

3. RECENT JURISPRUDENCE

In two recent cases, we can see how child rights principles and these types of child specific provisions in EU law have been interpreted in the regional European Courts judgements. Both cases are drawn from the immigration context, a context which often serves as a litmus test for the application of the UN CRC rights in a particular jurisdiction, given that the migration is an area where there are strong countervailing arguments are often made on the basis of the public interest in border control and security.

In each case, the courts have found that national authorities failed to consider the best interests of the child and have emphasised that the best interests' principle is central in interpreting the application of law. The ability of children to participate in proceedings has also been a determining factor in the court's decision-making.

3.1 Rahimi v. Greece ¹

- Facts of the case
 - The case concerned the conditions in which an Afghan child, Eivas Rahimi, who, following the death of his parents in armed conflict, left Afghanistan and entered Greece illegally.
 - He was held in the Pagani detention centre on the island of Lesbos for two days and subsequently released with a view to his expulsion.
 - The parties did not agree on other crucial facts. The authorities submitted that, by means of a note written in Arabic, Eivas had been informed of his right to complain to the chief of police and to apply to the president of the administrative court as regards his detention. The applicant claimed that he had not been informed of his rights and situation in a language he could understand. He alleged that he had been placed with adults in detention, had slept on a dirty mattress, had had to eat while sitting on the floor and had not been allowed contact with persons outside the detention centre, meeting only one representative of the German NGO (who was on official business on the island). In contrast, the Greek Government claimed that the applicant had been held in a cell specially adapted for minors and had not made any complaint to the local authorities about the detention conditions.
 - When an order for the applicant's deportation was issued, it mentioned that his cousin, N.M., born in 1987, was accompanying him. The applicant stated that he did not know N.M. and had never otherwise claimed to the authorities.
 - On his release from detention, the applicant was not provided with any accommodation or transport, and apparently received assistance from an NGO.
 - After arriving in Athens, he remained homeless for several days but subsequently provided with accommodation by the NGO Arsis in an Athens hostel. Arsis testified to the court that when the applicant had arrived in Athens he had difficulties integrating, sleeping in the dark and speaking, and was very emaciated.
 - Arsis noted that Eivas had apparently fled Afghanistan because he feared being conscripted into the Taliban armed forces.
 - Arsis claimed that no guardian had been appointed although the public prosecutor responsible for minors had been apprised of the situation.

¹ Rahimi v. Greece ECHR (8687/08)

- In September 2007 the applicant's application for political asylum was rejected; although his appeal was still pending in 2008 when he lodged proceedings before the European Court of Human Rights.
- In the case before the court he alleged violations of Article 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the ECHR, based inter alia on the a lack of support appropriate to his status as a child, the conditions in the Pagani detention centre, consistent disregard for his situation as unaccompanied child, and lack of information on reasons for his arrest or of any remedies in that connection.
- The European Court of Human Rights accepted the applicant's version of the facts in several important regards. Although the detention had been for only two days, the Court condemned the Greek State for a violation of Eivas Rahimi's human rights. The judgement of the European Court of Human Rights, which also found violations of the child's rights on several other counts, is important in several regards.
 - First the Court found that automatic application of the legislation to detain a child without any consideration of his best interests caused a breach of his rights.
 - The Court did not examine what would have been in the child's best interests or what factors should have been considered but considered failure to consider the best interests when taking a decision to detain the child was in and of itself problematic.
 - This underlines the need for a specific step in detention procedures when a child is involved, and requires an active review by the Court of the circumstances of the child.
 - The Court also noted the deep concern expressed by UNHCR that Greek prosecutors, although designated by law as the temporary guardians of minors seeking asylum, rarely intervened in matters relating to the latter's living conditions and treatment. The absence of a guardian, and the deficit in the information and the way it was provided ("the information brochure had been incomprehensible to him"), were significant factors in the Court's finding that the Greek State actions had violated the rights of the child.
 - The Court noted that "it was clear that the authorities were undertaking no efforts to protect [unaccompanied children released from detention] from possible violence and exploitation".

As a whole, the findings illuminate the need for specific safeguards in justice processes for children in precarious situations, in light of their vulnerability and their needs and rights to special protection and assistance.

3.2 *M.A, BT, DA v Secretary of State for the Home Department*²

Facts

- Two minors of Eritrean nationality (MA and BT) and a minor of Iraqi nationality (DA) applied for asylum in the United Kingdom.
- No member of their families was legally present in another Member State of the EU.
- The United Kingdom authorities established that they had already lodged applications for asylum in other Member States: in Italy (MA and BT) and in the Netherlands (DA) and decided that the minors would be transferred to those States, which were considered responsible for examining their asylum applications.
- This case which was referred to the European Court of Justice by a UK court is of enormous interest because it deals with the interpretation of the best interests' principle in relation to

² MA and Others v UK, Case C-648/11

technically complex and politically sensitive legislation, namely the so-called “Dublin II Regulation” to which we previously referred, which sets out criteria for determining which Member State is responsible for examining an asylum application of an asylum applicant who has moved from one country to another.

- Before proceeding with the transfer of MA and DA, but after BT had been transferred, the United Kingdom authorities decided to examine the applications for asylum themselves, under the ‘sovereignty clause’ provided for by the regulation. Consequently, BT was able to return to the United Kingdom.
- However the Court in any event delivered a judgement in the cases.

Judgement

- The Dublin II Regulation explicitly refers to the application of the best interests’ principle as regards the application of some provisions in relation to children but not others. In the absence of a family member, the Member State responsible for examining the application is to be that where the minor has lodged his application for asylum, although the regulation does not specify whether that is the first application which the minor lodged in a Member State or the most recent application lodged in another Member State.
- The Court of Justice declared that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged an asylum application in more than one Member State, the Member State responsible for examining it will be that in which the minor is present after having lodged an application there.
- The Court referred to Article 24(2) of the Charter of Fundamental Rights. It found that “although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child’s best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.”
- The Court press release noted that “that since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State”.