures applied to the infant, the authorities of a Contracting State shall, as far as possible, not take measures with respect to him save after an exchange of views with the authorities of the other Contracting States whose decisions are still in force.*"

[320] Carpaneto L., " *La tutela della famiglia nell'ambito della CEDU. Il caso di "Maria"* in "*Diritto di famiglia e Unione Europea*", 2008, p. 155

minor; c) the child hearing had been done at first instance, so it was not necessary to hear Maria again, as it could have cause a trauma to her.

The Court in the end held that the Couple would have only been entitled to assist Maria back to Belarus.

Having exhausted all the possible internal remedies, the spouses went before Strasbourg Court in the interests of Maria and complained against an infringement of Article 3 of the European Convention on Human Rights [321].

They also invoked Article 8 of the ECHR, because they claimed a breach of Maria's right to have a family life, along with a violation of article 6 ECHR [322] for the reasons that they had been denied the possibility to access the Court, that the Tribunal had not been impartial and independent –due to the clamorous attention from the media to this case- and an infringement of Maria's right to be heard.

It should be highlighted three relevant issues decided by the Court: i) the possibility for the couple of representing Maria's interests before the Court; ii) the existence of family relationship deserving protection; iii) Maria's right to be heard. [323]

Their claim had been declared inadmissible by the Court because *"the first two applicants do not exercise any parental responsibility over V., are not her guardians and are not biologically related to her. The procedure for V.'s adoption was unsuccessful. No power of attorney was signed in favour of the first two applicants authorising them to represent V.'s interests before the Court. It follows that the first two applicants do not appear, from a legal standpoint, to possess the necessary*

[321] Article 3 ECHR "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*."

[322] Article 6 ECHR "*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: 10 11 (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

[323] Carpaneto L., " *La tutela della famiglia nell'ambito della CEDU. Il caso di "Maria"* in "*Diritto di famiglia e Unione Europea*", 2008, p. 158.

qualifications to act on the child's behalf in judicial proceedings. Furthermore, they have never applied to the Italian authorities to be appointed as V.'s guardians on the basis of the emergency resulting, in their opinion, from the child's allegations of ill-treatment."[324]

But in this Case, the Court clarifies that it was not necessary to examine whether the two applicants have the necessary capacity to lodge an application on Maria's behalf, because their complaints are in any event inadmissible for the reason that there was no *lyen de type familial*- as the couple argued- because the fact that the child spent time with the spouses cannot be equated to a family relationship.

In fact, in order to invoke Article 8 of the ECHR, there shall be the evidence of a family, because this article cannot be addressed to the mere desire of creating a family. Therefore, given the lack of a biological connection or family relationship, the Court held that the relationship established with Maria did not fall under Article 8 ECHR.

While for what concerns the infringement of the right to be heard, Strasbourg Court stated that national judges are those entitled to do it and it is up to their discretion to decide who can be heard, as it would be too disproportionate to require the hearing of all the concerned minors.

However, in referring to the case at stake, the ECtHR agreed with Court of Appeal's decision of not hearing Maria again, for avoiding that she would be subjected to another trauma. [325]

3.2 *Paradiso and Campanelli v. Italy* Judgment: Italy's compliance with EU norms

The spouses Paradiso and Campanelli[326], after several unsuccessful attempts at in vitro fertilisation, had concluded a gestation contract for others in Russia, without however obtaining the transcript of the child's birth certificate, once they came back to Italy.

The *Tribunale per i Minorenni di Campobasso* had then ordered the removal of the child from the applicants, since it was not genetically linked to them.

[324] Application no. 38972/06 Giusto, Bornacin and V. v. Italy par. 2 Court's assessment

[325] Carpaneto L., " *La tutela della famiglia nell'ambito della CEDU. Il caso di "Maria"* in "*Diritto di famiglia e Unione Europea*", 2008, p. 161.

[326] Application n. 25358/12

The child, initially placed in a facility, was then entrusted with a new identity to a family and, finally, adopted.

The Second Chamber of the EDU Court, in the judgment of January 2015, acknowledged the existence of a de facto family life, considering that Mrs. Paradiso and Mr. Campanelli had lived together with the minor in its early stages of life (the cohabitation lasted a few weeks in Russia and six months in Italy) and they had behaved towards him like parents. [327]

Therefore, the Chamber examined the conduct of the Italian authorities -who had removed the child from the applicants- in the light of Article 8 ECHR and in the respect for family and private life. The House finally recognized the violation of Article 8 of the ECHR by the Italian authorities for exceeding their margin of appreciation in taking the child away from his/her parents, as such measure was considered as extreme and contrary to the best interests of the child.

Following the conviction, the Italian Government submitted a referral request to the Grand Chamber, arguing that the judgment raised serious problems of interpretation and application of the Convention.

In particular, the defendant State took the view that the conclusions reached by the Chamber led to the introduction of a third criterion of parentage (other than that based on consanguinity with at least one of the two parents and not considering the case of adoption) and excessively narrowed the margin of appreciation, by also undermining the principle of subsidiarity.

The Grand Chamber held that controversial issues such as pregnancy for others require a wide margin of appreciation States and the central issue of the decision of the Grand Chamber concerned the possibility of recognizing the existence of a family life between the applicants and the child: as in the Chamber's judgment, this is precisely the knot on whose solution the conclusions directly depend. The parties had presented opposed arguments on this point: the Government insisted on the non-existence of a biological

327 Anro I., "*La Grande Chambre si pronuncia sul caso Paradiso e Campanelli: niente condanna per l'Italia, ma ancora dubbi in tema di maternità surrogata*" in "*Eurojust*", http://rivista.eurojus.it/la-grande-chambre-si-pronuncia-sul-caso-paradiso-e-campanelli-niente-condanna-per-litalia-ma-ancora-dubbi-in-tema-di-maternita-surrogata/?print=pdf

link, on the opposition to the domestic and international rules of conduct of the applicants and on the short period of time they had spent with the child [328].

The spouses, for their part, asked the Court to recognize the existence of a family life, pointing out how the parental relationship was recognized by Russian legislation and insisting on the strong emotional ties they had developed with the child during the period spent together. [329]

In delivering its judgment, Strasbourg Court recalled the previous case-law on this issue[330] and reaffirmed the elements that shall be taken into account for assessing a private life, in compliance with Article 8 ECHR; such provision does not protect neither the desire of creating a family, nor the right of adoption.

It rather implies the existence of a de facto situation in which concrete family ties are recognizable, or the presence of a legally formalised link, or even the aspiration to establish a family, provided that it is accompanied by a clear legal basis or a consanguinity link. [331]

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[328] Application no. 25358/12 Paradiso and Campanelli v. Italy *"136. The Court reiterates that the Chamber concluded that there existed a de facto family life between the applicants and the child (see § 69 of the Chamber judgment). It further considered that the situation complained of also related to the second applicant's private life, in that what was at stake for him was the establishment of a biological tie with the child (see § 70 of the Chamber judgment). It followed that Article 8 of the Convention was applicable in the present case.*
137. The Government challenged the existence of a family life in the present case, relying essentially on the absence of a biological link between the applicants and the child and on the illegality of the applicants' conduct under Italian law. They submitted that, in view of the applicants' unlawful conduct, no tie protected by Article 8 of the Convention could exist between them and the child. They also argued that the applicants had lived with the child for only eight months."

[329] Application no. 25358/12 Paradiso and Campanelli v. Italy Par 138. "*The applicants asked the Court to recognise the existence of a family life, in spite of the lack of a biological tie with the child and the non-recognition of a parent-child relationship under Italian law. Essentially, they argued that a legal parental relationship was recognised in Russian law and that they had formed close emotional ties with the child during the first eight months of his life*."

[330] Such as the aforementioned *X, Y and Z v. the United Kingdom*, 22 April 1997

[331] Application no. 25358/12 Paradiso and Campanelli v. Italy par. 140 and 141"*The existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties. The notion of "family" in Article 8 concerns marriage-based relationships, and also other de facto "family ties" where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy.*
141. The provisions of Article 8 do not guarantee either the right to found a family or the right to adopt. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family, or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see Nylund v. Finland (dec.), no. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 62, Series A no. 94), or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis (see Nazarenko v. Russia, no. 39438/13, § 58, ECHR 2015 (extracts)), or the relationship that arises from a lawful and genuine adoption (see Pini and Others v. Romania, nos. 78028/01 and 78030/01, § 148, ECHR 2004-V.

Furthermore the Court admitted that the existence of a *de facto* family life between one or two adults and a minor may be recognized -even in the absence of a biological link or a clear legal basis- but provided that there are 'genuine personal ties'.[332]

In this specific case, the Grand Chamber intended to verify the quality of the ties established between the couple and the child, the parental role played by the applicants with regard to the child and the duration of their cohabitation.

Having no doubt as to the existence of the first two requirements - the Grand Chamber acknowledged that the applicants "*had developed a parental project and had assumed their role as parents vis-à-vis the child*", developing in particular "close *emotional bonds with him in the first stages of his life*" [333] - the Court focused on assessing the length of time spent together.

Although it would be inappropriate to define a minimum time for a de facto family life to be considered established, the majority felt that the time spent together (six months of the child's stay with the couple in Italy, preceded by a period of about two months in which Mrs Paradiso had been with the child in Russia) was too short. [334]

Moreover, despite the insistence on emotional ties and the role played by the appellants, the Court makes a quantitative calculation of the time of cohabitation, without considering the 'quality' of living together, in other words without taking into account the age of the child and the intensity of interpersonal relationships.

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[332]Application no. 25358/12 Paradiso and Campanelli v. Italy "*The Court must ascertain whether, in the circumstances of the case, the relationship between the applicants and the child came within the sphere of family life within the meaning of Article 8. The Court accepts, in certain situations, the existence of de facto family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties*."

[333] Application no. 25358/12 Paradiso and Campanelli v. Italy Par 151" *It is therefore necessary, in the instant case, to consider the quality of the ties, the role played by the applicants vis-à-vis the child and the duration of the cohabitation between them and the child. The Court considers that the applicants had developed a parental project and had assumed their role as parents vis-à-vis the child (see, a contrario, Giusto, Bornacin and V. v. Italy (dec.), no. 38972/06, 15 May 2007). They had forged close emotional bonds with him in the first stages of his life, the strength of which was, moreover, clear from the report drawn up by the team of social workers following a request by the Minors Court ."*

[334] Application no. 25358/12 Paradiso and Campanelli v. Italy Par 153. "*It would admittedly be inappropriate to define a minimal duration of shared life which would be necessary to constitute de facto family life, given that the assessment of any situation must take account of the "quality" of the bond and the circumstances of each case. However, the duration of the relationship with the child is a key factor in the Court's recognition of the existence of a family life".* […]

In fact, it takes no consideration of the relationship of total dependence which is necessarily established between children in the first months of life and their caregivers[335].

Finally, the Court considered that the measures taken by the Italian authorities must be proportionate to the objective pursued. Its reflection on the choice faced by the Italian authorities was very interesting: on the one hand to allow the complainants to continue their relationship with the child- and thus legalise what they had imposed on the Italian authorities as a *fait accompli*- or on the other hand to take measures for assigning a family to the child in accordance with the Adoption Law. [336]

In this respect, the Court noted the importance of the interests at stake and considers that the reasoning of the Italian authorities with regard to the best interests of the child was not superficial or stereotyped, having balanced the impact of the measures adopted.[337]

Finally, the Court pointed out that the Italian Government, in its defence, highlighted not only the unlawfulness of the applicants' conduct but also the fact that they had exceeded the age limit for the adoption of a child laid down by law.

Although it is possible to derogate from that limit, the Court held that the choice of the Italian courts not to take into consideration that hypothesis does not appear to be censurable in the circumstances of the present case. [338]

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[335] Poli L., "*La Grande Camera e l'ultima parola sul caso Paradiso e Campanelli*" http://www.sidiblog.org/2017/02/21/la-grande-camera-e-lultima-parola-sul-caso-paradiso-e-campanelli/

[336] Anro I., "*La Grande Chambre si pronuncia sul caso Paradiso e Campanelli: niente condanna per l'Italia, ma ancora dubbi in tema di maternità surrogata*" in "*Eurojust*", http://rivista.eurojus.it/la-grande-chambre-si-pronuncia-sul-caso-paradiso-e-campanelli-niente-condanna-per-litalia-ma-ancora-dubbi-in-tema-di-maternita-surrogata/?print=pdf

[337] Application no. 25358/12 Paradiso and Campanelli v. Italy "*The Court has already noted that the public interests at stake were very weighty ones. Moreover, it considers that the Italian courts' reasoning in respect of the child's interests was not automatic or stereotyped (see, mutatis mutandis, X. v. Latvia [GC], no. 27853/09, § 107, ECHR 2013). In evaluating the child's specific situation, the courts considered it desirable to place him with a suitable couple with a view to adoption, and also assessed the impact which the separation from the applicants would have. They concluded in essence that the separation would not cause the child grave or irreparable harm*."

[338] Application no. 25358/12 Paradiso and Campanelli v. Italy Par. 214 "*Moreover, apart from the illegality of the applicants' conduct, the Government pointed out that they had exceeded the age limit-for adoption laid down in section 6 of the Adoption Act, namely a maximum difference in age of forty-five years in respect of one adopting parent and fifty-five years in respect of the second. The Court observes that the law authorises the courts to make exceptions from these age-limits. In the circumstances of the present case, the domestic courts cannot be reproached for failing to consider that option.*

Considering that "the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child", the Court established that the measures adopted are proportional to the aim pursued and pointed out that allowing the child to remain with the applicants "*would have been tantamount to legalising the situation created by them in breach of important rules of Italian law*" [339].

Without difficulty, therefore, the public interest in the protection of minors prevails over the opportunity to satisfy the complainants' desire, although legitimate and acceptable, to be fulfilled through the experience of parenthood. [340]

In conclusion, the Court held that Italian authorities –having ascertained that the minor would not have suffered from an irreparable harm as a result of the adopted measures- did a correct balance among all the different interests at stake and did so within their margin of appreciation; so there had not been any violation of article 8 ECHR. [341]

3.3 A decision from the Italian Supreme Court

An Albanian married couple in 2015 lodged an application[342] for residence permit in Italy, in order to take care of their minor children; one of them was born in Albany, while the second one was born in Italy.

They grounded their appeal on article 31.3 of the Legislative Decree n. 286 of 1998 [343]

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[339] Application no. 25358/12 Paradiso and Campanelli v. Italy Par 215 "*The Court does not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention does not recognise a right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case."*

[340] Poli L., "*La Grande Camera e l'ultima parola sul caso Paradiso e Campanelli*" http://www.sidiblog.org/2017/02/21/la-grande-camera-e-lultima-parola-sul-caso-paradiso-e-campanelli/

[341] Anro I., "*La Grande Chambre si pronuncia sul caso Paradiso e Campanelli: niente condanna per l'Italia, ma ancora dubbi in tema di maternità surrogata*" in "*Eurojust*", http://rivista.eurojus.it/la-grande-chambre-si-pronuncia-sul-caso-paradiso-e-campanelli-niente-condanna-per-litalia-ma-ancora-dubbi-in-tema-di-maternita-surrogata/?print=pdf

[342] Sentenza 12 giugno 2019, n. 15750

on the basis of the request, the applicants indicated the need for minors to be cared for by both parents, the indispensability of relations with them in order to receive the necessary care to ensure their peaceful growth and the need to guarantee the right to family unity.

They also pointed out the serious reasons connected with the psychological and physical development of minors resulting from the sudden departure of the parents who until then had been present in the life of the family [344], as well as the fact that the children were attending primary school in Italy.

Both the *Tribunale per i Minorenni* and the Court of appeal rejected their claim, by holding that there were no emergency situations and no proof that that the removal of the parent would cause serious harm to the minor child's personality.

The two Bodies also noted that the serious reasons connected to the psychophysical development of the foreign child, legitimising the authorisation referred to in the aforementioned provision, must be correlated to the existence of contingent emergency conditions which pose a serious danger to the normal development of the child's personality, and cannot be identified in the mere presence in the territory of the Italian State.

In the case at stake there are no serious reasons that may have justified the authorization requested; in addition, it was also highlighted the fact that one of the applicant had been convicted for drug dealing and extortion.

These two crimes, according to the Court of appeal, should be qualified as activities not compatible with the stay in Italy and that are capable of justifying the revocation of the authorization and therefore, *a fortiori*, the failure to grant it. [345]

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[343] Art 31.3 Consolidated Act on Immigration*[..]3". Il Tribunale per i minorenni, per gravi motivi connessi con lo sviluppo psicofisico e tenuto conto dell'eta' e delle condizioni di salute del minore che si trova nel territorio italiano, puo' autorizzare l'ingresso o la permanenza del familiare, per un periodo di tempo determinato, anche in deroga alle altre disposizioni della presente legge. L'autorizzazione e' revocata quando vengono a cessare i gravi motivi che ne giustificavano il rilascio o per attivita' del familiare incompatibili con le esigenze del minore o con la permanenza in Italia. I provvedimenti sono comunicati alla rappresentanza diplomatica o consolare e al questore per gli adempimenti di rispettiva competenza. […]"*

[344] Sentenza Cassazione Civile n. 15750 del 12/06/2019 par. 1

[345]Sentenza Cassazione Civile n. 15750 del 12/06/2019 par. 3 " *La Corte territoriale ha osservato che la norma di riferimento prevede il rilascio dell'autorizzazione di cui trattasi in presenza di situazioni, pregiudizievoli per lo sviluppo psicofisico del minore, che, pur non avendo carattere emergenziale o eccezionale, tuttavia non siano di lunga o indeterminabile durata e non siano caratterizzate da tendenziale stabilità. I reclamanti, invece, non indicano la necessità della loro permanenza in Italia come transitoria, ma anzi la rappresentano esplicitamente come destinata ad esaurirsi solo quando i figli*

The Court also noted that the provision of the Consolidated Act provides for the grant of the authorisation in situations that are prejudicial to the child's psychophysical development, which, although not of an emergency or exceptional nature, are not of long or indefinable duration and are not characterised by stability. The applicants, on the other hand, do not indicated the need for their stay in Italy as transitory, but on the contrary explicitly represented it as meant to run out only when the children have reached full economic and "emotional" autonomy [346].

The appeal lodged by the applicants was grounded on four reasons:

a) The first plea concerned the infringement of Article 31.3 of the Legislative Decree n.286 of 1998, as the applicant pointed out that his conduct could not be relevant for the refusing to the authorization to enter or stay; in addition, his stay was necessary for preventing damages to the psychophysical development of his preschool children.
b) The second reason denounced the violation of the right to family unit, which is enshrined in Directive 2003/86 and in Article 8 of the European Convention on Human Rights.
c) In the third plea the applicants complained the violation of New York Convention on the rights of the child as well as the violation of the prohibition of minor's expulsion.
d) The fourth reason denounces the violation of Article 31 Legislative Decree n. 286 of 1998 and the lack and illogicality of the motivation, due to the fact that the Court of Appeal completely failed to carry out a prognostic evaluation concerning the danger of serious and irreparable damage to the psychophysical development of minors.

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avranno raggiunto la piena autonomia economica ed affettiva. Sussiste, inoltre, quanto al padre, una ulteriore ragione ostativa all'accoglimento della domanda, costituita dall'arresto nel 2012 e dal successivo rinvio a giudizio per spaccio di sostanze stupefacenti ed estorsione ai danni del tossicodipendente al quale egli aveva venduto la droga, e che non l'aveva pagata (attività estorsiva portata avanti in maniera molto pressante, con l'ausilio di altri connazionali e con pestaggi), il che ha determinato la revoca del permesso di soggiorno. Inoltre, S.B. è stato condannato per violazione delle norme sull'immigrazione e nell'aprile 2016 è stato arrestato nuovamente per spaccio di sostanze stupefacenti. Il comportamento rivelato da tali precedenti - ha evidenziato la Corte d'appello - è qualificabile come attività incompatibile con la permanenza in Italia, idonea a giustificare, ai sensi del secondo periodo del comma 3 dell'art. 31, la revoca dell'autorizzazione e quindi, a maggior ragione, il mancato rilascio della stessa."

346 Sentenza Cassazione Civile n. 15750 del 12/06/2019 par. 3.1

In the deciding on this appeal, the Cassation Court had to clarify the interpretation on the norm that allows residence permits. In fact, the Joined Chambers held that the *a quo* judge applied a restrictive interpretation, because he did not balance "the serious prejudice that minors would suffer, including on account of their age, as a result of the sudden returning of their parents".

Thus, they established that the refusal "cannot be made to result automatically from the conviction", which however has a weight "in that it is likely to constitute a concrete and current threat to public order or national security" and "may lead to the rejection of the application for authorisation following a detailed examination of the case and a balance with the interests of the child", to which the law attributes "priority, but not absolute value". [347]

So the claim was admitted and the matter was referred back to the Appeal Court.

In conclusion, the Directive 2003/86 –in granting all the Contracting States a very wide margin of appreciation- has done nothing but confirm the Member States power on this sensitive issue and that the ECHR does impose relatively considerable limitations on national restrictions.

For answering to the previous question –whether Italy could be considered as a model legislation for all the other Member States in the field of family reunification- first of all it shall be remarked that the low-level binding character of the Directive leaves too much discretion to Member States and it is the reason of the differences in implementing those non-binding provisions throughout the Member States[348]; in fact, always taking as an example Italy, from the definition of nuclear family contained in the above mentioned provisions, it emerges that on the one hand the Italian legislator

[347]Sentenza Cassazione Civile n. 15750 del 12/06/2019 par *7. "Conclusivamente, la questione di massima di particolare importanza va risolta enunciando il seguente principio di diritto: «In tema di autorizzazione all'ingresso o alla permanenza in Italia del familiare di minore straniero che si trova nel territorio italiano, ai sensi dell'art. 31, comma 3, t.u. immigrazione, approvato con il d.lgs. n. 286 del 1998, il diniego non può essere fatto derivare automaticamente dalla pronuncia di condanna per uno dei reati che lo stesso testo unico considera ostativi all'ingresso o al soggiorno dello straniero; nondimeno la detta condanna è destinata a rilevare, al pari delle attività incompatibili con la permanenza in Italia, in quanto suscettibile di costituire una minaccia concreta e attuale per l'ordine pubblico o la sicurezza nazionale, e può condurre al rigetto della istanza di autorizzazione all'esito di un esame circostanziato del caso e di un bilanciamento con l'interesse del minore, al quale la detta norma, in presenza di gravi motivi connessi con il suo sviluppo psicofisico, attribuisce valore prioritario, ma non assoluto".*

[348] COM(2008) 610 final Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, 2008

has transposed certain possibilities, granted by the European Directive, to extend the categories of family members admitted to the reunion. This is the case of the provisions relating to the assimilation of natural and adopted children.

On the other hand, in some aspects the Italian legislation is more restrictive than the possibilities offered by the European legislation: no concession has been made regarding the possibility of admitting even the stable partner to reunification, while it has been used the opportunity of setting a limit to the spouse's age.

National judiciaries therefore hold an important and difficult role in this area, because they have to monitor and enforce compliance with the norms provided at international and EU level when they act as Union courts of first instance. [349]

Hence, it is true that Italian laws such as *Turco-Napolitano* and *Bossi-Fini* have anticipated the *ratio* of the Directive, but some flaws emerge from these two laws and the subsequent ones that have transposed the Directives into the Italian legal system: first and foremost, it is still not possible for Italian laws, differently from other Member States, to deviate from the traditional model of core family founded on the marriage, neither in relation to family members that can benefit of the reunification, nor concerning the members that are considered to be as legitimate to financially support the sponsor in the achievement of material requirements [350]. In fact in this field Italy has correctly exercised the margin of discretion left by Directive 2003/86 and decided not to extend the possibility of family reunification for registered partners or for stable partnership.

Furthermore, another flaw of these two laws is that even if they were born for humanitarian purposes, in the end they have started to be characterized by more efficacious measures against illegal immigration, which had become the real priority for Italy[351].

We are still far from reaching a perfect equality in treating applications for family reunification of third country nationals and those of EU citizens, but it is a matter on which the Member States are becoming more and more aware of.

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[349] Stoorgard H., "*National Law Restrictions on Family Reunification Rights of International Protection Beneficiaries from a ECHR/EU law Perspective*", Working paper presented at SLS 2016 Annual Conference St Cathrine's College, University of Oxford.

[350] Della Puppa F., "*Il ricongiungimento familiare in Europa e in Italia*" in "*Autonomie locali e servizi sociali*", 2015, p. 194.

[351] Colombo A., Sciortino G., "*The Bossi-Fini law: explicit fanaticism, implicit moderation and poisoned fruits*", in "*Italian Politics*", vol. 18, 2002, p.166

Or, at least, this is what seems to emerge from the Member States' responses to the public consultation on Directive 2003/86, which has been launched by the Commission in 2011.

Chapter IV

A system that needs to change? The European Commission's proposal for a reform of Directive 2003/86

1. A proposal for solving the divergences among Member States

As already underlined in the previous chapters, family reunification is a necessary instrument of making family life possible for everyone that is forced or has to move from his/her Country of origin.

The main landmark on this topic is Directive 2003/86 and it aims at creating a common and minimum set of rules, which the Member States have to respect[352].

The problem that arose was that each Member State is left discretion on how to implement these rules and the result has been a different level of these rights' protection throughout the Member States: so how to cope with such a sensitive matter?

Since 2011, the Commission opted for launching a public debate to lay down the conditions for the exercise of the right to family reunification, that may facilitate the integration of third-country nationals who comply with the conditions in force in the Member State concerned.

Such Green Paper had been necessary because- as it emerged from the Commission Report in 2008 on the implementation of Directive 2003/86- over the last 20 years family reunification has been one of the main sources of immigration into the European Union. Today, in many Member States, family reunification contributes to an important and increasing legal migration. But, in some Member States, discussions on how to manage in a more effective way the significant influx of immigrants in the field of family reunification have led to several policy changes, many of them considered to be too restrictive, that were not in line with the provisions laid down in the Directive.[353]

[352] We will not talk about Directive 2004/38, as its implementation from the Member States has not raised any issue and there is no reform's proposal at stake.

[353] COM/2008/0610 Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification

In order to carry out this desired uniformity throughout the Member States, the Commission in 2011 the Green Paper[354]: will it be a valid instrument for overcoming these differences?

2. The Green Paper on the right to family reunification of third-country nationals living in the European Union

Common European rules on immigration are in force since Directive of 2003, laying down at Union level the conditions governing the exercise of the right to reunification for family members of third-country nationals.

The Directive lays down the conditions for entry and exit, residence in a Member State of the family members of a third-country national residing in a Member State legally in that State and who are also nationals of a third country.

As it is a field in which it is recognized to Member States a wide discretion [355], some of them – for instance the Netherlands- started to impose more restrictive norms and even asked for a modification of the Directive, in order to fight against the abuses on this matter and for better handling migration fluxes. [356]

From the Commission's point of view, the right to family reunification should be more developed, especially for what concerns integration measures; as the Commission pointed out in its 2011 report, there are problems in the implementation into national measures and lacks in the norms.

In addition, the report remarked problems concerning an incorrect implementation on, as an example, the importance given to the bests interest of the child or more favourable norms for refugees claiming family reunification.

Therefore, the Commission concluded that such Directive leaves to Member States a too wide margin of appreciation in applying non-mandatory clauses, in particular in relation to the waiting period, the minimum income required and integration conditions.

[354] The Commission published it on 15th November 2011 and Interested parties were invited to submit their written responses to the 14 questions incorporated in the Green Paper from 15th November 2011 to 1st March 2012.

[355] NGOs criticized such discretion because, in their opinion, it did not lead to a real harmonization through the Member States

[356] COM/2011/0735 final Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)

How to solve these problems?

In the 2011 Green Paper [357], some of the questions that were enquired concerned the status of "family member", the waiting period running from the moment in which the application is lodged or the possible introduction of new categories of beneficiaries other than those included in the notion of " core family". [358]

More in depth, the Commission asked the Member States whether they consider it necessary to continue to apply the rules already in force, or the possibility of limiting family ties to those dating back to a period prior to their entry, or to the hypothesis of not recognising more favourable conditions in cases in which application for family reunification had been lodged more than three months after the recognition of the refugee status. [359]

The Commission aimed to launch a broad discussion among all relevant stakeholders[360].

We should not forget that this Directive lays down the conditions of entry and residence of family members who are not Union citizens, who want to join a non-EU citizen who is legally resident in a Member State.

Consequently, it does not apply to citizens of the Union; in fact in the latter case, the family reunification situation of the members of the family who are third country nationals is covered by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and freely reside within the territory of the Member States, which concerns cases such as Union citizens that move to, reside in or resided in a Member State other than that of which they come from and the members of their family -who are third country nationals - want to join them. [361]

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[357] Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward.

[358] COM/2011/0735 final Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) par. II

[359] Consiglio Italiano per i Rifugiati, Report of the project "*Ritrovarsi per Ricostruire"* chapter II "*Il Libro Verde sul diritto al ricongiungimento familiare*", 2016, p. 44 http://cironlus.org/old_site_2016/images/pdf/RITROVARSI_PER_RICOSTRUIRE_VERSIONE_FINALE.pdf

[360] COM/2011/0735 final Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) par. VI "*All EU institutions, national, regional and local authorities, candidate countries, third-country partners, intergovernmental and non-governmental organisations, all state actors and private service providers involved with family members, academia, social partners, civil society organisations and individuals are invited to contribute by replying the above questions*."

[361] Espino Garcia S.,*"Respuestas a las cuestiones planteadas por el Libro Verde sobre el Derecho a la Reagrupación Familiar: Revisión de la Directiva 2003/86/CE del Consejo, de 22 de septiembre de 2003, sobre el derecho a la reagrupación*

Another relevant question on which the Commission wanted to collect information was that relating to the documents necessary to prove family ties; in fact many difficulties have been encountered on this point, particularly in relation to marriages concluded according to traditional rites, as well as to lasting extramarital ties.

It has been reported that such links are often not recognised by the Member States as a result of a strict interpretation of the Directive on the same subject. The practice of using the DNA testing to verify family relationships has also been the subject of a number of criticisms and it has been said that it should be used only where there are serious doubts about the relationship after other means of proof have already been used.

The Commission, in its Green Paper, sought to understand the extent of the fraud detected by the States and the effectiveness of the DNA test.

Lastly, the topic touched by the Commission was that of the duration of the procedure and the costs which, if excessive, may jeopardise the procedure of reunion.

In this context, the Commission's reference to the need to protect family and private life acquired a relevant importance. [362]

In the following paragraphs we will see the most interesting reactions to the Green Paper, starting from the one given by the United Nations High Commissioner for Refugees.

2.1 United Nations High Commissioner for Refugees' point of view on the Green Paper

UNHCR [363] had been charged by the United Nations General Assembly with the task of providing international protection to refugees and, together with Governments, to seek solutions to refugee problems.

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familiar de nacionales de terceros países residentes en la Unión Europea" in *" Revista Electrónica de Estudios Internacionales*", number 26, 2013, p. 3

[362]Consiglio Italiano per i Rifugiati, Report of the project "*Ritrovarsi per Ricostruire"* chapter II "*Il Libro Verde sul diritto al ricongiungimento familiare*", 2016, p. 45 http://cironlus.org/old_site_2016/images/pdf/RITROVARSI_PER_RICOSTRUIRE_VERSIONE_FINALE.pdf

[363] UNHCR is a United Nations agency with the mandate to protect refugees, forcibly displaced communities and stateless people, and assist in their voluntary repatriation, local integration or resettlement to a third country

As this body is also entrusted for supervising the correct application by the Contracting Parties of International Agreements related to refugees, its responsibility is extended to Member States of the European Union too: such a responsibility is also recalled by Article 78 TFEU [364].

In its report, the UNHCR firstly underlined the importance of the family for refugees coming to Europe, as the family plays a crucial role for helping people to build a new life and because it is a fundamental support to adapt to new circumstances[365].

Subsequently, the UNHCR observed that despite the fact that in the family Reunification Directive were adopted more favourable rules for refugees [366], there still were lots of obstacles in the reunification process, that led to a long-lasting separation and to very difficult possibility of success.

The main areas in which the UNHCR identified the most the presence of obstacles for a correct implementation of the Directive were "*the restrictions in scope and time; limited family definition, difficulty in tracing relatives; insufficient information about the procedure; difficulties accessing embassies to lodge an application; difficulties documenting family links and dependency; problems securing travel documents and*

[364] Article 78 TFEU: "*1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

[365] UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) p. 3

[366] For instance, the exemption from meeting the requirements of income, accomodation and health insurance.

visa from remote or insecure areas; financing travel and meeting integration requirements."[367]

We will briefly detect the key points and some of the aspects on which the UNCHR suggested to focus on; for what concerns the first point, the recommendation of the UNCHR was that of applying the Directive to beneficiaries of subsidiary protection, at the same conditions laid down for the refugees and it requested to Member States not to rely on the clause provided in Article 12.1 of the Directive [368].

On the second aspect, the UNHCR invited Member State to adopt wider criteria for defining the family, that could go further than only including the nuclear family [369].

Furthermore, although the Directive expressly provides that "*the rejection of the application cannot be based solely on the absence of documentary evidence*"[370], in practice - in some Member States- official documents are indispensable and this forces refugees to return to their country of origin in order to obtain them.

Therefore, UNHCR strongly encouraged the Commission to enact some guidelines for ensuring an equal treatment among all Member States.

In addition, DNA testing is justified, according to the UNHCR, provided that it is only used when- after all other means of proof have been exhausted- serious doubts remain on the family relationship.[371]

Furthermore, UNHCR focused on *problems securing travel documents and visa from remote or insecure areas.*

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[367] UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) p. 5

[368] Article 12 Directive 2003/86/EC[…]"*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."*[...]

[369]UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) p. 7 […] "*While there is no single, universally agreed definition of what constitutes a family, UNHCR promotes cultural sensitivity and underlines that flight may lead to separation and loss of extended family members in close relationships of dependency. Accordingly, UNHCR encourages States to adopt a more inclusive definition, beyond what is known as the traditional "nuclear family", including for the purpose of family reunification*" […]

[370] Article 11 Directive 2003/86/EC "[…] *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.*"

[371] "Diritto al ricongiungimento familiare – Le risposte di UNHCR ed ECRE al Libro Verde della Commissione" http://www.asiloineuropa.it/2012/03/28/diritto-al-ricongiungimento-familiare-le-risposte-di-unhcr-ed-ecre-al-libro-verde-della-commissione/

It observed that obtaining a visa can be a significant obstacle, due to the difficulty for family members of refugees to reach Member States' embassies in their countries of origin. Likewise, obtaining a passport from the Country of origin could be extremely difficult or dangerous, especially in cases where the State itself is persecuting the refugee.

UNHCR, therefore, called upon Member States to provide a *laissez-passer* to family members of beneficiaries of international protection who are unable to obtain passports from their country of origin and to make the issuance of visas easier.

In addition, UNHCR remarked that the costs of family reunification should be eliminated or reduced by States and, in order to cover them, financial support should be used. This because "*In the absence of financial assistance schemes, UNHCR is concerned that high family reunification costs may put beneficiaries of international in a precarious situation and at increased risk of falling victim to exploitation, high interest loan schemes or becoming unduly dependent on others. UNHCR is also concerned that high costs may in worst case scenarios lead families to choose with which family member to reunite first, leaving other family members behind until they can gather sufficient resources*."[372]

On the last aspect concerning integration, the UNHCR strongly encouraged that family members are granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee and that the rights of family members do not depend on those of the sponsor.

In conclusion, UNHCR believed that the Directive 2003/86 had already laid down sufficient instruments that the Member States could use for ensuring the right to family reunification and to family life for refugees. What was needed, according to the UNHCR, was a different approach to the Directive by some Member States, that should apply the positive clauses contained in the Directive.

Finally, the UNHCR proposed to adopt guiding lines on the main sensitive areas, as well as a better cooperation among Member States and the use of European and National funds for simplifying family reunifications. [373]

[372] UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) p.16

2.2 European Council on Refugees and Exiles' reaction to the Green Paper

Differently from UNHCR, ECRE [374] was not in favour of a Commission proposal to amend the directive because it would risk to lower the already existing standards rather than raising them.

ECRE therefore suggested that the Commission should monitor the application of the existing rules and initiate possible infringement proceedings against Member States in cases in which they incur in an incomplete or incorrect transposition and application of the rules of the Directive.

The main fields on which the ECRE focused were [375]:

a) the exclusion of beneficiaries of subsidiary protection from the scope of the Directive: even though many States guarantee them the right to family reunification, this does not mean that they also benefit from the more favourable conditions enjoyed by refugees. There is no objective justification for this difference in treatment and therefore the same exceptions should be made for beneficiaries of subsidiary protection as for refugees in terms of housing, income and health insurance.

b) the possibility for States to set a minimum age for the reunification of the spouse: in ECRE's view, this could represent an unjustified interference with the right to family life provided for in Article 8 ECHR.

c) the possibility for States to submit the family reunification of refugees to the conditions laid down for immigrants, if the request is not made within three months of recognition of the status or if family reunification is possible in another country with which the refugee or his family member has special links.

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[373] "Diritto al ricongiungimento familiare – Le risposte di UNHCR ed ECRE al Libro Verde della Commissione" http://www.asiloineuropa.it/2012/03/28/diritto-al-ricongiungimento-familiare-le-risposte-di-unhcr-ed-ecre-al-libro-verde-della-commissione/

[374] The European Council on Refugees and Exiles (ECRE) is a pan-European alliance of 104 NGOs in 41 countries protecting and advancing the rights of refugees, asylum seekers and displaced persons. Its mission is to promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law. ECRE strives for a Europe that protects refugees, asylum seekers and displaced persons with dignity and respect.

[375]"Diritto al ricongiungimento familiare – Le risposte di UNHCR ed ECRE al Libro Verde della Commissione"http://www.asiloineuropa.it/2012/03/28/diritto-al-ricongiungimento-familiare-le-risposte-di-unhcr-ed-ecre-al-libro-verde-della-commissione/

d) integration of family members: ECRE, in particular, asked the Commission to clarify the difference between integration measures and integration conditions, given the trend in some States to regard integration 'measures' as a pre-requisite to be met before the right to family reunification can be exercised;
e) DNA testing: ECRE believed that it should only be used if the doubts are so great that reunification would be denied or if it is the interested parties who request it.

To sum up, ECRE -as already suggested by UNHCR- encouraged the adoption of guidelines to improve the uniformity of application of the rules on family reunification in the EU and recalled that States must apply the rules of the Directive with respect for fundamental rights, urging the use of more favourable provisions and refraining from adopting the more restrictive policies that the Directive allows.

2.3 Member States' contributions to the Green Paper

After having concisely illustrated the position of UNHCR and ECRE, a brief analysis on the concerns of the Member States shall be carried out.
Starting from the first question of the Commission "*Who can qualify as a sponsor for the purpose of the Directive?*", it must be observed that Article 3.1 of the Directive sets out two conditions for being considered applicant: 1) holder of a residence permit issued by a Member State for a period of one year or more and 2) have reasonable prospects to obtain the right of permanent residence.
Obviously, this last condition leaves a margin of interpretation which could lead to clear legal uncertainty.
Furthermore, the Directive allows Member States to introduce a waiting period of up to two years before family reunification can take place.
The problem with setting these requirements is clear: Member States' approaches differ in the implementation of this mandatory provision, as the vast majority of them allow family reunification with a temporary residence permit [376].

[376] Espino Garcia S.,"*Respuestas a las cuestiones planteadas por el Libro Verde sobre el Derecho a la Reagrupación Familiar: Revisión de la Directiva 2003/86/CE del Consejo, de 22 de septiembre de 2003,*

Concerning the second question, the Directive provides that Member States may require that the applicant and his or her spouse have reached a minimum age -without exceeding 21 years- before the spouse can join the applicant.

The main and immediate consequence of this requirement is that the threshold referred to may be higher than the age of majority set by the various Member States in their national legislation. Although the real meaning of this clause is that it was introduced to prevent forced marriages, the Green Paper asked whether there are other means of preventing forced marriages in the context of family reunification and if it is legitimate to require a minimum age for the spouse that differs from the age of majority in a Member State. [377]

Also in this context the Member States' opinions were very fragmented, as some States (for instance Germany and Finland) believed that the minimum age requirement did not need a modification; on the other hand, other Member States have observed that in their national legislation the age for applying for reunification and the majority age are the same, as it happens in Greece.

But a more relevant issue concerned the third question: in relation to minor children, the Directive allows two restrictions. [378]The first one is laid down in article 4 of the Directive 2003/86 and it states that "*By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive*"[379], while the second one is contained in the same article but at paragraph 6 "*By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the*

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sobre el derecho a la reagrupación familiar de nacionales de terceros países residentes en la Unión Europea" in " *Revista Electrónica de Estudios Internacionales*", number 26, 2013, p.20.

[377] Espino Garcia S.,*"Respuestas a las cuestiones planteadas por el Libro Verde sobre el Derecho a la Reagrupación Familiar: Revisión de la Directiva 2003/86/CE del Consejo, de 22 de septiembre de 2003, sobre el derecho a la reagrupación familiar de nacionales de terceros países residentes en la Unión Europea"* in *" Revista Electrónica de Estudios Internacionales*", number 26, 2013, p. 22

[378] COM/2011/0735 final Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)

[379] The interpretation of such article has already been analyzed *supra* in judgment *Parliament v. The Council*.

Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification."

As it was highlighted in the Green Paper by the Commission, none of the Member States had used the second clause and in fact this has led to the formulation of another question: "*Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?"*

The majority of the Member States was in favour of its removal, for being in compliance with the Convention on the Rights of the Child, whereas Germany was the sole Member State to use it and that wanted it to be maintained into force.

Of particular interest is also the fourth question on who have to be considered the addressees of the family reunification. As already pointed out, Article 4.1 of the Directive states that beneficiaries are "*the sponsor's spouse; the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned […]; the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her.[…] ; the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. […]"*

In addition, Article 4 of the Directive set out other possibilities for Member States [380], but this is an optional clause which Member States may or may not make use of.

For instance, more than half of the Member States –including Italy-, authorises family reunification for the parents of the applicant and his/her spouse, while only seven allow

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[380] Article 4 Directive 2003/86 par. 2 and 3 *"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.
3. 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 unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.
Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification".

the reunification of the unmarried couple either as a registered partner or as a stable relationship duly proved. [381]

But the same rule also shows that when a minor is a recognised refugee, Member States must authorise the entry and residence of the parents without the conditions of dependency and lack of appropriate family support.

Similarly, Articles 4.2 and 4.3 allow Member States to authorise the entry and residence of other family members , provided that the conditions set out in Chapter IV- concerning the conditions for the exercise of the right to family reunification- are met. Therefore, once Member States decide to agree on this possibility, the conditions set out in the Directive shall be applied.[382]

Consequently, the Commission asked stakeholders whether the rules on eligible family members were adequate and sufficiently broad to take into account the different definitions of family that exist, without only referring to the nuclear family.

The peculiar fact is that whereas most of the States that have responded to this question –such as Austria, Germany and France- have declared that the existing rules on the matter are satisfactory and that the decision to include additional family members as eligible for reunification should be taken by each Member State, in Italy the right to family reunification is not allowed to be extended to unmarried couples, whether they are registered or not, nor to same-sex couples; while States such as Hungary and Sweden have remarked in their reports that their national legislation offers a much broader concept of the family.

Another question that needs to be commented is the latter one, which states that there are two horizontal mandatory clauses in the Directive: Article 5.5, that obliges Member States to pay due regard to the best interests of minor children when examining an application [383] and that the child's best interest must be a primary consideration in all actions relating to children, as well as the need for a child to maintain on a regular basis a personal relationship with both parents [384].

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[381] Espino Garcia S.,*"Respuestas a las cuestiones planteadas por el Libro Verde sobre el Derecho a la Reagrupación Familiar: Revisión de la Directiva 2003/86/CE del Consejo, de 22 de septiembre de 2003, sobre el derecho a la reagrupación familiar de nacionales de terceros países residentes en la Unión Europea"* in *" Revista Electrónica de Estudios Internacionales*", number 26, 2013, p. 27

[382] Ibid.

[383] This provision mirrors the obligation contained in both Article 24.2 of the CFR and Article 3.1 of the UN Convention on the Rights of the Child.

[384] According to article 24.3 of the Charter

The other horizontal clause is Article 17 and it enshrines that " *Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family*".

In other words, this clause obliges Member States to make individual examinations of each case, specifically recalled by the ECJ in its case law. [385]

"How could the application of these horizontal clauses be facilitated and ensured in practice?"

On this latter issue, the most of the Member States maintained a neutral position for the reason that they believed that these clauses did not require any change; only Estonia affirmed that it could be given more guidelines by the EU in these areas and that there was the need for a more exchange of information among Member States for ensuring the best application of these principles. [386]

To conclude, we may notice that there had been a high number of participants in the consultations raised by the Green Paper on the right to family reunification of third country nationals residing in the EU, in which Member States, national and international organizations, have welcomed the opportunity to respond to the issues raised in order to contribute to the debate on family reunification and everyone shared the different points of view on migration, the problems experienced in each Country as well as the proposals for the future in this field.

From the results of the consultations, it has been possible to detect that -despite the Directive's efforts to harmonise national legislation on family reunification- there still

[385] COM/2011/0735 final Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)

[386] Espino Garcia S.,*"Respuestas a las cuestiones planteadas por el Libro Verde sobre el Derecho a la Reagrupación Familiar: Revisión de la Directiva 2003/86/CE del Consejo, de 22 de septiembre de 2003, sobre el derecho a la reagrupación familiar de nacionales de terceros países residentes en la Unión Europea"* in *" Revista Electrónica de Estudios Internacionales*", number 26, 2013, p. 49.

are weaknesses and a lack of uniformity of criteria in each of the Member States, due to the disparity of regulations contained in each National legislation. [387]

In this respect, it can be concluded that these opinions have not constituted an express request for a complete reform of the Directive, using arguments such as the fact that the current Directive adequately established the harmonisation and flexibility of the provisions of the Directive and that it is therefore not necessary to amend the Directive: maybe because a change in the norms may lead to narrow the competence of States in this area and to limit their freedom of action.

In the following paragraphs it will be verified if these observations have been put into practice.

3. The final analysis carried out by the Commission

In the years following the publication of the Green Paper, the Commission had been monitoring these policy and legislative choices that need to remain within the margin of appreciation offered by the Directive.

Such analysis will be focused on two Communications, both issued by the Commission: the first one enacted after the publication of the Green Paper in 2014 and the second one in 2019.

In 2014, the Commission published a Communication providing guidance to Member States on how to apply the Directive.

What emerged after the public consultation of 2011, was that the Commission should: a)ensure full application of the existing rules ;b) initiate infringement proceedings where necessary and; c) develop guidelines on the issues identified. [388]

As seen in the judgment *Parliament v. Council "Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being*

[387] Espino Garcia S.,*"Respuestas a las cuestiones planteadas por el Libro Verde sobre el Derecho a la Reagrupación Familiar: Revisión de la Directiva 2003/86/CE del Consejo, de 22 de septiembre de 2003, sobre el derecho a la reagrupación familiar de nacionales de terceros países residentes en la Unión Europea"* in *" Revista Electrónica de Estudios Internacionales*", number 26, 2013, p. 50

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

left a margin of appreciation."[389], but on the other hand Member States enjoy a wide margin of appreciation because they can decide to extend the right to family reunification to relatives other than the spouse and minor children and to subject such right to certain additional conditions.

But, as held by the Commission in its final report of 2014, it must not be forgotten that the authorization to family reunification shall be the general rule and so derogations must be interpreted narrowly.

At the same time, the right to family reunification is not unlimited.

Beneficiaries are required to respect the laws of the host country, as laid down in the Directive. In case of abuse or fraud, it is in the interest of both society and honourable applicants that Member States take vigorous measures, as required by the Directive.

Finally, the Directive must be interpreted and applied with respect for fundamental rights, in particular the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy enshrined in the European Convention on human rights and the Charter of Fundamental Rights of the European Union. [390]

Since the last report in 2014 there have been ongoing issues for some Member States in implementing the Directive into national legislation, particularly in respect of integration measures, stable and regular resources, best interests of the child, and treating refugees more favourably than those with subsidiary protection.

In continuing its analysis in the years following its 2014 report, the Commission has emphasized the crucial role played by the Court of Justice in implementing the Directive, as it has helped to interpret the most sensitive provisions of the Directive by replying to the preliminary questions asked by the National Courts.

In this respect, it is worth-mentioning that the Commission has received many complaints related to the family reunification of third-country nationals.

The main issues raised were about: *the refusal to issue visas or permits, proof of identity or family ties as ground for rejection, long processing times by administrations, disproportionate charges for issuing permits, the notion of stable and regular*

[389] Case C-540/03 European Parliament v Council of the European Union. Par. 60

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

resources, access to employment for family members, incorrectly applied waiting periods, and the proportionality of pre-integration conditions. [391]

It is interesting to mention the most important transposition measures for our purpose.

For instance, it has been stressed that under Article 5.5 of the Directive, when examining an application, Member States should have due regard to the best interests of minor children.

As already analyzed, this had been emphasized by the ECJ in *O. and S., Maahanmuuttovirasto*[392], and *Parliament v. Council*[393]

The Commission noticed that most Member States have complied with this obligation, but not all have explicitly transposed it for the purpose of reviewing a family reunification application. However, this obligation of taking into account the best interests of the child appears to be a general legal principle in the national legislations.

For what concerns the waiting period and reception capacity that are laid down in Article 8 of the Directive, this latter sets out the possibility for Member States to require a period of lawful residence before a sponsor may be joined by their family members and to provide for a waiting period of up to three years for the issue of a residence permit in cases where their previous legislation on family reunification required the need to take into account reception capacities

Although many States had transposed this article, the Commission had identified several inconsistencies in the implementation, which have required clarifications and modifications in national legislations following exchanges with the Member States concerned.

"Many Member States do not set a waiting period before a sponsor's family is eligible to apply for family reunification. Where this provision applies, the waiting period can be between one, one and a half, two or three years from the point the sponsor became resident in the country or received a final decision granting international protection, with exemptions granted by individual Member States"[394].

Differently from this provision, in Article 6 concerning the possible restrictions on grounds of public order, public security and public health, most of the Member States

[391] COM(2019) 162 final Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification.
[392] Case C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L
[393] Case C-540/03 European Parliament v Council of the European Union
[394] Case C-540/03 European Parliament v Council of the European Union

have correctly transposed this article, also due to the fact that these terms must be interpreted in the light of the case law of the Luxembourg Court and the European Court of Human Rights.

In relation to the contentious issue represented by the horizontal clauses on relevant consideration in Article 17 – that are, respectively, the obligation to take into account the nature and solidity of the person's family relationships, the duration of their residence in the Member State and of the existence of family, cultural and social ties with their country of origin, and the need to apply a case-by-case approach- this provision has been correctly implemented by most Member States.

In fact, the principles of proportionality and legal certainty [395] (which are general principles of EU law) must be applied in any decision on rejection, withdrawal or refusal to renew a permit.

Last mention to be made is about the family reunification of refugees, where the Directive referred to several derogations granting more favourable provisions for the family reunification of refugees so as to take their particular situation into account. Article 10, which sets out the application of the definition of family member to the family reunification of refugees, provided for exceptions and for specific rules concerning the unaccompanied minors that are sponsors.

This article, the Commission pointed out, had been correctly transposed by most Member States.

Article 12 provides that some of the family reunification facilitations offered to refugees are applicable only if the application for family reunification is submitted within a period of three months after the granting of refugee status.

In a recent judgment[396] Luxembourg Court confirmed, in principle, the absolute character of this time limit, but highlighted that this strict rule cannot apply to situations in which particular circumstances render the late submission of the application objectively excusable.

To draw a conclusion, it should be pointed out that, undoubtedly, since 2008 the implementation of the Directive on family reunification has improved; the main reasons

[395] This principle means that the law must be certain, in that it is clear and precise, and its legal implications foreseeable.

[396] C-380/17 K and B v Staatssecretaris van Veiligheid en Justitie par. 59

can be identified in the numerous infringement proceedings highlighted by the Commission, as well as to the launch of the Green Paper and to the relevant judgments of the ECJ.

All these aspects have contributed to putting major efforts for the Member States to the improvement and adaptation of their national legislations, in order to fulfill the requirements of the Directive.

Moreover, as already mentioned both in the previous reports and communications, the wording of the Directive -which leaves to Member States relevant room for discretion in its implementation- should not result in lowering the standards when applying provisions on certain requirements for the exercise of the right to family reunification in a too broad or disproportionate way, but on the contrary to apply them in a more consistent way.

The general principles of EU law, above all proportionality and legal certainty, must be regarded as the main key in assessing the compatibility of national provisions with the Directive.

Due to its important role as guardian of the EU Treaties, the Commission has been regularly monitoring the legal and practical implementation of the Directive by Member States, particularly on the areas highlighted in its reports. [397]

[397] COM(2019) 162 final Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification.

Conclusions

As illustrated in the present dissertation, the right to family reunification is extremely fragmented and, therefore, it had to be build and developed through primary and secondary law, even though the most important contributions were given by Court of Justice and the European Court of Human Rights.

Thanks to these two judicial bodies, it has been possible to shape the best interest of the child principle, which is anchored in Article 3.1 of the Convention on the Rights of the Child, in Article 24.2 of the Charter of Fundamental Rights of the European Union and that can be derived from the interpretation of Article 8 ECHR provided by the Courts .

Even though the Courts do not systematically refer to the best interest of the child in their judgments, they have held that- in every measure affecting children- the best interest of the child shall be a primary consideration for the Member States[398].

Specifically, Luxembourg Court has played a crucial role in the implementation of the 2003 Directive on family reunification, providing an extensive case law on the interpretation of the most sensitive provisions of the Directive, by mainly addressing preliminary questions sent by the national courts of the Member States[399].

Compared to other human rights instruments, children's rights have started to be taken into consideration later, but currently they have a key role in the assessments made by the ECJ and the ECtHR.

In theory, sectors such as family law or migration policies do not belong to the exclusive Community's competence, but the fact that the boundaries between Community and Member States' competences have proven to be weak has led to a gradual reliance on the jurisprudence held by the two judicial Bodies, as well as on the general principles of EU law[400].

Furthermore, a better protection of these rights has been granted since the ECJ's adherence to Strasbourg case-law and to the Convention on Human Rights; it means that, if the Court of Justice affects areas such as the family or migration policies-whose regulation is still formally largely reserved to national authorities- it shall act cautiously,

[398] It has been affirmed in Case C-648/11 MA, BT and DA v Secretary of State for the Home Department

[399] COM(2019) 162 final Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification.

[400] Amongst others the European Court of Justice has expressly recognised fundamental rights, proportionality, legal certainty, equality before the law and subsidiarity

by always complying with the obligations to which States are already bound by virtue of their accession to the European Convention.

As described throughout this work, the possibility of widening the cases in which the right to family reunification may be invoked, had also been represented by a slow evolution on the concept of the family, which went from only considering the nuclear family to gradually include also registered partnership and couples that cohabit, even without registering their partnership[401].

But it shall be remarked that, in this field, Member States have reaffirmed their exclusive competence in deciding which additional family members can be included into the notion of nuclear family, for the purpose of family reunification.[402]

The other controversial aspect of the Directive lied in the exclusion of holders of subsidiary forms of protection from the scope of the Directive that has been most criticised by organisations working in the field of asylum, who stressed the lack of distinction between refugees and beneficiaries of subsidiary protection as regards their humanitarian needs.

However, such legal vacuum has been partly filled by Member States, many of which now grant holders of subsidiary protection the right to the family reunification.

Another issue that shall be highlighted is that, even though there were several attempts to grant an equal treatment to all those who were legally residing in a Member State's territory, differences between them can still be found.

Starting from static and dynamic EU citizens, we have seen that the first category sometimes not only face stricter family reunification conditions than migrants and nationals of other Member States, but that static citizens may also be in a less

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[401] This issue has been largely discussed in the first chapter, in relation to those who can be qualified as the addressees of Directive 2003/86.

[402] European Commission Directorate-General Home Affairs Summary of stakeholder responses to the Green Paper on the right to family reunification of third-country nationals

"Almost all Member States who answered this question (AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, LV, LT, LU, MT, NL, PL, PT, SK) stated that the current rules are satisfactory and that the decision which additional family members to include should lie with Member States. FR and RO noted that they do not recognise same sex marriage. HU, IT and SE stated that their own national legislation defines family more broadly, and RO believed in extending the rights to family reunification to other family members which are not currently covered by the Directive definition, e.g. those in a situation of non-contractual guardianship. Turkey called for same and opposite sex partners and parents to be included in the definition." https://www.eesc.europa.eu/sites/default/files/resources/docs/summary-of-stakeholder-responses-to-the-green-paper-on-the-right-to-family-reunification-of-third-country-nationals.pdf

convenient position in comparison to third country nationals residing lawfully in the territory of a Member State.

In fact, this latter category is protected by Directive 2003/86 on the right to family reunification within the Union, as well as from other provisions included in international agreements.

In addition, the abovementioned Directive applies to third-country nationals holding a residence permit for at least one year likelihood of obtaining permanent residence and it explicitly excludes family members of Union citizens from its scope of application.

This problem had already been risen in 1999 Tampere Council which -in defining the common policy on immigration and asylum- affirmed the necessity of granting an equal treatment of third country nationals who legally reside in Member States' territory and remarked the need of a more incisive policy for granting the same rights and duties of EU citizens, in order to equate the legal status of third Country nationals and Member States' citizens.

As mentioned earlier, the impeding factor to a real harmonization of the two Directives may be constituted by the fact that such Directives only set minimum harmonization rules, but do not impede to Member States to exercise their (wide) margin of appreciation in the adoption of either more favourable rules or additional –and less favorable- conditions for the best exercise of these rights.

Consequently, family reunification rules remain far from being harmonized in Europe and discretions have consistently been used by Member States to establish even more restrictive conditions for family reunification.

However, as it has been emphasized in the present work, it is now granted to all third country nationals the right to family reunification with the spouse and minor children, while it is up to the Member States to allow the reunification for stable partners and adult children, if they do not have adequate and sufficient resources and therefore they need to be cared by the applicant.

More favourable conditions are provided for refugees concerning the official documents that have to prove family ties; considering their peculiar situation and the impossibility to contact national Authorities of their Country of origin, Member States shall take into account other evidence.

Moreover, it could be remarked that the protection of the child and of the family granted by EU Conventions and Treaties could be equated with the aforementioned International norms, thanks to the continuous evolving interpretation of the Courts, which is increasingly aware of the needs of minors.

A further flaw is that it remains unclear how the Member State should apply the best interest concept, as they do not have sufficient guidelines on how to implement it into national law; it must be said that the only certainty is that Member State shall- in weighing the interests at stake- pay particular attention to the children's age, their situation in the Country concerned and the extent to which they are dependent on their parents. Specifically, it has been discussed in detail Italian legislation, which has proven to be in compliance with current EU norms even before the adoption of the Directive on family reunification, and that was therefore considered as a model legislation for EU Member States.

In conclusion, as the Directive has showed lowering of common standards in the sphere of family reunification compared to the standards proposed by the Commission, this latter has committed itself "*to regularly monitoring the legal and practical implementation of the Directive by Member States, particularly on the issues highlighted in this report. As family reunification remains a major challenge for the EU in the frame of migration policy, the Commission will continue to closely monitor national legislations and administrative practices and may consider appropriate action – in line with its powers under the EU Treaties – including opening infringement procedures, where necessary*." [403]

This means that, despite Commission's efforts –such as its specific Communication, providing further guidance on the Directive's implementation to EU Member States as well as its constant monitoring of the legal and practical implementation of the Directive- the right to family reunification is still far from being harmonized across the EU and children seeking to be reunited with their family face considerable obstacles.

So far, the best interest of the child and the right to family reunification have tried to be consistently protected by the evolving interpretation of both the Courts, which aimed at filling the lacks of Member States' legislation.; hence, there is a need to revise the Directive and to convert it into a clearer legal instrument with the purpose of promoting

[403] COM(2019) 162 final Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification.

family reunification in EU Member States, with more direct and precise rules and with less margin of appreciation to Member State. The chance of doing so may be had by 2030, as Governments have committed in Agenda for Sustainable Development to "orderly, safe, regular and responsible migration and mobility of people".[404]

[404] Advocacy brief, "*Refugee and Migrant crisis in Europe*", 2016 https://www.unicef.org/eca/sites/unicef.org.eca/files/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf

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