Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 4 May 2023 [1]

Case C-560/20

CR,
GF,
TY
respondent authority:
Landeshauptmann von Wien

(Request for a preliminary ruling from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria))

(Reference for a preliminary ruling – Immigration policy – Right to family reunification – Directive 2003/86/EC – Family reunification of refugees – Unaccompanied minor – Article 10(3)(a) – Parents applying for family reunification with an unaccompanied minor with refugee status together with disabled adult sister of refugee – Member of refugee's family not referred to in Article 10(2) and Article 10(3) – Article 3(5) – Possibility for the Member States to adopt more favourable provisions – Article 4(2)(b) – Family reunification with adult unmarried children of the sponsor who are unable to provide for their own needs on account of their state of health – Article 17 – Examination of applications for reunification on a case-by-case basis – Balanced and reasonable assessment of all relevant interests – Article 7 and Article 24(2) and (3) of the Charter of Fundamental Rights of the European Union)

I. Introduction

1. The present request for a preliminary ruling from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) concerns the eligibility for family reunification of the parents and the disabled adult sister of an unaccompanied minor refugee. [2] For that purpose, the referring court seeks to ascertain the date on which to assess the refugee's status as a minor. It also inquires whether, as a matter of EU law, a residence permit must be granted to the disabled adult sister of an unaccompanied minor refugee where a refusal to do so would have the effect of preventing the parents from exercising their right to family reunification.

[1] Original language: English.

[2] As defined by Article 2(b) and (f) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

II. Legal framework

A. European Union law

2. Article 2(c) of Directive 2003/86 defines the term 'sponsor' as 'a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her'.

3. By Article 2(f) of Directive 2003/86 the term 'unaccompanied minor' is defined as 'third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States'.

4. By Article 3(5) thereof, Directive 2003/86 will not affect the possibility for Member States to adopt, or to maintain, more favourable provisions.

5. Under Article 4(2)(b) of Directive 2003/86, Member States may authorise, pursuant to that directive and subject to compliance with the conditions laid down in Chapter IV thereof, the entry and residence of the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

6. Article 10 of Directive 2003/86 provides that:

'…

2. The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.

3. If the refugee is an unaccompanied minor, the Member States:

(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);

…'

7. Under Article 12 of Directive 2003/86:

'1. By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members referred to in Article 4(1), the evidence that the refugee fulfils the requirements set out in Article 7.

…

Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status.

…’

B. Austrian law

8. The relevant provisions of national law are Paragraphs 11 and 46 of the Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG) (Federal Law on establishment and residence in Austria; ‘the NAG’) of 16 August 2005 [3] and Paragraphs 34 and 35 of the Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005) (Federal Law concerning the granting of asylum (Law on asylum 2005); ‘AsylG 2005’) of 16 August 2005. [4]

III. The facts of the main proceedings and the questions referred for a preliminary ruling

9. RI is a Syrian national, born on 1 September 1999. He arrived as an unaccompanied minor in Austria on 31 December 2015 and applied for international protection on 8 January 2016. The Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum, Austria) granted RI refugee status while he was a minor and notified him of that decision on 5 January 2017. On 6 April 2017, three months and one day thereafter, RI’s parents, CR and GF, and his adult sister, TY, [5] applied [6] to the Embassy of Austria in Syria for permission to enter and to reside in Austria with RI for the purposes of family reunification. RI was a minor at the time those applications were filed. The Embassy of Austria rejected them [7] on the ground that RI had become an adult during the course of the family reunification procedure. There was no appeal against that decision and it became final on 26 June 2018.

10. On 11 July 2018, CR, GF and TY applied to the Landeshauptmann von Wien (Head of Government of the Province of Vienna) for residence permits for the purposes of family reunification under Paragraph 46(1)(2) of the NAG. CR and GF relied on their rights under Directive 2003/86. TY based her application on Article 8 of the European Convention on Human Rights (‘ECHR’). On 20 April 2020, the Landeshauptmann von Wien (Head of Government of the Province of Vienna) rejected those applications since they had not been lodged within three months of the date of when RI’s refugee status was recognised.

11. CR, GF and TY (‘the applicants’) challenged those decisions before the Verwaltungsgericht Wien (Administrative Court, Vienna). That court inquires, inter alia, as to whether the applicants have a right to family reunification pursuant to Article 10(3)(a) of Directive 2003/86 given that RI became an adult in the course of the family reunification procedure. If not, it wishes to know the date when that application for family reunification ought to have been submitted in order for that right to exist.

3 BGBl. I, 100/2005. The version of 14 August 2018 applies to the present proceedings: BGB1. I, 56/2018.

4 BGB1. I, 100/2005. The version of 18 October 2017 applies to the present proceedings: BGB1. I, 145/2017.

5 Born on 15 August 1988. CR, GF and TY are Syrian nationals.

6 Pursuant to Paragraph 35 of AsylG 2005.

7 The decision to reject those applications was notified on 29 May 2018.

12. Following a hearing, the Verwaltungsgericht Wien (Administrative Court, Vienna) found that the applicants are not entitled to accommodation considered as 'normal',[8] do not have 'sickness insurance'[9] and have no stable and regular income.[10] They accordingly do not meet the requirements of Article 7 of Directive 2003/86. The referring court also found that TY, who lives with her parents in Syria, suffers from cerebral palsy, as a result of which she is confined to a wheelchair and requires daily personal care, including assistance with eating. Her mother, CR, provides that care. TY's parents cannot leave her alone as the care her mother provides is otherwise unavailable in Syria and no other family members reside there.

13. The Verwaltungsgericht Wien (Administrative Court, Vienna) held that since the Republic of Austria does not apply the option in Article 10(2) of Directive 2003/86, TY is not a family member for the purposes of family reunification as a matter of Austrian law. The referring court thus considers that RI's parents would be forced to waive their right to family reunification under Article 10(3)(a) of Directive 2003/86 if RI's sister, TY, were not granted a residence permit at the same time as them. It asks if the interpretation of Article 20 TFEU in the judgments in *Ruiz Zambrano*[11] and in *Dereci and Others*[12] may apply by analogy to the exercise of the right to family reunification pursuant to Article 10(3)(a) of Directive 2003/86, so as to extend that directive's scope to categories of persons other than those it expressly provided for. The referring court points to the fact that, under Austrian law, TY may be eligible for a residence permit for compelling reasons relating to her private and family life pursuant to Article 8 ECHR. It nevertheless considers that a right to a residence permit under EU law may confer greater protection than that which might be available through the application of Article 8 ECHR by the Austrian authorities.

14. In those circumstances, the Verwaltungsgericht Wien (Administrative Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the third-country national parents of a refugee who has applied for asylum as an unaccompanied minor and has been granted asylum as a minor continue to rely on Article 2(f) in conjunction with Article 10(3)(a) of [Directive 2003/86] if the refugee reached the age of majority after being granted asylum but during the procedure for granting a residence permit to his [or her] parents?

(2) If Question 1 is to be answered in the affirmative: In such a case, is it necessary that the parents of the third-country national comply with the period for submitting an application for family reunification referred to in the judgment of … 12 April 2018, … *A and S* [(C-550/16, EU:C:2018:248, paragraph 61)], namely "in principle, … within a period of three months of the date on which the 'minor' concerned was declared to have refugee status"?

(3) If Question 1 is to be answered in the affirmative: Must the adult third-country national sister of a recognised refugee be granted a residence permit directly on the basis of EU law if, in the event that the adult sister of the refugee were to be refused a residence permit, the parents of the refugee would be de facto compelled to waive their right to family reunification under

[8] See Article 7(1)(a) of Directive 2003/86.

[9] See Article 7(1)(b) of Directive 2003/86.

[10] See Article 7(1)(c) of Directive 2003/86.

[11] Judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124).

[12] Judgment of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734).

Article 10(3)(a) of Directive [2003/86] because that adult sister of the refugee is in urgent need of the permanent care of her parents on account of her state of health and therefore cannot remain in the country of origin alone?

(4) If Question 2 is to be answered in the affirmative: What criteria are to be applied when assessing whether such an application for family reunification was submitted "in principle" within a period of three months within the meaning of the statements made in the judgment of … 12 April 2018, … *A and S* [(C-550/16, EU:C:2018:248, paragraph 61)]?

(5) If Question 2 is to be answered in the affirmative: Can the refugee's parents continue to rely on their right to family reunification under Article 10(3)(a) of Directive [2003/86] if three months and one day have elapsed between the date on which the minor was declared to have refugee status and the date on which they applied for family reunification?

(6) Can a Member State require the refugee's parents, in principle, to meet the conditions of Article 7(1) of Directive [2003/86] in a family reunification procedure under Article 10(3)(a) of Directive [2003/86]?

(7) Is the requirement to meet the conditions referred to in Article 7(1) of Directive [2003/86] in the context of family reunification under Article 10(3)(a) of Directive [2003/86] dependent on whether the application for family reunification was submitted within a period of three months after the granting of the refugee status within the meaning of the third subparagraph of Article 12(1) of Directive [2003/86]?'

IV. The procedure before the Court

15. On 9 July 2021, the President of the Court suspended the proceedings in the present case pending final judgment in Case C-279/20 and Joined Cases C-273/20 and C-355/20. On 8 August 2022, the President of the Court asked the referring court whether, in the light of the judgments delivered in those cases, it wished to maintain, in whole or in part, its request for a preliminary ruling.[13] On 6 September 2022, the referring court withdrew the first question in its request for a preliminary ruling but maintained its request with respect to the second to seventh questions.

16. The applicants, the Netherlands and Austrian Governments and the European Commission submitted written observations. Those same parties presented oral argument and replied to questions from the Court at the hearing on 14 February 2023.

V. Assessment

17. In keeping with the Court's request, I confine my Opinion to an analysis of the third question.[14]

[13] Judgments of 1 August 2022, *Bundesrepublik Deutschland (Family reunification of a child who has reached the age of majority)* (C-279/20, EU:C:2022:618), and of 1 August 2022, *Bundesrepublik Deutschland (Family reunification with a minor refugee)* (C-273/20 and C-355/20, EU:C:2022:617).

[14] Since the third and sixth questions partially overlap, I shall address the referring court's sixth question to the extent necessary to assist the Court in its deliberations.

18. The Verwaltungsgericht Wien (Administrative Court, Vienna) asks, in essence, if a third-country national, the adult sister of an unaccompanied minor refugee who, due to her state of health, is entirely dependent on her parents, is entitled to a residence permit pursuant to EU law where a refusal to grant that permit would have the effect of preventing her parents from exercising their right to family reunification. [15] The applicants and the Commission consider that this question requires an affirmative answer. The Netherlands and Austrian Governments propose that it receive a negative answer.

19. The applicants submit that, given TY's state of health, a refusal to grant her family reunification would mean that her parents, CR and GF, would be unable to exercise their right to family reunification with their son RI, thereby depriving that right of any practical effect. That outcome is contrary to the objective of Directive 2003/86 to promote family reunification and the requirement to take particular account of the situation of refugees. It is also contrary to the principle of effectiveness according to which provisions of national law must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law. The Commission also considers that Article 10(3)(a) of Directive 2003/86 must be so interpreted as to bring the adult disabled sister of an unaccompanied minor refugee within its scope to enable the latter to benefit from reunification with his or her parents.

20. The Netherlands Government considers that to extend the scope of Article 10(3)(a) of Directive 2003/86 to include the adult disabled sister of an unaccompanied minor refugee would render ineffective the provisions of that directive which expressly permit Member States to extend the circle of persons who can benefit from family reunification. The Austrian Government submits that an extension of the scope of Directive 2003/86 is contrary to the express will of the EU legislature since that measure defines exhaustively the categories of persons to whom it grants a right to family reunification.

21. The referring court considers that the exercise of RI's right to family reunification with his parents is dependent upon the grant of a right of residence to TY at the same time as her parents. [16] I shall therefore first examine RI's right to family reunification with his parents under EU law prior to considering whether TY has a right to a residence permit thereunder.

A. An unaccompanied minor refugee's right to family reunification with his or her parents – Article 10(3)(a) of Directive 2003/86

22. In seeking to facilitate the integration of third-country nationals in Member States by making family life possible through reunification, Directive 2003/86 determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. [17] Article 5(5) of Directive 2003/86 requires Member States to examine applications for reunification in the best interests of any minor children concerned and

[15] The third question is based on the premiss that the third-country national parents (CR and GF) of a refugee (RI) who applied for and was granted asylum as an unaccompanied minor before reaching the age of majority may rely on Article 2(f) of Directive 2003/86, read in conjunction with Article 10(3)(a) thereof, even if that refugee had reached the age of majority after being granted asylum but during the course of the family reunification procedure.

[16] Article 13(2) of Directive 2003/86 provides that as soon as an application for family reunification is accepted, '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'. Article 13(1) of Directive 2003/86 also provides that as soon as it accepts an application for family reunification, 'the Member State concerned shall authorise the entry of the family member or members'.

[17] To which recital 4 and Article 1 of Directive 2003/86 refer.

with a view to promoting family life.[18] Directive 2003/86 falls to be interpreted and applied in the light, inter alia, of Article 7 and Article 24(2) and (3) of the Charter of Fundamental Rights of the European Union ('the Charter').[19] Article 7 of the Charter recognises the right to respect for private or family life.[20] That provision is to be read in conjunction with the obligation to have regard to the child's best interests, as Article 24(2) of the Charter recognises. Account must also be taken of the need, as expressed in Article 24(3) of the Charter, for a child to maintain a personal relationship with both parents on a regular basis.[21]

23. Article 4 of Directive 2003/86 defines the members of a third-country national's family on whom Member States must or may, as the case may be, confer a right to family reunification within the meaning of that directive.[22] Article 4(1) of Directive 2003/86 governs the right to family reunification of members of the sponsor's nuclear family, namely his or her spouse and his or her minor children.[23] Article 4(2)(a) of Directive 2003/86 provides that Member States may, in certain circumstances, authorise family reunification of parents of the sponsor or his or her spouse. The possibility of family reunification with parents is thus, in principle, a matter for each Member State to determine by reference to that provision. Its enjoyment is subject, in particular, to the condition that the parents are dependent upon the sponsor and do not enjoy proper family support in their country of origin.[24] Exercise of the right to family reunification pursuant to Article 4(2)(a) of Directive 2003/86 is also 'subject to compliance with the conditions laid down in Chapter IV' of Directive 2003/86.

24. Article 7(1) of Directive 2003/86, contained in Chapter IV thereof, allows Member States to require evidence that the sponsor has (a) accommodation regarded as normal for a comparable family in the Member State concerned; (b) sickness insurance for himself or herself and the members of his or her family; and (c) stable and regular resources sufficient to maintain himself or herself and the members of his or her family without recourse to the social assistance system of the Member State concerned. Since Article 7(1) of Directive 2003/86 uses the word 'may', Member States can waive the requirements that provision lays down.

25. In certain instances refugees benefit from more favourable conditions for the exercise of the right to family reunification.[25] Article 10(3) of Directive 2003/86 specifically addresses the situation of unaccompanied minor refugees. It affords them preferential treatment[26] by ensuring

[18] Judgment of 1 August 2022, *Bundesrepublik Deutschland (Family reunification with a minor refugee)* (C-273/20 and C-355/20, EU:C:2022:617, paragraphs 35 and 39).

[19] See recital 2 of Directive 2003/86.

[20] In so far as Article 7 of the Charter contains rights which correspond to those guaranteed by Article 8(1) ECHR, their meaning and scope are the same (judgment of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 70 and the case-law cited).

[21] Judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraphs 55 and 56 and the case-law cited).

[22] Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 35). Article 4 of Directive 2003/86 is not exhaustive. See, for example, Article 10(2) of Directive 2003/86.

[23] See recital 9 of Directive 2003/86. In judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 64 and 65), the Court held that Article 4(1) of Directive 2003/86 adheres to a broad conception of 'nuclear family'. It is settled case-law that Article 4(1) of Directive 2003/86 imposes specific positive obligations on the Member States, with corresponding clearly defined individual rights, since it requires them, in cases governed by that directive, to authorise family reunification of certain members of the sponsor's family without having any margin of appreciation in that regard (judgment of 20 November 2019, *Belgische Staat (Implied acceptance decision scheme)*, C-706/18, EU:C:2019:993, paragraph 29 and the case-law cited).

[24] Judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 34).

[25] See Chapter V of Directive 2003/86 entitled 'Family reunification of refugees'. Recital 8 of Directive 2003/86 provides that 'special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification'.

[26] Judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 44).

family reunification with, inter alia, their parents [27] or their legal guardians [28] without imposing certain conditions otherwise applicable under that directive. Article 10(3)(a) of Directive 2003/86 thus requires [29] Member States to authorise the family reunification of a refugee who is an unaccompanied minor with his or her parents 'without applying the conditions laid down in Article 4(2)(a)' of that directive.

26. Given that Article 4(2)(a) of Directive 2003/86 explicitly refers to the conditions laid down in Chapter IV, Member States cannot require an unaccompanied minor refugee or his or her parents to meet the requirements of Article 7(1) of Directive 2003/86 in a family reunification procedure based on Article 10(3)(a) thereof. [30] Article 10(3)(a) of Directive 2003/86 makes it clear that the EU legislature specifically excluded, inter alia, the requirement that an unaccompanied minor refugee be dependent on his or her parents [31] and that he or she comply with Article 7(1) of Directive 2003/86. [32] That reading of Article 10(3)(a) of Directive 2003/86 is consonant both with the context in which it appears and with the aim of Directive 2003/86 to grant preferential protection to refugees and to take account of the vulnerable situation of minors, particularly unaccompanied minors. If the parents of an unaccompanied minor refugee were required to fulfil the requirements of Article 7(1) of Directive 2003/86, the effective application of Article 10(3)(a) thereof and the preferential treatment of unaccompanied minor refugees would be restricted.

B. An unaccompanied minor refugee's right to family reunification with other family members – Article 10(2) and (3)(a) of Directive 2003/86

27. The Court has held that a refugee's sister is not one of a sponsor's family members to whom Article 4 of Directive 2003/86 refers. [33] In addition, RI does not have a right to family reunification with his sister, TY, pursuant to Article 10(3)(a) of Directive 2003/86. The text of that provision is unequivocal: it applies to unaccompanied minor refugees and their parents only. [34]

28. It is settled case-law that national authorities may not, on the basis of Directive 2003/86, issue a residence permit to a third-country national who does not meet the requirements that directive lays down for that purpose. The Court has gone so far as to hold that national legislation that

[27] Article 10(3)(a) of Directive 2003/86 refers to first-degree relatives in the direct ascending line.

[28] Article 10(3)(b) of Directive 2003/86.

[29] That provision uses the term 'shall'. The right to family reunification of unaccompanied minor refugees with their parents pursuant to Article 10(3)(a) of Directive 2003/86 is thus not subject to a margin of discretion on the part of the Member States (judgment of 12 April 2018, *A and S*, C-550/16, EU:C:2018:248, paragraph 43).

[30] The Austrian Government considers that the conditions in Article 7(1) of Directive 2003/86 apply to family reunification pursuant to Article 10(3)(a) thereof. It emphasises that the first subparagraph of Article 12(1) of Directive 2003/86 specifically refers to and excludes the application of the requirements laid down in Article 7(1) thereof. According to that Government, Article 10(3)(a) of Directive 2003/86 does not explicitly refer to, and thus exclude, the application of Article 7(1) thereof.

[31] Judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 34).

[32] By Article 12(1) of Directive 2003/86, Member States shall not require the refugee and/or family member(s) of his or her nuclear family to fulfil the requirements set out in Article 7 thereof. Article 10(3)(a) of Directive 2003/86 thus provides more extensive protection to unaccompanied minor refugees than the first subparagraph of Article 12(1) of Directive 2003/86, the application of which is limited to refugees and members of their nuclear family.

[33] Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 69).

[34] That provision is inextricably linked to the concept of 'nuclear family' as envisaged by Directive 2003/86.

allows the issue of a residence permit on the basis of Directive 2003/86 to a person who does not meet the requirements contained therein impairs that directive's effectiveness and is contrary to the objectives it pursues. [35]

29. By enacting Directive 2003/86, which applies to all Member States – with the exception of the Kingdom of Denmark and Ireland – the EU legislature did not intend to regulate all matters relating to family reunification exhaustively, [36] but instead established a set of minimum common rules in reliance upon the principles of subsidiarity and proportionality. [37] Directive 2003/86 therefore provides for minimum harmonisation and does not exclude the Member States' right to apply provisions of national law on family reunification in cases where that directive does not apply. [38] The conditions in Directive 2003/86 are thus without prejudice to Member States, under Article 3(5) thereof, conferring rights of entry and residence under more favourable conditions by reference to their respective national laws. [39] Where a Member State provides for such favourable conditions, national law, not Directive 2003/86, [40] regulates their exercise, thus excluding the application of the Charter. [41]

30. The Austrian Government confirmed at the hearing that although it considers that TY does not have a right to family reunification with RI pursuant to Article 10(3)(a) of Directive 2003/86, the Republic of Austria grants a right to family reunification to such individuals under national law in accordance with Article 8 ECHR. This division of competences between the European Union and the Member States is reflected both in the clear terms in which Directive 2003/86 is framed and in the Court's consistent interpretation of its provisions.

31. The applicants and the Commission nonetheless claim that, in order to guarantee the effectiveness of an unaccompanied minor refugee's right to family reunification with his or her parents under Article 10(3)(a) of Directive 2003/86, that provision must be interpreted so as to confer that right upon his or her disabled sibling. That end is to be achieved by an interpretation of Article 10(3)(a) of Directive 2003/86 in the light of Articles 7 and 24 of the Charter so as to guarantee RI's right to family reunification with his parents and, by extension, with his sister. [42]

32. When they implement Article 10(3)(a) of Directive 2003/86, Member States must respect the fundamental rights enshrined in the Charter, here Articles 7 and 24 thereof. The existence of that obligation cannot, however, support an interpretation of Article 10(3)(a) of Directive 2003/86 or

35 Judgment of 20 November 2019, *Belgische Staat (Implied acceptance decision scheme)* (C-706/18, EU:C:2019:993, paragraphs 35 and 37 and the case-law cited).

36 See Article 3(5) of Directive 2003/86.

37 See recital 16 of Directive 2003/86.

38 To that effect, see Opinions of Advocate General Pikamäe in *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)* (C-483/20, EU:C:2021:780, point 53), and of Advocate General Hogan in Opinion 1/19 *(Istanbul Convention)* (EU:C:2021:198, footnote 81).

39 Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 43). See, by analogy, judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraphs 32 to 43), which interprets Article 3(2)(c) of Directive 2003/86 so as to exclude from its scope third-country family members of a beneficiary of subsidiary protection. While those family members do not fall within the field of application of EU law, a Member State may grant them more favourable treatment under national law (judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraphs 34 and 37).

40 See, by analogy, judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraphs 34 and 49). See also, by analogy, judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraphs 82 and 83), with respect to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

41 See, by analogy, judgment of 10 June 2021, *Land Oberösterreich (Housing Assistance)* (C-94/20, EU:C:2021:477, paragraphs 60 to 63).

42 See also recital 2 of Directive 2003/86.

any other provision of that directive that is contrary to the express terms in which they are expressed. A *contra legem* interpretation of that kind, whether by reference to the provisions of the Charter or the principle of effectiveness, is also excluded since it would breach the principle of legal certainty.[43] Nor can the absence of a reference to any other family members in Article 10(3)(a) of Directive 2003/86 be attributed to an oversight on the part of the EU legislature since it specifically envisaged situations analogous to those that arise in the present case, as clearly evidenced by Article 4(2)(b) and Article 10(2) thereof.

33. Article 10(2) of Directive 2003/86 expressly allows Member States to confer the right to family reunification on the members of a refugee's family other than those to whom Article 4 thereof refers where those persons are dependent on the refugee.[44] Article 10(2) of Directive 2003/86 affords each Member State the option to decide whether to so extend the scope of Directive 2003/86. It also confers significant latitude on each Member State to choose the members of a refugee's family, other than those to whom Article 4 of Directive 2003/86 refers, who may benefit from any such extension.[45]

34. It is clear from the file before the Court that the Republic of Austria has chosen not to avail of the option in Article 10(2) of Directive 2003/86. In any event, TY is dependent on her parents, not on her brother RI.[46] The Court has held that national legislation that does not comply with the condition of dependency laid down in Article 10(2) of Directive 2003/86 is contrary to that directive's objectives, as it allows the status it afforded thereunder to be granted to persons who do not meet the conditions to obtain it.[47]

35. The Court has also ruled that the Charter does not strip Member States of their power to decide to implement Article 10(2) of Directive 2003/86 and to examine applications for family reunification made thereunder.[48] It follows that it is not open to the Court to alter or to extend the text and the scope of Article 10(2) of Directive 2003/86 by way of reliance upon Article 7 or Article 24 of the Charter.[49]

[43] By analogy with the *contra legem* interpretation of national law, see judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 32 and the case-law cited). The principles that case-law describes apply to the interpretation of EU and national law. See also, by analogy, Lenaerts, K. and Gutiérrez-Fons, J., *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI AEL 2013/9, p. 16, in which the authors state that 'where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness … It goes without saying that that general principle of interpretation must not trespass on the limit of "*contra legem*"'.

[44] See, by analogy, judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 48).

[45] Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 39 and 40). Recital 10 of Directive 2003/86 states that 'it is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children …'.

[46] Whilst the applicants stated at the hearing that RI sends approximately EUR 100 per month to his family in Syria, there is no evidence TY is dependent on RI.

[47] Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 42). Recital 6 of Directive 2003/86 states that 'the material conditions for exercising the right to family reunification should be determined on the basis of common criteria'. See also, by analogy, judgment of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, paragraphs 44, 48 and 49), where the Court held that the third subparagraph of Article 12(1) of Directive 2003/86 would be deprived of its effectiveness and clarity if a Member State could not impose a time limit to submit an application for family reunification thereunder.

[48] Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 65).

[49] Article 51(1) of the Charter provides that its provisions are addressed to the Member States only when they are implementing EU law. According to Article 51(2) thereof, the Charter does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify the powers and tasks as defined in the Treaties. See, to that effect, judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraph 85).

36. I therefore advise the Court that, pursuant to Article 10(2) and (3)(a) of Directive 2003/86, read in the light of Articles 7 and 24 of the Charter, RI has no right to family reunification with his sister TY. An untoward extension of the scope of those provisions would be contrary to the Court's recent case-law, undermine the effectiveness of Directive 2003/86 and upset the carefully crafted legislative balance the European Union and the Member States have arrived at.

37. Nor can the Court's case-law on Article 20 TFEU and Union citizenship, to which the referring court referred, be applied by analogy so as to justify an extension of the scope of Directive 2003/86.[50] In its judgment in *Ruiz Zambrano*,[51] the Court held, inter alia, that Article 20 TFEU precludes a Member State from refusing a third-country national with dependent minor children, who are Union citizens, a right of residence in the Member State of residence and nationality of those children, where that decision would deprive those children of the genuine enjoyment of the substance of the rights attaching to Union citizenship. In so ruling, the Court emphasised that Union citizenship is 'the fundamental status of nationals of the Member States'.[52] The status of third-country nationals, including refugees, cannot be compared with that of Union citizens save where EU legislation specifically grants third-country nationals comparable rights and obligations.[53]

C. The right of adult unmarried children to family reunification when they are unable to provide for their own needs due to their state of health – Article 4(2)(b) of Directive 2003/86

38. Article 4(2)(b) of Directive 2003/86 provides that Member States may authorise the entry and residence of the adult unmarried children of the sponsor or his or her spouse, subject to the requirement that the children in question are objectively unable to provide for their own needs due to their state of health. In that context the conditions laid down in Chapter IV of Directive 2003/86 must be complied with.

39. Leaving to one side the fact that it is unclear whether the Republic of Austria has chosen to avail of the option in Article 4(2)(b) of Directive 2003/86,[54] that provision refers to the nuclear family of the sponsor rather than to his or her brothers and sisters. TY therefore cannot rely upon its terms to assert a right to family reunification with RI. As points 36 and 37 of the present Opinion indicate, in accordance with the Court's case-law, it is contrary to the objectives of Directive 2003/86 to extend the protection that Article 4(2)(b) thereof affords to other persons. Nor can the Charter operate so as to limit the Member States' choice as to whether to give effect to that provision.[55]

[50] Judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124); of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734); and of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354). See also judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602).

[51] Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

[52] Judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraph 41 and the case-law cited).

[53] See, for example, recital 3 and Article 13 of Directive 2003/86. See also, by analogy, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44). The limitations on extending the scope of Directive 2003/86 confirmed by the case-law referred to in points 36 and 37 of the present Opinion apply *mutatis mutandis* to family reunification pursuant to Article 10(3)(a) of Directive 2003/86.

[54] The Netherlands Government indicated at the hearing, without being contradicted by the Austrian Government, that the Republic of Austria had exercised the option under Article 4(2)(b) of Directive 2003/86.

[55] See, by analogy, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 42 and 65).

40. While RI and his sister, TY, do not have a right to family reunification under Article 4(2)(b) of Directive 2003/86, his parents, CR and GF, are entitled to family reunification with RI pursuant to Article 10(3)(a) thereof. Once their application for family reunification has been accepted, CR and GF also have a right to obtain a residence permit in the Republic of Austria in accordance with Article 13(2) of Directive 2003/86. In the judgment in *O and Others*,[56] the Court observed that third-country nationals lawfully resident in a Member State who seek to benefit from family reunification must be recognised as 'sponsors' within the meaning of Article 2(c) of Directive 2003/86. CR and GF are entitled to family reunification with TY under Article 4(2)(b) of Directive 2003/86 provided that the Republic of Austria avails of that option. Once Member States exercise that option they implement EU law. National legislation for that purpose must therefore comply with the fundamental rights enshrined in the Charter and the principle of proportionality.[57]

41. CR, GF and TY applied together for family reunification with RI. In the light of the nature of their family relationship and TY's severe disability, their applications should be examined simultaneously[58] in order to ascertain all of their rights and obligations under EU law, including Article 4(2)(b), Article 10(3)(a) and Article 13 of Directive 2003/86, read in the light of Article 7 and Article 24(2) and (3) of the Charter.[59] In that regard, it is settled case-law that Article 17 of Directive 2003/86 requires the case-by-case examination of applications for family reunification. Competent national authorities, when implementing Directive 2003/86 and examining such applications, must make a balanced and reasonable assessment of all of the interests in play.[60] Account must also be taken of the best interests of minor children and the special circumstances of unaccompanied minor refugees.[61]

42. It is therefore contrary to the objectives of Directive 2003/86 and Article 7 and Article 24(2) and (3) of the Charter to require applicants such as CR and/or GF[62] to possess a residence permit pursuant to Article 13(2) of that directive prior to the examination, pursuant to Article 4(2)(b) thereof, of TY's application for family reunification with her parents. Such a piecemeal approach would, moreover, undermine RI's right to family reunification under Article 10(3)(a) of Directive 2003/86.

43. The Republic of Austria may require that family reunification pursuant to Article 4(2)(b) of Directive 2003/86 be subject to compliance with the requirements laid down in Article 7(1) thereof. Those requirements apply with respect to TY only, as CR and GF are exempted therefrom by virtue of Article 10(3)(a) of Directive 2003/86.[63] The Court has held that since the authorisation of family reunification is the general rule, the faculty given by Article 7(1) of Directive 2003/86 must be interpreted strictly. Member States must not use their margin of

[56] Judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 68).

[57] See, by analogy, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family Reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 61 to 67).

[58] The Austrian Government confirmed at the hearing that all the applications in question were being examined simultaneously.

[59] See, by analogy, Article 16(1) of 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 (recast) (OJ 2013 L 180, p. 31). Article 16(1) of Regulation No 604/2013 provides, inter alia, that where a severely disabled applicant is dependent on the assistance of his or her parent(s) legally resident in a Member State, that Member State shall normally keep or bring together the applicant with that parent. In accordance with recital 17 of that regulation, that provision seeks to allow Member States to bring together 'family members' where it is necessary to do so on humanitarian grounds. See also, by analogy, judgment of 6 November 2012, *K* (C-245/11, EU:C:2012:685, paragraphs 26 to 54).

[60] Judgment of 21 April 2016, *Khachab* (C-558/14, EU:C:2016:285, paragraph 43 and the case-law cited).

[61] See, by analogy, judgment of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, paragraphs 26 to 36).

[62] CR and GF have a right to family reunification with RI pursuant to Article 10(3)(a) of Directive 2003/86 and are thus entitled to a residence permit pursuant to Article 13(2) thereof.

[63] See point 26 of the present Opinion.

appreciation so as to undermine the objective to promote family reunification.[64] It is for the referring court to verify the competent authorities' compliance with the requirements of Article 7(1) of Directive 2003/86 and the case-law thereon.

VI. Conclusion

44. In the light of the foregoing considerations, I propose that the Court answer the third question referred by the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) as follows:

Article 4(2)(b), Article 10(3)(a), Article 13(2) and Article 17 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and Article 7 and Article 24(2) and (3) of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the adult disabled sibling of an unaccompanied minor refugee who, due to his or her state of health, is entirely dependent on his or her parents is entitled to family reunification with his or her parents and minor sibling pursuant to EU law, provided the Member State in question has exercised the option laid down in Article 4(2)(b) of Directive 2003/86.

[64] Judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 43).