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UM's in the Jurisdiction of the ECtHR

The study aims to give an overview regarding the evaluation of judicial protection of unaccompanied children. Although there are many international documents regarding refugees, the growing number of children on the way makes relevance to overview their protection realized through the case-law concerned with the subjects of inhuman treatment, reception, detention and remedies, different issues regarding unaccompanied children can be followed.

The cases were divided into two parts with a focus on the principle of the best interest of a child and the characteristic of vulnerability. The best interest of a child is the main and primary principle and a requirement in procedures regarding children and the study gives an overview of the term through international documents. The levels of vulnerability constitute the differences between adult asylum seekers, a child on the way and an unaccompanied child on the way. The study, using the characteristic of vulnerability and the abovementioned principle should be understood as presenting the step-by-step creation and evaluation of the basis of protection of unaccompanied children by the ECtHR. Also, referring to cases regarding accompanied children gives a broader view to understand the special status of this group.

Introductory remarks

Unaccompanied children who are seeking asylum are vulnerable. Their vulnerability consists of the past, present and future; past experiences of trauma, their plight in the country of origin and their journey, the present lack of support in the new environment and feelings of isolation, and future uncertainty about their fate. I shall point out that trauma can be experienced when a child is on the way because later on the parent would like to follow on the ground of family reunification[1].

In light of ever growing trends, observing a significant increase in the flow of refugees to the European continent, it shall be pointed out that some 34,300 asylum applications were lodged by unaccompanied or separated children in 82 countries in 2014; children below 18 years constituted 51 per cent of the refugee population in 2014. This means an increase from 41 per cent in 2009 and is the

[1] See Article 10 of the Convention of the Rights of the Child.

highest figure in more than a decade.[2] The number of unaccompanied or separated children seeking asylum on an individual basis has reached levels unprecedented since at least 2006, when UNHCR started systematically collecting this data.[3]

First of all, we shall clarify the term "unaccompanied minor" by looking at different international documents. The basis for the term "child" was defined at the Convention of the Rights of the Child, stating that a child is a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18.[4] The EU's Qualification Directive states that "unaccompanied minors" are third-country nationals or stateless persons below the age of 18, who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and they are defined as such for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States.[5] The General Comment No. 6 of the UN Committee on the Rights of Child[6] refers to two types of minors, similarly to the CoE Recommendation CM/Rec (2007)9[7] which is about "unaccompanied migrant minors". Both definitions state that unaccompanied minors are children (below 18) outside their country of origin who have been separated from both parents/other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. Separated minors are children (below 18) outside their country of origin separated from both parents/previous primary caregiver, but not necessarily from other relatives, including children accompanied by other adult family members. According to the Inter-Agency Guiding Principles on unaccompanied and separated children, unaccompanied children (also called unaccompanied minors) are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.[8] When writing about unaccompanied children I shall mention that although international documents mainly use the term "unaccompanied and separated children" some states provide special protection only to unaccompanied children and not

[2]UNHCR: Global Trends – Forced Displacement in 2014, 3

[3]UNHCR: Global Trends – Forced Displacement in 2014, 31

[4] Convention on the Rights of the Child.

[5] Art. 2(i) of the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted).

[6] General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin.
http://daccess-dds ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement

[7] Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors
https://wcd.coe.int/ViewDoc.jsp?id=1164769

[8] International Committee of the Red Cross Central Tracing Agency and Protection Division: Inter-Agency Guiding Principles on unaccompanied and separated children, (2004), 13. http://www.unicef.org/violencestudy/pdf/IAG_UASCs.pdf

to separated ones e.g. Greece which as we see later on is an ever returning party in significant ECtHR rulings regarding unaccompanied children.[9]

Regarding asylum, the ECHR does not provide a right to asylum, but protects it with the results: it indirectly prohibits the removal of a refused asylum seeker, especially in cases where the applicant has or is about to face treatment that meets the threshold of severity of Article 3. Asylum issues may also arise with respect to right to life (Article 2), prohibition of slavery (Article 4), right to liberty and security of the person (Article 5), right to fair trial (Article 6), prohibition of retroactive criminal punishment (Article 7), right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), right to marry (Article 12), right to an effective remedy (Article 13), prohibition of discrimination (Article 14), prohibition of expulsion of own nationals (Article 3 of Protocol No. 4), prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4), procedural safeguards relating to expulsion of aliens (Article 1 of Protocol No. 7), prohibition of double jeopardy Article 4 of Protocol No. 7), and general prohibition of discrimination (Article 1 of Protocol No. 12).[10]

1. The Notion of Vulnerability in the Practice of the ECtHR

When speaking about the vulnerability of unaccompanied children, one must look at the background, namely, at the term "vulnerability" in connection with asylum seekers. The particular vulnerability of asylum seekers was first recognised by the Court in the case M.S.S. v Belgium and Greece in 2011.[11]

In this milestone case the Court pointed out that an asylum seeker is particularly vulnerable because of everything the person had been through during their migration and the traumatic experiences the

[9] E.g. Rahimi v Greece, Mohamad v Greece.

[10] Mariana, Gkliati: Blocking Asylum: The Status of Access to International Protection in Greece, 4 Inter-American and European Human Rights Journal, 85 (2011), 99.

[11] The summary of the case M.S.S. v Belgium and Greece (Application No. 30696/09) is following. The Afghan national entered the European Union through Greece. In 2009 he arrived in Belgium, where he applied for asylum. The Aliens Office submitted a request in accordance with the Dublin Regulation for the Greek authorities to take charge of the asylum application. When the Aliens Office issued an order directing the applicant to leave the country and return to Greece, the applicant applied for a stay of execution under the extremely urgent procedure, but to no avail. In June 2009 the Greek authorities confirmed that it was their responsibility to examine the asylum request and that he would be able to submit an application when he arrived in Greece. Still in June 2009 the applicant was transferred to Greece, where he was immediately placed in detention for four days in a building next to the airport, in allegedly appalling conditions. A few days later he was released, given an asylum-seeker's "pink card" and told to report to the police headquarters to register his address in Greece so that he could be informed of progress with his asylum application. The applicant did not report to the police headquarters, and without means of subsistence, he lived on the street. Later, as he was attempting to leave Greece, he was arrested and placed in detention for a week in the same building next to the airport, and allegedly beaten by the police. On his release, he went back to living on the street. When his card was renewed at the end of 2009, steps were made to find him accommodation, but nothing has been achieved. See Reports of Judgements and Decisions, European Court of Human Rights, Wolf Legal Publishers (WLP) 2011-I.

person was likely to have endured previously.[12] The feeling of arbitrariness, inferiority and anxiety, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment, and the distress is accentuated by the vulnerability inherent in their situation as an asylum seeker.[13] The Court stated that asylum seekers are considered to be particularly vulnerable in detention and their systematic placement there without being informed of the reasons for their detention.[14] A very important step was made by the Court when it not only pointed to the elements of vulnerability but called upon the need for special protection of this particularly underprivileged and vulnerable population group and for a broad consensus at the international and European level concerning the need for special protection.[15]

It is worth mentioning in this case the opinion of Judge Sajó in which he also touched upon the issue of vulnerability regarding asylum seekers. He pointed out that although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group, in the sense that the jurisprudence of the Court uses the term, where all members of the group, due to their adverse social categorisation, deserve special protection. According to him the concept of a vulnerable group has a specific meaning in the jurisprudence of the Court. If a restriction on fundamental rights applies to a particularly vulnerable group in society who have suffered considerable discrimination in the past, such as people with mental disabilities, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subjected to prejudice with lasting consequences, resulting in their social exclusion as in the case of Roma but this characteristic does not match asylum seekers. Some or many asylum-seekers are vulnerable but this does not amount to a rebuttable presumption with regard to the members of the "class". Asylum-seekers are far from being homogeneous, if any such group exists at all. He pointed out that asylum-seekers are generally at least somewhat vulnerable because of their past experiences, a new and different environment, and more importantly, the uncertainty about their future. As for the vulnerability of unaccompanied children, the following cases shed light on the reasoning of the ECtHR. [16]

This case is of utmost importance because according to the Court, the lack of an effective remedy at the second instance, the reception, living and detention conditions in Greece violated Article 3, as well as Article 13 in conjunction with Article 3, and the judgement caused the suspension of implementation in practice of the Dublin Regulation regarding Greece.[17] The Court's findings against

[12] M.S.S. v Belgium and Greece (Application No. 30696/09), 232.
[13] Ibid. 233.
[14] Ibid. 233.
[15] Ibid. 251.
[16] Partly concurring and partly dissenting opinion of Judge Sajó in the case M.S.S. v Belgium and Greece (Application No. 30696/09).
[17] Cf. Mariana, Gkliati: Blocking Asylum: The Status of Access to International Protection in Greece, 4 Inter-American and European Human Rights Journal, 85 (2011), 85-117.

Belgium mean that Member States of the EU can no longer take it as given that the system established by the Dublin Regulation absolves a sending state of responsibility for the procedure applied to asylum seekers in the receiving state or for the living conditions there, or that the receiving state's membership of the CEAS entails that an asylum seeker will be safe from refoulement there.[18]

And as for the ECHR, it was violated by Greece with its asylum conditions and by Belgium through its transfer of the applicant back to Greece and knowingly exposing him to the systemic deficiencies of the asylum procedure.[19;20]

After the overview of the definition of vulnerability I shall highlight the first milestone case regarding unaccompanied minors. The Court laid down the basis for principles regarding unaccompanied minors in the case Mubilanzis and Kaniki Mitunga v. Belgium in 2006. The case involved the subjects of degrading, inhuman treatment, minors and respect for family life.[21] In the case we can clearly see the elements of being in an extremely vulnerable group as pointed out by the Court; a child being in the same conditions as adults, being unaccompanied, having no one assigned to look after the her, having no measures taken to ensure that she receives proper counselling and educational assistance from a qualified person specially assigned to the child.

[18] Gina, Clayton: Asylum Seekers in Europe: MSS v Belgium and Greece, (2011) 11 Human Rights Law Review, 761.

[19] Ni, Xing-Yin: The Buck Stops Here: Fundamental Rights Infringements Can No Longer Be Ignored When Transferring Asylum Seekers Under Dublin II, (2014) Boston College International and Comparative Law Review 37, 83.

[20] See more about the case in Cathryn Costello: Dublin-case NS/ME: Finally, an end to blind trust across the EU? (2012) 2 Asiel and Migrantenrecht 83; Patricia, Mallia: Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation, (2011) 30 Refugee Survey Quarterly 107-128; V Moreno, Lax: Dismantling the Dublin System: MSS v Belgium and Greece, European Journal of Migration and Law 14 (2012) 1, Available on SSRN;

[21] The short summary of the case is following. The two applicants, Ms Mayeka and her daughter were Congolese nationals. The mother arrived in Canada in 2000, where she was granted refugee status in the next year and obtained indefinite leave to remain in 2003. After being granted asylum, she asked her Dutch national brother living in the Netherlands, to collect her five-year-old daughter from the Democratic Republic of the Congo and to look after her until she was able to join her. On 18 August 2002 shortly after arriving at Brussels airport, her daughter was detained because she did not have the necessary documents to enter Belgium. The uncle who had accompanied her to Belgium returned to the Netherlands. On the same day a lawyer was appointed by the Belgian authorities to assist the child. The application for asylum that had been lodged on behalf of Tabitha was declared inadmissible by the Belgian Aliens Office which decision was upheld by the Commissioner-General for Refugees and Stateless Persons. Tabitha's lawyer asked the Aliens Office to place Tabitha in the care of foster parents, but did not receive a reply. The *chambre de conseil* of the Brussels Court of First Instance held that Tabitha's detention was incompatible with the New York Convention on the Rights of the Child ordering her immediate release, the Office of the High Commissioner for Refugees sought permission from the Aliens Office for Tabitha to remain in the country while her application for a Canadian visa was being processed and explained that her mother had obtained refugee status in Canada. However, the following day the child was removed to the Democratic Republic of Congo. She was accompanied by a social worker who placed her in the care of the police at the airport, and on board the aircraft she was looked after by an air hostess who had been specifically assigned to by the chief executive of the airline. She travelled with three Congolese adults who were also being deported. No members of her family were waiting for her when she arrived in the Democratic Republic of Congo. On the same day of her deportation her mother phoned to speak to her daughter, but was informed that she had been deported. At the end of October 2002 Tabitha joined her mother. See http://www.asylumlawdatabase.eu/en/case-law/ecthr-mubilanzila-mayeka-and-kaniki-mitunga-v-belgium-application-no-1317803

The Court stated that the situation was accompanied by inhuman treatment when authorities demonstrated a lack of humanity; the parent was not informed in time about the child's detention and the deportation, and going through with the latter had not ensured that the child was properly looked after or had regard to the real situation she was likely to encounter in her country of origin.

Regarding the level of vulnerability, in Mohamad v. Greece in 2014 the extremely vulnerable position of an unaccompanied child is further highlighted by the absence of an effective remedy.[22] The Court pointed out that domestic legislation allowing for appeals against detention conditions did not offer any reasonable chance of success and presented no effective remedy as noted in A.F. v. Greece (Application no. 53709/11). The Court also noted that Article 13 guarantees a right to an effective remedy for every arguable complaint, and the remedy must be effective in law and practice as stated in McGlinchey and Others v. UK (Application no. 50390/99). The Court had ruled that referral to a superior within the police department does not constitute an effective remedy as pointed out in A.A v Greece (no 12186/08), and that the requirements of an effective remedy when complaining of inhuman treatment requires a thorough investigation into the alleged cause of the violation as noted in Egmez v. Cyprus (Application no. 30873/96). The Court highlighted the necessary link between detention and good faith; the latter directly linked to the grounds for detention, furthermore, conditions must be appropriate and the length must not exceed what is reasonably necessary to meet the aim of detention as stated in Mahmundi and Others v. Greece (no 14902/10).

We shall point out that in this case both the applicant and the Court made reference to international documents in the asylum procedure and inhuman detention conditions in Greece which were also pointed out as well in other related ECtHR-cases e.g. M.S.S. v. Belgium and Greece. Also, regarding the application procedures and remedies for asylum seekers the Court made references to a submission by ECRE and the International Commission of Jurists stating that domestic legislation in Greece does not expressly provide for the review of conditions of detention.[23]

[22] The summary of the case Mohamad v. Greece (Application no. 70586/11) is following. After being arrested for irregular entry into Greece, the applicant was examined by a FRONTEX officer who erroneously noted his age, declaring that he was an adult. He was ordered to leave the Greek territory with his expulsion to Turkey. However, the Turkish authorities refused to accept the applicant. Considering that he would abscond, he was placed in detention at Soufli border post. Although the post' Director was notified that the applicant was under 18, he was still kept in detention and supposedly given information as to the reasons for his detention and rights in English. The applicant highlighted that he had neither been given an information brochure nor could understand English. After rectifying the discrepancy with the applicant's age the police authorities notified the Prosecutor and suspended the expulsion order. He was placed in a hospital to undergo examinations and after it he was kept in Soufli border post for a period of 5 months. Upon reaching the age of majority the applicant complained of the duration and conditions of his detention, which the President of the Alexandroupoli Administrative Tribunal acceded to. The applicant was later released and given thirty days to the leave the territory, after which the return decision would be enforced if he had not left the country. See http://www.asylumlawdatabase.eu/en/content/ecthr-mohamad-v-greece-no-7058611-articles-3-5-para-1-13-11-december-2014

[23] http://www.coe.int/t/democracy/migration/archiveSelectYear_en.asp

In connection with the above-mentioned cases we shall cite the Court's ruling in case Kanagaratnam and Others v. Belgium, when stating that the extreme vulnerability of children is more important than their illegal residence status.[24]

2. The Principle of the Best Interest of the (Unaccompanied) Child

It is well-established that the principle of the best interest of the child is a generally recognised principle in international law. This principle is laid down in several legally binding and soft law documents and constitutes the basic standard for guiding decisions and actions taken to help children, whether by national or international organizations, courts of law, administrative authorities, or legislative bodies.[25]

The UN Convention on the Rights of the Child lays out children's human rights that are to be applied regardless of immigration status,[26] and any decision concerning a child must be based on respect for the rights of the child as set out in the Convention. The Convention on the Rights of the Child was adopted in 1989, is the most widely accepted human rights treaty. It had been ratified by 196 UN states, except the United States of America. Among the four general principles – all the rights guaranteed by the UNCRC must be available to all children without discrimination of any kind (Article 2); the best interests of the child must be a primary consideration in all actions concerning children (Article 3); every child has the right to life, survival and development (Article 6); and the child's view must be considered and taken into account in all matters affecting him or her (Article 12) – on which the Convention is based, and must be taken into consideration when interpreting the additional rights, the principle of the best interest of the child incorporates the main message of the Convention. Thus the best interests of children shall be a primary consideration in all actions concerning children,[27] in the search of short and long-term solutions,[28] acting as an "umbrella provision" with prescription of the approach to be followed in cases concerning children.[29]

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[24] Affaire Kanagaratnam et Autres c. Belgique ((Requête no 15297/09), para. 62. In this case the children were accompanied.

[25] International Committee of the Red Cross Central Tracing Agency and Protection Division: Inter-Agency Guiding Principles on unaccompanied and separated children, (2004), 13. http://www.unicef.org/violencestudy/pdf/IAG_UASCs.pdf

[26] The UN Committee on the Rights of the Child has provided additional guidance for the protection, care and proper treatment of unaccompanied children in its General Comment No. 6 (2005), available at: www2.ohchr.org/english/bodies/crc/comments.htm.

[27] See CRC Art. 3(1), ECRE (Children) para. 4, ICCPR Art. 24(1), ICESCR Art. 10(3), UNHCR Guidelines para.1.5

[28] 19. Article 3 (1) states that "[i]n 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". In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.

The treaty body of the Convention on the Rights of the Child which belongs to the ten treaty bodies working in the frame of universal international human rights conventions, issued the first comment on providing additional guidance for the protection, care and proper treatment of unaccompanied children in its General Comment No. 6 (2005),[30] furthermore, General Comment No. 14 (2013)[31] has provisions on the right of the child to have his or her best interests taken as a primary consideration.[32] We shall point out that "general comments" of a treaty body are often referred to in national and international courts which allude to the fact that they can be seen as guidelines in the interpretation of human rights.[33]

Also, the United Nations High Commissioner for Refugees gave guidance on policies and procedures in dealing with unaccompanied children seeking asylum,[34] and regarding the term "best interests" the UNHCR has highlighted that it broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences.[35]

The European Social Charter (ESC) refers to separated children in Article 17 (1) (c). Moreover, the European Committee of Social Rights – like the ECtHR – has highlighted that states interested in stopping attempts to circumvent immigration rules must not deprive foreign minors - especially if they are unaccompanied - of the protection their status warrants. The protection of fundamental rights and

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20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite of this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

21. Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serve as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

22. Respect for best interests also requires that, where competent authorities have placed an unaccompanied or separated child "for the purposes of care, protection or treatment of his or her physical or mental health", the State recognizes the right of that child to a "periodic review" of their treatment and "all other circumstances relevant to his or her placement" (article 25 of the Convention). See Committee on the Rights of the Child: General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 9.

http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement

[29] Philip, Alston – Bridget, Gilmour-Walsh: The Best Interest of the Child. Towards a Synthesis of Children's Rights and Cultural Values. Innocenti Studies, UNICEF, 1996. 1.

[30] See on http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf

[31] See on http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

[32] Cf. Katalin Margit, Haraszti: Kísérő nélküli kiskorúak a menekültjogban és a gyermekvédelemben: árnyak a Paradicsomban, 4 Családi Jog 2014, 7-21.

[33] Vanda, Lamm: Néhány megjegyzés az emberi jogi tárgyú egyezmények értelmezésének sajátos esetéről. In: Katalin, Szoboszlai-Kiss–Gergely, Deli (eds): Tanulmányok a 70 éves Bihari Mihály tiszteletére. Győr, Universitas-Győr Nonprofit Kft., 2013, 300-311.

[34] UNHCR: Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997

http://www.refworld.org/docid/3ae6b3360.html

[35] UNHCR: Guidelines on Determining the Best Interests of the Child, May 2008, 14. http://www.unhcr.org/4566b16b2.pdf

the constraints imposed by a state's immigration policy must therefore be reconciled. The Committee held that unaccompanied minors enjoy a right to shelter under Art. 31 (2) of the ESC.[36]

Parts of the EU Charter of Fundamental Rights is based on the Convention, and states that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

Although the European Convention on Human Rights[37] does not contain explicitly the best interest of the child principle (nor does it make any reference to the rights of children or vulnerable groups) references are made to the equality between spouses and their right to see the child (Article 5),[38] to the right of respect for private life and family life (Article 8)[39] and to the right of education (Article 2)[40] thus their treatment is considered under these provisions. These references create the grounds for the principle expressed in the ECtHR case-law concerning children, and children belonging to extremely vulnerable groups, such as those being unaccompanied as we can see in the following cases. The ECtHR has stated that the human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention[41] thus it made direct reference to a UN treaty.

In the milestone case Mubilanzis Mayeka and Kaniki Mitunga v. Belgium, the Court highlighted that when placing an unaccompanied child in a detention center, the authorities could have used other measures that could have been more conducive to the highest interest of the child. This thought continued in the case Rahimi v. Greece in 2011, with the Court highlighting the important link between the best interest principle and detention. [42]

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[36] Fundamental Rights Agency: Handbook on European law relating to asylum, borders and immigration, Publications Office of the European Union, Luxembourg, 2014, 17.

[37] http://echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer

[38] Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

[39] 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. 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 wellbeing 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.

[40] No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

[41] Sahin v. Germany (Application no. 30943/96)
https://www.crin.org/en/library/legal-database/sahin-v-germany

[42] The summary of the case is following. The Applicant was born in 1992, left Afghanistan to flee the armed conflicts there and arrived in Greece, where he was arrested in 2007. He was placed in a detention centre pending an order for his deportation and was held there. A deportation order issued mentioned that the Applicant's cousin, N.M., was accompanying him. On his release the Applicant was not offered any assistance by the authorities, left homeless for several days and subsequently, with the aid of local NGOs, found accommodation in a hostel. An application he made for political asylum was rejected; his appeal is still pending. Before the European Court the Applicant complained, among other things, of a complete lack of support or accompaniment appropriate to his status as an unaccompanied minor, and of the conditions in the detention centre, in particular the fact that he had been placed together with adults.See http://hudoc.echr.coe.int/eng?i=001-104367

Here, the Court pointed out the authorities' failure to take the best interest principle into account and failure to consider whether detention was a measure of last resort with the automatic application of national legislation with no consideration of the particular circumstances and whether less drastic measures securing deportation exist. The Court highlighted the importance of good faith regarding the authorities' measure which should include best interest of a minor and take into account the individual's situation. It also held that states have a responsibility to look after unaccompanied minors and not abandon them when releasing them from detention.

Also, the particular state of insecurity and vulnerability in which asylum seekers are known to live was highlighted again because of the Greek authorities' inaction. Furthermore, as previously mentioned, other international bodies had all highlighted the ever returning failings regarding the supervision of unaccompanied migrant children.

Similarly to the Rahimi case, the Court noted in the case Housein v. Greece in 2013 that according to the Convention of the Rights of the Child, a child should be detained only as a last resort. The Court pointed out that the use of a detention measure was made without taking into consideration the applicant was an unaccompanied child.[43]

The development of the best interest of a child principle can be followed thus also creating basic outlines for cases concerning unaccompanied children, although the cases Neulinger and Shuruk v. Switzerland and Nunez v. Norway concern children who were accompanied.

In the Neulinger and Shuruk v. Switzerland case in 2010,[44] the child's (future) well-being and development was taken into consideration when deciding on what was in the child's best interests. It emphasised that neither the working group during the drafting of the Convention nor the Committee on the Rights of the Child had developed the concept of the child's best interests or proposed criteria

[43] The case-summary of Housein v. Greece (Application No. 71825/11) is following. The Afghan national was arrested while still a minor in 2011 for entering Greece illegally, and detained pending removal in an adult detention facility. He complained via his legal representative to the head of the detention centre against both the detention conditions and the fact of being detained. His representative requested transfer to a special detention institution for minors. The objections concerning the Applicant's detention in an adult facility, which the representative filed with the district administrative court, were dismissed on the basis that it was open to the representative to apply for more suitable accommodation to the competent authorities. Later by order of the prosecutor, he was transferred to a youth hostel, at which he remained until the decision ordering his detention and deportation was set aside. Before the ECtHR, he claimed a violation of Article 3 (prohibition of degrading treatment), regarding the detention conditions, Article 5(1) and (4) (right to liberty and right to have the lawfulness of detention decided speedily by a court), regarding his detention as an unaccompanied minor, and, as a Muslim, Article 9 (freedom of religion) for being allegedly forced to choose between eating pork and going hungry. See http://www.asylumlawdatabase.eu/en/content/ecthr-decision-housein-v-greece-application-no-7182511-articles-3-5-and-9

[44] The summary of the case Neulinger and Shuruk v. Switzerland (Application No. 41615/07) is following. The first applicant, a Swiss national, settled in Israel, where she got married and the couple had a son. When she feared that the child (the second applicant) would be taken by his father to an ultra-orthodox community abroad, known for its zealous proselytising, the Family Court imposed a ban on the child's removal from Israel until he attained his majority. The first applicant was awarded temporary custody, and parental authority was to be exercised by both parents jointly. The father's access rights were subsequently restricted on account of his threatening behaviour. The parents divorced and the first applicant secretly left Israel for Switzerland with her son. At last instance, the Swiss Federal Court ordered the first applicant to return the child to Israel.
See http://www.incadat.com/index.cfm?act=search.detail&cid=1001&lng=1&sl=1

for their assessment, in general or in relation to specific circumstances. They have both confined themselves to stating that all values and principles of the Convention should be applied to each particular case (see Rachel Hodgkin and Peter Newell (eds.), Implementation Handbook for the Convention on the Rights of the Child, United Nations Children's Fund 1998, p. 37)[45] and stated that the term best interests broadly describes the well-being, which is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's development and experience.[46]

In the Nunez v. Norway case in 2011,[47] concerning both family life and immigration, the Court applied explicitly the Convention on the Rights of the Child and stated that the particular circumstances of the involved persons and the general interest must be taken into consideration. In this regard the authorities shall strike a fair balance between public interest in ensuring immigration control and the need to remain in a position that is able to maintain contact with the children in their best interest.[48]

Both cases touched upon the respect for family life and the best interest principle where the Court emphasised again that the best interest principle must be the primary consideration. Regarding family life, we shall mention that the Court noted already in the above-mentioned Mubilinza Mayeka case that since the child was unaccompanied, the state was under an obligation to facilitate the family's reunification.

3. Interim measures of ECtHR

The problem of the unaccompanied children touches upon the means of interim measures of the Court. According to Rule 39 of the Rules of Court, these measures can be indicated to any State party to the Convention but it is possible to applicants as well. Interim measures are urgent means in cases where

[45] Neulinger and Shuruk v Switzerland (Application No. 41615.07), para. 51

[46] Ibid. para. 52.

[47] The short summary of the case is following. The applicant, a Dominican Republic national, was deported from Norway in 1996 with a two-year prohibition on re-entry following a criminal conviction. Four months later she re-entered the country under a false identity and married a Norwegian national. She continued to reside and work there unlawfully, using permits obtained by deception. She subsequently divorced and cohabited with a settled non-national, with whom she had two daughters, who were born in 2002 and 2003. In April 2005 the immigration authorities, who had been aware since 2001 that the applicant's stay in the country was unlawful, decided she should be expelled and prohibited from re-entering for two years. Her appeals to the domestic courts failed. In the interim and following her separation from the children's father in October 2005 the applicant assumed the daily care of the children until May 2007, when the father was given custody after the court considering the case found that there was little prospect of the applicant obtaining a reversal of the expulsion order. The applicant was granted contact.

[48] Nunez v. Norway (Application no. 55597/09), para 84.

there is an imminent risk of irreparable harm,[49] and in most cases the suspension of expulsion and extradition was requested by interim measures. The suspensions by interim measures are for as long as the application is being examined. The Strasbourg case-law shows a clear tendency to protect aliens through interim measures in case of imminent deportation/extradition because the person concerned risks such traumas as losing his life upon return (Article 2 ECHR), being ill-treated (Article 3 ECHR) or, exceptionally, being separated from his family (Article 8 ECHR)[50] or being denied fair hearing (Article 6 ECHR). We shall point out that in the above-mentioned Neulinger and Shuruk case, an interim measure was also used on the grounds of Article 8. Since 2008, quite a lot of these measures have been issued suspending removal decisions from Austria, Belgium, Finland, France, the Netherlands, Hungary, Sweden, the UK, etc., to the above-mentioned countries, in the light of allegations that such transfers implied a risk of violation of Articles 2 and 3.[51] This was also exemplified in the case of an Afghan minor when the Court requested the Hungarian government to suspend the return of an unaccompanied 16-yar old Afghan asylum seeker to Greece under the Dublin Regulation, being the first time when interim measures were applied in a Hungarian asylum case involving a transfer under the Dublin Regulation. The immigration office decided not to enforce the transfer and to examine the Afghan minor's asylum application as regards the regular asylum procedure.

Conclusion

As we can observe from the statement of the June 11, 2015 meeting of the Committee of Ministers overviewing the execution of M.S.S. v Belgium and Rahimi v. Greece group cases, the implementation of human rights judgements cannot be seen as a success. Why? Because in this statement the Committee highlighted the lack of cooperation when calling up the authorities to take all necessary steps to preserve and protect the rights of third-country unaccompanied children, and provide an effective guardianship system.[52] This means that although the ECtHR has milestone judgements where a clear view is given to the authorities about the rights and protection of

[49] Article 39 states that the Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

[50] C. Burbano Herrera, Y Haeck: Staying the Return of Aliens from Europe through Interim Measures: The Case-law of the European Commission and the European Court of Human Rights, European Journal of Migration and Law 13 (2011), 33.

[51] Ibid. 48.

[52] http://www.asylumlawdatabase.eu/en/content/committee-ministers-execution-mss-v-belgium-and-greece-and-rahimi-v-greece

unaccompanied children, ever returning similar cases show the authorities' unwillingness to follow good faith.

Although the ECtHR can decide to apply interim measures as e.g. when it requested the Hungarian government to suspend the return of an unaccompanied 16-yar old Afghan asylum seeker to Greece under the Dublin Regulation[53], the solution would be not using this measure: the authorities take into account the extreme vulnerability of this group of asylum seekers and follow the directions set out by the ECtHR.

The case-law of the ECtHR presented in the study confirms and highlights the interaction of universal and regional human rights protection: the ECtHR refers to the ECHR and to the UN CRC as well. As for the documents cited by the Court, next to the legally binding document, the soft law materials of treaty bodies are strengthened by the fact that the Court makes references to them, too.

[53]http://helsinki.hu/en/the-european-court-of-human-rights-suspends-return-of-seriously-ill-afghan-minor-asylum-seeker-from-hungary-to-greece-under-the-dublin-regulation