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Separated Minors or the Dilemma Between General and Individual Interest in Migration Law Compliance

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Abstract

Separating children accompanied by a non-family adult is a current practice, at least when crossing Spanish borders, serving the general purpose of fighting against sexual exploitation, minor trafficking, or crime prevention, in general. However, such a routine response could violate the minor's right to family life from the perspective of contemporary changes in the concept of family or preclude an attempted migration to reunification and, consequently, risk or endanger a proper consideration of the best interests of the minor.

This paper sheds light on the interpretative framework of the concept of separated minors and its scarcely specific normative framework. Although no clear-cut regime exists, an analysis of the conflicting interests is possible by combining international law of migrations, human rights law, and the case law of international adjudicating bodies.

The proposed analysis is twofold. On the one hand, the expansion of the sociological and legally recognised concept of family must help protect interpersonal bonds not based on biological relationships, according to the European Court of Human Rights and Court of Justice of the European Union case law. On the other hand, limitations to the right to family life can be undertaken in the fight against crime, such as human trafficking. Nevertheless, separation measures need to be carefully weighed, for a goal of general prevention may not comply with human rights standards on the limitation of rights.

The resulting balance between conflicting interests needs to be addressed from the perspective of the proper consideration of the best interests of the minor. This analysis requires a case-by-case examination of the circumstances, excluding automatic separation policies. The present scarce normative framework, basically sketched through case law, would certainly benefit from a concerted, common legislative action at the level of the European Union when revisiting the migration legal regime, alongside operational measures at national, regional, and local levels.

Keywords

Migration law, Separated Minors, Foreign Unaccompanied Minors, Right to Family Life, Best Interests of the Minor, Human Trafficking

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I. Separated Minors: The Distinct Situation of Migrant Children without a Specific Legal Framework

Unaccompanied foreign minors are a widely studied category in migration studies and law, while 'separated minors' are not.[2] Throughout this work, 'separated minor' will be used to refer to an underage person migrating together with an adult who is not biologically or legally related as 'parent' or 'guardian'. Without a specialized regime, separated minors are generally considered in both legal documents and practice – international and domestic – as part of the broader category of foreign unaccompanied migrant children. Hence, as a current practice direction and policy, they are allegedly 'protected' through separation from the accompanying adult when crossing the borders of European Union Member States. This separation measure is generally meant to shield the separated minors from human trafficking and similar crimes, out of general public interest (public safety, crime prevention), and considering it an abstract realisation of the best interests of the minor. While this grants the minor a specific and, apparently, more protective regime, which can be generally perceived as an individual gain, an automatic response endangers a proper consideration of the individual interests of the minor and rejects contemporary and structural changes in the concept of family. A more balanced approach to compliance should be stressed in order to avoid cases in which the minor, through this separation, suffers from a violation of their right to family life. Consequently, this research will highlight the need for a set of rules or, at the very least, clarifying guidelines, that could accompany the never-ending reform of EU migration legislation to abide by human rights standards concerning separated migrant minors.

Some current cases may illustrate the specificity of the situation of these separated children. An immigrant man who lives illegally in France intends to reunite with his son. The child travels from Africa, where the minor lived with his mother, in the company of the father's new partner, a legal immigrant woman. When crossing the Spanish border, the child and stepmother are separated because they do not have a legal or biological bond, despite the letter of acquiescence that the biological mother provided the son with for the purpose of travelling to France. The child currently remains under governmental custody, whereas the stepmother was allowed to continue her travel. The biological father and mother remain unable to reach their son, who lacks legal documents to travel, and there is no readmission agreement between the countries. A second situation is that of a minor and their family leaving their country of origin together: after all adults perish during a sea crossing, the minor is taken care of by a third fellow countryman or woman doing the same journey, with whom the minor is not biologically related. A third case is represented by those minors travelling with an adult considered, in a broad sense, 'family' in their original culture, whom upon arrival to EU shores is found to be neither biologically nor legally related to the minor. A fourth case is that of minors travelling with an adult with whom they share a legal bond in the country of origin, which is not known or recognised in EU legislation, such as the Algerian *kafala*. A fifth case is that of a newborn travelling with their commissioning parents from a third country, where surrogate motherhood took place, to an EU country where the contract is void and surrogate parenthood is not yet recognised.

As stated above, there is no legally binding definition of a separated minor in international law. Nevertheless, the very concept has been defined in soft law international documents. General Comment No. 6 (2005) of the United Nations Committee on the Rights of the Child (CRC) on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin states that

> 'Separated children' are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.[3]

As such, it is clearly differentiated from the concept of 'unaccompanied children' (also called unaccompanied minors) – namely, 'children, as defined in article 1 of the Convention, who have been separated from both

[2] Some attention has been given to the topic by the European Union Agency for Fundamental Rights (FRA). See *Separated, Asylum-Seeking Children in European Union Member States* (Publications Office of the European Union 2011); *Current Migration Situation in the EU: Separated Children* (Publications Office of the European Union 2016). Nevertheless, neither policy definition nor legislative action has been adopted at EU or domestic level since.

[3] CRC/GC/2005/6 para 8.

parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so'.[4]

The same differentiation is also made by the Inter-American Court of Human Rights[5] and the United Nations High Commissioner for Refugees (UNHCR).[6] Furthermore, the duality has been acknowledged in the Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 22 (2017) of the CRC on the general principles regarding the human rights of children in the context of international migration;[7] the Joint General Comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return;[8] and finally the United Nations' 2018 Global Compact for Safe, Orderly and Regular Migration.[9]

Divergently, domestic law lacks a specific definition of separated minors, referring to the broader condition of unaccompanied minors as a protective and special regime,[10] excluding an appropriate recollection of diversified statistics or rules for a specific regime.[11] The undisputed application of the unaccompanied minors regime, transferring the child to the state care system, is elicited without verifying the precise nature and scope of the relationship between the minor and the accompanying adult.[12] Were this to amount to a 'family' relationship or put at risk the family ties of the child in a third country, a different action other than automatic separation should be adopted. Therefore, attention needs to be given to the expanding case law updating interpersonal links as the cornerstone to determine the child's right to a family and its limits. For this, we shall turn to the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) case law – their decisions being final and binding upon EU Member States.[13]

II. A European Case Law–Based Approach to Separated Children's Protection

Both international and domestic law fail to provide a common definition of the family link requirement to consider a child 'duly' accompanied or 'travelling with family'. While GC 6 CRC refers to separated children

[4] Ibid., para 7.

[5] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International* Protection, Advisory Opinion OC 21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 49, as requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay, and the Oriental Republic of Uruguay.

[6] See UN High Commissioner for Refugees (UNHCR), *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (United Nations High Commissioner for Refugees 2021) 12 <https://www.refworld.org/docid/5c18d7254.html>.

[7] CMW/C/GC/3-CRC/C/GC/22 paras 5, 9, 32, 33, 36, 38, 40, and 42.

[8] CMW/C/GC/4-CRC/C/GC/23 paras 8, 13, 16, 17, 27, 30, 34, 39, and 40.

[9] UNGA Res 73/195 (11 January 2019) UN Doc A/RES/73/195, paras 15, 23, 24, 27, and 28.

[10] In EU law, see Article 2 (l) of Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337 <https://data.europa.eu/eli/dir/2011/95/oj>; and Article 2.e, Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180 <https://data.europa.eu/eli/dir/2013/33/oj>. Other EU migration rules, outside the especial protection regime are equally restrictive. For Spanish legislation, see article 189, Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, BOE 103, 30 April 2011 <https://www.boe.es/eli/es/rd/2011/04/20/557/con>.

[11] European Union Agency for Fundamental Rights, *Current Migration Situation in the EU: Separated Children* (December 2016) 2–3.

[12] Fundación Abogacía Española, *La protección en Europa de 'menores separados' de su acompañante adulto en movimientos migratorios* (2019) 5–6.

[13] For an analysis of the concept of family in Article 17 ICCPR, see William Schabas and Manfred Nowak, *U. N. Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd rev edn, N. P. Engel 2019) 475–484; and for its interpretation by human rights treaty bodies, mainly the Human Rights Committee (HRC) and the CRC, see Frances Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (2nd edn, United Nations High Commissioner for Refugees 2018) 16–18 <https://www.unhcr.org/5a8c40ba1.pdf>. For the concept of family in UNHCR practice, see ibid 34–36.

as those accompanied by 'other relatives' or 'other family members' different from parents or the 'legal or customary primary caregiver', EU law ignores the separated children concept and considers unaccompanied children any minor arriving without 'an adult responsible for him or her whether by law or by the practice of the Member State concerned'. As such, any other family relation as regards the state of origin is not to be considered at all when defining the status of the minor. Nevertheless, European Courts have broadened the family bond concept. This should restrain the unaccompanied minor regime, excluding certain situations in which we are before 'separated children' cases and not truly unaccompanied minors.

a. The Child's Right to a Family Depends on the Definition of Family

The European law concept of family is quite restrictive and conventional[14] compared to the long tradition of a non-formal approach to family in ECtHR case law.[15] For the last fifteen years, the ECtHR has recognised family ties protected by Article 8 of the European Convention of Human Rights (ECHR) between minors and adults not sharing a legal or biological bond when the relationship is genuine.[16] This court, and in the same vein the CJEU,[17] considers that the family link is a de facto question rather than a legal one; authorities should thus verify the existence of a real relationship – one of dependence and care. The factors to be weighed up are the role played by the adults and the closeness, duration, and quality of the bond.[18] Once verified, the relationship must be respected and protected.[19] Nevertheless, no unique legal model for a family bond or relationship exists according to ECtHR case law, which allows states a wide margin of appreciation. Therefore, the case law of the international tribunals is of paramount importance to determine whether a specific tie is already considered protected by family boundaries.

Surrogate motherhood cases are among the new situations the ECtHR has analysed whereby a minor may cross borders accompanied by an adult who is not legally or biologically related (as in the separated minor concept mentioned above). First and foremost, the ECtHR has never been confronted with a claim introduced by a biological mother against any of the states involved (either the state where the surrogacy takes place or the state to where the intended parents fly with the child). Second, the ECtHR has always been concerned with the rights of the child born in a surrogacy relationship. Thus, the Court has underlined the need for protection of the child's right to an identity and a family, as per Article 8 ECHR.

There are only two surrogate motherhood cases where minors have been separated from their intended parents when arriving at their home country. In both cases, there were no biological bonds between the child and the intended parents and no legal bond according to the home state. In *Paradiso e Campanelli*, national authorities considered the child 'in a state of abandonment for the purposes of the law' and gave him in adoption with a new identity, although there were publicly commissioned reports of the strong commitment of the intended parents to the welfare of the child. This case was first decided by a chamber that found that there was a de

[14] ibid 19–20; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child* (2022) 207–2012.

[15] As a starting point, see *Marckx v Belgium* App no 6833/74 (ECtHR, 19 June 1979) paras 30–34.

[16] *Wagner and J M W L v Luxembourg* App no 76240/01 (ECtHR, 28 June 2007) para 117; *Moretti and Benedetti v Italy* App no 16318/07 (ECtHR, 27 April 2010) para 48; *Kopf and Liberda v Austria* App no 1598/06 (ECHR 17 January 2012) para 37; *Paradiso e Campanelli v Italia* App no 25358/12 (ECtHR [GC], 24 January 2017) paras 148–149; *Valdís Fjölnisdóttir and Others v Iceland* App no 71552/17 (ECtHR, 18 May 2021) para 59.

[17] C-129/18 *SM v Entry Clearance Officer, UK Visa Section* (CJEU [GC], 26 March 2019) paras 69–70.

[18] *Wagner and J M W L* para 117; *Moretti and Benedetti* its guardians, who are citizens of the Union, are called to lead a genuine family life and that that child is dependent on its guardians, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and (…) in order to enable the child to (…) live with its guardians in their host Member State', para 71. Otherwise, 'those guardians are in fact prevented from living together in that Member State because one of them is required to remain, with the child, in that child's third country of origin in order to care for the child', para 72.paras 49–50; *Kopf and Liberda* para 37; *Nazarenko v Russia* App no 38438/13 (ECtHR, 16 July 2015) para 58; *Paradiso e Campanelli* paras 149, 151, and 153–154. For an analysis, see Idoia Otaegui Aizpurúa, *La relevancia del Tribunal Europeo de Derechos Humanos en la protección de los derechos del menor* (Aranzadi Thomson Reuters 2017) 152–164.

[19] European Court of Human Rights (ECtHR), *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (Council of Europe/European Court of Human Rights) para 266, and the case law referred therein. The CJEU [GC] stated in *SM* (2019) that 'In the event that it is established (…) that the child placed under the Algerian kafala system and

facto family relationship between the intended parents and the child. The ECtHR Chamber (2015) found a violation because 'the national authorities had failed to strike the fair balance that should be maintained between the general interest and the private interests at stake', 'without any specific assessment of the child's living conditions with the applicants, and of his best interests'.[20] The Grand Chamber (2017) concluded otherwise, as it considered that the duration and quality of the bonds in the specific case did not amount to a de facto family bond. That said, the non-violation judgment delivered by the Grand Chamber was based on a different appreciation of facts rather than on the legal approach to the de facto family bond.[21] A second case has been *Valdís Fjölnisdóttir and Others v Iceland*. At arrival in Iceland, the child was considered a foreign national (the biological mother was a United States national) and an unaccompanied minor, despite travelling with the intended mothers. The minor was taken into child custody but later given in permanent foster care to one of the intended mothers (since the couple split and subsequent marriages were entered into by both intended mothers), granting equal access to the second mother. No legal adoption was allowed by Icelandic superior courts, and no legal family tie was recognised either, although nationality was granted to the child through an Act of Parliament. The ECtHR (2021) recognised the existence of de facto family bonds between the two intended mothers and the child and found no violation because, although no legal recognition of parenthood was allowed by Icelandic legislation or courts, the family bond was neither impeded nor disturbed. Considering the wide margin of appreciation granted to the States Parties to the European Convention on Human Rights concerning surrogate motherhood, the nature or specifics of the applied legal regime were not in conflict with Article 8 of the Convention.

In the same vein, the CJEU has already accepted a broad understanding of the family bond for purposes of migration and family reunification in the territory of an EU Member State. In *SM*, the Grand Chamber judgment (2019) defined a minor in *kafala* (an Algerian legal guardianship regime) not in the concept of 'direct descendant', which would require a biological or adoptive relationship, but as one of the 'other family members' of a citizen of the European Union. Notwithstanding the nuance, this legal definition allowed to recognise that, as one of the 'other family members', dependant or member of the household of the EU citizen having the primary right of residence, a minor in a *kafala* relationship should be granted entry and residence rights so as to 'maintain the unity of the family in a broader sense'.[22] The ECtHR had previously taken position on the matter, and the CJEU endorsed it: the *kafala* regime establishes family bonds between the minor and the caring adult, secured by Article 8 ECHR.[23] For the ECtHR, this Article protects the minor in *kafala* against arbitrary action by public authorities and requires those authorities, where the existence of a family bond has been proved, to enable that bond to develop and to establish legal safeguards to make it possible for the child to integrate into their family.[24] No separation measures should be adopted in those cases, short of violating the minor's fundamental and legal rights.

Following the aforementioned jurisprudence on surrogate parenthood and *kafala*, it needs to be concluded that there are several ties that equate to family, either de facto relations or legal bonds in origin not recognised at national level in the destination country. Consequently, protection of these ties must be ensured, as they inform the right to a family according to Article 8 ECHR. Hence, separation of a child currently holding a family bond, whether de facto or not, could amount to a violation of the European Convention of Human Rights.

b. Separation Measures May Encroach on a Minor's Family Life

The ECtHR has confronted different situations involving separated minors in the sense defined above,[25] concluding that there is a state obligation to carefully research the nature and scope of the family bond prior to any decision on expulsion (refoulement) or separation from the accompanying adult and to determine how those decisions would affect the child's right to family life. In *Mubilanzila Mayeka and Kaniki Mitunga* (2006), a five-year-old minor travelling accompanied by an uncle, both arriving from the Democratic Republic of Congo in transit to Canada, where her mother was awaiting a refugee status, was separated by Belgian

[20] *Paradiso e Campanelli* paras 75–87.
[21] ibid para 157.
[22] C-129/18 *SM v Entry Clearance Officer, UK Visa Section* (CJEU [GC], 26 March 2019) paras 69–70.
[23] *Chbihi Loudoudi and Others v Belgium* App no 52265/10 (ECtHR, 16 December 2014) para 78.
[24] *Harroudj v France* App no 43631/09 (ECtHR, 4 October 2012) paras 40–4; *Chbihi Loudoudi and Others* paras 88–89.
[25] Not surprisingly, these cases are included in the ECtHR Press Unit fact sheet on 'Unaccompanied Migrant Minors Detention' (updated December 2021) and not in the one devoted to 'Accompanied Migrant Minors Detention' (updated April 2022), as there is no detached 'separated minor' category for the ECtHR Press Unit.

authorities and deported back to the country of origin. The ECtHR found that Belgium had failed to protect the right to a family – both of the child and of the mother – under Article 8 ECHR when preventing the child to continue the travel along with her uncle.[26] In *Bubullima* (2010), an uncle's minor, provided with a notarised power of attorney granting custody in a third country, was not allowed to claim a regularisation permit for the child, as domestic norms only authorised legal or biological parents to act on behalf of a minor. This caused the minor to be separated and detained, awaiting expulsion. Unfortunately, the Court was not to decide on the right to a family but on the right to challenge the lawfulness of the detention before a court. Therefore, it did not elaborate on the status of the minor as an unaccompanied or separated child.[27] In *Rahimi* (2011), a minor escaping Afghanistan was in a detention centre in Lesbos, Greece, allegedly – according to local authorities – accompanied by an adult cousin, but alone by his own telling. Without an appointed tutor, he travelled to the mainland with the assistance of an NGO. The ECtHR accorded the utmost importance to elucidating his personal situation, as the obligations on the state would drastically differ whether he was an unaccompanied minor or not. The Court, considering the facts of the case, decided that Greece had followed a random proceeding for deciding the existence of a family tie between the minor and the accompanying adult, acknowledging a violation of Article 3 ECHR owing to the conditions to which the child was exposed.[28] This case underscores, on the one hand, that a bond other that parenthood (eg being a cousin) is admitted by the ECtHR for the minor not to be unaccompanied and, on the other, that the state is under an obligation to thoroughly investigate the nature of the bond between the minor and the accompanying adult before any measure is adopted. Finally, in *Moustahi* (2020), two brothers, both minors, travelled without the company of an adult family member in a *kwassa* (migrants' boat) along with other fifteen people from Comoros to Mayotte, a French overseas *département* in that archipelago, where their father resided. Upon arrival, the children were registered as travelling with a certain adult (a 'M A') and were consequently detained. The father, provided with the children's birth certificates, tried to get them released to no avail, as they were sent back to Comoros, where their grandmother took them in charge. The ECtHR found France in violation of both the parent's and the children's rights ex-Article 8 ECHR, given that the authorities should have delved into the bonds between the children and M A in order to ascertain if there truly existed a family tie.[29]

In sum, minors crossing borders with an adult who is not the legal parent or guardian or does not have a direct biological relationship are, nonetheless, entitled to the full respect of their right to family according to constant jurisprudence of the ECtHR and the CJEU.[30] That said, the right to family life may lead to maintaining the bond between the accompanying adult and the child, even when it is a temporary company aimed at restoring another family bond for the minor travelling between countries. Be that as it may, the case law underlines the fundamental obligation of national authorities to thoroughly examine the bonds between the minor and the accompanying adult before any separation, internment, or deportation measure is undertaken. The compatibility of such separation measures with the ECHR is not excluded, although this might depend on the specificities addressed in the following section.

c. A Public Interest Can Be at Stake: Fighting Against Human Trafficking and Abuses

The right to family life is not an absolute one. Restrictions are accepted both at the regional level in ECHR and EU law and at the universal level, as determined by the International Covenant on Civil and Political Rights (ICCPR). Such restrictions must satisfy a set of requirements – namely, they must serve a public interest and be provided for by the law, resulting in a necessary and proportionate restriction in the circumstances of the case to attain said goal. It is not the purpose of this paper to elaborate on these elements, which have been widely addressed in scholarly literature. Attention should only be given to the specifics of taking measures in the public interest as justification for restrictions on the right to family life of the separated minor.

[26] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) paras 75–86. On this case, see Vicente A Sanjurjo Rivo, 'La protección del desamparo de una menor inmigrante no acompañada y su familia por el Tribunal Europeo de Derechos Humanos: el caso Mubilanzila Mayeka y Kaniki Mitunga contra Bélgica' (2009) 29 Estudios Penales y Criminológicos 491.
[27] *Bubullima v Greece* App no 41533/08 (ECtHR, 28 October 2010).
[28] *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011) paras 63 and 67–73.
[29] *Moustahi v France* App no 9347/14 (ECtHR, 25 June 2020) paras 111–114.
[30] Other international human rights bodies, such as the HRC, have also adopted am extended the concept of family. See Nicholson, *The Right to Family Life and Family Unity of Refugees*.

According to Article 8.2 ECHR, interference with the exercise of the right to respect for family life must be based on

> the interests of national security, public safety or the economic well-being 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.[31]

Prevention of crime is the public interest of choice when it comes to detention and migration policies concerning minors, whether to hinder a career into crime of unaccompanied minors arriving illegally in a country or to fight against human trafficking networks in which a minor might be caught.[32] Prevention probably represents the main goal for restrictive measures undertaken on unaccompanied and separated minors, which encompasses modern forms of slavery (eg sexual exploitation, domestic servitude, forced labour, recruitment of soldier children, etc.) but could also include forced adoptions or organ trafficking. It truly constitutes an objective threat to migrant minors, especially those travelling alone, as stated in the CRC GC 6 (2005, paras 50–60), the joint GC 3 CMW, GC 22 CRC (2017, paras 40–42), and the joint GC 4 CMW, GC 23 CRC (2017, paras 39–40).

Nevertheless, neither the general fear of trafficking mafias nor the overall region/country information – ie a general prevention goal – can justify a restriction of individual rights (be it the right to family life or the right to security and freedom) as a routine and rigid scheme.[33] Human rights instruments require, along with a general public interest justifying the nature and scope of the measure in abstract terms, a case-by-case examination of the existence of the threat and the necessity and proportionality of the measure to protect the minor against that risk, assuming this measure is comprised by the law establishing limits to the discretional powers of the state at both administrative and judicial levels.[34]

In that vein, the ECtHR has shown a very restrictive approach to the limitation of the right to family based on a 'pressing social need' (eg a child's separation from their family – once proved that a legally or de facto family link exists – in a migration context). The necessity requirement (restriction based on a public interest) does not accommodate other close concepts, such as 'reasonable', 'useful', or 'desirable' restrictions. The separation measure as legal restriction becomes admissible only when required by a 'pressing social need' and if proportionate to the aim pursued. Any restrictive measure at the national level must be subject to domestic judicial review, which should account for individual circumstances and risk assessment.[35] Although a margin of appreciation is granted to the state, the ECtHR retains the right of review over the analyses made by the national authorities.

Surprisingly, there is no extensive case law on 'trafficking in human beings' as the legitimising basis for restrictions with regard to minors in the HUDOC data base.[36] When examining the specific case law concerning separated children, both the CJEU and the ECtHR have seldom been confronted with these public policy restrictions to the right to family life. The CJEU in *SM* (GC 2019) stated that 'it is also necessary to take account of possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation

[31] Art. 17 ICCPR only states a general prohibition of 'arbitrary or unlawful interference with his privacy, family…', without clarifying the specific public interest under which a restriction could be implemented. For clarifications on the interpretative problems this wording brings about, see Schabas and Nowak, *U. N. Covenant on Civil and Political Rights*, 462–466.

[32] An analysis centred on the legal regime of detention of minors is a complementary approach to the family rights–based analysis chosen for this paper. See, in that same vein, Joanna Markiewicz-Stanny, 'The Rights of the Child and a Problem of Immigration Detention' (2020) 9 [2] Polish Review of International and European Law 83. This approach becomes relevant whenever a separated minor's family relation with the accompanying adult is not recognised and the child is detained, as in ECtHR case *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*.

[33] This was also clearly stated by the Inter-American Court of Human Rights in its Advisory Opinion OC 21/14 para 93.

[34] On the requisite 'in accordance with the law' for restrictions on the right to family life, see ECtHR, *Guide on Article 8 of the European Convention on Human Rights*, paras 1–21, and the case law cited therein.

[35] ibid paras 28–30.

[36] A search for 'trafficking in human beings' showed fifty-three judgments, the oldest being *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005). There were seventy-five results for 'human trafficking', with the oldest case being *Ramanauskas v Lithuania* App no 74420/01 (ECtHR [GC], 5 February 2008).

or trafficking.'[37] This pressing social need has been invoked by the parties before the ECtHR in *Rahimi*,[38] although this Court has not taken any consideration into the argument. In *Mubikanzila*, instead, the ECtHR asserted that the detention of the minor could hypothetically be justified based on 'the interests of national security or the economic well-being of the country or, just as equally, for the prevention of disorder or crime', although it concluded that this very detention provoked a violation of the minor's right to family life, as

> the effect of the second applicant's detention was to separate her from the member of her family in whose care she had been placed and who was responsible for her welfare, with the result that she became an unaccompanied foreign minor, a category in respect of which there was a legal void at the time. Her detention significantly delayed the applicants' reunification. The Court further notes that, far from assisting her reunification with her mother, the authorities' actions in fact hindered it.[39]

In summary, European Courts have found violations of a minor's right to a family in situations where family reunification has been impeded either by not recognising a non-European legal family bond (*kafala*) or by not respecting the accompanying adult relationship (extended family) as a caretaker in transit while the child was being safely transferred to or reunited with their legal or biological family, and whereby a separation measure based on a public interest – such as fighting organised crime – is not proved indispensable in the circumstances of the specific case.

III. The Best Interests of the Child: A Solomon Sword between General and Particular Protection of Separated Minors for Enhanced Compliance

The cornerstone of the 1989 United Nations Convention on the Rights of the Child in regard to children's protection is the 'best interests of the child', embodied in Article 3.1:

> In 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.[40]

Both the CRC[41] and legal scholars[42] have stated that the 'best interests' clause is at the same time a principle for children's rights interpretation from which new and specific rights arise, along with a procedural rule.[43] It is not an abstract notion, yet it gains significance when applied to the specific circumstances of a case.[44]

Although the 'best interests' principle is not present in the ECHR, given that minors' rights are not individualised as the Convention dates back to 1950,[45] it has been present in ECtHR case law since the 1990s[46] as a criterion to be taken into account when pondering the need for separation against conflicting rights[47] or when assessing the need in a democratic society for a measure such as the expulsion of a minor.[48] On the other

[37] C-129/18 *SM v Entry Clearance Officer, UK Visa Section* (CJEU [GC], 26 March 2019) para 70.
[38] *Rahimi v Greece* para 58.
[39] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* para 82.
[40] United Nations, *Treaty Series* vol 1577 (United Nations 1999) 3.
[41] CMW/C/GC/3-CRC/C/GC/22 para 32.f.
[42] Jorge Cardona Llorens, 'La Convención sobre los Derechos del Niño: significado, alcance y nuevos retos' (2012) 2 Educatió Siglo XXI 48, 53–54.
[43] UN Committee on the Rights of the Child (CRC), 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14.
[44] UNGA Res 73/195 (11 January 2019) UN Doc A/RES/73/195 para 15 (h).
[45] The only mention of minors' rights in the European Convention on Human Rights appears in Article 5.1.d, on especial rules concerning a minor's detention. Later, Article 5 of the 1984 Additional Protocol 7 mentioned children's interests when addressing equality between spouses.
[46] The term 'best interests of the child' can be found in previous cases, although only as a reference to national legislation or arguments put forward by the parties. The first mention in the Court's reasoning is to be found in *Hokkanen v Finland* App no 19823/92 (ECtHR, 23 September 1994) para 58.
[47] *Johansen v Norway* App no 17383/90 (ECtHR, 7 August 1996) para 78.
[48] *Maslov v Austria* App no 1638/03 (ECtHR, 23 June 2008) para 82.

hand, EU law includes specific and direct references to the best interests of the child – inspired by the 1989 Convention on the Rights of the Child – to be considered when applying any measure concerning minors.[49]

The very concept of the best interests of the child requires a case-by-case examination of a minor's right to a family, weighted against the eventual risk arising out of organised crime – human trafficking or other. No general measure is acceptable without a risk assessment. While the determination is undertaken, a separation measure from the accompanying adult is to be considered exceptional, as declared by the ECtHR (see Section II.c. above) and the CRC.[50] Nevertheless, accompanying measures such as observation through public services – either in public premises or through institutions, such as assisted housing with the help of collaborative NGOs – should be in place. These very measures may contribute to clarifying the case, observing the relationship between the child and the accompanying adult while keeping the minor protected under control and surveillance. Yet no separation or internment measure should be automatically adopted without prior risk determination and assessment, unless there is an imminent or actual danger of being held in a human trafficking network or any other form of criminal activity. The United Nations High Commissioner for Refugees (UNHCR) has already developed methodologies for such a risk assessment,[51] and a collection of best practices has been published by the European Union Agency for Fundamental Rights (FRA).[52] In any event, neither the child's right to be heard (Article 12, 1989 CRC) nor respect for the non-refoulement principle should be forgotten.[53] The best interest of the child requires an individualised analysis of the relationship between the accompanying adult and the minor in order to determine whether it amounts to a de facto family bond, which immediately engages the minor's right to family life, or whether the adult is a temporary guardian transferring the child to a family nucleus, guaranteeing per se the access of the minor to their family as part of the guaranteed minor's right to family life. In the latter case specifically, it should be stressed the need for the EU Member State to where the child arrives to facilitate the transit of the minor to the country where a family member is present, provided that it is in the best interest of the minor, *mutatis mutandis* what it is already foreseen for asylum seekers.[54]

To conclude, some proposals are to be advanced to cope with the current blindness of European and domestic legislation towards the specifics of the separated minors' living and legal situation.[55]

On a normative level, a triple proviso could be specified in EU migration rules, building on the especial situation of separated minors. First, the category of separated minors should be made explicit in EU and national legislation, properly defined and clarified, as a differentiated situation from the unaccompanied minor status and regime. Second, the broader concept of family bonds as per jurisprudential developments should be expressly acknowledged in legislation. In this regard, it should not be limited – as it is now – to the sole legal or customary bonds in EU Member States. It should rather include other ties as prescribed or recognised in the minor's country of origin or transit states. Third, in cases of intended reunification either in the context of general migration or protection seekers, arrival Member State obligations should not depend on the legality of the adult family member status in the destination Member State. The best interests of the child might be in opposition to a situation in which the minor is to be considered unaccompanied and, consequently, taken into

[49] See Article 20, setting the general rules for the implementation of any provision involving minors, and accordingly, Article 6 (guarantees for minors) in Council Directive 2011/95/EU, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180 <http://data.europa.eu/eli/reg/2013/604/oj>.
[50] UN Doc CRC/C/GC/14 paras 58–66 <https://www.refworld.org/docid/51a84b5e4.html>.
[51] UNHCR, 2021 UNHCR Best Interests Procedure Guidelines.
[52] European Union Agency for Fundamental Rights (FRA), *Separated, Asylum-Seeking Children in European Union Member States* and *Current Migration Situation in the EU: Separated Children*.
[53] UN Committee on the Rights of the Child (CRC), 'General Comment No. 6 (2005) on Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (17 May–3 June 2005) para 26.
[54] Article 8.1 and 2, Council Regulation (EC) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.
[55] For all, see the specificities of the invisibility of separated minors in Punto Nacional de Contacto de la Red Europea de Migración en España, *Estudio sobre el régimen de los menores extranjeros no acompañados tras la determinación de su estatus: España 2017* (2017).

the state care system because of the irregular migration status of the adult in the same or another EU Member State and despite that very family member being willing and in a position to take care of them. The right to family life, identity, and culture of the separated child must prevail, unless their best interests reveal otherwise.

On the operative level, thorough training on the specificities of this category should be compulsory for migration officers either in police corps or in competent national, regional, and local administrations. Such training should include continuing updating for new jurisprudential developments concerning interpretation of minors' rights and state obligations in a migratory context. A clear and straightforward protocol should be defined at the competent domestic level to assess human trafficking risks and other pernicious threats. Such a protocol must avoid automatic responses such as separation, unless harmful risk for the minor is proved, for which careful monitoring of the relationship between the separated minor and the accompanying adult must be implemented. Finally, a data collection mechanism at national, regional, or local levels through distinct and compulsory registration of separated minors, along with a best practices directory, should be introduced, as they are not currently being singularised in migration statistics. Its existence would constitute an invaluable tool to be used in self-directed learning for staff, state transparency and accountability, academic research, and prospective policy analysis.

REFERENCES

European Union Agency for Fundamental Rights, *Separated, asylum-seeking children in European Union Member States* (Publications Office of the European Union Office 2011), http://fra.europa.eu/sites/default/files/fra_uploads/1692-SEPAC-comparative-report_EN.pdf.

—— *Current migration situation in the EU: separated children* (Publications Office of the European Union 2016), https://fra.europa.eu/sites/default/files/fra_uploads/fra-december-2016-monthly-migration-report-separated-childr.pdf.

European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child* (2022), https://www.echr.coe.int/documents/handbook_rights_child_eng.pdf.

European Court of Human Rights (ECtHR), *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (updated 31 August 2022).

Fundación Abogacía Española, *La protección en Europa de 'menores separados' de su acompañante adulto en movimientos migratorios* (2019), https://www.abogacia.es/wp-content/uploads/2019/10/Informe-Fundación-análisis-sobre-menores-separados.pdf.

Markiewicz-Stanny J, 'The Rights of the Child and a Problem of Immigration Detention' (2020) 9 [2] Polish Review of International and European Law 83–106.

Nicholson F, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (2nd edn, United Nations High Commissioner for Refugees 2018) https://www.unhcr.org/5a8c40ba1.pdf.

Otaegui Aizpurúa I, *La relevancia del Tribunal Europeo de Derechos Humanos en la protección de los derechos del menor* (Aranzadi Thomson Reuters 2017).

Punto Nacional de Contacto de la Red Europea de Migración en España, *Estudio sobre el régimen de los menores extranjeros no acompañados tras la determinación de su estatus: España 2017*.

Sanjurjo Rivo V A, 'La protección del desamparo de una menor inmigrante no acompañada y su familia por el Tribunal Europeo de Derechos Humanos: el caso Mubilanzila Mayeka y Kaniki Mitunga contra Bélgica' (2009) 29 Estudios Penales y Criminológicos 491–507.

Schabas W and Nowak N, *U. N. Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd rev edn, N. P. Engel 2019).