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**Advisory note - Call for Input OCHRC (report on the rights of the child and family reunification)**

**Introduction**

This advisory note[[1]](#footnote-1) aims at responding to (the first two questions of) the [Call for input](https://mcusercontent.com/478e05da372d2b7611f1d1740/files/09130556-03f8-c459-66c7-dc5b21a18b75/Call_for_input_Civil_society_NHRIs_FRA.pdf) sent out by the Office of the United Nations High Commissioner for Human Rights in the context of its prospective report “The rights of the child and family reunification”.

Due to the limited scale of this note, we will focus on some key issues faced by TCN unaccompanied minors and separated children in Europe, without attempting to be exhaustive. The discussed preoccupations are mainly related (but not limited) to family reunification procedures. A first chapter discusses the principal preoccupations arising in the light of the right to family life (including issues related to (exercising) the limited right to family reunification, the child’s identity, the right to be heard, etc.). A second chapter deals with the principal preoccupations in light of the principle of the best interests of the child. Finally, in a third chapter some important recommendations are formulated to address the issues discussed in chapters one and two.

1. **Key human rights concerns affecting unaccompanied minors and separated children**
   1. Preoccupations in the light of the right to family life[[2]](#footnote-2)

* *The limited right to family reunification for UAM and the restrictive notion of “nuclear family”*

Although both article 8 ECHR and article 7 EU Charter guarantee the right to respect for one’s private and family life, these provisions do not automatically provide for a right for families to live together in the EU. At EU level, the provisions governing family reunification for family members of third country nationals (TCN) are laid down in Directive 2003/86 on the right to family reunification (also referred to as “Family Reunification Directive”)[[3]](#footnote-3). This directive provides for a substantive right to family reunification, which according to its Recital 9, “should in any case apply to members of the nuclear family, that is to say the spouse and the minor children”[[4]](#footnote-4). However, when it comes to any other type of relative, the Directive leaves it to the Member States to decide whether or not they wish to authorise family reunification in such cases[[5]](#footnote-5).

Nevertheless, many families do not fit neatly into the preconceived notion of “nuclear family”. For this reason, and multiple others[[6]](#footnote-6), the limitation of the right to family reunification to members of the “nuclear family” is highly problematic, not in the least for unaccompanied minors (UAM). When it comes to UAM refugees for example, the “nuclear family” solely includes “first-degree relatives in the direct ascending line”[[7]](#footnote-7). Consequently, under EU law, UAM refugees benefit from a right to be joined by their parent(s) only[[8]](#footnote-8). Any other relative who was part of the family unit in the country or origin is excluded from suchright, and is therefore entirely left upon the goodwill of the concerned Member State to accord a visa to enter the territory on humanitarian grounds (“humanitarian visa”).

A bizarre side effect of this delimitation is that the UAM’s siblings, unlike their parents, are not entitled to a right to join their brother or sister in the EU. Take for instance the little baby who was handed over to American soldiers at the international airport of Kabul in August 2021. Let’s imagine, for the purpose of this study, that this baby was a little girl who ends up in Belgium, where she will most probably receive international protection status as a UAM. As a consequence, she will be entitled to a right to be joined by her (biological) parents[[9]](#footnote-9). Any siblings she may have, no matter how young and/or vulnerable they are, will need to apply for a humanitarian visa[[10]](#footnote-10), the accordance of which is never a right, always a favour, and therefore highly uncertain.

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* *Barriers to family reunification*

In addition to the restrictive notion of “nuclear family”, several other practical, procedural and legal barriers are faced by UAM’s and their family members wishing to be reunited in the EU. Given the fact that the specific conditions for the exercise of the right to family reunification are to be determined at national level, this note will focus, by way of example, to the Belgian law and practices.

A first issue concerns the duration of family reunification procedures. Under Belgian law, the authorities need to decide on applications with regard to family reunification within a period of 9 (to 15) months[[11]](#footnote-11) from the day of the registering of the request[[12]](#footnote-12). However, for applications to enter Belgium on humanitarian grounds no time limit is provided by law. These long time limits (or the absence of any time limit) risk to lead to unnecessary prolongation of a situation of family separation.

Another barrier has regards to the costs related to applications for family reunification[[13]](#footnote-13), usually rising up to several thousands of euros per application and per person, which is unaffordable for most migrant families.

A third obstacle resides in the fact that (family reunification or humanitarian) visa applications, in principle, need to be submitted at the Belgian embassy abroad. Although the Family Reunification Directive (art. 5(1)) allows for Member States to opt for the submission by the sponsor (*in casu* the UAM) in Belgium, most Member States (including Belgium) have deliberately chosen not to. Yet, an exception is provided for (nuclear) family members of recognised refugees, whose application can “in exceptional circumstances” be submitted by the sponsor in Belgium[[14]](#footnote-14). However, in all other cases, family members (e.g. the UAM’s siblings) still need to travel to the embassy in order to submit their visa application[[15]](#footnote-15), which involves several difficulties[[16]](#footnote-16) and therefore creates an additional burden to family reunification.

* *No effective enjoyment of the right to family life*

Consequently, the delimitation of the right to family reunification to members of the nuclear family only, combined with the discussed barriers hampering applications for family reunification are likely to impede the effective enjoyment of the right to family life by UAM’s in Europe.

* 1. The child’s identity and proof of family ties
* *Age assessment procedures*

According to the [Global Compact on Migration](https://undocs.org/fr/A/CONF.231/3) (pt. 12 d), and the [General Comments of the Committee on the Rights of the Child](https://www.refworld.org/docid/42dd174b4.html) (no. 6), separated or unaccompanied children should be promptly identified at arrival sites in transit and destination countries. (…) The host State should ensure that a qualified and impartial legal guardian is systematically appointed, ensure that family unity is preserved and that all those who legitimately claim to be minors are treated as children, unless a multidisciplinary, independent and child-sensitive assessment determines otherwise.

These recommendations are necessary in the absence of systematic identification of minors upon their arrival. The UAM should benefit from a presumption of minority according to the identity documents they present ( birth certificate, taskera ...). This raises the question of determining the age of young people who declare themselves to be UAM and whose documents are not considered. There is a great disparity in the procedures implemented for the purpose of age determination (triple bone test, ...). We refer to several communications of the Committee on the Rights of the Child, questioning the practices related to physical examinations only ([several cases against Spain](https://juris.ohchr.org/fr/search/results?Bodies=5&sortOrder=Date), the most recent of which dates from February 2021, [CRC/C/86/D/76/2019](https://juris.ohchr.org/Search/Details/2920)). It states that this determination requires, among other things, an assessment based on a method that takes into account the degree of psychological maturity [[17]](#footnote-17). Furthermore, these communications indicate that such procedures should only be initiated in the absence of any identification documents produced by the person concerned. Furthermore, the benefit of the doubt should be granted in case of doubt about the authenticity of the document (e.g. a taskera presented by minors from Afghanistan should be considered as a valid identity document). Once recognized as an UAM, he or she will benefit from care adapted to his or her situation and from specific protection in the procedures that will be put in place for him or her ([Procedure directive](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0033), art. 24). A guardian will be appointed to accompany him/her in his/her procedures, and if he/she is recognized as a refugee, he/she will benefit from favourable conditions to obtain family reunification with his/her ascendants. In case of late age determination / identification (in Belgium), UAM are sometimes 'detained' in a closed center during the age determination procedure and are only assigned a guardian after a few months of presence on the territory.

Another obligation of the States is to start, as soon as possible, the procedures of family tracing for minors who are on their territory or at the borders of the territories. This search is carried out through the Tracing services but needs to be reinforced through international cooperation, since there are sometimes real difficulties in establishing collaboration with States such as Afghanistan or Eritrea, even though the majority of UAM come from these countries.

* *Proof of family ties*

The question of identity arises because the establishment of a parent-child relationship is essential for the success of the family reunification procedure of an UAM in the host country ([Directive 2003/86](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0086), art. 10.3). The directive has somewhat mitigated the obligation to submit identity documents for family-members of refugees by admitting that an application cannot be refused because of the absence of identity documents (art. 11.2 Directive 2003/86).

The Court of Justice has in several rulings highlighted the difficulties specific to the family reunification of unaccompanied or separated minors[[18]](#footnote-18). The CJEU refers to the jurisprudence of the ECHR, indicating that when family reunification procedures are aimed at persons with refugee status, there must be an understanding of the specific circumstances of asylum situations, the right to family unity must be promoted, and these applications must be dealt with humanely, expeditiously and efficiently (*[Tanda-Muzinga](http://hudoc.echr.coe.int/fre?i=001-145653)*)[[19]](#footnote-19). In [*BMM*](https://curia.europa.eu/juris/document/document.jsf?docid=228674&doclang=EN), the Court of Justice favours family unity for all children awaiting family reunification, whether separated or unaccompanied, whether beneficiaries of international protection or not. Indeed, it requires a priority procedure when children are involved in this procedure. The same principle applies in case of appeal against a negative decision, in the name of the necessary effectiveness of the appeal.

In Belgium, the law provides that other means of evidence can be provided in the absence of official documents through interviews or investigations to determine this link. As a consequence, in the practice of the Belgian administration, a DNA test is almost automatically requested for this purpose (visa applications usually "denied under reservation of a positive DNA test", e.g. documents from DRC, Guinea). Requesting a DNA test is expensive and involves cumbersome procedures, especially when the separated child or family member is not in the country of origin (e.g. due to war circumstances) or the diplomatic representation of the host country is difficult to reach. Also, socio-affective relations between a child and non-biological parents should be considered in order to reunite a *de facto* family.

* 1. No input / right to be heard

The child has the right to be heard in proceedings affecting him or her in order to give his or her opinion on a given situation (Art. 12 ICRC). This is certainly the case for children in family reunification proceedings where the State has a margin of appreciation. The child's opinion is even more important in this type of procedure because the involvement of the child "has a direct link to the possibility for the child to live with the authors as a family" (pt 8.8 of [the Communication](https://alfresco.uclouvain.be/alfresco/service/guest/streamDownload/workspace/SpacesStore/f6d2d698-eb24-42cc-9e8d-d5d6d010e5d1/Droits%20de%20l'enfant_kafala.pdf?guest=true)). The possibility to be heard and to express one's opinion is part of the process of determining the best interests of the child as well as a procedural guarantee that must be ensured to every child in the context of a decision affecting him or her.

In Belgium, the right of minors to be heard is very rarely implemented in family reunification procedures even if art. 22 bis from the Constitution refers to it[[20]](#footnote-20). Even if the child has the right to be heard and his or her views are to be taken into account, the authority has the right to deviate from this. However, the reasoning of the decision should reflect that the child's views have been considered. The family reunification directive does not specifically refer to this obligation. In the case law of the European Court of Human Rights, the right to be heard for a child separated is not evoked. While the Court finds that considering the interests of the child allows for a balancing of interests (proportionality analysis) in a way that is more protective of family life in the case of [*Jeunesse v. Netherlands*](http://hudoc.echr.coe.int/eng?i=001-147117), it does not mention taking the child's voice into account. In the recente [*TQ*](https://curia.europa.eu/juris/document/document.jsf?docid=236422&doclang=EN) judgment related to an UAM who should be returned to his country, the Court of Justice holds that when the Member State concerned is considering adopting a return order on the basis of Directive [2008/115](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115) against an UAM, it must obtain the child's opinion on the conditions in which he or she could be received in the State of return . This assessment must be made *ex nunc*.

On the other hand, in all the cases listed above, there is no systematic hearing of the minor in case of appeal against a negative decision. The appeal before the administrative court in the context of decisions on family reunification or return (which is the Aliens Litigation Council in Belgium) follows a procedure that the law identifies as "written". It does not leave room for a hearing of the child as it is the case in protection procedures (related to youth protection). In those situations, the migrant child is treated differently from the non-migrant child. Therefore, migrant children should be treated as full rights holders; their special needs should be considered equally and individually and their views should be duly heard and taken into account (pt. 15[, General Comment No. 22](https://bice.org/app/uploads/2018/05/CRC-C-GC-23_FR.pdf)).

1. **Principal preoccupations in the light of the Best interests of the child principle in cases of family separation**

Finally, given the enormous impact a situation of family separation may have on minors, the importance to correctly assess and take into account their best interests cannot be overestimated. In this chapter, we will discuss some major preoccupations arising with regard to the application of the principle of the best interests of the child (hereinafter: BIC-principle). This key principle of international children’s rights is not only embedded in art. 3 (1) [UNCRC](https://www.ohchr.org/documents/professionalinterest/crc.pdf), and has also been codified in several regional and national instruments. In the context of family reunification, the principle has been reaffirmed in several legislative sources[[21]](#footnote-21)- all imposing on the deciding authorities to have due regard to the best interests of the child when examining applications of family reunification[[22]](#footnote-22). According to, *inter alia*, the European Court of Justice and the UN Committee on the Rights of the Child, the BIC-principle must be interpreted broadly[[23]](#footnote-23). Therefore, when dealing with family reunification applications, the authorities must not only have due regard to the best interests of the children who are directly involved (e.g. the UAM sponsor in Belgium), but also to those on whom the decision only has an indirect impact (e.g. the siblings remaining in the country of origin).[[24]](#footnote-24)

When it comes to the BIC-assessment, the Committee has put forward some key elements[[25]](#footnote-25) that need to be taken into account[[26]](#footnote-26), and advocates for this “best-interests assessment” to be carried out by a multidisciplinary team[[27]](#footnote-27), a recommendation which has been supported by the UNHCR[[28]](#footnote-28) and many other organisations and experts[[29]](#footnote-29). In Belgian migration procedures, however, the BIC-assessment generally is a one-person job and does not usually include a multidisciplinary approach[[30]](#footnote-30). Many decisions also lack a thorough assessment and determination of the best interests of the child, discussing which elements have been taken into account and which weight has been assigned to them[[31]](#footnote-31). Usually, the obligation to have due regard to the best interests of the child is considered to be complied with by simply referring to the fact that procedural guarantees have been met[[32]](#footnote-32). As such, in practice, the BIC-principle is reduced to a rule of procedural instead of the threefold that it should be (a substantive right, an interpretative principle and a rule of procedure)[[33]](#footnote-33).

1. **Recommendations**

As a general principle, the migrant child should be considered first as a child than as a migrant, following the rule of non discrimination (art. 2 ICRC).

3.1. How to ensure compliance to the right to respect for family life for children who are separated from their family?

* In the legislation regarding family reunification, the notion of “nuclear family” should be replaced by a broader notion of family, reflecting the reality of migrant families.
* Accordingly, when it comes to UAM, the right to family reunification should be expanded to his/her siblings and, in some cases, other persons based on *de facto* family ties.
* Family reunification procedures must be faster and cheaper, and all other practical barriers to applying for (family reunification or humanitarian) visas should be eliminated.
* It should be possible for all family reunification applications to be submitted by the sponsor in the hosting country (principle instead of exception).
* Decision-makers should adopt a more flexible attitude towards legal conditions and delays.
* Decision-makers should adopt a more flexible attitude towards providing documents and proving family ties:
  + DNA only as a last resort: carry out less costly investigations to establish parentage.
  + Reinforce international cooperation
* Identification upon arrival on the territory or at the borders applies to all those who declare themselves to be minors, including migrant children or asylum seekers, regardless of their nationality or status (pt 12, General Comment n°6).
* The host State should ensure that a qualified and impartial legal guardian is systematically appointed, ensure that family unity is preserved and that all those who legitimately claim to be minors are treated as children, unless a multidisciplinary, independent and child-sensitive assessment determines otherwise.
* The identification of separated or unaccompanied children should be carried out in a flexible and multidisciplinary manner.
* Age assessment procedures should be based on a multidisciplinary examination by independent team (pedagogues, psychologues etc.). A presumption of minority should benefit all persons presenting themselves as minors and presenting such documents.
* There should be an (effective) right to be heard: systematic hearing of separated and unaccompanied minors should be organised pending family reunification procedures, in order to get his opinion about this possibility. Migrant children should be treated as full rights holders; their special needs should be considered equally and individually and their views should be duly heard and taken into account.
* Particular attention should go to maintaining family units and avoiding family separation.
* More attention to tracing families and establishing international cooperation to ensure better collaborations.

3.2. How to serve the best interests of children who are separated from their family?

* In every decision affecting a child either directly or indirectly, a thorough assessment of the child’s best interests should be carried out.
* The justification of a decision must show that the right has been explicitly taken into account, explaining how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations.
* This BIC-assessment should be carried by an independent and multidisciplinary team.
* This BIC-assessment must include respect for the child’s right to express his or her views freely and due weight given to said views in all matters affecting the child.
* In cases of family separation, particular attention should go to maintaining the family unit (which should not be limited to the nuclear family).
* All barriers that render the right to family reunification should be eliminated.

Louvain La Neuve, 28 October 2021

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2. Given the limited scale of this note, this first chapter only deals with preoccupations related to the right to family life arising in the context of family reunification. [↑](#footnote-ref-2)
3. The right to family reunification for family members of EU citizens is regulated by another directive, to wit Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. [↑](#footnote-ref-3)
4. Recital 9 of the EU Family Reunification Directive. [↑](#footnote-ref-4)
5. Recital 10 *juncto* art. 10.3 of the EU Family Reunification Directive. [↑](#footnote-ref-5)
6. Which are beyond the scope of this study. For a discussion, see *inter alia*: ECRE, Position on refugee family reunification by the European Council of Refugees and Exiles, July 2000, < https://ecre.org/wp-content/uploads/2016/07/ECRE-Position-on-Refugee-Family-reunificatuin-July-2000.pdf>. [↑](#footnote-ref-6)
7. Art. 10 (3) (a) EU Family Reunification Directive. [↑](#footnote-ref-7)
8. In so far as no more favourable rules have been provided for by the concerned Member State. [↑](#footnote-ref-8)
9. Art. 10, §1, °7 Belgian Aliens Act, which is a transposition of art. 10(3) (a) of the Family Reunification Directive. [↑](#footnote-ref-9)
10. In fact, all family members other than the biological parents (e.g. stepfather or aunt who took care of the child) are excluded from a right to family reunification and need to apply for a humanitarian visa. [↑](#footnote-ref-10)
11. The 9-month deadline can be extended up to 15 months “in case further enquiries are required”. [↑](#footnote-ref-11)
12. Art. 12*bis* § 2 Belgian Aliens Act. [↑](#footnote-ref-12)
13. These costs usually include administrative fees, costs in view of the legalization and translation of documents, travel expenses, doctors (DNA test, medical certificates) and lawyers, etc. [↑](#footnote-ref-13)
14. Art. 12bis, §1 Aliens Act. [↑](#footnote-ref-14)
15. Still, the Belgian Immigration Office claims that it always allows for the documents to be sent by the applicant to their Brussels office in cases where it’s “impossible to reach the embassy”. However, this practice has no legal ground and is therefore not enforceable. Many Belgian migration lawyers also argue that this practice is never to seldomly applied (this is a preliminary result deriving from the co-author’s (L. Cools) ongoing doctoral research). [↑](#footnote-ref-15)
16. Such difficulties include : long waiting periods to get an appointment at the embassy, the fact that some embassies are hard to reach and may require extremely dangerous border-crossings, etc. [↑](#footnote-ref-16)
17. UN Committee of the rights of the child, Gen. Comment n°6, pt. 31. [↑](#footnote-ref-17)
18. In [E](https://curia.europa.eu/juris/document/document.jsf?docid=211670&doclang=EN), the Court, referring to Art. 11.2 of the Qualification Directive considers that "the requirements which may be laid down as regards the probative or plausible nature of the evidence provided by the sponsor or the member of his family, in particular for the purpose of establishing the inability to provide official evidence of family ties, must be proportionate and depend on the nature as well as the level of the difficulties to which they are exposed" (pt. 65 and 66). In [*A and S*](https://curia.europa.eu/juris/document/document.jsf?docid=200965&text=&doclang=EN&pageIndex=0&cid=25808514) (2018), the CJEU also stated that the family reunification guidelines must be given meaningful effect and that every effort must be made to maintain personal relationships and family unity or "reconstitute" the refugee MENA's family. Therefore, in determining the right to family reunification for an unaccompanied minor refugee, the Court takes into account his or her age at the date of filing the asylum application. In the [*K and B*](https://curia.europa.eu/juris/document/document.jsf?text=&docid=207426&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=25809312) case, the Court of Justice raised the issue of time limits for filing an application for family reunification and ruled that the time limits for applying for family reunification should not be interpreted too strictly when the person benefits from international protection. Flexibility is required with regard to deadlines as well as an open and non-formalistic mindset, depending on objectively excusable circumstances. [↑](#footnote-ref-18)
19. This is also a requirement of art. 10 of the ICRC. [↑](#footnote-ref-19)
20. Const., art. 22 bis; "Every child has the right to express himself/herself on any matter that concerns him/her; his/her opinion shall be taken into consideration, having regard to his/her age and discernment. [↑](#footnote-ref-20)
21. See *inter alia*: art. 5 (5) Family Reunification Directive, arts. 10*ter*, §2 and 12*bis,* §7 of the Belgian Aliens Act, art. 5 Return Directive, etc. [↑](#footnote-ref-21)
22. The BIC-principle also plays a growing role in case law with regard to family reunification. For a discussion (of CJEU cases), see : L. Cools, « [L’affaire M.A. : la Cour réaffirme la portée large du principe de l’intérêt supérieur de l’enfant dans le contexte de la directive retour](https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-11-mars-2021-m-a-c-112-20-eu-c-2021-197.html) », *Cahiers de l’EDEM*, avril 2021. [↑](#footnote-ref-22)
23. See e.g.: CJEU (GC), 8 May 2018, *K.A. and Others v. Belgium*, C‑82/16, EU:C:2018:308. [↑](#footnote-ref-23)
24. CJEU, 11 March 2021, *M.A. v. Belgium*, [C-112/20, EU :C :2021 :197](https://curia.europa.eu/juris/document/document.jsf?text=&docid=238749&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=24097), pt. 36; UN Committee on the Rights of the Child, [General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf), pts. 19-20. [↑](#footnote-ref-24)
25. The elements include : the child’s views, the child’s right to health, the child's identity, the preservation of the family environment and maintaining relations, care, protection and safety of the child, the child’s right to education and his/her situation of vulnerability. [↑](#footnote-ref-25)
26. Committee on the Rights of the Child, [Gen. Com. n°14](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf), *opcit*, pts. 52 - 79. [↑](#footnote-ref-26)
27. Committee on the Rights of the Child, [Gen. Com. n°14](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf), *opcit*, pt. 47. [↑](#footnote-ref-27)
28. UNHCR, [Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child](https://www.refworld.org/docid/5c18d7254.html), May 2021, pp. 43 and 179. [↑](#footnote-ref-28)
29. See e.g.: <https://www.easo.europa.eu/sites/default/files/Practical-Guide-Best-Interests-Child-EN.pdf>, p. 15. [↑](#footnote-ref-29)
30. This is a preliminary result deriving from the co-author’s (L. Cools) ongoing doctoral research on the implementation of the BIC-principle in Belgian migration procedures. [↑](#footnote-ref-30)
31. *Ibid*. [↑](#footnote-ref-31)
32. *Ibid.* [↑](#footnote-ref-32)
33. Committee on the Rights of the Child, [Gen. Com. n°14](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf), *opcit*, pt. 6. [↑](#footnote-ref-33)