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E INTERNAZIONALE

2I

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SCRITTI DI DIRITTO PRIVATO EUROPEO E INTERNAZIONALE

Diritto privato, diritto europeo e diritto internazionale rivelano intrecci via via più significativi, chiamando docenti e studiosi dei diversi settori scientifici a confrontarsi e a collaborare sempre più intensamente. Da tale proficua osmosi scientifica origina il progetto della nuova collana *Scritti di diritto privato europeo e internazionale*, con la quale si persegue l'obiettivo di raccogliere opere scientifiche – a carattere monografico e collettaneo – su temi di attualità in un'ottica interdisciplinare e in una prospettiva di valorizzazione della stretta connessione tra le discipline coinvolte. Tale obiettivo trova un riscontro nelle specifiche competenze dei Direttori e dei membri del Comitato scientifico.

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- b) pubblicabile previo apporto di modifiche;
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Persons on the Move

New Horizons of Family, Contract and Tort Law

edited by

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Preface

The aim of the Series of Essays of Private European and International Law (*Scritti di diritto privato europeo ed internazionale*) is to foster critical and interdisciplinary reasoning on legal problems to explore the growing interconnections among the fields of Private, European and International law.

The coordinated approach to common legal issues by professors, researchers and legal experts from different fields of specialisation, with different backgrounds and methodologies is nowadays felt as an added value to the study of all subjects that experience the influence of supra-national regulation over domestic legal systems.

By bringing together PhD candidates from different EU Member States to attend four seminars of advanced learning in a Programme in European Private Law for Postgraduates (PEPP), the PEPP is playing an active role in moulding law practitioners and scholars with an international and comprehensive approach. The Programme is coordinated by the University of Münster and involves Partners amongst the best law Universities and Research Centres in Germany (Katholieke Universiteit Leuven; University of Cambridge; Bucerius Law School; Max-Planck-Institute for Comparative and International Private Law; Università degli studi di Genova; Silesian University at Katowice; University of Wrocław; Jagiellonian University in Kraków; University of Valencia).

PEPP attendants deal with a whole variety of topics in the field of private law and private international law, and the Programme's aim is to boost knowledge and understanding of the emerging legal system, and to build up a network among academicians and lawyers addressing similar issues.

Sharing the same interdisciplinary approach, a cooperation between the PEPP Programme and the Series of Essays is the natural follow up of the European network created by PEPP. A cooperation, we are happy to say, that has grown stronger each year. This *Volume* is the fourth of its kinds, and is focused on some topical issues in family,

contract and tort law. It collects the works of PEPP Lectures and Phd Candidates of the 2016/2017 PEPP Rounds.

All contributions were subject both to a double-blind referee procedure and to revision by an English native speaker.

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Part I

Family, Children, and Refugees

Minor Refugees under the Brussels IIa-Regulation

BETTINA HEIDERHOFF, BERND FRANKEMÖLLE

SUMMARY: 1. General considerations. - 1.1. Introduction. - 1.2. Best interest of the child. - 1.2.1. Significance. - 1.2.2. Minor refugees under the CRC. - 1.2.3. CEAS, Dublin III and judgments of the CJEU. - 1.2.4. Further aspects of the best interest of the child. - 1.2.5. Summary and effects. - 1.3. Right to be heard and necessity of representative. - 1.4. Appointment of a guardian and other issues of family law. - 2. Responsibility for the asylum application and jurisdiction under Brussels IIa. - 2.1. Definitions. - 2.1.1. Minority. - 2.1.2. Unaccompanied minor. - 2.2. Responsibility under Dublin III. - 2.3. Competency under Brussels IIa - 2.3.1. Overview. - 2.3.2. Article 8 – habitual residence. - 2.3.3. Simple presence. - 2.3.4. Prorogation - 2.3.5. Article 15 Brussels IIa. - 2.3.6. Article 20 Brussels IIa. - 3. Case studies and possible approaches. - 3.1. German Substantive Law. - 3.2. Analysis of possible situations. - 3.2.1. Overview. - 3.2.2. The minor stays in one Member State. - 3.2.3. The minor moves between Member States. - 3.2.3.1. Modifications to the concept of habitual residence. - 3.2.3.2. A different approach to Article 13 par. 2 Brussels IIa. - 3.2.3.3. A transfer enabled by Article 15 Brussels IIa. - 3.2.3.4. Article 20 Brussels IIa. - 3.3. Results. - 4. Conclusion.

1. General considerations

1.1. Introduction

When minor refugees enter an EU Member State, many legal issues arise. The most crucial of these concern the refugee status and the application for asylum. It may come as a surprise that family law matters are closely interlinked with the issues of asylum and that these actually may need to be solved before the asylum procedure can even begin.

The purpose of this paper is to investigate whether the provisions of the Common European Asylum System, and specifically its rules on the responsibility of a particular Member State in the Dublin III-

Regulation¹ (Dublin III), correspond with the rules on jurisdiction in family matters, namely with the Brussels IIa-Regulation² (Brussels IIa).

Unfortunately, this topic had not been identified as problematic and was therefore left unaddressed in the proposal for a recast of Brussels IIa from 30 June 2016, most likely due to the fact that the rising number of unaccompanied minors is too recent a phenomenon.³ It therefore seems unlikely that the legal provisions will be revised in the near future, which makes the search for adequate solutions within the existing legal framework even more important.

In this paper, we will pay specific attention to the child's best interests. That the child's best interest must be a primary consideration in all actions taken by courts or administrative authorities is laid down in the Convention on Children's Rights (CRC)⁴, in the Charter of Fundamental rights of the European Union (ChFR), and in particular also in Dublin III. Dublin III tailors the rules for the responsibility of state authorities fully in line with the child's best interests and requires neither a habitual residence, nor does it admit the institute of *perpetuatio-fori* for cases, where a minor leaves a state of the commencement of the asylum proceedings. Our focus will thus be on how well Brussels IIa allows the full consideration of the child's best interest and whether it allows enough discretion for a full alignment with Dublin III.

¹ Regulation (EU) No 604/2013 of the European Parliament and 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 L 180*, 29.6.2013, p. 31–59.

² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23.12.2003, p. 1–29.

³ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM(2016) 411 final.

⁴ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

1.2. Best interest of the child

1.2.1. Significance

The best interest of the child is a fundamental and internationally acknowledged principle that is guiding in all legal acts concerning children⁵. It must be the aim of all legal provisions dealing with children, whether they stem from a Member State's domestic law or from EU law. It is at the core of the Convention on Children's Rights (CRC), although the CRC is sometimes criticized because Article 3 provides that the best interests of the child shall (only) be a (!) primary consideration in all actions concerning children. This careful wording should not be overestimated. Article 3 CRC has an immense guideline effect worldwide and can even be invoked before a court, at least in theory⁶. Article 24 par. 2 ChFR uses a very similar wording⁷.

The principle is also explicitly stated wherever EU regulations touch upon the rights of children. In our context, it can be found in Article 6 par. 1, as well as in Recital 13 of Dublin III, and in Recitals 12 and 13 of Brussels IIa. While the law regularly refers to the best interest of the child, a definition of this principle is missing. Even the CRC lacks a general definition. However, many of its provisions allow some conclusions. In the context of refugee law, we can find several pointers in the CRC as well in the Common European Asylum System (CEAS).

1.2.2. Minor refugees under the CRC

Minor refugees are dealt with in Article 22 CRC. Under par. 1, appropriate measures must be taken to ensure that a child who is seeking refugee status or who is considered a refugee shall receive "*appropriate protection and humanitarian assistance in the enjoyment of appli-*

⁵ See e.g. J. POBJOY, *The Best Interests of the Child Principle as an Independent Source of International Protection*, in *ICLQ* vol. 64, April 2015, pp 327 ff.

⁶ J. POBJOY, *The Best Interests of the Child Principle as an Independent Source of International Protection*, cit., p. 330.

⁷ "...must be a primary consideration...".

cable rights”. This explicitly pertains to both unaccompanied children and those accompanied by their parents. Article 22 par. 2 CRC contains rules for family reunification and the treatment of unaccompanied minors.

Firstly, the parents or other members of the family of any refugee child shall be traced “*in order to obtain information necessary for reunification with his or her family*”. Articles 9 and 10 CRC elaborate in more detail on the generally acknowledged principle that children must not be separated from persons whom they depend on and that children who have been separated from their parents should get all assistance possible in reuniting with their family.

Secondly, in cases where no such persons can be found, the child “*shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment*”.

This means that not only does the child have to get housing and financial support, but that a guardian and caretaker must also be appointed for any unaccompanied minor refugee – just like for any other child who has lost his or her parents.

1.2.3. CEAS, Dublin III and judgments of the CJEU

The CEAS comprises numerous elements of asylum law, most of which do not primarily concern unaccompanied minor refugees and cannot be dealt with here. Dublin III, a central instrument, is mainly restricted to the matter of responsibility for asylum proceedings. Here, the concept of the child’s best interest is reflected in several rules aimed at avoiding the relocation of minors and the separation of families (see in detail below II. 2).

However, Dublin III does not just govern the responsibility for the proceedings on an intra-state level, it also protects the asylum seekers’ fundamental rights. In this context, Article 6 guarantees several rights to minor refugees and can be understood as the central rule on safeguarding the best interest of the child in the asylum context. While par. 1 mentions – once again – that the best interests of the child shall be a primary consideration with respect to all procedures, paras. 2 to 4 contain more detailed provisions. Under par. 2, a qualified representative is to be appointed who has to ensure that the best interests of the

minor are taken into consideration during the procedures. The tasks and duties of the representative are described in more detail in Article 25 of Directive 2013/32/EU⁸. Par. 3 obliges the Member States to cooperate with each other and mentions several matters that they must take due account of, in particular, possibilities for family reunification, the minor's well-being and social development, and the views of the minor, in accordance with his or her age and maturity.

The CJEU has not yet delivered any decision on the child's best interest in general. However, there is one decision concerning the interpretation of the central rule in Article 8 par. 4 Dublin III (formerly Article 6 par. 2)⁹. The CJEU had to decide on the jurisdiction for asylum proceedings in cases in which unaccompanied minors had each lodged an asylum application in one Member State and had afterwards moved on to another Member State, where they lodged a second application. The CJEU stated that under Dublin III (then Dublin II) "*the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'*". This is clearly directed at protecting minors from being relocated back to the state of the first application against his or her will and to give all support to the minor in the state where he or she is present.

On a more general level, in a rather recent judgment the CJEU had to decide on a matter regarding the separation of children from their parents¹⁰. While the case does not pertain to asylum law, the decision is of interest in our context as it contains some general thoughts on the relation between children and parents and the best interest of the child. The CJEU was asked under what circumstances the refusal of a right of residence for a third country national is possible if this person is parent of a child who is a citizen of the European Union. The CJEU

⁸ Article 25 Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) which gives more details on the tasks and appointment of the guardian, *OJ L 180*, 29.6.2013, p. 60–95.

⁹ CJEU 6 June 2013, *MA and Others v Secretary of State for the Home Department*, Case C-648/11 in *Electronic Reports*, ECLI:EU:C:2013:367 (concerning the old Article 6 par. 2 Dublin II).

¹⁰ CJEU 10 May 2017, *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, Case C-133/15, in *Electronic Reports*, ECLI:EU:C:2017:354.

held that the mere fact that the other parent would be able to assume the primary day-to-day care for the child was not sufficient to allow the refusal. The assessment must “*take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child’s equilibrium*”. This shows that the CJEU has a comprehensive and developed concept of the best interest of the child. It should be kept in mind that the idea of “the child’s equilibrium” can also include its relationship to persons other than its parents who may have taken on factual responsibility for the child.

Finally, Article 12 of the Implementing Regulation¹¹ lays down some additional rules for the proceedings when care for an unaccompanied minor is entrusted to a relative other than the mother, father or legal guardian. The provision aims at enabling the authorities to decide, “*with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests*”.

1.2.4. Further aspects of the best interest of the child

There are other aspects of the best interest of the child that might be mentioned and are incontestable. The chance to develop healthily and to get an appropriate education is among them. The right not to be discriminated against covers children just as much as adults.

In our context, the right to be heard is of central importance (see explicitly Article 12 par. 2 CRC). While different Member States have different approaches to how the right to be heard should ideally be put

¹¹ Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ L* 222, 5.9.2003, p. 3–23; Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003, *OJ L* 39, 8.2.2014, p. 1–43.