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Expert information from the GRC Tracing Service on family reunification of and to refugees (5 September 2022)

The ECJ rulings of 1 August 2022: Point in time of minority in parental and child reunification with recognised refugees

On 1 August 2022, the European Court of Justice (ECJ) issued two important rulings in response to questions referred by the Federal Administrative Court (BVerwG) in family reunification proceedings

a) of parents to their unaccompanied minor children with refugee status and
b) of minor children to their parents with refugee status

in which the court once again comments among others on the question of when the children must be minors in order to be able to claim the right to family reunification. Furthermore, the court addresses the existence of actual family ties and the length of the residence permit after entry of the person joining the family.

The present expert information presents the decisive statements and terminology from the court decisions for use in advisory practice. The actual implementation of the ECJ's requirements by the BVerwG, the competent German authorities and the legislator remains to be seen.

Background

- In its judgment of 12 April 2018 (C-550/16 - Netherlands), the ECJ, responsible for the uniform interpretation of European Union law, formulated general principles of a uniform European interpretation and application of the rules of the Family Reunification Directive (Directive 2003/86/EC) and, inter alia, made binding statements on the question of the point in time at which a child must be a minor if the parents' family reunification procedure is to be based on the minor status of their children who have been recognised as refugees.[1]

- Subsequently, in its judgment of 16 July 2020 (Joined Cases C-133/19, C-136/19 and C-137/19 - Belgium), the Court continued its case law on the determination of the decisive moment of minority in reunification proceedings of children with their parents recognised as refugees.[2]

- In response to questions referred by the BVerwG, in its judgment of 9 September 2021 (C 768/19 – Federal Republic of Germany), the ECJ also ruled on the decisive point in time of minors eligible for international protection in proceedings for family asylum and international protection pursuant to section 26 of the Asylum Act and on the question of what is to be understood by an "asylum application".[3]

[1] ECJ, Judgment of 12 April 2018 (C-550/16 - Netherlands)
[2] ECJ, Judgment of 16 July 2020 (Joined Cases C-133/19, C-136/19 and C-137/19 – Belgium)
[3] ECJ, Judgment of 9 September 2021 (C 768/19 – Federal Republic of Germany)

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- After the BVerwG had requested additional clarifications by referring questions to the ECJ in decisions of 23 April 2020, both in parental reunification proceedings and in child reunification proceedings for recognised refugees, the ECJ has now handed down two further judgments on 1 August 2022 (Joined Cases C-273/20 and C-355/20 Parental Reunification and C-279/20 Child Reunification) with reference to its previous case law.[4]

All the rules of interpretation and clarifications of terms made in the ECJ rulings mentioned above should be read in context. The ECJ rulings are likely to lead to decisive changes in the legal provisions, case law, and administrative practice of family reunification procedures of recognised refugees in the Federal Republic of Germany, in which the minority of the children involved plays a decisive role.

General principles

In previous decisions and now again in the decisions of 1 August 2022, the ECJ referred to specific principles with regard to the Federal Republic of Germany, which run like a common thread through the ECJ case law.

1. The aim of Directive 2003/86/EC is to facilitate the family reunification of refugees and, taking into account the best interests of the children, to accelerate the family reunification of minors in these procedures and grant them protection.

2. The Member States have no discretion as to when the children involved in family reunification procedures with recognised refugees must be minors.

3. A refugee is already a refugee at the time of entry and application for asylum in a member state, irrespective of when this refugee status is established or confirmed by a subsequent legal act – i. e. official notification or subsequent judgement. This is merely a declaratory act.

4. The minor status of children in family reunification procedures – be it the reunification of parents with minor children with refugee status, or the reunification of minor children with parents with refugee status – must therefore be established at the time of the entry and asylum application of the reference person if this person is to be recognised as a refugee in the course of the subsequent asylum procedure.

5. The relevant point in time of minority may not be made dependent on other factors, as then random circumstances from the state sphere, such as the duration of administrative procedures or the staffing and sickness levels at the competent authorities, could influence the rights of refugees. The right to family reunification would otherwise depend on random and unpredictable circumstances. Moreover, the competent national authorities would no longer have any reason to process the applications with the urgency required to take account of the minors' need for protection. Furthermore, a different interpretation would not be compatible with the principles of equal treatment and legal certainty, according to which equal and predictable treatment of all applicants who are in the same situation in time must be guaranteed.

[4] ECJ, Judgments of 1 August 2022 (Joined Cases C-273/20 and C-355/20 Parental Reunification; C-279/20 Child Reunification, Federal Republic of Germany)

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6. Member States, in particular their courts, would not only have to interpret their national law in conformity with Union law, but they would also have to ensure that they do not rely on an interpretation of a provision of secondary legislation which conflicts with fundamental rights protected by the Union legal order.

7. Member States shall ensure that the best interests of minor children are duly taken into account. Article 7 of the Charter also recognises the right to respect for private and family life. According to consistent case law, Article 7 of the Charter must be read in conjunction with the obligation to take into account the best interests of the child under Article 24(2) of the Charter and with due regard to the requirement of regular personal relations between a child and both parents laid down in Article 24(3) of the Charter.

Regarding the transferability of the ECJ's case law on the interpretation and applicability of Directive 2003/86/EC to beneficiaries of subsidiary protection in Germany

Support centres are already frequently confronted with the question of whether the ECJ's case law applies to family reunification procedures for beneficiaries of subsidiary protection or whether it is transferable to them.

Article 3(2)(c) of Directive 2003/86/EC stipulates: *"This Directive shall not apply where (...) the sponsor has been authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States (...)."*

With reference to the above, the ECJ has repeatedly held, inter alia in its decision of 7 November 2018 (Case C-380/17 – Netherlands), that "*Directive 2003/86 must be interpreted as not applying to third-country nationals who are (...) members of the family of a beneficiary of subsidiary protection*."

This is not the case *"where the provisions of that directive have been declared directly and unconditionally applicable to the beneficiaries of subsidiary protection status in national law."* [5]

The Netherlands, for example, has made use of this possibility, but the Federal Republic of Germany has not.

The clarification of the question to what extent unequal treatment of refugees and beneficiaries of subsidiary protection can be justified at all when determining the point in time at which children must be minors in family reunification procedures, taking into account not only the interpretation requirements of the provisions of Directive 2003/86/EC, but also the fundamental rights from the EU Charter, will be left to a further fundamental procedure.

As long as the renewed equal treatment of recognised refugees and beneficiaries of subsidiary protection with regard to their rights to family reunification announced in the coalition agreement has not taken place and/or the applicability of the Family Reunification Directive 2003/86/EC to beneficiaries of subsidiary protection has not been expressly declared in the national law of the Federal Republic of Germany, the transfer of ECJ case law cannot be assumed in practice in family reunification procedures for beneficiaries of subsidiary protection.

[5] ECJ, Judgment of 7 November 2018 (C-380/17 - Netherlands)

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Practical guidance:

- In family reunification procedures for beneficiaries of subsidiary protection, please proceed on the basis of the previous practice for determining the point in time at which the children must be minors, see next chapter.

- If you should consider a case to be suitable for a fundamental proceeding on the question of a possible illegality of the unequal treatment of beneficiaries of subsidiary protection and refugees in determining the point in time of minority or if you are unsure, you can refer the persons seeking advice to a qualified lawyer.

Legal practice in the Federal Republic of Germany to date

a) **Reunification of parents with minor children (Section 36 (1) of German Residence Act)**

In the case of parents reuniting with their unaccompanied minor children pursuant to section 36(1) of the Residence Act, the previous case law of the Federal Administrative Court (see BVerwG, judgment of 18 April 2013, 10 C 9.12 as well as judgment of 13 June 2013, 10 C 25.12) required that the children to be reunited with are still minors both at the time of the application for an FR visa and at the time the visa was granted and the parents subsequently entered the country.

Under the German Residence Act, the period of validity of the residence title subsequently granted to the parents is also linked to the continued minority of the children.

b) Reunification of children with (one of) their parents (Section 32 of German Residence Act)

In the case of minor children reuniting with their parents or one of their parents pursuant to section 32 of the Residence Act, the point in time at which the application for family reunification was filed was decisive for determining whether the children reuniting with the parents or one of their parents were minors. If the child was a minor at that time, the subsequent coming of age of the children was irrelevant.

ECJ case law
Point in time of minority in family reunification to refugees and follow-up questions

1. The minority of children in family reunification procedures to refugees – both in the case of parental reunification to minor children and in the case of reunification of minor children to their parents – must be established at the time of the application for asylum of the reference person in Germany. A later coming of age is irrelevant for the respective claim for reunification.

2. In such a situation, the application for family reunification must in principle be filed within a period of three months, which the ECJ considers reasonable, from the day on which the reference person's recognition as a refugee became final.

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3. According to Article 16(1) (b) of Directive 2003/86/EC, Member States may reject an application for entry and residence for the purpose of family reunification if there are no actual family ties between the sponsor (reference person) and the family members, or if they no longer exist. In response to questions referred by the BVerwG, the ECJ stated in concrete terms that mere first-degree kinship in the ascending line was not sufficient to establish an actual family relationship. However, it was up to the family to decide how they wanted to organise their family life (for details see below "The existence of actual family ties").

4. Once the application for family reunification has been granted, the reunifying family members must be granted a residence title valid for at least one year, without the child's coming of age being allowed to shorten the duration of the residence title.

Overview:
Time of minority of children in family reunification procedures with beneficiaries of international protection

Parents/one parent reuniting with minor children with refugee status in Germany	➢ The child is a minor at the time of its **application for asylum** ➢ Subsequent coming of age is not prejudicial ➢ Requirement: Application for family reunification within 3 months after refugee recognition (ECJ deadline)
Parents/one parent reuniting with minor children with subsidiary protection status in Germany	➢ Minority must apply at the time of the application for family reunification, at the time of the decision as well as at the **time of entry** of the parents ➢ In case of imminent majority: Special appointment and, if necessary, informal FR application at the competent German mission abroad and, if necessary, urgent court application
Child reuniting with parents/a parent with refugee status in Germany	➢ The child is a minor at the time of the parent's **application for asylum** ➢ Subsequent coming of age is not prejudicial ➢ Requirement: Application for family reunification within 3 months after refugee recognition (ECJ deadline)
Child reuniting with parents/a parent with subsidiary protection status in Germany	➢ Minority must apply at the time of the **application for family reunification** ➢ Subsequent coming of age is not prejudicial

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In detail:

Decisive point in time of minority – Application for asylum of the reference person

Unlike before, the decisive question in family reunification proceedings of

a) parents to their unaccompanied minor children with refugee recognition and
b) minor children to their parents with refugee status

is:

- **Was the child a minor at the time the respective reference person with refugee recognition applied for asylum in Germany?**

Insert: The filing of an asylum application

German law regulates the filing of an asylum application in sections 13 and 14 of the Asylum Act. "*An asylum application shall be deemed to have been made if it is clear from the foreigner's written, oral or otherwise expressed desire that he is seeking protection in the federal territory from political persecution or that he wishes protection from deportation or other removal to a country where he would be subject to persecution*." (Section 13(1) Asylum Act).

In its judgment of 9 September 2021 (C 768/19), the ECJ clarified, upon referral by the BVerwG, that the "filing" of the asylum application does not require any administrative formality and therefore the time of filing the asylum application may neither be made dependent on the formal filing of the application, e.g. by means of a form provided for this purpose, nor on its official registration. Expressing the wish to apply for asylum to an "authority other than the Federal Office for Migration and Refugees" suffices. The time of the (first) submission of an asylum application, which may only be informal, is therefore considered the relevant time for assessing whether the application was submitted before the minor children involved reached the age of majority.

Practical guidance:

- The official date of the asylum application can be taken from the hearing record and the recognition decision of the Federal Office for Migration and Refugees (BAMF) or also from the file of the immigration office (Ausländerbehörde).

- If the decisive factor is that the asylum application was filed earlier than the officially recorded date, it will be difficult to prove that the asylum application was filed informally, e.g. orally, and it will only be possible to prove this based on statements of witnesses or – better – based on a written confirmation from the authority addressed.

The 3-month deadline – Application for family reunification after refugee recognition

The ECJ points out that for cases which have been ruled on, family reunification cannot take place without any time limit, but the application for family reunification must be made within a reasonable period of time. Referring to the context of Article 12(1), third subparagraph, of the Directive, the ECJ

states in its case law that in such a situation the application for family reunification must in principle be made within a period of three months from the date on which recognition as a refugee was granted.

Insert: The filing of an application for family reunification

In practice, it will be impossible in most cases for the family members seeking family reunification to obtain an appointment at the competent German mission abroad within 3 months of the refugee recognition of the reference person and to reach this mission in order to submit the application for family reunification within the time limit.

An application for family reunification can, however, be submitted **informally in writing** to the competent German diplomatic mission abroad, without prejudice to the usual procedure of German diplomatic missions abroad with the effect of preserving rights.[6]

However, according to the case law of the OVG-Berlin-Brandenburg of 19 January 2022[7], the notification submitted within the deadline pursuant to section 29 para. 2 sentence 2 of the Residence Act – regardless of whether it is submitted via the (general) online portal of the Federal Foreign Office or at the competent immigration office – does not constitute an effective visa application for family reunification at the mission abroad which is solely competent in this respect pursuant to section 71 para. 2 of the Residence Act. The registration for the application for a national visa in a waiting list also does not constitute an application for a visa for family reunification.[8]

Instead, a written application for a FR visa – which may be informal – must be submitted to the competent diplomatic mission abroad.

The extent to which the distinction between timely notification and application for an FR visa at the competent mission abroad is in conformity with European law in the practice of the Federal Republic of Germany requires clarification by the BVerwG and/or the ECJ in future proceedings, in which the decisive question is whether the application for an FR visa was submitted in due time.

Practical guidance:
The following information varies depending on the point in time in the procedure at which your support centre is approached.

- In order to keep track of the relevant dates and to be able to compare them with each other, it is best to work with a timeline for the reference person in Germany and for the family members joining the reference person, which you can write down next to or below each other. Enter the following data in the timeline as far as they are already known:
  - The dates of birth of children involved in the procedure (reference person or family members joining the applicant);
  - The date of coming of age (or the date of the last day of minority) of the children;
  - The date on which the reference person (child or parent(s)) applied for asylum in Germany;
  - The date of the reference person's final recognition as a refugee in Germany;
  - The expiry date of the 3-month deadline for the application for family reunification of family members joining the reference person after the refugee status of the reference person has been recognised as final and absolute;

[6] OVG Berlin-Brandenburg, B.v. 25 August 2020 - OVG 12 B 18.19
[7] OVG Berlin-Brandenburg, B.v. 19 January 2022, OVG 3 M 185/20
[8] OVG Berlin-Brandenburg, B.v. 25 January 2022 - OVG 3 S 87/21

- The date of the informal written application for family reunification, if applicable.

➢ Since many people do not have the exact dates in mind: Ask for written proof of the respective dates.

➢ Make sure that the three-month deadline for the application for family reunification is complied with: To be on the safe side and as long as the Federal Republic of Germany has not passed a corresponding legal regulation or as long as there is no higher court ruling, you should advise to always adhere to the three-month deadline set by the ECJ from the date of refugee recognition for submitting the application for family reunification (for parents and children), as the duration of the following procedures and the associated possible coming of age of the minors involved cannot be foreseen.

➢ Informal applications for family reunification are letters with information on the reasons for the application and possibly documents. They should contain at least the following information:

- Data of the applicant/joining family members: Surname, first name, date of birth, place of birth, passport number – if available, address/contact details
- Data of the reference person: Surname, first name, date of birth, place of birth, residence status of the reference person, date of refugee recognition, file number of the asylum procedure, contact details
- Request for family reunification
- Place, date, signature (in the case of minors: indication and signature of the legal guardian)

➢ To be on the safe side, you can also use the application form provided on the website of the competent mission abroad.

➢ If no appointment for the submission of the application is granted within the three-month period, send the informal application by fax to the competent German mission abroad until further notice and document the transmission by means of a corresponding fax transmission report. If the competent German diplomatic mission abroad cannot be reached by fax or if the fax connection does not work, send the application by e-mail to the competent German diplomatic mission abroad for evidence purposes, indicating the missing fax connection, and send it to the Federal Foreign Office for information. If you do not take action yourself, inform the person seeking advice of the relevant procedure.

The existence of actual family ties

The ECJ states in response to the corresponding questions referred by the BVerwG:

Mere relationship in the direct ascending line in the first degree is not sufficient.
The relevant provisions of Directive 2003/86 and the Charter protect the right to family life and promote its preservation, although it is left to the holders of this right to decide how they wish to conduct their family life.
In particular, no requirements are made regarding the intensity of the family relationship.

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Moreover, for the period of separation during the flight, the special situation of refugees and their families must be taken into account, who were not able to lead a real family life in this time, which is why this circumstance alone cannot be taken as a basis.

It is not required that the child and parent(s) live together in the same household or under the same roof in order to be entitled to family reunification.

Occasional visits, where possible, and regular contacts of any kind may be sufficient for the presumption that these persons are re-establishing personal and emotional ties and as evidence of the existence of actual family ties. Furthermore, the assumption of actual family ties does not require that the reunifying child and the parent in question support each other financially.

It should be left up to the family to decide how they want to organise their family life.

Practical guidance:
It remains to be seen how a possible examination of the prerequisites for the assumption of actual family ties will be carried out in administrative practice in the future. If there is any doubt, it will be up to the courts to decide.

- Recommend that those seeking advice briefly describe the family relationships experienced to date and those intended for the future. In doing so, you can be guided by the statements of the ECJ outlined above: Reference to a shared home – if this is intended – regular contact through visits, telephone calls, letters, digital speaking on the computer, joint travel, etc.

One year residence title after entry

In its decisions, the ECJ also states that if the application for family reunification with recognised refugees is granted, the reunifying persons must be granted a residence title that is valid for **at least one year**, irrespective of when the children involved come of age. The coming of age of the child must not lead to the duration of such a residence title being shortened. Legal provisions or a legal practice of the Member States to grant a right of residence to the joining family members in these cases only for as long as the child is actually a minor are therefore not compatible with European law.

Article 13(2) in conjunction with Art. 13(1) of Directive 2003/59/EC states:

"As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member or members. In that regard, the Member State concerned shall grant such persons every facility for obtaining the requisite visas. The Member State concerned shall grant the family members a first residence permit of at least one year's duration. This residence permit shall be renewable."

So-called old cases

In the expert information of the GRC Tracing Service on family reunification of and to refugees of June 2018, page 9, reference was already made to the problem of the so-called "old cases" with regard to the ECJ ruling of 12 April 2018. Reference is hereby made to this.

A retroactive application to already negatively concluded family reunification procedures for recognised refugees, in which the time of minority was decisive, for example by way of reopening the procedure, shall be predominantly excluded. If you are unsure, you can suggest the involvement of a lawyer specialised in migration law.

The pending reunification proceedings, however, in which the question of the point in time of minority is decisive and which have not yet been concluded with a legally binding negative decision, will now have to be decided with regard to the requirements of the ECJ.

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