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# FAMILY REUNIFICATION FOR UNACCOMPANIED REFUGEE MINORS, A RIGHT OR A PRIVILEGE?

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The Case of the United Kingdom

## Abstract:

Family reunification for unaccompanied refugee minors is one of the most debatable issues when it comes to deciding whether it should be viewed as a right or it can be justifiable for states to completely prevent it and rather provide it only as a privilege. The discussion in the legal sphere proved that the issue is still problematic in both international and European laws. In this thesis, I have analyzed this issue through assessing the three claims that were provided by the United Kingdom for its negative position on the case. Through the lens of the child's best interests' principle, the non-discrimination principle, and the global distributive justice theory, I argued for considering family reunification as a right rather than a privilege. Children should always be treated as children. It cannot be justifiable for states to completely prevent them from being reunited with their families for being refugees.

*Keywords: Family Reunification, Unaccompanied Refugee Minors, the United Kingdom, the Best Interests of the Child, Non-Discrimination Principle, Global Distributive Justice, the Convention on the Rights of the Child.*

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## List of Abbreviations:

UK: The United Kingdom, consists of England, Scotland, Wales and Northern Ireland.

UAM: Unaccompanied Minors.

UDHR: Universal Declaration of Human Rights.

UNHCR: The Office of the United Nations High Commissioner for Refugees.

ICCPR: International Covenant on Civil and Political Rights.

ICESCR: International Covenant on Economic, Social and Cultural Rights.

CRC: The United Nations Convention on the Rights of the Child.

CESCR: The Committee on Economic, Social and Cultural Rights.

EU: The European Union.

GC: General Comment.

OHCHR: The Office of the United Nations High Commissioner for Human Rights.

FRD: The European Family Reunification Directive.

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## 1.Introduction

*“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” (UDHR, 1948, art. 16.3).*

The right to family has been protected under several provisions of international, regional and national treaties and legislation. For instance, the two main instruments of human rights, which are: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both recognize the family as the natural and fundamental unit of society that should be protected both by the society and the state. (art.23.1, and art.10.1 respectively).

Children are vulnerable and highly dependent on their family; especially their parents. Thus, this right to family has particularly been protected through many different articles in the United Nations Convention on the Rights of the Child (CRC). For example, in articles 7, 8, 9, and 10.

Some children have been exposed to extra-ordinary circumstances which pushed them to be refugees in a strange country without a parent or a guardian. Those are the unaccompanied refugee minors. Between 2008 and the end of 2017, the total number of unaccompanied refugee minors entering Europe was about 278,760. Nearly 8.4% of them ended up in the United Kingdom (UK) (Eurostat, 2018: annual data).

After their miserable journeys to Europe, a new journey faced them in the countries of asylum that determines their lives and futures. Among the controversial issues that face both the countries and the UAM after protection is provided (either temporary or permanent), is the issue of family reunification.

The problem with this issue is that it is totally up to the country to decide who to allow to move and reside in its territories. For example, in this regard, we can find that the United Kingdom decided simply not to grant this right to the families of unaccompanied refugee minors residing within its territory (Gov.uk, Settlement: Refugee of Humanitarian Protection).

## **1.2. Aim and Research Question**

The aim of this thesis is to assess whether family reunification for unaccompanied refugee minors should be one of their rights both as children and as refugees, or whether it should be completely left to the state to decide whether to grant or not to grant it for those children who migrated without their parents. I will do this assessment in light of assessing the claims provided by the UK for its position on the issue.

I'm completely aware that this issue might be also problematic for adults, especially the parents. However, I have decided to deal with the problem from the perspective of children because of their double vulnerability status as children and refugees at the same time.

Based on the aim of my research, the main question of this thesis will be as follows:

- Should family reunification for unaccompanied refugee minors be viewed and implemented as a right, or is it justifiable for states to restrict or ban it and provide it only as a privilege?

In order to answer this question, the following sub-question has been developed:

- How strong are the provisions which are governing the issue of family reunification for unaccompanied refugee minors?

## **1.3. Methods and Materials:**

In order to answer the research question of this thesis, I will use a combination of two methods, which are: the legal method, and the case method (case study).

### **1.3.1. The Case Method**

In academic research, a case study is a “detailed investigation, often with data collected over a period of time, of phenomena, within their context” (Hartley,2004:323). The aim of the case study varies from describing, through explaining, predicting and until controlling certain processes associated with a phenomenon at various levels (Gagnon,2010:2).

In this thesis, the aim behind choosing the UK's position on family reunification for UAM as a case study is to both describe and explain the issue of family reunification for UAM in

terms of practice and to assess the strength of the claims which are provided by the UK for its position in this regard. The case of the UK was an important choice since it is one of only two countries in the EU (the other is Denmark) that prevent children under 18 to act as sponsors for bringing their parents up to live with them (Amnesty International UK, 2017: Press Release).

Concentrating on one single case appears to be a strength for this method since it allows us to go deeply into analyzing the circumstances and complexity of this specific case (May,1997:224). However, this same strength could simultaneously work as a weakness. Concentrating on the circumstances of one case might make it difficult for generalizing the outcomes of the research beyond the boundaries of the case itself (Gagnon,2010:3).

In order to overcome this weakness, I will combine this case study with the legal method that will help to explain the situation in more general terms. Understanding the position of family reunification in the international and regional legal instruments and bodies will help answer my research question on whether this issue should be viewed as a right or is it totally up to the state to decide. By answering this question, I could, at least initially, generalize this answer to the case in Denmark.

Moreover, by comparing the reasons provided by other countries for refusing family reunification for unaccompanied refugee minors with the ones provided by the UK, it can be found that mainly the reasons are almost the same.

### **1.3.2. Legal Method**

In Legal research, academics find and use legal information in order to solve legal problems (McFadzean, Gareth, 2010:4). In this thesis, the legal method will be useful in providing a general background that will assist in answering the research question. I will use both primary and secondary legal sources. The primary sources include the legal provisions themselves from both international and regional treaties, case law, and extra-legal sources, including codes and guidelines provided by different legal bodies such as the Comments from the UN Committees (McFadzean, Gareth,2010:5). Whereas the secondary sources consist of “textbooks, monographs, journals, encyclopedic works, and reference and bibliographic works including dictionaries”. (McFadzean, Gareth,2010:5).

### **1.3.3. The Used Materials**

In terms of materials, I will use both primary and secondary sources. The primary sources include legal documents such as international, regional and national treaties, human rights documents, court cases and so on.

Secondary sources will consist of monographs, books, dissertations, academic journals, official news websites, as well as, human rights reports from trustworthy organizations and NGOs. For instance, from UN bodies, Amnesty International, European and British NGOs, and so forth. These will be helpful in both describing and analyzing the issue in question.

### **1.4. Theoretical Framework:**

Mainly, two principles have been brought up to form the theoretical framework that will assist in answering the research question of this thesis. These are: the child's best interests' principle and the principle of non-discrimination.

Finally, some aspects of the global distributive justice theory will be considered in order to analyze the moral obligations of the states toward refugees and their families in terms of allowing the families to join their refugee children who are residing in a third state.

#### **1.4.1. The Child's Best Interests' Principle**

This principle was firstly introduced in article 3.1 of the United Nations Convention on the Rights of the Child (CRC) which states that *"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"* (CRC,1989: art.3.1).

Since CRC did not define this principle or provide a checklist of the things that should be considered when deciding whether a certain decision is in the best interests of the concerned child or not, some academics have tried to put a definition for it. For instance, John Eekelaar stated that a Child's Best Interests are *"basic interests, for example, physical, emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own"*.

(Freeman,2007:27).

Michael Freeman has identified three roles for this principle. First, it should be considered at the time of deciding on other rights stated in the CRC. So, the principle might be supporting, justifying, or clarifying any concerns or issues occurring when deciding on anything related to the child. Second, the principle might play the role of a mediator in case of conflicting rights in the CRC. Finally, the principle could also close any gaps occurring in the CRC (Freeman,2007:32-3).

So, this principle could be considered a milestone for any issue in relation to the child. Despite some of its vagueness and, sometimes, misuse (Perez,1998:213), the Committee on the Rights of the Child, the member states, and human rights defenders and NGOs are relying highly on this principle for justifying any action that should (not) be taken in relation to the child.

Therefore, this principle is important for states when it comes to justifying their refusal for granting unaccompanied refugee minors with family reunification. Therefore, this same principle will be important for analyzing their claims.

#### **1.4.2. The Principle of Non-Discrimination**

Among the important principles when dealing with the rights of children is the principle of non-discrimination. This principle was enshrined in article 2 of the Convention on the Rights of the Child. It called on all member states to ensure that all the rights in the convention are applied to all children without discrimination of any kind. This includes discrimination based on his or her parents' or legal guardians' race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (CRC,1989: art.2.1).

In its general comment no.6, the UN Committee on the Rights of the Child stated that this principle should be applied when dealing with unaccompanied refugee minors. According to this principle, they should not be discriminated for being children, being unaccompanied, being refugees, asylum seekers, or migrants (CRC/GC/2005/6, 2005: para.18).

It is worth to mention that this principle should not mean the prevention of differentiation in the protection provided for those children based on the fact that they are children. Rather, this

principle is, in fact, encouraging such positive differentiation based on their vulnerable needs (CRC/GC/2005/6,2005: para.18).

### **1.4.3. Global Distributive Justice Theory**

We are living in a globalized world where states are affecting each other. Negative circumstances occurring in one state might be caused, either directly or indirectly, by other states. For example, poor economic circumstances in African states are, in one way or another, a result of long years of exploitation by western countries who benefited from this exploitation to build up their own economies (Benhabib,2004:1778). Moreover, in a globalized world, the consequences of the bad situation in a certain state will definitely reach other states, even the ones that are further away. Take, for instance, the Syrian crisis and how the migration flows caused a migration crisis in the European continent (bbc.com,2016: European migrant crisis).

All this means one thing, the countries of the world have an obligation to cooperate in order to ensure that justice is distributed fairly among people all over the world.

The global distributive justice theory is a theory of political philosophy and is concerned with finding ways to justify the inequalities between people in a global context (Blacke and Smith,2013: plato.stanford.edu). According to this theory, rich countries have an obligation to ensure that “the basic entitlements of people to live a decent life are met” (Moore,2015:215).

The distributive justice theory is not new. However, it was concerned only with providing fair opportunities inside the state itself while ignoring the global level. Quite recently, political philosophers tend to concentrate more on discussing this issue in a more international perspective. This theory covers a wide range of issues such as economic situation and fair trade, gender equality, and immigration across borders (Blacke and Smith,2013: plato.stanford.edu).

For the purpose of this thesis, I will only concentrate on the discussion which is related to the issue of closing borders and migration.

### **1.5 List of Definitions:**

For the purpose of this thesis, the following concepts are defined as follows:

- A minor/A child: “Every human being below the age of eighteen years unless, under the law

applicable to the child, majority is attained earlier” (CRC,1989: art.1).

- An Unaccompanied minor: “A person who is under the age of eighteen, and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so” (UNHCR,1997:1).

- A refugee: Any person “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. (Refugee Convention, 1951: art.1.2 and additional protocol, art.I).

- The Family: Consists of parents (or other legal guardians) and children who are under 18 years old (including adoptive children).

- Family Reunification: An entry channel which enables persons from a third country to join their family members who are residing legally in another country (Europa.eu,2018: Family Reunification).

- A Sponsor: The person who is residing legally in a third country and who can apply for his other family members to be reunified with him.

- Durable Solutions: An ultimate goal of refugee protection that will enable them to live safely and build up their lives and integrate into their new societies (refugeecouncil.org,2013).

## **1.6 Literature Review:**

When it comes to previous academic research conducted in the area of the rights of unaccompanied refugee minors in general and their right to family reunification in particular, two problems were identified that affected the unaccompanied minors’ enjoyment of this right, a problem in the international and regional laws and a problem in the implementation of these laws.

When it comes to the problems within the law itself, Gates argued in his article that the International Convention on the Rights of the Child is not providing a proper protection that

addresses the extraordinary position of unaccompanied refugee minors. He argued that “this Convention (UNCRC) does not specifically acknowledge the plight of unaccompanied minors, nor does it distinguish between their painful and often traumatic childhoods and those experienced by accompanied children—a childhood often filled with loving parents, peaceful schools, and harmonious playgrounds” (Gates,1999:300). Bhabha (2003) added that the issue of migration itself is usually addressed by the law as related to adults and their families, and thus ignoring the rights of children who migrated alone (Bhabha,2003:253). In 2006, Bhabha argued that the current legal instruments are dealing with children as objects rather than subjects that can be right-bearers. Therefore, a right such as family reunification is not provided to children the same way as it is provided for adults (Bhabha,2006:1529).

The European provisions were also viewed to be weak and not addressing the needs of unaccompanied refugee minors properly. Smith, for instance, viewed the problem in the European focus on deterring migration and closing the borders while ignoring the fact that children should be always treated as children (Smith,2005:38). Throughout the paper, he focused on showing the gaps in the different refugee directives, among them was the family reunification directive which Smith described as disappointing and lacking for the proper protection that ensures the right to family reunification for children (Smith,2005:44).

On the other hand, academics such as Shamseldin and Goodwin-Gill argued that the current instruments are viable and enough for addressing the different issues of unaccompanied refugee minors. Instead, the problem was viewed in the implementation of these instruments. (Shamseldin,2012:93, Goodwin-Gill,1995:409). For instance, this problem is obvious when assessing the United Kingdom’s implementation of the European and International provisions when it comes to unaccompanied refugee minors. In her article, Alison Hunter showed the UK’s non-adherence to and the misinterpretation of different European and International rules when it comes to applying them on UAM (Hunter,2001:385). For instance, the UK’s reservation on article 22 of the UNCRC allowed it to clearly discriminate between unaccompanied refugee minors and other minors in its territories. Preventing the right to family reunification is only one example of this (Hunter,2001:406).

Among the important articles that are governing the implementation of international and

regional rules when it comes to the child is article 3.1 which calls for the child's best interests to be a primary consideration in any issue related to them. However, putting this principle into practice faced many problems. Among them were the problems of misusing the principle or even ignoring it. For example, Engebrigtsen discussed in her article the way social workers in Norway misused the principle in order to prevent unaccompanied refugee minors from the right to family reunification (Engebrigtsen,2003:192). Klaassen and Rodrigues, on the other hand, showed how the principle could be simply ignored or outweighed by other considerations. (Klassen and Rodrigues,2017:191).

Finally, the problem of implementation was addressed through the role of politics when it comes to controlling migration. In this regard, Bhabha (2009) argued that although there is a legal framework which ensured rights such as the right to family life for UAM, the policies of the state remained to be a main obstacle affecting the implementation of such rights (Bhabha,2009:412). Lahav added that there is a tension between human rights and state sovereignty when it comes to allowing people from a third country to come and resettle in their states through the process of family reunification (Lahav,1997:349).

In general, the review of the literature provides a very good background for my research aim and question. There is a comprehensive and viable legal analysis when it comes to the rights of UAM in international and European provisions and the general reasons behind their weakness or problems in implementation. However, most of the literature either did not concentrate much on the issue of preventing family reunification for UAM by a domestic law or did not analyze the reasons that have been provided by the countries that developed such provisions.

This thesis will analyze these reasons through studying the position of one of the only two EU countries which have such provisions. The aim behind this analysis is to identify whether these reasons could be justifiable or not in order to finally answer my main research question on whether family reunification for UAM should be dealt with as a right or is it justifiable for states to restrict it and provide it as a privilege.

### **1.7 Delimitations:**

This thesis will only concentrate on whether family reunification for UAM should be dealt with as a right for UAM or not. The thesis will not go further to assess the implementation of family reunification in countries where it is allowed. I understand the problematic nature of the implementation process in several countries, however, the study of these problematic areas is beyond the scope of this thesis and might be a useful topic for future research.

Moreover, the thesis will not discuss the issue of granting those unaccompanied minors with protection or refugee status. This case might be also problematic; however, it is also beyond the aim of this thesis. So, I will just assume that children in question have been granted the needed protection on a fair basis.

Furthermore, I will concentrate only on the child's perspective in my discussion. I'm fully aware that family reunification is a sensitive and problematic issue for all refugees and displaced persons. However, due to the scope of this thesis, I have chosen to concentrate only on unaccompanied minors.

The tracing of the families of unaccompanied minors is also an important aspect that should be considered by the host states. However, the discussion of this issue needs an independent research of the laws and implementation processes. Thus, it will not be discussed in this limited in size thesis. The thesis will rather concentrate only on family reunification with the assumption that the countries are doing enough for finding and identifying the family members of those children.

### **1.8 Chapter Outline**

Chapter 2 of this thesis will build upon the previous literature which is analyzing the legal provisions (international and regional) when it comes to the rights of unaccompanied refugee minors. My particular concentration will be to discuss the strength of the right to family reunification in these provisions. This chapter will also address the position of different legal and international bodies when it comes to this issue in order to decide whether this issue should be considered as a right. In Chapter 3, I will move to study the position of the United Kingdom when it comes to implementing family reunification for UAM residing in its territory. I will

address its position with regard to the legal provisions as well as its reasons behind this position. Chapter 4 will be dedicated to analyzing the strength of these reasons according to the principles and theories chosen for this research. Throughout the analysis that is conducted in this chapter, I aim to provide an answer to my research question. Finally, Chapter 5 will provide a summary of the findings of this thesis, the conclusion, and suggestions for further research.

## 2. Legal Method: Family Reunification for Unaccompanied Minors in the Law.

### 2.1 International Human Rights Law

#### 2.1.1. Primary Law

In the International human rights treaties, there are plenty of articles which ensure the right to family life and family unity for everyone.

Among these are, article 17 and 23 in ICCPR which prohibit interference with the private family life and ensure that the family is the fundamental unit of society that should be protected by the society and the state (ICCPR,1966: art.17-23). This call for protecting the family was reiterated in article 10.1 of ICESCR (ICESCR,1966: art.10.1).

While most of the international instruments did not mention “family reunification” explicitly in any of their articles, this term was primarily established through the International Convention on the Rights of the Child (CRC) (Jastram and Newland,2003:578). In particular, article 10.1 of CRC explicitly dealt with the issue of family reunification for children. It states as follows:

*“a child shall not be separated from his or her parents against their will... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by states parties in a positive, humane and expeditious manner” (CRC, 1978: art.10.1).*

Family reunification was reiterated again in art.22 of the CRC which is specialized in dealing with refugee children. In particular, paragraph 2 of the article called the states to “*trace the parents or other members of the family of any refugee child in order to obtain information*

*necessary for reunification with his or her family” (CRC,1989: art.22.2).*

In addition to that, articles 9 and 16 of the CRC are also concerned with the family life of the child. Article 9 prevented separation from the parents against the child’s will, except when it is in the best interests of the child. While article 16 prevented arbitrary interference with the child’s family life (CRC,1989: art.9-16).

### **2.1.2. Soft Law**

While the articles are not explaining enough about family reunification for refugees or unaccompanied minors, comments from treaty monitoring bodies, UNHCR, and other declarations and acts found to be very helpful for explaining the situation. Although not binding, these soft laws are dealt by most of the states and scholars with high respect and wide acceptance.

#### **- *Family Reunification for Refugees:***

In its general comment no.15 on “The Position of Aliens under the Covenant”, the Human Rights Committee expressed that the right of the refugees to the protection of their family life is protected under ICCPR. Moreover, according to the Committee, the states might be obliged in some cases, to provide the refugee with family reunification (Human Rights Committee,1986: para.5).

Furthermore, the Committee on Economic, Social and Cultural Rights (CESCR) was concerned about the restrictions imposed by Norway when it comes to allowing “those who have been granted a residence permit on humanitarian grounds” to be reunited with their direct family members (CESCR,2005: para.16). The Committee finally recommended Norway to ease these restrictions on family reunification and provide the “widest possible protection of, and assistance to, the family” (CESCR,2005: para.35).

Family reunification for refugees was agreed upon unanimously by the states who participated in “The Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons” which was conducted by the UN General Assembly to provide recommendations in relation to the 1951 refugee convention and its additional protocol (unhcr.org,1951).

The recommendations from the Conference, urged the states to take all the necessary measures to protect the refugee's family and particularly in cases where the head of the family gained protection in a certain country, and when the refugees are minors, particularly unaccompanied ones (Final Act,1951:8). However, it is worth noting that when it comes to unaccompanied refugee minors, special consideration was given to guardianship and adoption (Final Act,1951:8).

Finally, the UNHCR in its 2001 Note on Family Reunification, provided five principles to guide the states when it comes to family reunification for refugees. These are:

- 1) Family is the fundamental unit of society and has to be protected by the states. UNHCR believes that this will help to “restore basic dignity to a refugee's life”, and particularly will protect the most vulnerable part of the family\_ the children.
- 2) The UNHCR Office includes in its mandate the resettlement of separated refugee families since the protection of the refugee family means the protection and well-being of its individual members.
- 3) Family reunification criteria should be flexible and includes family members other than the nuclear family based on the principle of dependency and should take into consideration the culture and tradition of different parts of the world.
- 4) Refugees can live a normal life again by reuniting with their families to live with them in the only country where they can reside safely. Therefore, family reunification efforts are important for the refugees, who has usually experienced so much stress in their journeys.
- 5) In order for the refugees to successfully be integrated in their new societies, it is important that they have their families with them. (UNHCR,2001:1-2).

- ***Family Reunification for UAM:***

When it comes to unaccompanied refugee minors, the Committee on the Rights of the Child has provided comments on different occasions to regulate their right to family reunification. For instance, in the General Comment No.6 on the treatment of unaccompanied and separated children outside their country of origin, there is a separated

part specified only for family reunification. In this part, the Committee stated that family reunification is among the durable solutions that states should consider when dealing with unaccompanied minors in their territories (UNCRC, 2005: para.79). In this regard, the Committee urged the state parties to start tracing the families of unaccompanied children as soon as possible, even before their refugee status is determined. The only restriction that could impede this process and the process of family reunification is when it is decided to be not in the best interests of the child (UNCRC,2005: para.80-81).

The Committee urged the host states to assess the possibility for family reunification in its countries in “a positive, humane and expeditious manner” and without unnecessary delays (UNCRC,2017: para.32).

Moreover, in many of its concluding observations, the Committee criticized the host states’ practices which paralyze, delay or prevent family reunification for unaccompanied children which goes against their best interests. For instance, it criticized the practices by France, Denmark, and Poland for not complying with the provisions of the convention when it comes to family reunification for UAM (CRC/C/FRA/CO/5,2016 para.52\_ CRC/C/DNK/CO/5,2017: para.40\_ CRC/C/POL/CO/3-4,2015: para.44-45).

### **2.1.3. Discussion**

As can be observed from the treaty instruments, most of the instruments are not calling for family reunification as a right in itself. Rather, the treaties considered the right to family life and private life as fundamental rights for all human beings. Some academic scholars, such as Gallya Lahav, argued that the right to the protection of family life does not necessarily impose an obligation on the states to reunify separated refugee family members (Lahav,1997:367). Although comments from the UN committees and different UN bodies are claiming that family reunification for refugees should be a right, these claims only amount to soft law which is not binding on states.

The only binding and widely accepted instrument where family reunification was explicitly mentioned is the Convention on the Rights of the Child (CRC). When analyzing the content of articles 9.1 and 10.1, we can find that the level of protection which provided for this right is not as strong as the one provided for the right to education, for instance, making this right

more debatable.

Jastram and Newland argued that the request to deal with family reunification in “a positive manner” is a strong “affirmative action” which limited the allowed reasons for refusal. They argued that the only permitted limitations, according to their interpretation of article 9.1 and article 10.1, are when it is not in the best interests of the child, or when family reunification is decided to be fulfilled in a different country (Jastram and Newland,2003:578). In this regard, Abram argued that the countries cannot apply restrictive laws when it comes to family reunification without infringing the provisions of the CRC. Abram argued that the states have no power to ensure that family reunification will be placed somewhere else. Thus, they should bear this responsibility of ensuring family reunification in their countries (Abram,1995:423).

On the other hand, Lahav stated that although the CRC provided protection against separation and called for dealing with family reunification in “a positive, human and expeditious manner”, this call is serving as a “strong recommendation rather than as a provision establishing a right to family reunification” (Lahav, 1997:358). He supported this idea by arguing that dealing in a positive manner doesn’t directly mean a positive decision. The decision is surrounded by a lot of restrictions such as national security, public order, public health, morals, the rights and freedoms of others, the best interests of the child and so on (Lahav,1997:359). Moreover, many of the concepts are vague and not clear. For example, there is no clear definition of what family or protection exactly mean. There are also no guidelines when it comes to deciding what is in the best interests of the child (Lahav,1997:360). These reasons allowed for different interpretations by the states which sometimes serve their interests rather than the child’s.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) reaffirmed this problem with the language of the convention which did not guarantee the right to family reunification for children. In its 2005 migration paper, OHCHR attributed this weakness to the states’ will to maintain immigration control and restrict migration and resettlement in their countries (OHCHR,2005:3).

On its side, the Committee on the Rights of the Child tried to strengthen the right to family reunification through its comments and concluding observations for states. However, the treaty itself is weak and allows the countries to decide on whether to provide or not provide

family reunification for UAM. Although some guidelines were provided, the language of the article on family reunification consists of many gaps that states can use to prevent or restrict family reunification.

## **2.2 European Law**

When it comes to the European Law, family reunification for UAM is even weaker. The Right to family life was enshrined in article 7 of the Charter of Fundamental Rights of the European Union, and in article 8 of the European Convention on Human Rights. Nothing more was said with regard to family or family reunification in these instruments.

When it comes to secondary law, more explanation for family reunification right was provided in its directives. These directives are requiring member states to achieve a certain result but without dictating the forms or methods for reaching this goal which gives a wide space and power to the member states to decide upon cases (Treaty of Rome,1958: art. 288).

The most important directive when it comes to family reunification for non-EU nationals is the Family Reunification Directive (FRD). According to the Court of Justice of the European Union, this directive provides that family reunification is a rule and should only be restricted on narrow circumstances (Council of Europe,2017:28).

When it comes to unaccompanied minors, the directive entitles that children over 15 years old have to demonstrate that they are dependent on their parents in order to be allowed to be reunited with them. However, the term dependency was not explained. Moreover, the directive entitles children over 12 years old for an integration interview. Again, it did not explain what this means and what are the sought outcomes from this interview (Smith,2005:44/ Council of Europe,2017:28).

The other directive which also provides provisions in relation to family reunification is the Dublin II directive. This directive states that the application by unaccompanied minors should be the responsibility of the country where a family member resides legally but only if this is in the child's best interests. Moreover, unaccompanied minors might be reunited with family members who are in another EU member state but again with considering the child's best interests' principle (Smith,2005:42).

When it comes to case law, we can find that family reunification for unaccompanied refugee minors was dependent highly on the child's best interests. For instance, in cases *Mugenzi v. France*, and *Tanda-Muzinga v. France*, the court stated the child's best interests' principle should be a precedent consideration when deciding on family reunification (*Mugenzi v. France*, op.cit., paragraph 45; *Tanda-Muzinga v. France*, op. cit., paragraph 67).

More generally stating, the court has positively distinguished between refugees and non-refugees when it comes to family reunification. This is by taking into account their vulnerable situation, unable to return to their country of origin, and forcible separation between family members. All these elements entitle refugees to higher protection when it comes to their family life (Council of Europe, 2017:21).

To sum up, unaccompanied refugee minors, and minors in general, seem to occupy only a tiny space in the provisions of the European Law, while a lot of autonomy and power is allowed for the state parties when it comes to deciding on family reunification.

## 3. Case Study: Family Reunification for Unaccompanied Refugee Minors in the United Kingdom.

### 3.1 The Law

#### 3.1.1. Definitions in the UK Law

Before introducing the laws and regulations which the UK developed when it comes to family reunification for unaccompanied refugee minors, it is important to introduce the definition of some of the terms used in the UK provisions.

1. The Nuclear Family: According to the UK regulations, a nuclear family consists of only parents and their children. Family Reunification applies for this nuclear family.
2. The Sponsor: A third country national who is present and settled legally in the UK but did not obtain a British citizenship yet and can apply for family reunification to his/her nuclear family.
3. Family Reunification: In order to keep the family together, nuclear family members

of a third country national-residing legally in the UK- are permitted to enter and reside in the UK.

4. Unaccompanied Minor: A third country national or a stateless child who is under 18 and who reaches the UK alone without a parent or a legal guardian or who was left unaccompanied after entering the country. The child remains under this definition unless he/she is cared for by a legal guardian.
5. Dependent: A person who has filled a family reunification application and was allowed to come and reside in the UK with his/her family members (already residing in the UK\_ those serve as sponsors). (UK Border and Immigration Agency Home Office, p.2).

### **3.1.2. The Law**

Family Reunification in the UK is governed by the Immigration Rules. These are a group of different legal documents which together make up the UK Immigration Law. These rules are regularly updated to meet any new challenges (Gov.uk, 2016: Immigration Rules).

When carefully studying these documents, we can find that there is no right to family reunification for unaccompanied refugee minors who are residing and settled in the UK. Instead, it can be found that in order to be eligible to sponsor family reunification for other nuclear family members the sponsor must be over 18 years old (Gov.uk: Settlement: Refugee or Humanitarian Protection).

In special and rare occasions, some exceptions could be made but are considered outside the immigration rules and through the provisions of the European Convention of Human Rights. However, these cases very rarely succeed and could take a very long time (UNHCR,2016:6).

### **3.1.3 Adherence to the International and Regional Provisions**

- **The International Convention on the Rights of the Child**

The UK has ratified most of the international instruments related to family reunification. For instance, it has ratified the International Convention on the Rights of the Child in 1991. Although it had introduced an important reservation when it comes to applying the provisions to

refugee children, this reservation was withdrawn later in 2008. Thus, now the UK has a responsibility to provide unaccompanied refugee minors with all the protection entitled for them upon the convention. This includes accepting their family reunification requests and examining them in a positive and humane manner (art.10.1) and ensuring that children are not separated from their parents against their will (art.9.1).

However, when it comes to implementation, we can find that the UK is not fulfilling its obligations in this regard. For example, a report directed to the UN Committee on the Rights of the Child found that a lot of UK provisions regarding family reunification go against its obligations according to the CRC. Moreover, preventing family reunification for unaccompanied refugee minors while allowing it for refugee adults was also found to be a clear form of discrimination (prohibited by article 2 of the CRC) (Ayotte and Williamson,2000:65).

It is also worth mentioning that the UK is not fulfilling its obligation toward the Committee on the Rights of the Child. The country did not provide the committee with the required periodic reports in order to discuss and assess its adherence to the provisions of the CRC. The only two reports provided were about the situation in its dependent areas and not about the UK itself (CRC/C/41/Add.7, CRC/C/41/Add.9). Family Reunification issue in the two reports was barely mentioned. And in both reports, it was stated that the UK doesn't see a problem with the current implementation of the family reunification in these territories which are governed by the same rules applied in the UK (CRC/C/41/Add.7,2000: para.53, CRC/C/41/Add.9,2000: para.478).

Currently, there is a move by private parliament members toward changing these family reunifications restrictive laws. A bill was formed and supported by members of the parliament on March 2018. The bill includes, among other things, a call for allowing family reunification for unaccompanied refugee minors residing in the country (Refugees Family Reunion Bill 13 HL, House of Commons,2017: para.5-20). However, it seems to be unlikely that this bill will be adopted by the government. The immigration minister, Caroline Nokes, stated clearly that the government will oppose this legislation at later stages. She justified the government's position by stating that "Those who – with all good intention – try to promote and encourage alternative pathways to the UK could be putting the people they are trying to help in danger." (The

Guardian, 16 March 2018). The minister did not explain further on how more generous family reunification rules would endanger the refugees.

- **European Provisions**

According to the treaty of Amsterdam: the protocol that governs the position of the United Kingdom and Ireland, the UK is not automatically bound by the directives and provisions agreed upon by the European community and can opt out in selective areas such as the provisions in relation to visas, asylum, immigration and other policies related to free movement of persons (Amsterdam Treaty,1999: art.1,2). In article 3, the protocol provides a mechanism that the UK and Ireland should follow if they want to opt into existing provisions (Amsterdam Treaty,1999: art.3).

Based on this special position held by the UK in the European Union, it was legal and easy for the UK to opt out from the European Family Reunification Directive where unaccompanied minors are entitled to the right of family reunification. The main reason provided by the UK was that it wanted to maintain its own immigration control policies (UK Border and Immigration Agency Home Office, p.8).

Although the UK is arguing that it is complying highly with the provisions of this directive (UK Border and Immigration Agency Home Office, p.8), we can see the obvious problem when it comes to applying the provisions for unaccompanied refugee minors.

### **3.1.4. The justification for its position**

The UK government provided mainly three justifications which serve as a background for its rule on family reunification for unaccompanied refugee minors.

#### ***\* The Pull Factor Theory***

Pull factors mean the factors that are existing in the destination country and are encouraging the individuals to migrate from their country of origin in order to seek a better life in the destination country (thoughtco.com, push-pull factors).

The UK government argues that allowing family reunification for unaccompanied refugee minors residing in the UK will play the role of a pull factor. The government explains that this will encourage the families in a third country to send their children alone to the UK in

order to sponsor their own migration and resettle in the country (helprefugees.org).

The government also used the same argument in order to stop the resettlement scheme which was introduced by Lord Alf Dubs and other aid experts in order to resettle some of the huge numbers of unaccompanied refugee minors arriving at the EU border countries across other European countries, including the UK. After only accepting 350 unaccompanied refugee minors out of 3000, the UK announced that it has closed the scheme (Anders,2017: Devex.com). The reason behind this is that such scheme will play as a pull factor which will encourage families to send their children to Europe (Roeck, 2016: Yale.edu).

So, the UK is using this theory with the hope to stop unaccompanied refugee minors from crossing the borders and resettling in the country.

#### ***\* The Child's Best Interests' Principle***

Based on the aforementioned pull factor theory, the UK government argues further that by encouraging the families to send their children alone to the UK, those children become more likely to be exposed to trafficking and exploitation (Scottish Refugee Council,2001:3). They will also risk their lives in dangerous journeys while trying to reach the UK. Moreover, the government adds that this will consequently allow more children to become categorized as unaccompanied (Melyer and Morrish,2017:14).

Through this policy, the government argues that it is trying implicitly to meet the child's best interests' principle since it is in the best interests of the child to remain with his/her parents (Engebrigtsen,2003: 198).

#### ***\*The Border Control and Immigration Policies***

Unlike other EU countries, which are allowing a free movement policy in compliance with the Schengen area agreement, the United Kingdom is preserving a tight border control and holds sovereignty over who to allow to enter or reside in its territories.

In order to maintain its control over the borders and the movement of people in and out of its territory, the UK introduced very restrictive family reunification policies. These include not providing family reunification for unaccompanied refugee minors residing lawfully on its territories.

In order to be able to maintain these policies and avoid unnecessary clashes, the United Kingdom opted out of the European Family Reunification Directive (UK Border and Immigration Agency Home Office, p.5).

Moreover, when the UK ratified the International Convention on the Rights of the Child in 1991, it entered a debatable reservation to article 22 which calls on member states to ensure that refugee children (accompanied or unaccompanied) will enjoy all the rights entitled to children according to the convention (CRC,1989: art.22.1). The wording of the reservation makes it clear that the UK wants to tighten its control over the borders and preserve its sovereignty when it comes to allowing refugees and their families to reside in its territories (Maegusuku-Hewett and Tucker,2013:131). The reservation states as follows:

*The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom on those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time (Hunter,2001:389).*

It is worth mentioning that the UK had finally withdrawn this reservation on 18 November 2008 (bayefsky.com, United Kingdom of Great Britain and Northern Ireland, CRC: Reservations and Declarations). However, in practice, it can be noticed that no vital changes were conducted by the government in order to ensure that the national provisions are complying with all its obligations according to the convention. Here, I particularly refer to the right to family reunification.

## 4. Analysis

After providing a background of the position of the UK when it comes to providing unaccompanied refugee minors residing in its territories with the right to family reunification, in this chapter I will analyze the claims and arguments that have been provided and might be provided, by the UK in order to maintain its position. Through using two main principles of the

CRC which are the child's best interests' principle and the non-discrimination principle I will study whether family reunification for UAM should be viewed as a right or could it be justifiable to prevent it. Moreover, through using the principles of global distributive justice theory, I will analyze from a moral perspective whether the UK has a right to close its borders in the face of refugees and their family members who want to join them and whether family reunification for unaccompanied refugee minors should be a right from the theory's point of view.

#### **4.1 The Child's Best Interests' Principle**

The principle of the best interests of the child is among the fundamental rules enshrined in the CRC for dealing with issues in relation to children. Article 3.1 of the CRC clearly stated that in all actions in relation to the child, the child's best interests should have a primary consideration (CRC,1989: art.3.1). In our case, this means that when considering family reunification issue for an unaccompanied refugee minor, child's best interests' principle should be of first importance (Freeman,2007:61).

The UK government argued that by banning family reunification for UAM residing on its territories it is working toward securing the best interests of this group. This is through discouraging the families to send their children alone and thus expose them to trafficking and fatal journeys which are definitely not in the best interests of those children. The UK rather argues that it is in the children's best interests to remain together with their families (Scottish Refugee Council,2001:3).

Several counterarguments could be raised to defeat this argument. First of all, the child's best interests' principle should apply to the unique situation of every child on a case by case basis and take into consideration the different circumstances and characteristics of the child (CRC/C/GC/14,2013: para.48). Thus, the best interests of the child who has already arrived and resided lawfully in the country should not be withheld due to general expectations that this might deter unsafe migration which is not in the best interests of those children.

Secondly, even the assumption that it is in the best interests of children in third countries to remain in their home countries could be doubted. The push factors in some countries might be very strong and even fatal. For instance, war, extreme poverty, or starvation all are not in the best interests of the child. Such factors push the parents to send their children alone in order to rescue

them from inevitable death, forced recruitment, or other dreadful futures (ILPA,2015:31) (Hamwee (LD), House of Lords,2017: Volume 787). What is in the best interest of this group is to provide them with safe migration routes instead of tightening the border control and asylum rules (unicef.org,2017).

Thirdly, the UK government did not provide any evidence to prove its claim that allowing family reunification for UAM residing in its territories will, in fact, encourage more families to send their children alone to the country (Lady Sheehan, House of Lords,2017: Volume 787). Moreover, when comparing the numbers of unaccompanied refugee minors arrived in a country which allows family reunification to the numbers received by the UK, we can find that the figures are either nearly the same or even lower with Germany the only exception. For instance, in 2017, Sweden accepted 1,565 UAM and Netherlands accepted 1,180 UAM whereas the UK accepted 2,205 (Eurostat,2018: annual data).

From these three counterarguments, we can conclude that the claims of the UK based on the child's best interests' principle and pull factor theory are not reasonable for preventing UAM residing in its territory from being reunified with their families.

Moreover, in the following part, I will provide three arguments that explain why family reunification for UAM should be viewed as a right from the perspective of the child's best interests' principle.

### ***1. Better Mental Health for UAM***

It is generally agreed that children should live with their parents in order to have a secure emotional and mental development (UNHCR,1996:3). According to different studies, it was agreed upon that permanent or temporary separation of the child from his/her parents causes him/her a lot of mental problems. Moreover, the failure to reunify the child again with his/her parents could lead to stopping the child's development as well as long-term disruptions (Reed and Fazel, 2012:101).

Unaccompanied refugee minors are facing a greater risk of mental health problems due to experiencing both separation from family and refuge in a strange country (Derluyn, Educ, and

Broekaert, 2009:291). The World Health Organization identified three types of psychiatric disorders faced by unaccompanied minors. These are:

1) Anxiety: which might include panic attacks, development of new phobias, and restriction of activities;

2) Post Traumatic Stress Disorders: the symptoms include flashbacks or nightmares in relation to the distressing events that the child came through, anger, problems with the ability to concentrate, sleep problems, and many other;

3) Depression: The major symptoms of this problem include bad mood, “fatigue, and loss of interest in previously pleasurable activities”. Moreover, children might suffer from sleep problems, “low self-confidence; difficulty concentrating; decreased appetite; agitation; suicidal thoughts, with or without acts of self-harm; excessive feelings of guilt; hopelessness about the future; and feeling one can neither help oneself nor be helped” (Reed and Fazel, 2012:102-103).

In order to be able to recover faster and minimize the risk of facing these disorders, refugee children need the support of their families. Thus, reunification is usually found to be in their best interest and is highly encouraged to be implemented as fast as possible (Reed and Fazel,2012:116/ UNHCR,1996:9). In this regard, UNHCR argued that according to different studies, highly traumatized persons react more positively to the “therapeutic interventions” and recover much faster when their family lives are fully restored (UNHCR,2001:10). UNHCR also compared compulsory family separation to torture by arguing that “One of the goals of torture is not only to destroy the psyche of the individual person, but also to annihilate the social support systems that support and nourish the individual” (UNHCR,2001:10).

A study conducted in Belgium on 1294 refugee children, 10 percent of them are separated from both parents (Derluyn, Educ and Broekaert, 2009:291), found out that refugee children who are not accompanied by parents are experiencing higher mental health problems than the children who are accompanied by at least one parent (Derluyn, Educ and Broekaert,2009:294). The study concluded that one of the main reasons behind these results is the lack of parental care and support (Derluyn, Educ, and Broekaert,2009:295).

A similar study took place in the Netherlands on more than 920 unaccompanied refugee minors during a period between 2002 and 2003. The findings were almost the same. This vulnerable group of children is struggling with higher risks of psychiatric problems due to lack of parental help to aid their recovery (Bean, Eurelings-Bontekoe, and Spinhoven,2006:25). Moreover, the study added that these mental problems seem to be chronic and not going away by time as was revealed through studying the situation of 582 children out of the 920 again a year later (Bean, Eurelings-Bontekoe, and Spinhoven,2006:23).

Finally, Reed and Fazel revealed that studies in the United Kingdom on the mental situation of unaccompanied refugee minors compared to their accompanied counterparts also came up with similar findings (Reed and Fazel, 2012:104).

These studies alarm the authorities of a severe problem that must be dealt with. The best way to deal with it is to reunify those children with their parents (when they are traced and identified). If it is found to be not in the best interests of the child to be returned to his/her original country or to be resettled in a third country, family reunification in the host country should be facilitated as fast as possible.

It is worth mentioning that after separation from their parents, those children are detached from the last and most important social environment that they know and love and thus reunification is important. Derluyen and Broekaert described the situation as following:

*“With this separation, children might lose their entire social infrastructure: not only their parents and relatives, but also the security of grandparents, neighbours, teachers.... The world of significant adults is lost, and with it goes much of the security and stability, safety and roots of the child. Finally, separation from parents also places refugee children at higher risks to experiencing traumatic events during the refugee process, because of the absence of their parents’ protection” (Derluyen and Broekaert,2008:323).*

## ***2. Better Integration***

Another reason for considering family reunification to be in the best interests of unaccompanied refugee minors is that it associates in and leads to a better integration of the child in his/her new environment.

In the host country, refugee children face a lot of obstacles. These include, learning a new language, adapting to a new educational system, adapting to a new culture, as well as dealing with issues such as bullying, racism, discrimination and prejudice (Kirmayer, Narasiah, Munoz, Rashid, Ryder, Guzder, Hassan, Rousseau, and Pottie,2011: E962). In order to be able to overcome these obstacles and integrate better, the support of the family is essential. The family is believed to be “the strongest and most effective emotional, social and economic support network for a refugee making the difficult adjustment to a new culture and social framework” (UNHCR,2001:2). Therefore, UNHCR considers family reunification of refugee children with their parents as a main priority (UNHCR,2001:7).

Moreover, host countries also benefit from reunifying refugee families together. In the long term, those refugee children who got the support of their families in dealing with the difficulties of adapting to the new society will become a productive part of the country which will lower both social and economic costs of non-integration (UNHCR,2001:12).

## ***3. A Durable Solution***

After immediate protection and help have been provided for the unaccompanied minor, the country should seek to reach long term solutions for their situation. In general, three durable solutions have been identified for refugees. These are: voluntary return to the home country, local integration in the host country, or resettlement in a third country (UNHCR,1987: para.29).

When it comes to deciding the best durable solution for unaccompanied minors, two principles should be taken into consideration as guiding tools; the best interests of the child principle and the principle of family unity (UNHCR,1987: para.11).

When it is determined that remaining in the host country is in the best interests of the unaccompanied minor, family unity is the next principle to be considered for child’s integration in the new society. In this situation, the host country has an obligation under article 8 of the

European Convention on Human Rights to respect the family life of the newly integrated refugee children (ILPA,2015:24). This includes child's right to family reunification.

According to the discussion above about better integration, reunifying the child with his family, in most cases, has been proven to be the best long-term solution for both the child and the host country.

The United Kingdom is usually providing foster care or adoption for unaccompanied refugee minors residing in its territories instead of the right to family reunification (UK Border Agency Home Office,2009:28). In this regard, the General Assembly argued that adoption or foster care should not be sought before all the attempts for family tracing and reunification with the real family members are made (UNHCR,1987: para.32). Moreover, Reed and Fazel argued that those children might be placed in abusive homes (the abuse could be both physical and emotional) or fostered by families who are understanding care as only providing the child with food and a place to sleep. In such cases, the child is not getting parental love and thus not developing normally (Reed and Fazel,2012:106). Based on this, family reunification should usually be sought as the best durable solution for child's healthy development and normal integration.

All in all, family life and family reunification for unaccompanied refugee minors has been given a high consideration or even prioritization when determining the child's best interests. The UNHCR stated that:

*"The existing bond with the (extended) family, including parents, siblings and other persons important to the child's life is thus a key factor in determining the child's best interests. While individual circumstances and the quality of relationships must always be carefully examined, emphasis should also always be placed on the continuity of the child's relationship with the parents, siblings and other family members" (UNHCR,2008:71).*

In its general comment no.14, the Committee on the rights of the child clearly stated that *"no right could be compromised by a negative interpretation of the child's best interests"*. This

statement clearly argues that family reunification cannot be banned in its entirety based on country's interpretation of the child's best interests' principle.

On the other hand, it is important to clarify that the arguments in this part do not necessarily mean that family reunification is always in the best interests of the child. Although, it is generally accepted to be the best solution for the child, the child's best interests should be assessed individually on a case by case basis (Parliamentary Assembly,2011: para.110). Sometimes, the parents (or the legal guardians) could be abusive and cause harm to the child or even don't want to take care of him/her. Thus, the reluctance shown by the child or his/her parents when it comes to family reunification should never be ignored (UNHCR,2008:71).

#### **4.2 Non-Discrimination Principle**

The United Kingdom is providing the right to family reunification only for adult refugees who are residing in its territories but not for minors. This states a clear discrimination against those children from two perspectives:

First, not providing family reunification for unaccompanied minors based on their age is a clear discrimination against those children. The non-discrimination principle is a well-established principle in international human rights law. For instance, in International Covenant on Civil and Political Rights, article 24.1 states that "*Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State*" (ICCPR,1966: art.24.1). This means that the non-discrimination principle is not only preventing discrimination against children on any basis but also calls to additional positive measures to be considered when dealing with minors based on their vulnerable status as children (CRC/GC/2005/6,2005: para.18).

In addition to that, the Convention on the Rights of the Child and the UN Committee on the Rights of the Child prohibited discrimination against unaccompanied minors based on being a child. The General Comment No.6 stated that "the principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child" (CRC/GC/2005/6,

2005: para.18). Moreover, in the European context we can find that the Family Reunification Directive also prohibited discrimination based on age (Schweitzer,2014:8).

In practice, however, children are highly discriminated upon based on their vulnerable situation and their disability to access remedies as well as their dependency on adults who don't want to provide them with more power to decide or participate positively in the society (Child Rights Information Network,2009:3).

When those children are unaccompanied refugees, the chances of discrimination against them are usually much higher. This is the second perspective of discrimination against unaccompanied refugee minors, a discrimination for being a refugee. The General Comment No.6 from the UN Committee on the Rights of the Child obviously prohibited discrimination against unaccompanied refugee minors based on their refugee status (CRC/GC/2005/6,2005: para.18).

However, according to the UK rules, those unaccompanied minors don't have the right to live with their families based on being refugees (or migrants in general). This is unlike children who are nationals of the UK whose right to be brought up by their families is called to be promoted by the local authorities, and also special family support, including financial, is called to be provided for the families of those children in order to assist them in bringing up their children (Children Act,1989: Part III). It is vital to reiterate here that unaccompanied minors must be treated first and foremost as children, not as refugees. Thus, they should enjoy the same rights as the children who are residents of the host country (UNHCR and Save the Children,2004:7).

An argument could be raised by the UK that children are dependent on their adult guardian/s but not vice versa. Based on this, it could be justified by the state to allow an adult (who is usually the head of the family) to sponsor the entrance of his/her family members but not to allow children to sponsor the entrance of their parents. In other words, the child should follow his/her parents and thus is entitled to family reunification in the place where his/her parents are residing and not the opposite.

Even though this could be a reasonable claim in some cases, it is important to remember that children we are talking about have been granted the status of "a refugee". According to the

definition of a refugee, those children have escaped “a well-founded fear” in their countries, and thus are unable to return to a country that is unable or unwilling to protect them, or they might don’t have a nationality (stateless) (Refugee Convention,1951: art.1.2). Based on these reasons they have been provided protection in the host country. In most of the situations, the families of those children are still residing in the home country where well-founded fear is present and thus there is no possibility to return the child to this country to be reunited with his/her parents. Accordingly, the only solution for preserving family life for this child is to allow family reunification in the host country.

Based on this, it could not be justifiable for a state to completely prevent family reunification for unaccompanied minors. The law should provide a space for considering family reunification applications for unaccompanied refugee minors on “a positive, humane and expeditious manner” (CRC,1989: art.10.1) and while taking into consideration what is in the child’s best interest as well as what ensures that the child enjoys all the rights of the CRC without discrimination of any kind (CRC,1989: art.2).

### **4.3. Global Distributive Justice Theory**

In this part, by using the principles of global distributive justice theory, I will argue that the UK has a moral obligation toward unaccompanied refugee minors and toward their families who are usually living in dire situations and even could be entitled to a refugee status themselves.

I will begin by providing a brief introduction to the global distributive justice theory. Then I will move to analyze the right of the UK to control its borders and to restrict the migration movements toward it. Finally, I will argue for a moral obligation toward unaccompanied refugee minors, particularly in allowing them to be reunified with their families.

#### **4.3.1. What is Global Distributive Justice?**

Global Distributive Justice is a theory of political philosophy that is interested in finding fair solutions for the inequalities between people in an international context and ensuring a fair distribution of rights and burdens among them (Sager,2012:58).

In general, there are three principles that are guiding a just distribution among people. Firstly, equity. This means that the distribution of benefits among individuals depends on the amount of their contribution. This principle is mainly dominant in the world of economy and business. Secondly, equality. This means that all individuals should deserve the same benefits and rights despite their inputs. This principle, which is contrasting the first principle, is usually utilized in social and humanitarian perspectives (Sahbaz,2013:1). Finally, the third principle is the principle of need. This one means that rights and benefits have to be distributed among people according to their need. This principle is dominant when welfare and development of persons are the main goals (Sahbaz,2013:7). In this thesis, I will concentrate only on the second and third principles (equality and need).

Global distributive justice concerns with a wide range of issues such as economy, poverty, fair trade, gender equality, immigration, and human rights (Amstrong,2012:16). However, there is a disagreement with regard to the scope of this justice. Some argue that it should only apply to minimum standards needed for a decent life. Others argue for a more egalitarian account of justice which includes a “fuller set of entitlements and accordingly demand much more of us in the way of duties” (Amstrong,2012:17). In my argument, I will adopt the egalitarian account of justice.

#### **4.3.2. Open or Closed Borders for Migration?**

There are different categories of migrants, among them are refugees and family members reunified with their close relatives in a third country (Seglow,2005:317). Here, I will concentrate on the responsibility that the UK has toward allowing the entrance and residence of those groups.

There is a huge debate among scholars when it comes to the right of states to control their borders and restrict the access of refugees and their families to come and reside in the country.

Proponents of egalitarian global distributive justice argue that the countries should open their borders without any restriction to host the refugees and allow their families to join them. The main reasons for this argument are that-in a global civil society-states have a responsibility toward those disadvantaged persons (Benhabib,2004:1780). Wars, extreme poverty, and starvation all are results of some kind of injustice. The responsibility toward those people from poor or torn-by-war states is derived from the argument that many of these disadvantages were,

either directly or indirectly, caused by rich countries (Benhabib,2004:1780). For instance, the long-term exploitation of the resources in India and African countries by the developed states, such as the UK, led to the extreme poverty and weakness of these countries (Benhabib,2004:1778). Another example is the Syria conflict. The foreign interventions by USA, UK, France, Turkey, Saudi Arabia and other countries prolonged the conflict and only made things worse (Fisher, 2016: New York Times).

Another argument for an open border policy toward migrants, especially refugees, is that those people did not choose to be citizens of a certain state, or even to be stateless. The rules of citizenship are arbitrary because they are determined by the person's or his/her parents' place of birth and residence (Benhabib,2004:1775). In this regard, Friedrich Hayek argued that:

*“There is clearly no merit in being born into a particular community, and no argument of justice can be based on the accident of a particular individual's being born in one place rather than another” (Hayek,1960:100).*

Therefore, global distributive justice theorists argue that in order to preserve the norms of social justice for people despite their citizenship, these people should be allowed to move freely between states and enter new states where this justice could be preserved (Seglow,2006:235).

Important concerns and counterarguments could be raised against these calls for an open border policy. One important counterargument used to justify a restrictive border control is that the responsibility of rich states toward the less advantaged peoples does not necessarily mean allowing them to reside in their countries (Benhabib,2004:1772). Rather, there are other means for fulfilling this duty toward those people. For example, the United Kingdom argues that it is fulfilling its obligations under the global distributive justice through providing big portions of humanitarian and financial aid to help those people. It uses this argument in order to justify closing its borders in the face of refugees and asylum seekers (Mason,2016: The Guardian).

Although I agree that humanitarian aid can help in rectifying the hard economic situation in which people who are residing in extreme poverty areas live and can reduce the flow of migrants toward developed countries (Benhabib,2004:1773), humanitarian aid is not enough to provide a fair solution for people in conflict areas. Those people still need a shelter and a safe haven to flee to in order to restore their lives. Therefore, I argue that the developed countries still

have a responsibility toward hosting those vulnerable people and providing them with fair living conditions, so they can start over their lives again.

Another counterargument could be raised against opening borders is that such policy might threaten the national security of states as well as their political culture (Benhabib,2004:1772). I acknowledge that some kind of border control should exist in order to maintain national security and protect the state from the flow of radical extremists. However, this argument should never justify the complete closure of borders or tough restrictions against the access of asylum seekers in need of shelter and protection. Moreover, this argument could not justify the prevention of members of the family to join their other family members who managed to seek refuge in the country. In other words, my argument here is not for an ideal world where borders are totally open between the states but for fair and just policies for border control that are providing a fair distribution of rights and benefits for people in need.

When it comes to the argument that allowing refugees into the country might threaten the political culture of the state, Benhabib defeated this argument by providing many examples where migrants have, in fact, enriched and freshened the political culture of the state. She provided examples of “the contribution of exiled liberals and socialists to the political cultures of nineteenth-century Paris and London”, as well as the “contributions of immigrant Irish, Italian, Jewish, Polish and other communities” in the American political culture in the nineteenth and twentieth centuries. She concluded that “*Migratory movements alone, and without crucial dislocations and tensions already at work in the receiving societies themselves, do not threaten a people's political culture and its constitutional principles*” (Benhabib,2004:1772).

Moreover, I want to add that the integration of migrants and refugees into the host countries has a good impact on the cultural and economic situation of the country. For example, young refugees provided working-hands for the old continent (Europe) and fulfilled the market needs (Adecco Group and Heidelberg University,2017:45). Moreover, their different backgrounds provided a more diverse society and promoted a culture of tolerance and acceptance of others among the population (Beste,2015: United Nations University).

### 4.3.3. Just Membership

From the perspective of global distributive justice, Selya Benhabib has developed the concept of “just membership” which includes the following principles: 1) Refugees and asylum seekers have a moral claim to be sheltered; 2) A directive against denationalization and the loss of citizenship rights should be developed; 3) A fair border control policy for immigrants; 4) Every human being has the right to have rights (Benhabib,2004:1787). In this part, I will concentrate on the last principle.

The principle of the right to have rights has been introduced by Hannah Arendt in her book “The Origins of Totalitarianism” where she stated that: *“It turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them, and no institution was willing to guarantee them . . . [What was] supposedly inalienable, proved to be unenforceable”* (Arendt,1966:291-2-3). So, the right to have rights concept reflects this situation of complete rightlessness. When people became refugees, they became out of the political public life and thus don’t enjoy any rights (Oudejans,2014:11).

More particularly, this concept has been introduced to call on the right of everyone to *“belong to some kind of organized community”* where people are judged according to their actions and opinions (Arendt,1966:296-7).

I argue that according to this principle, and the principles of distributive justice, unaccompanied refugee minors should not be deprived of their right to live with their families solely for being refugees. My argument behind this is that those children did not choose to be born in a certain country or be born as stateless and thus there is no fairness in judge them based on circumstances that were coercively imposed upon them (Benhabib,2004:1775). They have a right to belong to the host country where they were provided refuge and have the right to exercise their rights in a fair manner and according to the principles of distributive justice. They should be treated first and foremost as children and thus should be treated the same as children who are citizens of the UK. This means that those children should have the right to be reunified with their direct family members in order to develop normally.

#### **4.4. A Right or a Privilege?**

As has been seen from the analysis, family reunification for unaccompanied refugee minors should be viewed as a right and not only as a privilege determined by the state. It has been proven that in most of the cases it is in the child's best interest to be reunified with his/her family. This reunification is important for protecting the refugee minor from mental health problems and help in his/her recovery. It has also been proven that the existence of the family is important to assist the child's integration into the new society and is among the best long-term solutions for his/her protection. Moreover, according to the principle of non-discrimination, family reunification should be seen as a right for unaccompanied refugee minors the same way as it is for adult refugees. Even though it is acknowledged that children are depending on their parents and thus should follow their place of residence, this situation usually does not apply to refugee children who fled from a "well-founded fear" and thus unable to return and join their parents. In most cases, their parents are living in bad or dangerous circumstances. Therefore, the only way to family reunification with the child is in the host country.

The global distributive justice theory provided moral grounds for viewing family reunification for unaccompanied refugee minors as a right. Through this theory, I argued for a fair border control policy and fair immigration rules that take into consideration the need of those children and their families. According to the theory, those children did not choose their place of birth or their citizenship, thus it is unjust to prevent them from their right to live with their families because they are refugees. Moreover, the developed countries have an obligation toward allowing the families of those children to enter and join them. The reason behind this obligation is that this injustice which those children and their families live in is, in some way or another, a result of unequal distribution of wealth, exploitation, and unjust global policies.

Finally, according to the principles of "just membership", those children and their families should enjoy fair border control policies that allow them to enter and reside safely in a third country. Moreover, after residing in the host country, unaccompanied refugee minors should have the right to have rights. This means that those children should belong to the host community they live in and exercise all their rights the same way as the citizens of this country.

Those children should be dealt with as children before being seen as refugees. Based on this principle, unaccompanied refugee minors have a right to live with their families through having the right to family reunification.

## 5. Summary and Conclusion

Even though the right to family life has been protected in several human rights documents, the right to family reunification for unaccompanied refugee minors seems to be not protected enough. This allowed countries such as the United Kingdom to prevent those children from being reunified with their parents in the host country.

In this thesis, I have tried to assess the claims that the UK had provided for justifying its position. Moreover, through analyzing family reunification for unaccompanied refugee minors by using the principles of the child's best interests and non-discrimination as well as from the perspective of global distributive justice theory, I tried to answer my research question on whether family reunification for unaccompanied refugee minors should be viewed as a right or could it be justifiable for states to totally prevent it and provide it only as a privilege.

I started with the legal method which was vital in providing a background on the position of family reunification (with a particular concentration on UAM) in legal documents, both international and European. In this regard, there is a debate on whether the right to family life means directly the right to family reunification. Moreover, in articles where family reunification was clearly stated, the language was weak and appears to provide a strong recommendation rather than establishing a right. While the primary law is weak in terms of ensuring the right to family reunification, the soft law is more obvious in calling for family reunification to be a right, especially for unaccompanied refugee minors.

After establishing the legal background, I moved to study the case of the United Kingdom. According to the immigration rules of the UK, the unaccompanied minor cannot be a sponsor for bringing his/her parents to reside with him/her in the host country. The UK government provided three justifications for its position. Firstly, it argued that allowing unaccompanied refugee minors to sponsor the access of parents to the country will form a pull factor for parents to send their children alone. Secondly, it argued that allowing family

reunification for those children will go against the child's best interests' principle. This is because it will push the parents to put their children on dangerous journeys where they might be exposed to trafficking and exploitation which is not in their best interests. The UK argued that it is in the best interests of those children to remain with their parents. Finally, the UK added that it restricted its family reunification rules in order to maintain its sovereignty and control its borders.

After analyzing these arguments, I conclude that these claims cannot justify the total prevention of family reunification for unaccompanied refugee minors. Moreover, according to the child's best interests' principle, family reunification for UAM should be viewed as a right since, in most cases, it is in the best interests of the child. Studies proved that the existence of a family with the child is better for his/her mental health as well as his/her integration in the new society. Family reunification is one of the best durable solutions for ensuring long-term protection for unaccompanied refugee minor. Furthermore, I argue that according to non-discrimination principle, children in the UK should be provided with the right to family reunification the same way as adults. It is not permitted for the state to discriminate against those children based on their double vulnerable situation both as minors and refugees.

Finally, I argue that the UK has a moral obligation toward those unaccompanied refugee minors. This is mainly for two reasons. Firstly, those children did not choose their citizenship or their refugee status. Therefore, they should not be treated unfairly and being deprived of their right to live with their families based on this status. In addition to that, according to the just membership principle, those children should have the right to have rights and should be treated according to their actions and not according to their status as refugees or as minors. Secondly, according to the global distributive justice theory, the unjust situation which those children and their families found themselves in is the result of global unjust policies, and unfair distribution of wealth and opportunities. Therefore, countries have a moral obligation toward those people and thus they should allow their access to their countries and deal with them according to fair immigration rules that ensure their enjoyment of their rights.

All in all, it is important to remember that unaccompanied refugee minors are children before being refugees. Thus, they should be treated as children and should never be deprived of

being reunified with their families due to their vulnerable status. The best interests of the child should always prevail over the interests of the state.

### **5.1. Future Research**

After proving that family reunification for unaccompanied refugee minors should be viewed as a right and it cannot be justifiable to completely prevent it, I believe that further research should analyze the practical implementation of this right and provide a guide for the states that establishes rules for ensuring the proper way of implementation of this right. Moreover, since I didn't discuss the issue of family tracing, I suggest that further research could be made to analyze the scope of state's responsibility to trace the families of unaccompanied minors arriving at its territories.

Finally, due to the limited space of this thesis, I only concentrated on the perspective of unaccompanied minors when discussing the right to family reunification in the host country. Further research could be made to cover the situation from the perspective of the parents.

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