



INSIGHT

SHEDDING LIGHT ON THE PROTECTIVE REGIME FOR UNACCOMPANIED MINORS UNDER THE FAMILY REUNIFICATION DIRECTIVE: THE CASE OF *A AND S*

SALVO NICOLOSI*

ABSTRACT: Family reunification constitutes one of the most pressing human rights issues for refugees, who are especially unaccompanied minors. Yet, the practical effectiveness of such a right is not always adequately ensured. Drawing from the recent decision of the Court of Justice in *A and S* (judgment of 12 April 2018, case C-550/16), the *Insight* aims to investigate the protection framework established by the Family Reunification Directive for refugees who are unaccompanied minors. The judgment is the first decision dealing with the right to family reunification for refugees in EU Asylum Law. In particular, the case deals with the question of whether an unaccompanied minor who attains the age of majority during the asylum procedure retains their right to family unification. By answering such a question, the Court's reasoning offers a valuable opportunity to reflect on the scope of the Family Reunification Directive and suggest possible guidance as to the protective regime for refugees who are unaccompanied minors.

KEYWORDS: unaccompanied minors – age determination – refugees – family reunification – international protection – asylum procedures.

I. INTRODUCTION

Over the past few years, EU Member States have been hosting a considerable number of refugees.¹ The increase in asylum seekers, including minors, arriving in Europe in 2015 triggered a strong focus on their immediate reception and the processing of their asylum

* Assistant Professor, Department of International and European Law, Utrecht University, Adjunct Professor of European Law, University of Catania, s.nicolosi@uu.nl.

¹ Data extracted on 16 March 2018 and 18 April 2018 confirm that 538 000 asylum seekers were granted protection status in the Member States of the EU in 2017, see Eurostat, Asylum Statistics, available at ec.europa.eu.

claims. This scenario has often resulted detrimental to ensuring the practical effectiveness of the right to family reunification for refugees who are unaccompanied minors.²

Family reunification is an essential right for refugees who need to integrate in the host society and is functional to the obligation to facilitate the integration of refugees descending from the Convention on the Status of Refugees.³ In this connection, the United Nations High Commissioner for Refugees (UNHCR) clearly stated that “the possibility of being reunited with one’s family is of vital importance to the integration process,” because “family members can reinforce the social support system of refugees and, in so doing, promote integration”.⁴

Under EU law, the right to family unity is guaranteed in Art. 23 of the recast Qualification Directive 2011/95/EU⁵ and is specifically regulated in Directive 2003/86/EC, known as Family Reunification Directive.⁶ The latter still constitutes the sole legal act at the international level regulating a clear subjective right to family reunification for those categories of individuals contemplated by the Directive.⁷ Despite being an instrument primarily adopted to promote family reunification for third country nationals and stateless persons that reside lawfully in the territory of the Member States, according to the Luxembourg judges, the Family Reunification Directive enshrines a specific protective regime for refugees who are unaccompanied minors.

The importance of the right to family reunification is stressed by the fact that refugee flights have, as a consequence, the separation of families. This is a harsh reality in Europe, also due to the lack of legal mechanisms for the safe arrival of refugees, such as visas for asylum or effective resettlements schemes.⁸ Accordingly, the issue of family reunification is

² See Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, Issue Paper, 7 February 2017, rm.coe.int, p. 7.

³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, Art. 34 specifically calls the Contracting States to facilitate as much as possible the assimilation and naturalization of refugees.

⁴ UNHCR, *Note on the integration of refugees in the European Union*, May 2007, www.unhcr.org, para. 35.

⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, pp. 9-26.

⁶ Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification, pp. 12-18.

⁷ On the Family Reunification Directive, see especially J.A. HARDY, *The Objective of Directive 2003/86 Is to Promote the Family Reunification of Third Country Nationals*, in *European Journal of Migration and Law*, 2012, pp. 439-452; P. BOELES, *Directive on Family Reunification: are the Dilemmas Resolved?*, in *European Journal of Migration and Law*, 2001, pp. 61-71. For a recent commentary see D. THYM, K. HAILBRONNER (eds), *EU Immigration and Asylum Law. Commentary*, Baden-Baden: Nomos, 2016.

⁸ See in this regard, S. NICOLOSI, *Testing European Values Beyond Emergency: The Right to International Protection and its Impediments*, in G. NESI (ed.), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza?*, Napoli: Editoriale Scientifica, 2018, pp. 119-141. See also EU Agency for Fundamental Rights (FRA), *Legal entry channels to the EU for persons in need of international protection: a toolbox*, March 2015, fra.europa.eu.

gaining momentum within the debate on the reception of refugees across the EU and this is confirmed by the recent judgment issued on 12 April 2018 in the case of *A and S*, by the Court of Justice.⁹ As has been already emphasized, the judgment is, in fact, the first one out of two other pending cases,¹⁰ delivered on the rights of refugees to family reunification.¹¹

The decision in *A and S* therefore offers a valuable opportunity to reflect through a holistic approach on the integrated system of rules that EU law provides in order to protect the rights of particularly vulnerable individuals, such as minors, who are also unable to return to their countries of origin and applied for asylum in the EU.¹² In order to understand the added value of the Court's reasoning, this analysis will firstly provide a short account of the main facts of the case; secondly, it will move on to discussing the main judicial findings; and, finally, the impact of the Court's judgment will be taken into consideration to draw some recommendations on how to ensure the practical effectiveness of the right to family reunification.

II. THE FAMILY REUNIFICATION DIRECTIVE IN THE LIGHT OF THE FACTUAL BACKGROUND OF THE CASE

The case concerns an Eritrean national, daughter of A and S, who applied for asylum in the Netherlands on 24 February 2014 at the age of 17, when she was a minor. While her asylum claim was still pending, in June of the same year the applicant attained her age of majority and she was a few months later granted refugee status on 21 October 2014, obtaining a five-year residence permit.¹³

Once the applicant was granted asylum, with the support of the Dutch Council for Refugees (*VluchtelingenWerk*), an independent organization providing refugees with practical assistance during their asylum procedure and their integration in the Dutch society, she submitted an application for temporary residence permits for her parents and three minor brothers for the purposes of family reunification. It is worth stressing that the Family Reunification Directive only contemplates the right to family reunification for refugees and not

⁹ Court of Justice, judgment of 12 April 2018, case C-550/16, *A and S v. Staatssecretaris van Veiligheid en Justitie (A and S)*.

¹⁰ Court of Justice: application lodged on 26 June 2017, C-380/17, *K and B*; application lodged on 14 November 2017, C-635/17, *E*.

¹¹ K. GROENENDIJK, *Children are entitled to Family Reunification with their Parents C-550/16 A & S Court of Justice of the European Union*, in *EU Immigration and Asylum Law and Policy*, 26 April 2018, eumigrationlawblog.eu.

¹² For a broader analysis see C. SMYTH, *European Asylum Law and the Rights of the Child*, London: Routledge, 2014.

¹³ Pursuant to Art. 24 of the recast Directive 2011/95/EU, once granted refugee status, Member States "shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable." Art. 4.22(2) of the Dutch Aliens Decree provides a residence permit with a validity of 5 years to beneficiaries of international protection in the Netherlands.

also for recipients of subsidiary protection.¹⁴ By and large, many Member States extend such a right to this second category of people, relying on the Commission's understanding that the Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification.¹⁵

In May 2015 the Dutch authorities rejected the application, because when submitted, the applicant was not a minor anymore and therefore ineligible for family reunification. According to Art. 10, para. 3, of the Family Reunification Directive, if the refugee is an unaccompanied minor, the Member States "shall authorise the entry and residence... of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Art. 4 para. 2, let. a)," namely the circumstance that they are dependent on him/her and do not enjoy proper family support in the country of origin.

Following such rejection, A and S lodged an action against that refusal before the District Court of The Hague (*rechtbank Den Haag*), claiming that, pursuant to Art. 2, let. f), of the Family Reunification Directive, in order to qualify as an unaccompanied minor for the purposes of the Directive, reference is to be made to the date on which the applicant entered the Member State concerned. On the contrary, the Dutch authority argued that the date, on which the application for family reunification is submitted, is determinative of the age the applicant for the purposes of submitting an application for family reunification.

The referring Court acknowledged that, pursuant to Art. 2, let. f), of the Family Reunification Directive, the status of an unaccompanied minor must be determined by reference to the moment of entry into the territory of the Member State. However, there are two exceptions to such a principle, entailing, on the one hand, minors who arrive accompanied but then left alone, and, on the other hand, minors who arrive unaccompanied but taken into care of a responsible adult. Since these exceptions do not apply to the case under examination, the District Court of The Hague decided to stay the proceedings and sought clarification to the Court of Justice by asking whether the term "unaccompanied minor" for the purposes of the right to family reunification, under Art. 10, para. 3, of the Family Reunification Directive, applies to a person who arrives on the territory of a Member State unaccompanied, who applies for international protection and who is granted the refugee status after attaining the age of maturity.

¹⁴ Art. 3, para. 2, let. c), of Directive 2003/86/EC.

¹⁵ See Communication COM(2014) 210 final of 3 April 2014 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. Contrary to the Commission's recommendations, several countries have excluded subsidiary protection beneficiaries from the right to family reunification. Greece, Cyprus and Malta fully exclude beneficiaries of subsidiary protection from the right to family reunification. This is also the case in Sweden following the entry into force of a temporary law from July 2016 to July 2019.

III. A CRITICAL APPRAISAL OF THE COURT'S REASONING IN *A AND S*

Before delving into the Court's reasoning, it is worth stressing that most states in Europe have greatly restricted family reunification rights over the past few years, as has been confirmed by the Council of Europe's Commissioner for Human Rights.¹⁶ Accordingly, there are a number of practical obstacles that impact the real chances of success for refugees seeking to reunite with their families, especially if these are minor children.¹⁷ Nevertheless, for a minor child that attains the age of majority during the asylum procedure, and which is consequently subject to the stricter reunification requirements, the situation does not suddenly become any easier.

The Court's reasoning in *A and S* perhaps unintentionally acknowledges such difficulties. Before reaching their conclusion on the interpretation of the concept of "unaccompanied minor" and the relevance of the right to family reunification for refugees, the Luxembourg judges first considered the general scheme of the Family Reunification Directive.

In this regard, the Court recalled that the Directive determines the conditions for the right to family reunification for third country nationals and stateless persons that reside lawfully in the territory of the Member States and establishes more favourable conditions for refugees for the exercise of their right to family reunification, including the possibility to reunite with first-degree relatives in the direct ascending line of the refugee.¹⁸ Pursuant to Art. 10, para. 3, of the Directive, in order to guarantee the best interest of the child, the latter option is not left to any discretion in case of unaccompanied minors. According to the Court, this provision, in fact, establishes "a precise positive obligation, to which a clearly defined right corresponds".¹⁹

Next, the Court delved into the concept of unaccompanied minor and its relevance for the purposes of the right to family reunification under Art. 10, para. 3, of the Directive. Based on a settled case law, the Court of Justice applied the traditional hermeneutical approach paying attention to "the wording, general scheme and objective of that directive, taking into account the regulatory context in which it is found and the general principle of EU law".²⁰ From this perspective, the Court set two cumulative conditions that must be fulfilled in order for an applicant to be considered an unaccompanied minor. *In primis*, the person concerned must be under the age of 18, moreover, he or she must be unaccompanied in the meaning of Art. 2, let. f), of the Family Reunification Directive.

¹⁶ Council of Europe Commissioner for Human Rights, Human Rights Comment, *Restrictive laws prevent families from reuniting*, 2 February 2011, www.coe.int.

¹⁷ For a broader critical analysis see M. SEDMAK, B. SAUER, B. GORNIK (eds), *Unaccompanied Children in European Migration and Asylum Practices. In Whose Best Interests?*, London: Routledge, 2017.

¹⁸ *A and S*, cit., paras 32-33.

¹⁹ *Ibid.*, para. 43.

²⁰ *Ibid.*, para. 48. See also Court of Justice, judgment of 5 February 1963, C-26/62, *Van Gend en Loos*, para. 3.

As to the determination of the specific moment by reference to which the age of a refugee must be assessed in order to be regarded as a minor and thus be able to benefit from the right to family reunification under Art. 10, para. 3, let. a), of the mentioned Directive, the Court clarified that the latter provision “confers no discretion on Member States and the lack of a reference to the national law in that regard,” accordingly the determination of that moment cannot be left to each Member State to assess.²¹

The court went on in its reasoning by considering the nature of refugee status in international law and as accepted by the Qualification Directive and the relevant rights connected to such a status.²² In this regard, the Court of Justice confirmed that, while the right to family reunification is subject to a positive recognition of refugee status,²³ it must be noted that the latter status is a declaratory one, as acknowledged by the Qualification Directive itself.²⁴ This means that a person who fulfills the conditions to be recognized as a refugee, according to the Qualification Directive, “has a subjective right to be recognised as having refugee status, and that is so even before the formal decision is adopted in that regard”.²⁵ Therefore, the Court concluded that if the right to family reunification is made dependent on the moment in which the national authority formally adopts a decision recognizing refugee status, the effectiveness of such right will be subject to the length of the national asylum procedures.

This situation might determine the consequence, well-illustrated by the Court, that two unaccompanied minors, who submit their asylum claims at the same time, could be treated differently as regards the right to family reunification, owing to the different duration of the refugee status determination which is influenced by the complexity of each individual case.²⁶ Such a circumstance would deprive a significant number of refugees to real access to family reunification especially when the national asylum system is confronted with a massive amount of applications. According to the Court, this calls into question the effectiveness of Art. 10, para. 3, with a result which is detrimental to the aims of the Family Reunification Directive, namely to promote family reunification and grant specific rights to refugees, but also the principles of equal treatment and legal certainty.²⁷

On the contrary, the Court concluded that taking the date on which the application for international protection was submitted would ensure the equal treatment of all applicants in the same situation. Furthermore, taking such a date into account stresses the

²¹ *A and S*, cit., para. 45.

²² For a broader doctrinal appraisal see J. HATHAWAY, *The Law of Refugee Status*, 2nd ed., Cambridge: Cambridge University Press, 2014 and J. HATHAWAY, *The Rights of Refugees in International Law*, Cambridge: Cambridge University Press, 2005, respectively.

²³ *A and S*, cit., para. 51.

²⁴ Recital 21 of Directive 2011/95/EU.

²⁵ *A and S*, cit., para. 54.

²⁶ *Ibid.*, para. 56.

²⁷ *Ibid.*, para. 59.

intrinsic link between the Qualification Directive and the Family Reunification Directive in an attempt to maximise the scope of protection for particularly vulnerable applicants, such as unaccompanied minors, in light also of Art. 24, para. 2, of the Charter of Fundamental Rights of the EU (Charter) on the best interest of the child,²⁸ according to which “in all action relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

IV. THE RELEVANCE OF THE COURT’S RULING IN DRAWING RECOMMENDATIONS TO ENSURE THE PRACTICAL EFFECTIVENESS OF THE RIGHT TO FAMILY REUNIFICATION

A and S is to be considered a test case as to the right to family reunification of refugees. Admittedly, it is expected to have an impact both on the forthcoming judgments concerning the Family Reunification Directive and on the domestic practice concerning the asylum claims submitted by unaccompanied minors. These two aspects will be shortly examined in order to draw a few recommendations on how to ensure the practical effectiveness of the right to family reunification.

As to the judicial impact on forthcoming cases, it is worth praising the Court’s ruling as an opportunity to reflect on the significant breakthrough of the Family Reunification Directive in that it provides a right to family reunification for refugees who are unaccompanied minor.²⁹ In this connection, the Family Reunification Directive expands the framework of protection for refugees established by the Common European Asylum System, first and foremost the Qualification Directive.³⁰

From this perspective, in bridging the differences between various protective regimes, the case of *A and S* also attenuates the concerns initially raised as to compliance with fundamental rights, first and foremost the right to respect for family life as laid down in Art. 8 of the European Convention on Human Rights (ECHR), as interpreted by the

²⁸ For a recent commentary, see, in particular, S. PEERS, T. HARVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Oxford University Press, 2014.

²⁹ S. BARTOLINI, *The Right to Family Reunification of Unaccompanied Minor Asylum Seekers before the Court of Justice of the EU*, in *European Law Blog*, 7 May 2018, europeanlawblog.eu.

³⁰ The Common European Asylum System (CEAS) consists of the following binding acts: Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013, known as ‘Dublin III Regulation’; Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013, known as ‘Eurodac Regulation’; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, known as ‘Qualification Directive’; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, known as ‘Reception Directive’; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, known as ‘Procedures Directive’. For an interpretation of the CEAS as an integrated legal system, see extensively H. BATTJES, T. SPIJKERBOER, *The Systematic Nature of the Common European Asylum System*, in F. JULIEN-LAFERRIÈRE, H. LABAYLE, Ö. EDSTRÖM (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Bruxelles: Bruylant, 2005, p. 27.

Strasbourg case law.³¹ This multilayered protective regime recalled by the judgment under discussion is especially relevant in a context, which, as mentioned earlier, illustrates many hindrances for refugees seeking to reunite with their families. The Court of Justice has therefore showed greater sensitiveness about the needs for protection for the most vulnerable refugees, such as unaccompanied minors who attain the age of maturity when submitting an application for family reunification. From this point of view, in the absence of clarity in the Family Reunification Directive on the date on which the refugee is to be considered minor for the purposes of recognition of family reunification, the Court has set a specific benchmark. In particular, by identifying such a date in that of the application for international protection, the Court ensured an identical treatment to all applicants, in accordance with the principle of equality of treatment.

Bartolini has considered the decision in *A and S* as a “child’s rights centred ruling”,³² which consolidates the Court’s approach to cases involving the right to family reunification especially for minor refugees. In this regard, the judgment answers, for instance, what the Court left open in *Noorzia*.³³ On that occasion, the Court did not elaborate on the issue of the age requirement, most probably because the case did not concern a minor applicant, nonetheless the fundamental rights approach adopted by the Court in that particular case left room for speculation as to the correct understanding of the principle of the best interest of the child. It is therefore expected that, on the one hand, such a purposeful interpretation of specific elements which are relevant at the procedural level would likewise be endorsed while dealing with other pending cases concerning the Family Reunification Directive. On the other hand, State authorities and judges at the national level should ensure the *effet utile* of the Directive by following among several possible interpretations the one that best guarantees the practical effect of existing law,³⁴ including a better application of the principle of the best interest of the child.³⁵

As to the impact of the ruling in *A and S* on the domestic practice, it is worth emphasising that the Court provided national authorities with further guidance as to a better appraisal of the principle of the best interest of the child. Already in *O., S. L.*, the Court

³¹ See A. WIESBROCK, *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 & International Legal Discourse*, 2011, pp. 138-165. For the analysis of the ECHR case law on family rights, see extensively C. DRAGHICI, *The Legitimacy of Family Rights in Strasbourg Case Law ‘Living Instrument’ or Extinguished Sovereignty?*, Oxford: Hart, 2017.

³² S. BARTOLINI, *The Right to Family Reunification of Unaccompanied Minor Asylum Seekers*, cit.

³³ Court of Justice, judgment of 17 July 2014, C-338/13, *Marjan Noorzia v. Bundesministerin für Inneres*.

³⁴ See P. PESCATORE, *The Doctrine of “Direct Effect”: An Infant Disease of Community Law*, in *European Law Review*, 1983, p. 135.

³⁵ For further references and comments see M. KLAASSEN, P. RODRIGUES, *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*, 2017, pp. 191-218.

clarified that, while implementing EU law, Member States have to ensure that fundamental rights such as the right to respect for family life (Art. 7 of the Charter) and the best interests of the child (Art. 24, para. 2, of the Charter) are fully respected.³⁶

Therefore, some crucial benchmarks for the national authorities can be drawn from *A. and S.* These would include the need to prioritise claims submitted by unaccompanied minors, in order to keep the procedure as short as possible as well as the prohibition to use discretion to determine the date to assess minor's status and the positive obligation to ensure that unaccompanied minors have their first-degree relatives in direct ascending line reunified with them.

Overall, it is worth monitoring how national authorities will incorporate the Court's findings in *A and S* and how the right to family reunification and the principle of the best interest of the child are implemented in asylum procedures. From this perspective it is urgent that States give effect to the Court's case law and ensure that family reunification procedures are effective, in order to ensure protection for the right to respect for family life.

States must also strengthen the position of minor refugees and ensure that, for the purposes of applying for family reunification, a child is regarded as such as long as the application is submitted before he or she turns 18.³⁷ Therefore, applications brought by children should not be terminated when the child turns 18 and should recognise the particular protection needs of young adults who have fled as unaccompanied minors.

V. CONCLUDING REMARKS

A and S as the first ruling issued by the Court of Justice on the right to family reunification for refugees who are unaccompanied minors distinguishes itself by shedding light on the protective regime under the Family Reunification Directive. The latter instrument offers a complementary set of provisions likely to complement the corpus of EU asylum law and expands the protection for recipients of international protection.

The ruling in *A and S* constitutes a valuable contribution to the clarification of the scope of the Family Reunification Directive by at the same time providing guidance as to the protective regime for refugees who are unaccompanied minor. The Court confirmed that such protection also extends beyond the age of maturity if the person concerned is able to access the territory of a Member State, submits an application for the refugee status before turning eighteen and is successively successful in their application.³⁸

³⁶ Court of Justice, judgment of 6 December 2012, Joined Cases C-356/11 and C-357/11, *O, S v. Maahanmuuttovirasto; Maahanmuuttovirasto v. L.*

³⁷ According to Art. 2, let. d), of Directive 2003/86/EC, an unaccompanied minor is to be understood as a "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."

³⁸ In this regard see also S. BARTOLINI, *The Right to Family Reunification of Unaccompanied Minor Asylum Seekers*, cit.

The relevance of the decision mainly lies in the Court deciding that national authorities cannot proceed of their own motion to establish the date for assessing minor status of an applicant, as this can result in legal uncertainty across the EU. What is more, the Court took a fundamental rights approach, underscoring the particular vulnerability of unaccompanied minors and stressed how the right to family reunification serves the crucial role of fostering a more coherent understanding of the principle of best interest of the child in family reunification cases.

Considering the difficulties in ensuring the practical effectiveness of such right to family reunification at the national level, the Court contributed to set specific benchmarks upon which certain recommendations can be based. These aim to consolidate the position of minor refugees and ensuring that family reunification procedures are effective and swift in order to guarantee the Directive's *effet utile*.

Ultimately, it is crucial to monitor how Member States implement the Court's judgment at a time of migratory pressure and rising concerns as to fundamental rights for asylum seekers.