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THE INTERACTION BETWEEN DIRECTIVE 2003/86 AND THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN THE FAMILY REUNIFICATION OF A THIRD COUNTRY NATIONAL

Lucia Serena Rossi*

1. Introduction

Directive 2003/86 (Directive) sets forth a basic legal framework for family reunification between third country nationals in Member States of the European Union (EU). This article will examine how the Court of Justice of the European Union (CJEU or "the Court") interprets the Directive in light of the values of the Charter of Fundamental Rights of the European Union (Charter). An exam of the case-law shows how, under the influence of the Charter, the Court on one hand recognizes a broad concept of family and, on the other hand follows a strict interpretation of the conditions set out by the Directive.

Sections 2, 3, and 4 consider how the Court has treated the concept of family and its components within the meaning of the Directive; sections 5, 6, 7, and 8 consider the Court's treatment of what conditions the Directive allows Member States to impose; brief conclusions will follow in order to put the case law of the CJEU in a broader context.

2. An Expanded Concept of "Family"

Articles 7 and 24 of the Charter of Fundamental Rights of the European Union have become increasingly important in the case law of the CJEU on family reunification

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concerning Directive 2003/86.[1] The primary outcome of this influence has been an expanded definition of "family" for the purposes of reunification.[2]

In O and Others the definition of nuclear family, meaning spouses and children, was extended beyond blood ties. The Court considered two families where a non-EU citizen applicant had an EU citizen child in a first marriage; they brought those children into a second marriage with another non-EU citizen and gained custody over non-EU citizen children; then the applicants sought family reunification for their non-EU citizen spouses and children.[3] The case therefore presented the Court with a combined *Zambrano*-Directive 2003/86 problem: on the one hand, the citizen rights of the first-marriage children had to be guaranteed, on the other hand, the application for reunification directly and fundamentally concerned two non-citizens.[4]

The Court's answer was twofold: first, it acknowledged the reality of complex families – some of which would inevitably end up in immigration litigation as had the applicants – by broadly interpreting the definition of family.[5] In applying Directive 2003/86, this was justified by reading the extensive subparagraphs of article 4(1) together with the recitals to imply the European legislature's intentionally broad conception of family.[6]

Second, it demanded a factual, circumstantiated, case-by-case assessment by national courts, especially insofar as the values of the Charter or optional derogations in Directive 2003/86 were implicated; in other words, families may be complex not only in the relationships between members, but also in the nexus of legal rights involved, demanding that the referring national judge take an individualized approach.[7] The CJEU therefore struck a balance, similar to that struck by the European Court of Human Rights (ECHR) in its case law,[8] between the Charter's fundamental rights and the national margins of discretion, showing the way to incorporate the Charter's article 7 and 24 values into family reunification law.[9] In later cases, the CJEU has read a case-by-case assessment

[1] E. FRASCA, J.Y. CARLIER, *The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?*, in *Common Market Law Review*, 2023, no. 60, pp. 345, 368, 379; Cf. K. HYLTÉN-CAVALLIUS, *Who Cares? Caregivers' Derived Residence Rights from Children in EU Free Movement* Law, in *Common Market Law Review*, 2020, no. 57, pp. 399, 417-418.
[2] Court of Justice, judgment of 6 December 2012, *O and Others v Maahanmuuttovirasto*, case C-356/11, paras 55, 65 ("the nuclear family referred to in recital 9 […] was conceived broadly by the European Union legislature").
[3] Court of Justice, *O and Others*, cit., paras 18-33.
[4] *Ibid.*, paras 56- 68.
[5] *Ibid.*, paras 64-65.
[6] *Ibid.*
[7] *Ibid.*, paras 49-54.
[8] European Court of Human Rights, judgment of 9 July 2021, *M.A. v. Denmark*, application no. 6697/18, paras 131-153. See also European Court of Human Rights, judgment of 1 December 2005, application no. 60665/00, *Tuquabo-Tekle and Others v. The Netherlands*, paras 42-44; European Court of Human Rights, judgment of 10 July 2014, application no. 2260/10, *Tanda-Muzinga v. France*, paras 64-69.
[9] E. FRASCA, J.Y. CARLIER, *The Best Interests of the Child*, cit., pp. 376-378.

requirement into article 17 of the Directive, leading CJEU analyses of national courts' procedures to further resemble ECHR methodology.[10]

In *Bevándorlási*, concerning family reunification between refugee siblings, the Court considered article 10(2) of the Directive, which allows States to authorize reunification with family members other than spouses and children (covered under article 4) only "if they are dependent on the refugee."[11] The Court concluded that a "situation of real dependence" is not defined exclusively by the sponsor's ability to provide, but is also demonstrated by the need of the family member claiming dependence.[12] The nature of this need can result from either financial or social conditions, and the dependency assessment's point of departure is the family member's ability to support themselves in the State of origin at the time of application.[13] According to the Court, "all relevant circumstances" must be considered,[14] including a given decision's impact on the fundamental rights granted by the Charter.[15]

The Court acknowledged the plain-language limits on non-nuclear family members under article 10, but interpreted that article's requirements through a more flexible definition of dependence. Furthermore, article 10's limits become most flexible – otherwise said, reunification with non-nuclear family members becomes most permissible – in cases concerning refugees, where its interpretation is coloured by the Directive's recitals and the Charter's fundamental values. A more relaxed standard exists for refugees under recital 8 of the Directive, which acknowledges refugees' special vulnerability and frequently diminished ability to provide for family members or to provide proof of their circumstances to national authorities.[16] This mirrors the Directive's articles addressing refugees, articles 9-12, all of whose provisions contain mandatory or optional expansions of refugees' right to family reunification.[17] According to the Court, this heightens the State obligation that national procedures consider a more expansive set of circumstances of refugee non-nuclear family members, including "age, level of education, professional and financial situation, and state of health," the sometimes great variation of individual needs, and the specific circumstances of asylum.[18] By way of comparison, the analogous ECHR approach was concisely stated in *Tanda-Muzinga*: "[H]aving regard to the special situation in which [refugees] find themselves, it is appropriate in numerous cases to give

[10] Court of justice, judgment of 12 December 2019, *TB v Bevándorlási és Menekültügyi Hivatal*, case C-519/18, para. 53. See also Court of justice, judgment of 9 July 2015, *Minister van Buitenlandse Zaken v K and A*, case C-153/14, para. 60; Court of justice, judgment of 7 November 2018, *K and B v Staatssecretaris van Veiligheid en Justitie*, case C-380/17, para. 53.
[11] Court of justice, *Bevándorlási*, cit., paras 7, 21, 44-52.
[12] *Ibid.*, para. 46-52.
[13] *Ibid.*, para. 48.
[14] *Ibid.*, para. 52.
[15] *Ibid.*, paras 64-67.
[16] Court of justice, *Bevándorlási*, cit., paras 50-51. Cf. European Court of Human Rights, *Tanda-Muzinga v. France*, cit., paras 58, 69, 75-76, 78-79; European Court of Human Rights, judgment of 10 July 2014, application no. 19113/09, *Senigo Longue and Others v. France*, paras 66-75.
[17] Council Directive 2003/86/EC, *on the right to family reunification*, of 22 September 2003, in OJ L251, 3 October 2003, arts 9-12.
[18] Court of justice, *Bevándorlási*, cit., para. 75.

them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof."[19] The CJEU cannot, however, overlook when a refugee has pleaded inapplicable law; as the recent case *XXX v Commissaire* has shown, the right to family reunification is not interchangeable with and has no bearing on the right to international protection, whatever similarity in circumstances.[20]

Another recent case, *Landeshauptmann von Wien*, was in certain aspects similar to *Bevándorlási*. A refugee minor sought family reunification with his seriously disabled adult sister and their parents, on whom the sister totally depended. In the course of the proceedings he attained majority and was no longer permitted to reunify with his siblings under Austrian national law implementing the Directive.[21] The applicants claimed that, under Directive article 10(3)(a), the sponsor's parents must be admitted, and articles 7 and 24 of the Charter and the principle of effectiveness of rights (*effet utile*) also required admission of the sponsor's sister.[22] Advocate General Collins considered this a *contra legem* interpretation of article 10 and advised against it.[23] Both article 10 and recital 10 lay out the national margins of discretion regarding which non-nuclear family members nations may decline to admit.[24] However, in order to ensure an adequate assessment of all interests at play as well as to determine all applicable rights under Union law, Advocate General Collins did consider it necessary to take into account all the applications simultaneously, and in light of one another.[25]

The Court took notice of the applicants' exceptionally grave circumstances, notably the sister's extremely grave medical condition, requiring constant care that only her parents could provide.[26] The Court resolved the case on the basis of *effet utile*: though the sister had no right to family reunification herself, her exceptional medical circumstances required, without alternative, that her parents stay with her. As a result, in order to ensure the effectiveness of the unaccompanied refugee minor's rights stemming from article 10(3)(a), national authorities were required to issue the sister an entry permit in this individual case.[27]

[19] European Court of Human Rights, *Tanda-Muzinga v. France*, cit., para. 69.
[20] Court of justice, judgment of 23 November 2023, *XXX v Commissaire général aux réfugiés et aux apatrides*, case C-374/22, paras 17-18, 20-22; Court of justice, judgment of 23 November 2023, *XXX v Commissaire général aux réfugiés et aux apatrides*, case C-614/22, paras 17-18, 20-22.
[21] Opinion of Advocate General A.M. COLLINS, delivered on 4 May 2023, in the case C-560/20, *CR, GF, TY v Landeshauptmann von Wien*, paras 9-14.
[22] *Ibid.*, para. 31.
[23] *Ibid.*, para. 32.
[24] *Ibid.*, para. 33, n. 45.
[25] *Ibid.*, paras 41-42.
[26] Court of justice, judgment of 30 January 2024, *CR, GF, TY v Landeshauptmann von Wien*, case C-560/20, paras 54-55.
[27] *Ibid.*, paras 51, 55-58.

3. The Concept of Effective Family Life (Article 16 of the Directive)

The expansive definition of "family" is subject to the important condition in article 16(1)(b) of Directive 2003/86 which allows States to reject family reunification applications if "the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship."[28]

What does this mean, practically? The Court answered this in *Bundesrepublik Deutschland v SW and Others* (C-273/20)[29] as it did in defining "family", by reading the Directive's recitals in conjunction with articles 7 and 24 of the Charter.[30] In the case of the applicant's nuclear family member, the Court characterized the family relationship as necessarily "real" but not necessarily "close."[31] According to the Court, neither cohabitation nor reciprocal economic support is necessary; the reality of the family members' relationship turns rather on their intentions to occasionally see each other and maintain regular contact.[32] While a State cannot require financial support as a dispositive element in assessing 'real' or effective family life, the Court did imply that it could be weighty circumstantial evidence where, for example, a family member had the means to visit or financially support another family member in need, but chose not to.[33]

The Court had immediate opportunity to apply this standard in *Bundesrepublik Deutschland v XC* (C-279/20). The minor applicant's father sought asylum in Germany eight months before the applicant reached majority, and the father was granted refugee status seven months after the applicant reached majority.[34] Articles 4(1) and 10(3) of Directive 2003/86, however, explicitly require minority status of a sponsor's children.[35] Though the Court noted that a family reunification request could only be valid after recognition of refugee status, making the applicant's request theoretically impossible, even these procedural limits flexed under the values of the Charter and recitals of the Directive.[36] National courts must consider the totality of family circumstances together with the time of the sponsor's application, and may – or in certain circumstances must – derogate from the requirement of majority if it would accord with the Charter's values and the goals of the Directive.[37]

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[28] Directive 2003/86/EC, art 16(1)(b).
[29] Court of justice, judgment of 1st August 2022, *Bundesrepublik Deutschland v SW and Others*, case C-273/20, para. 56.
[30] *Ibid.*, paras 58-61. See also G. PIZZOLANTE, *Il riconoscimento nell'ordinamento di destinazione degli status familiari costituiti all'estero per motivi di ricongiungimento*, in this *Journal*, 2020, no. 2 , pp. 118-121, http://www.fsjeurostudies.eu/files/FSJ.2020.II.PIZZOLANTE.5.pdf, accessed 16 November 2023.
[31] *Bundesrepublik Deutschland v SW*, para. 62.
[32] *Ibid.*, paras 65-67. See also M. BORRACCETTI, F. FERRI, *Direttiva 2003/86 e ricongiungimento con figlio rifugiato: rilievo dell'età del figlio e qualificazione del rapporto di vita familiare effettiva tra gli interessati*, in *Diritto, Immigrazione e Cittadinanza*, 2022, no. 3, pp. 317, 320-321.
[33] *Bundesrepublik Deutschland v SW*, paras 63-68.
[34] Court of Justice, judgment of 1st August 2022, *Bundesrepublik Deutschland v XC*, case C-279/20, paras 15-17.
[35] *Ibid.*, paras 3-10.
[36] *Ibid.*, paras 38-51.
[37] *Ibid.*, paras 52-54.

Within that assessment, the effectiveness of XC's family life would have to be considered during the eight-month period between her father's application and her attainment of majority.[38] Due to the situation in their country of origin, Syria, and her father's status as a refugee, no actual contact had been possible, though XC's own status and resources were not clear.[39] The Court held to its demand that national courts make a case-by-case assessment: while the legal parent-child link was not by itself sufficient and did not create a presumption of real family life, a lack of material, concrete financial support or in-person contact could not exclude it; rather, under the right, individual circumstances, intent alone could be enough to demonstrate existence of real family life.[40]

In *X v Belgische Staat*, the Court confronted the question of whether there is still effective family life between parents and a minor daughter who has married.[41] As an unaccompanied refugee minor, the situation of the applicant's daughter triggered article 24 of the Charter, imposing on the Court the need to consider the best interests of the child, and recital 8 of the Directive, demanding special concern for refugees.[42] This combination overpowered the national margin of discretion under article 4(2)(a) of the Directive, as well as the provisions of the Dublin III Regulation.[43] The married status of X's daughter could not be treated as having automatically severed her family life with her mother; therefore X, living in Lebanon, could be sponsored by her daughter who was already living in Belgium.[44]

4. Age Requirements

In *Noorzia*, the goal of protecting children from forced marriages, certainly compatible with the best interests of the child principle, was used to preserve wide national margins of discretion, so that the Austrian immigration services were allowed to deny family reunification.[45] Here, the sponsor, over the age of majority, sought reunification with her spouse, who had achieved majority during the application process but was still a minor when he first submitted his application.[46]

Article 4(1)(a) of the Directive allows spousal reunification, but this right is qualified by the public policy objectives of subparagraphs 4 and 5.[47] States may, within their margin of discretion and according to their own political and cultural context, set a

[38] *Ibid.*, para. 64.
[39] *Ibid.*, paras 17, 61, 64-65.
[40] *Ibid.*, paras 63-69.
[41] Court of justice, judgment of 17 November 2022, *X v Belgische Staat*, case C-230/21, paras 12-24.
[42] *Ibid.*, paras 41, 47-48.
[43] *Ibid.*, paras 28, 39, 42, 48-49.
[44] *Ibid.*, paras 18-23, 49.
[45] Court of justice, judgment of 17 July 2014, *Marjan Noorzia v Bundesministerin für Inneres*, case C-338/13, paras 12, 15-19.
[46] *Ibid.*, paras 7-10.
[47] Directive 2003/86/EC, arts 4(1)(a), 4(4)-(5).

minimum age for both sponsor and spouse, up to the age of 21.[48] Favouring these margins as well as the principles of equal treatment and legal certainty, the Court held that this age limit referred to age at time of application, rather than age when the spouses can join each other.[49] The Court in this instance declined to follow Advocate General Mengozzi's conclusions that the Charter's article 7 guarantee of a right to respect for family life, in this case between minor spouses, outweighed the Austrian margin of discretion to interpret the Directive. Instead, the Court weighed more heavily the principles of equal treatment and legal certainty supporting the national argument that spouses' ages be considered at the time of application, rather than at the time national authorities render their decision.[50]

The Court affirmed its position on submission dates in *A and S* and *État belge*. In *A and S*, the sponsor arrived in the Netherlands as an unaccompanied minor and was granted a 5-year residence permit for asylum; she applied for her parents' and siblings' reunification there; then while the sponsor's application was pending, she attained majority.[51] While the wording of article 4(2)(a) seemed to leave Member States a comparable margin of discretion as in *Noorzia*, the applicable law differed from *Noorzia* in that this provision was expressly qualified by article 10(3).[52] Furthermore, the principles of equal treatment and legal certainty supported counting time from the submission date,[53] and the objectives of the Directive reflected in recitals 2, 4 and 8, as well as the values of the Charter, made acceptance of the sponsor's family all the more pressing.[54]

In *État belge*, the Court considered the date of submission relative to article 4(1) of the Directive, which generally obligates States to grant family reunification for spouses and descending minor children.[55] The case concerned a refugee father, whose minor children residing abroad attained majority during the lengthy appeals process against rejection of their initial reunification application.[56] The Court resolved this question by restating the *Noorzia* and *A and S* principles of equal treatment, legal certainty, the objectives of the Directive, and the values of the Charter.[57] However, it also found article 47 of the Charter, regarding the right to real and effective legal remedy, implicated in an

[48] Court of justice, *Noorzia*, cit., paras 14-16.
[49] *Ibid.*, paras 17-19.
[50] *Ibid.*, paras 16-18. Cf. Opinion of Advocate General P. MENGOZZI, delivered on 30 April 2014, in the case *Noorzia*, paras 31-34, 40-45, 56, 63.
[51] Court of justice, judgment of 12 April 2018, *A and S v Staatssecretaris van Veiligheid en Justitie*, case C-550/16, paras 20-28.
[52] *Ibid.*, paras 46-47.
[53] *Ibid.*, paras 56-64.
[54] *Ibid.*, paras 4, 32, 58. See also J. SILGA, *Le Droit au Regroupement Familial des Réfugiés Mineurs non Accompagnés Devenus Majeurs: l'Affaire A et S, entre Progrès Incontestable et Portée Relative*, in *European Papers*, 2018, no. 3, pp. 1027, 1034-1036.
[55] Court of justice, judgment of 16 July 2020, *B. M. M. and Others v État belge*, joined cases C-133/19, C-136/19 and C-137/19, para. 24.
[56] *Ibid.*, paras 13-22.
[57] *Ibid.*, paras 29-47.

appeals process that could be dismissed for mootness.[58] Given the great disparity of appellate processing times across Member States, the doctrine of considering the minor's age and qualities from the time of application further strengthened the overarching goal of avoiding discriminatory treatment of applicants in different countries.[59]

As previously noted, the Court tries to ensure its case law results in a workable and clear set of procedural rules for Member States, rather than a confusing, 'à la carte' labyrinth of exceptions.[60]

5. Conditions Regarding Integration to the Member State

The necessity for national authorities and judges to conduct case-by-case assessments has emerged as a powerful theme over the past years as articles 7 and 24 of the Charter have been increasingly absorbed into family reunification case law.[61] For example, the best interests of the child can sometimes be interpreted to cut against family reunification as much as support it, notably in cases of split families where it may better serve the child's interests to stay with a parent outside the Union who is better able to protect or provide for the child.[62] Another good example of the CJEU's unfavourable view on hard-and-fast rules or blanket exclusions can be found in its case law on civic integration examinations.[63]

In *K and A*, the Court acknowledged Member States' interest in requiring integration examinations, but held them subject to the general legal principle of proportionality: they cannot "exceed what is necessary" to achieve their valid aims.[64] By invoking this principle, the Court demonstrated its sensitivity to the fact that these examinations can be a "disguised mechanism of immigration selection and control [...] mainly operating as a tool of exclusion."[65]

Importantly, the principle of proportionality generally requires case-by-case examinations, but it cannot result in an excessive burden for national judges.[66] According to the Court, national tests imposing minimum levels of civic integration and basic

[58] *Ibid.*, paras 48-58.
[59] *Ibid.*, paras 40-43.
[60] E. FRASCA, J.Y. CARLIER, *The Best Interests of the Child*, cit., 374-375.
[61] *Ibid.*, pp. 351, 383-386.
[62] Cf. *ibid.*, pp. 356-361, 382-383. See also European Court of Human Rights, judgment of 23 November 2021, application no. 12937/20, *S.N. and M.B.N. v. Switzerland*, paras 104-120; European Court of Human Rights, judgment of 3 October 2014, application no. 12738/10, *Jeunesse v. Netherlands*, paras 117-119.
[63] D. VITIELLO, *In Search of the Legal Boundaries of an "Open Society". The Case of Immigration Integration in the EU*, in this *Journal*, 2022, no. 2, pp. 162-164, http://www.fsjeurostudies.eu/files/FSJ.2.2022.8.VITIELLO.pdf, accessed November 17, 2023. See also M. BOTTERO, *Integration (of Immigrants) in the European Union: A Controversial Concept*, in *European Journal of Migration and Law*, 2022, no. 24, pp. 516, 532-535.
[64] Court of justice, *K and A*, cit., paras 53-56.
[65] M. BOTTERO, *Integration (of Immigrants) in the European Union*, cit., p. 533.
[66] Court of justice, *K and A*, cit., paras 60, 71. On the Court's balance between proportionality and national obligations, see P. DĄBROWSKA-KŁOSIŃSKA, *The Right to Family Reunion vs Integration Conditions for Third-Country Nationals*, in *European Journal of Migration and Law*, 2018, no. 20, pp. 251, 275-282, 285.

knowledge of the State's language might be permissible.[67] Under the principle of proportionality, however, these tests must not 1) make family reunification "impossible or excessively difficult"; 2) prevent consideration of special circumstances preventing the applicant's passage of the exam; and 3) present such a high cost (whether through course fees or examination fees) that they would practically exclude immigrants of diminished circumstances.[68] The Court affirmed this standard without variation in two 2018 cases, *C and A* and *K*.[69] However, in a third 2018 case, *K and B*, the Court implied that refugee status might amount to the special circumstances necessitating an exception to mandatory passage, by stating that *K and A*'s interpretation of article 17 as requiring case-by-case assessments must be qualified by Recital 8's objective of "special attention" and "more favourable conditions" for refugees.[70]

6. Economic Resources (Article 7 of the Directive)

Article 7's allowance of State requirements of economic resources is another element which might be used to exclude a large number of family reunification cases, given the frequently economic motivations for immigration. Article 7(1)(c) allows a State to limit family reunification on the basis of the stability, regularity, and sufficiency of their economic resources, and, within a qualitative assessment, to consider circumstantial factors such as reliance on the State welfare system, the national minimum wage, and the number of family members.[71]

In *Chakroun*, the Court considered what part the State's welfare system and minimum wage should play in the analysis of individual situations.[72] States cannot use the mere fact of reliance on a welfare system, or income below a certain threshold (even below minimum wage) as automatic exclusionary factors.[73] These can only be "reference[s]" in a circumstantial evaluation, as the "extent of needs can vary greatly depending on the individuals."[74] Thus, the limitations on the right to family reunification found in articles 7 and 10 are interpreted narrowly in light of the recitals in the Directive, the Charter, and ECHR case law.[75] The Court considered the Directives' objective as promoting family

[67] Court of justice, *K and A*, cit., para. 71.
[68] *Ibid*.
[69] Court of justice, judgment of 7 November 2018, *C and A v Staatssecretaris van Veiligheid en Justitie*, case C-257/17, paras 54-65; Court of justice, judgment of 7 November 2018, *K v Staatssecretaris van Veiligheid en Justitie*, case C-484/17, paras 20-24.
[70] Court of justice, *K and B*, cit., para. 53; Directive 2003/86/EC recital 8, art. 17.
[71] Directive 2003/86/EC, art. 7(1)(c).
[72] Court of justice, judgment 4 March 2010, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, case C-578/08, paras 46-47.
[73] *Ibid.*, paras 48-52.
[74] *Ibid.*, paras 45-52.
[75] *Ibid.*, para. 44; Court of justice, judgment of 21 April 2016, *Mimoun Khachab v Subdelegación del Gobierno en Álava*, case C-558/14, para. 25.

reunification, and therefore exercise of this right – as it may be considered a right held even by non-citizens[76] – is "the general rule."[77]

In *Khachab* the Court reaffirmed the narrow construction of limitations on the right to family reunification found in *Chakroun*, this time considering the regularity of the applicant's employment.[78] National authorities and courts may assess the applicant's resources not only at the time of application, but also prospectively, such as the ability to retain employment or for resources to last, as well as throughout the application process and when considering applications for renewal of residence permits.[79] This standard should not be seen so much as widening or curtailing the national margins of discretion or the rights of immigrants, as it should be seen a widening of the procedural boundaries and scope of assessment, for such an analysis could be a double-edged sword which could let certain immigrants in and shut others out, depending on their circumstances.[80]

In *Landeshauptmann von Wien*, the Court considered national discretion to impose Directive article 7 requirements on a refugee minor's sister, pursuant to the third paragraph of article 12(1).[81] The Court concluded in light of article 10(3)(a) that the European legislator had envisaged a separate regime specifically for unaccompanied refugee minors, due to their heightened vulnerability, and therefore admittance of both parents was mandatory, that is, outside the bounds of national discretion.[82] Underlining articles 7 and 24 of the Charter, the Court also held that it was practically impossible that refugee parents not accompanying their minor child could have or furnish proof of Directive article 7's conditions, and that these requirements would negate the effectiveness of the minor sponsor's article 10(3)(a) family reunification rights.[83] The Court therefore declined to follow Advocate General Collins' conclusion that the Member State could impose article 7 requirements on the sponsor's sister, concentrating instead on the special circumstances and best interests of the sponsor, whose importance the Advocate General had also noted.[84]

7. Public Order

A critical question concerning national margins of discretion is how to handle those situations where family reunification could pose a threat to public order, in the opinion of

[76] Directive 2003/86/EC, recitals 3, 6, 11; C. OVIEDO MORENO, *CJEU, Judgment of 21 April 2016,* Khachab*: Assessing Stable and Regular Resources for Family Reunification in Spain*, in *Asiel & Migrantenrecht*, 2021, no. 12, pp. 355, 358.
[77] Court of justice, *Chakroun*, cit., para. 43.
[78] Court of justice, *Khachab*, cit., paras 16-18, 25-29.
[79] *Ibid.*, paras 32-38.
[80] C. OVIEDO MORENO, *CJEU, Judgment of 21 April 2016,* Khachab, cit., pp. 357-358; Court of justice, *Khachab*, cit., paras 39-48.
[81] Court of justice, *Landeshauptmann von Wien*, cit., paras 62-70.
[82] *Ibid.*, paras 73-75.
[83] *Ibid.*, paras 76-80.
[84] *Ibid.*, Opinion of Advocate General A.M. COLLINS, cit., paras 41-43.

the authorities. This sometimes results in exceptions to an otherwise valid right to family reunification – though such exceptions are not without limits.

In *Y.Z. and Others*, the Netherlands government alleged fraudulent immigration by the sponsor, resulting in illegal secondary immigration by way of family reunification by his wife and minor child.[85] While the Court confirmed that, under article 16(2)(a), Member States have "a priori" discretion not to recognize family members' derived right of residence in cases of fraud, article 17 requires a "case-by-case […] balanced and reasonable assessment of all the interests in play" before States can exercise that discretion.[86] This includes an assessment of the gravity of the infraction, for while prevention of fraud is a general principle of EU law, the wife and child were not personally responsible and had no knowledge of the fraud.[87] Therefore, the Court limits national margins of discretion concerning public order where States might not have sufficient procedural safeguards to ensure proportional responses to a given offense.[88]

Drug trafficking and drunk driving are offenses which pose a tangible threat to public order, and which the CJEU has held to allow rejection, non-renewal, or deportation in family reunification cases, in similar terms to what has been decided by the ECHR.[89] In *G.S. and V.G.*, the Netherlands invoked article 6(1)-(2) of the Directive, which allows rejection or non-renewal for reasons of "public policy, public security or public health."[90] The Court of Justice found that "a serious crime, which tends to indicate that the mere existence of such a conviction could suffice to establish that there is a threat to public policy […] without it being necessary to establish a genuine, present and sufficiently serious threat."[91]

If the conviction is sufficiently serious, this can be the only factor needed for authorities to establish existence of a genuine threat.[92] But the public policy exception is still subject to the principle of proportionality and a case-by-case assessment of all interests in play, which in practice means national procedures cannot be simply automatic, summary, or excessively formalistic.[93] As such, in *A v Migrationsverket*, the Court interpreted the Convention implementing the Schengen Agreement as not requiring automatic refusal of family reunification in the case of the applicant's suspected identity

[85] Court of justice, judgment of 14 March 2019, *Staatssecretaris van Veiligheid en Justitie v Y.Z. and Others*, case C-557/17, paras 24-28.
[86] *Ibid.*, paras 47-48, 50-51.
[87] *Ibid.*, paras 55-56, 62.
[88] Opinion of Advocate General P. MENGOZZI, delivered on 4 October 2018, in the case C-557/17, *Y.Z. and Others*, paras 30-33.
[89] Court of justice, judgment of 12 December 2019, *G.S. and V.G. v Staatssecretaris van Justitie en Veiligheid*, joined cases C-381/18 and C-382/18, para 70; European Court of Human Rights, judgment of 21 July 2020, application no. 59534/14, *Veljkovic-Jukic v. Switzerland*, paras 5, 49, 55-60; European Court of Human Rights, judgment of 7 July 2020, application no. 62130/15, *K.A. v. Switzerland*, paras 49-55.
[90] Court of Justice, *G.S. and V.G.*, cit., paras 50-51.
[91] *Ibid.*, para. 58.
[92] *Ibid.*, paras 65-67.
[93] *Ibid.*, paras 64, 68-70. See also K. GROENENDIJK, T. STRIK, Chapter 14: *Directive 2003/86 on the Right to Family Reunification: a surprising anchor in a sensitive field* in E. TSOURDI, P. DE BRUYCKER (Eds.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham- Northampton, 2022, pp. 317-320.

fraud and drug convictions, signalled in the Schengen Information system (SIS).[94] Rather, States also have the discretion to admit criminally convicted applicants, after balancing the interests of the Member State where the convictions occurred with the humanitarian interests of the applicant.[95]

8. Procedural Conditions

The requirement of case-by-case assessments, motivated by article 17 of the Directive, the principle of proportionality, and the Charter's values, informs other procedural conditions not left to national margins of discretion. The case of *E* concerned the inability of a sponsoring aunt and alleged guardian of a minor to provide official documentation proving the death of that minor's parents.[96] The Court applied its case-by-case assessment requirement to the language of article 5(2), which requires State consideration of other evidence if documentary evidence is unavailable.[97] In addition to the plain language of the Directive, the Court's case law mandates "account of all the relevant aspects, including the age, gender, education, background and social status of the sponsor or the family member concerned as well as specific cultural aspects."[98] Especially where refugees are concerned, in view of recital 8, authorities' consideration of the reliability and authenticity of documents and the sponsor's ability to cooperate must be coloured by the "particular difficulties" the sponsor faces.[99]

Procedural requirements can also cut against more open immigration policies, as in *X v Belgische Staat*.[100] There, the Court found that a national procedural law, requiring approval of family reunification if no action had been taken after 6 months, was contrary to article 5(2)'s requirement of evidence of family relationship.[101] Even if, as X was, the applicant is a refugee or beneficiary of subsidiary protection, therefore subject to more favourable immigration policies, the Directive's plain language cannot be avoided; approval, as well as rejection, must not be automatic.[102]

On the other hand, if Member States wish to conduct too thorough of an assessment, this could be disproportionate to the applicant's circumstances, particularly those of refugees abroad.[103] Such was the case in *Afrin*, where the Belgian government required Syrian refugees to risk a hazardous journey through disputed territory to appear in person

[94] Court of justice, judgment of 4 March 2021, *A v Migrationsverket*, case C-193/19, paras 14, 36.
[95] *Ibid.*, paras 33-35, 38.
[96] Court of justice, judgment of 13 March 2019, *E. v Staatssecretaris van Veiligheid en Justitie*, case C-635/17, paras 19-26.
[97] *Ibid.*, paras 60-63.
[98] *Ibid.*, para. 63.
[99] *Ibid.*, paras 65-69.
[100] Court of justice, judgment of 20 November 2019, *X v Belgische Staat*, case C-706/18, paras 30-35.
[101] *Ibid*.
[102] *Ibid.*, para. 38.
[103] Court of justice, judgment of 18 April 2023, *X and Others v État belge*, case C-1/23, paras 56-58.

at a consular post.[104] While this requirement supported the goals of article 5(1), the excessive difficulty undermined Directive 2003/86's objective of promoting family reunification; it was contrary to recital 8's exhortation to consider the special circumstances of refugees and lay down more favourable conditions; and the peril of the journey was contrary to the best interests of the children.[105]

9. Framing the CJEU Case Law in a Broader Context

Despite the Directive's relative brevity at around only 20 articles, it has great importance for family reunification in the Union and has produced an abundant body of case law. The Court faces a growing problem: the proliferation of cases leads to an increase in detailed rulings; these then encourage new requests for clarification. It would probably be useful for the Commission to produce a communication on Directive 2003/86 restating the Court's case law. After 20 years, a simple and clear *résumé* of how the Court interprets the Directive could lead to greater legal certainty and uniform application of the Directive at the national level and, more importantly, it could also help many individuals better secure their rights under the Charter.

As seen in the previous sections, the case law concerning the Directive is very rich. Familial circumstances can vary greatly: non-citizens can be mixed with citizens (*O and others*); family relationships may change over the course of proceedings (*Bundesrepublik Deutschland v XC* – attainment of majority; *X v Belgische Staat* – minor marriage); refugee minor children (*Bevándorlási*) or people with disabilities (*Landeshauptmann von Wien*) may be involved; the criminal history of family members (*G.S. and V.G.*) or truly dramatic conditions in the country of origin (*Afrin*) can have circumstantial impact on the families.

What emerges from this case law is that national authorities and jurisdictions must always proceed to a case-by-case assessment; furthermore, once children are implicated, the best interests of the child must take a central place in considerations by authorities and courts, and children have a right under Charter article 24(3) to reunification and regular contact with both parents.

In this respect, the CJEU's case law has paralleled that of the ECHR. Indeed, the second recital of Directive 2003/86 includes ECHR case law interpreting the European Convention on Human Rights (Convention), as well as other European and international law, as relevant jurisprudence for interpreting its provisions.[106] As the wording of certain protected rights is identical or near-identical between the ECHR and the Charter, interpretation of the Convention becomes relevant not only as interpretation of general

[104] *Ibid.*, paras 12-21.
[105] *Ibid.*, paras 43-46, 50-52.
[106] Directive 2003/86/EC, recital 2. See also Court of justice, judgment of 27 June 2006, *Parliament v Council*, case C-540/03, para. 38.

principles of EU law (article 6 TEU), but also as interpretation of the language of the Charter, which has legal weight in EU law.

Both Courts also consider a wider range of international law, interpreting it in the European context; therefore, the ECHR's reading of instruments such as the Convention on the Rights of the Child also becomes valuable to the CJEU.[107]

The CJEU and the ECHR Court engage in a constant dialogue regarding the extent of migrant families' and children's rights, how to define the family unit, and the circumstances in which a family may be reunified.[108] However their approaches may differ.

While the Strasbourg Court may apply the Convention directly, the CJEU can only apply the Charter under its article 51, insofar as relevant in interpreting the Directive, as well as other sources of primary or secondary EU law, or judging the validity of EU acts. However, the high degree of detail of the EU legislation allows the Luxembourg Court to use a more precise and specific approach. For this reason, the CJEU usually awards principal legal weight to the language and provisions of the Directive itself, looking to the ECHR's case law when the Directive does not fully elaborate the fundamental rights, standards, or "strictly defined circumstances" of national discretion.[109]

For its part, the Strasbourg Court has generally avoided in depth consideration of EU law in family reunification cases, as – somewhat unlike the CJEU's relationship with European human rights law – it is not competent to rule on EU law.[110] This has not prevented it both from observing the development of CJEU case law,[111] considering its practical effect on the factual circumstances of the parties, which must necessarily be taken into account in a human rights analysis.[112] To this end, the ECHR has been willing to go so far as to analyse EU law and project its result on the applicant's case, such as in *X and Others v. Ireland*, where "[i]t found no basis in relevant EU law for the proposition that upon granting a right to reside in such circumstances all residence-related benefits must be awarded retrospectively," and that backdated child benefits were outside of the scope of the *Zambrano* line of case law.[113] Finally, the ECHR will not hesitate to consider

[107] *Ibid.*, paras 37, 50-59.
[108] S. SAROLEA, *De Strasbourg à Luxembourg, Quels Droits pour les Familles Migrantes?*, in *Revue Québécoise de Droit International*, 2020, no. 33, pp. 439, 439-441, 455, 464.
[109] *Parliament v Council*, paras 60-62. See also H. EKLUND, *The Margin of Discretion and the Boundary Question in EU Fundamental Rights Law*, in *Common Market Law Review*, 2022, no. 59, pp. 1407, 1421-1427.
[110] European Court of Human Rights, *Jeunesse v. Netherlands*, cit., para. 110; European Court of Human Rights, judgment of 22 June 2023, applications nos 23851/20 and 24360/20, *X and Others v. Ireland*, para. 92.
[111] European Court of Human Rights, *Jeunesse v. Netherlands*, cit., paras 71-73, 110-112; European Court of Human Rights, judgment of 9 July, 2021, application no. 6697/18, *M.A. v. Denmark*, para 50, 157; European Court of Human Rights, *X and Others v. Ireland*, cit., paras 50-51, 91-93. See also European Court of Human Rights, Grand Chamber, judgment of 30 June 2005, application no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, paras 147, 159-166.
[112] European Court of Human Rights, judgment of 24 May 2016, application no. 38590/10, *Biao v. Denmark*, paras 134-135; European Court of Human Rights, *X and Others v. Ireland*, cit., para. 93.
[113] *Ibid.*

EU law, including CJEU case law, as evidence of custom among European nations as well as internationally.[114]

Another important difference between the two Courts is the impact of their judgements. This is due to the principles governing the status of EU law in the legal systems of Member States and to the cooperation between the CJEU and national judiciaries through the preliminary ruling procedure, which can be triggered by any national judge and does not require – in contrast to ECHR procedure – exhaustion of judicial remedies. This cooperation allows the CJEU to rule before a national judgement is adopted, impacting not only the outcome of the case but the substance of the national judgment itself. The new Protocol 16, although non-binding and ratified by only some members of the Convention, could help establish a parallel – even if probably less effective – dialogue between the Strasbourg Court and national judges.

To be sure, in certain instances, the case law of the two Courts does not coincide, so much as runs parallel towards a similar outcome.[115] For example, the CJEU resolved *Chakroun*'s Directive 2003/86 questions primarily by looking at the relationship between the Directive's provisions themselves, with minimal reliance on the Charter or Convention and no mention of ECHR case law.[116] In *Parliament v Council*, the Parliament sought annulment of the final subparagraph of article 4(1) of Directive 2003/86.[117] The CJEU refused to annul the subparagraph, citing the more flexible standard of assessing State obligations relative to the best interests of the child articulated in the ECHR case *Sen v. the Netherlands*.[118]

Recent geopolitical events surrounding Europe, particularly Brexit and the conflict in Ukraine, ensure a continued stream of immigration cases and give the two Courts new opportunities to either coordinate or diverge in response to novel factual circumstances. In my opinion, the best way to describe that process is cross-fertilization.

ABSTRACT: This contribution aims to show how the interpretation of Directive 2003/86 on family reunification between third-country nationals is made by the CJEU case-law in the light of the fundamental rights of the EU Charter. On the one hand, the Court recognizes a broad concept of the notion of "family", not only when it comes to relations between family members, but also to the complex nexus of the legal rights involved. The CJEU asks the referring courts for a case-by-case assessment. As a result of this approach, the concept of effective family life is also interpreted in a broader sense. It requires the intention for family members to see each other and keep in touch rather than live together and provide mutual financial support. On the other hand, the conditions set out by the directive, whose respect is required by the member

[114] European Court of Human Rights, *M.A. v. Denmark*, cit., paras 157-160.
[115] H. EKLUND, *The Margin of Discretion*, cit., pp. 1413-1416.
[116] Court of justice, *Chakroun*, cit., paras 41-52, 59-66.
[117] Court of justice, *Parliament v Council*, cit., paras 1, 15-19, 38.
[118] *Ibid.*, paras 54-56, 61-71, 76.

States to grant the family reunification, are interpreted strictly. As regards the age requirement, the Court states that it corresponds to the time of the application in order to respect the principles of legal certainty and equal treatment. The Court demands an individual assessment regarding the integration in a member State; such a condition is often confronted with contradictory interests or rights (for example family reunification vs the child's interest). "Economic resources" fall under the exceptions to family reunification, which are interpreted narrowly by the EU Court. Nevertheless, a margin of discretion is granted to the national authorities; the same can be said for exceptions of public order.

KEYWORDS: Family reunification – Article 7 EU Charter of Fundamental Rights – Article 24 EU Charter of Fundamental Rights – Directive 2003/86.