Torn Between Predictability and National Decision-making

26 NOVEMBER 2026

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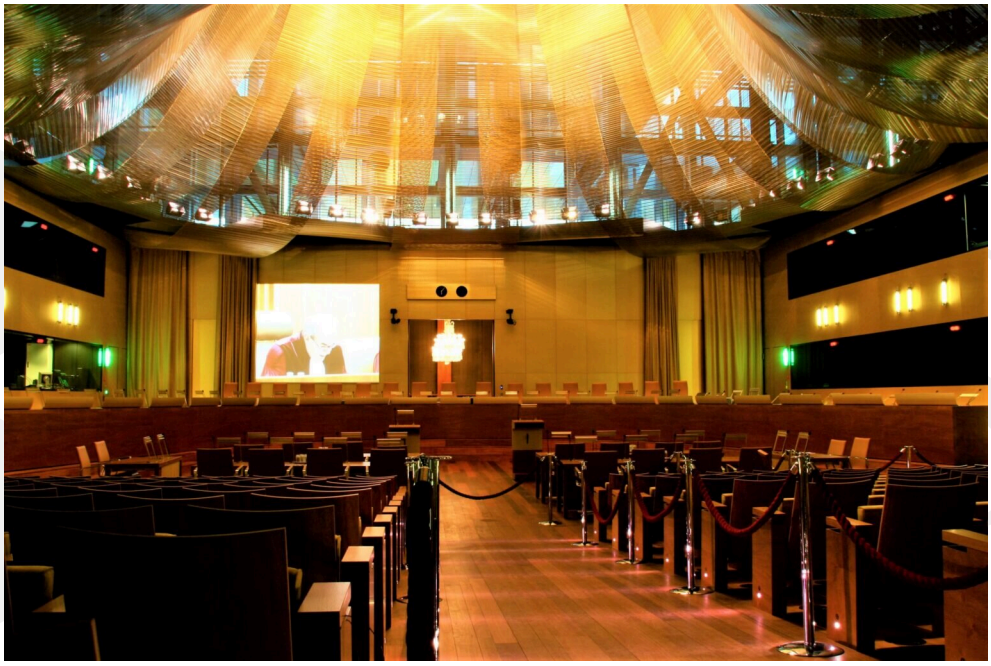

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How the CJEU Creates Practical Uncertainty While Maintaining Legal Certainty

Introduction

On October 8th 2026, the Court of Justice of the European Union (CJEU) handed down its most recent 'follow-up' judgment on family reunification in the context of the EU's asylum policy. This article analyses said judgment read together with an earlier interrelated one. In doing so, the implications for the protection afforded to family members of unaccompanied minors under the Family Reunification Directive (FRD) as well as the potential tension between the principle of legal predictability and the decision-making practice of national authorities are explored.

The theoretical and practical interest lies in providing a clearer picture of the CJEU's jurisprudential influence at the national level and its utilisation

of interpretative clarification. While the Court's clarification adds protection in a specific case, the risk of unfair (or absence of) outcomes as between the Member States is worth highlighting.

The CJEU on Family Reunification

A and S

In April of 2018, the CJEU gave a preliminary ruling concerning the interpretation of two provisions of the FRD. The case (*A and S v Staatssecretaris van Veiligheid en Justitie*) concerned two Eritrean nationals (A and S) applying for residence permits in the Netherlands for the purpose of family reunification with their daughter, who arrived as an unaccompanied minor and was subsequently granted refugee status (*A and S v Staatssecretaris van Veiligheid en Justitie*, 2018, paras.20-22). Under Article 10 (3) (a) FRD, Member States are obliged to authorise the entry and residence of first-degree relatives for the purpose of family reunification if the refugee is an unaccompanied minor (Council Directive 2003/86/EC [FRD], 2003, Art. 10(3)(a)).

The application for family reunification was rejected on the grounds that their daughter was no longer a minor on the date on which the application was submitted, having turned eighteen during the processing of her asylum claim (*A and S,* 2018, paras.20 and 23). The question referred to the CJEU was whether A and S's daughter could still be considered a minor under Article 2 (f) FRD's definition of an 'unaccompanied minor', which covers only persons below the age of eighteen (Council Directive 2003/86/EC, 2003, Art.2 (f)).

In its judgment, the Court noted that Member States cannot define the relevant moment for determining whether a refugee must be regarded as an 'unaccompanied minor' because Article 2 (f) FRD does not specify the moment at which the condition of being below eighteen years old must be satisfied (*A and S*, 2018, para.39). Furthermore, neither Article 2 (f) FRD nor Article 10 (3) (a) FRD made any express reference to national law for determining both provisions' meaning and/or scope, indicating that the EU legislature did not intend to leave any discretion to Member States in that regard (*A and S*, 2018, paras.40-42). If it did, the right to family reunification would depend upon the adoption of a formal decision by the competent national authority that could be adopted after the 'minor' in question had reached their majority. This would, in the Court's view, call into question said provision's effectiveness as well as the general aim of the Directive, that is, to promote family reunification and guarantee special protection for refugees (*A and S*, 2018, para.55).

The CJEU equally noted that asylum applicants had no influence over the duration of processing of applications, which varies between Member States due to workload, available staff or case prioritisation (*A and S*, 2018,

para.56). Thus, to ensure foreseeability and identical treatment, the appropriate reference point for assessing the applicant's age was the date on which the asylum application was submitted (*A and S*, 2018, para.56). The application for family reunification had to be submitted within a reasonable time, that is, in principle, within three months of the date on which the 'minor' concerned was declared to be a refugee (*A and S*, 2018, para.61).

YO and CT

Eight years later, in *YO and CT v Bundesrepublik Deutschland*, the CJEU delivered a preliminary ruling on the interpretation of Article 10 (3) (a) FRD. The case concerned an unaccompanied minor applying for asylum in Germany, which was granted to him by the time he was eighteen, but before the *A and S* judgment came out (*YO and CT v Bundesrepublik Deutschland*, 2026, para.15). Fearing that their application would fail, his parents did not apply for family reunification within three months of his recognition. At the time, German case law disallowed such claims if the 'minor' had reached the age of majority (*YO and CT*, 2026, para.16). Less than two weeks after the delivery of the *A and S* judgment, the applicants promptly applied for a residence permit and, as a precaution, submitted an application for *reštitutio in integrum* with regard to the time limit, which they had not met because they considered their claim bound to fail (*YO and CT*, 2026, para.18).

Thereafter, most competent authorities rejected their application, arguing that a deliberate decision not to apply within the three-month time limit because of the perception that the claim was 'doomed to fail' could not justify *reštitutio in integrum* (*YO and CT*, 2026, paras.20-21). The referring court, however, disagreed. In its view, adjustments to the time limit were necessary to accommodate the specific circumstances of the case at hand. Accordingly, the question referred was whether the time limit should remain unchanged and, if not, whether it should start to run from a later date or whether a longer time limit applied (*YO and CT*, 2026, paras.25-26). The CJEU, siding with the referring court, reiterated that the limit applied only in principle, adding that it could be adjusted in specific circumstances, served only as a 'guideline', and that there could be no abstract maximum limit that determines the reasonableness of that time period (*YO and CT*, 2026, paras.34-35).

Moreover, the Court reminded Member States that they must interpret the Directive in light of the best interests of the child and the right to family life, and therefore consider all the circumstances specific to each case when examining applications (*YO and CT*, 2026, paras.37-41). Ultimately, it was for the referring court to assess and come to its own conclusion as to whether the period of time that passed after the 'minor' was granted refugee status was reasonable (*YO and CT*, 2026, paras.42-45).

Implications and Potential Consequences

Increased protection under the Family Reunification Directive?

After *A and S*, a whole category of family members of unaccompanied 'minors' who would have otherwise been excluded for reasons outside their control, such as varying political choices and/or workload in Member States' asylum systems, was 'eligible' for family reunification under the Directive. In other words, the CJEU prevented unfair exclusion through definitional expansion of what constituted an 'unaccompanied minor'.

Furthermore, it is conceivable that certain applicant families had legitimate circumstances leading to non-compliance with the indicative three-month deadline post-*A and S*, without knowing that it could be adjusted in light of their situation. The Court's clarification of its position on the three-month time limit in *YO and CT* therefore perhaps now enables more applicants to benefit from family reunification. Protection is thus increased through two distinct phases of judicial clarification, the first relating to the Directive's interpretation and the second concerning the Court's own earlier case law.

Observable tension between predictability and national decision-making

As far as legal certainty goes, both cases cannot be seen as compromising legal certainty because they build on each other. The principle of legal certainty requires the law to be clear, predictable and stable so that individuals can understand their rights and foresee the legal consequences of their actions (Van Meerbeeck, 2016, p. 280). The CJEU's use of flexible language in the first case demonstrates acknowledgement that jurisprudential clarification might be necessary, preventing a drastic alteration of its position in the future, which would certainly go against legal certainty. That said, the practical implications of both judgments for national authorities are important to consider, especially in terms of predictability. In particular, two issues stand out.

First, *YO and CT*, as established, improves the position of applicants who would unfairly lose the benefit of their right because they, owing to their perceived weak legal position, chose not to submit an application; or, could not understand well enough that the time limit could be adjusted. However, as a matter of law, the majority of final judicial and administrative decisions cannot be reopened (Ginter & Schasmin, 2016, pp. 137-138). Only in pending proceedings can a national court apply the relevant interpretation of EU law, possibly reducing the practical benefit of the Court's clarification for applicants pre- and post-*A and S*, whose decisions on family reunification applications are final. It is thus uncertain whether Member States' legal

systems provide, procedurally speaking, sufficient means for other applicants to benefit from the Court's clarification.

Besides procedural rules, circumstances also play a role in a pending application's success. The circumstance-specific nature of *YO and CT* makes the task of producing uniform criteria for assessing the time period's reasonableness rather difficult for domestic authorities. Consequently, a potential risk arises that national authorities of different Member States might reach different decisions in cases with similar circumstances, accepting one application for family reunification but rejecting another.

On the one hand, the Court can hardly be blamed for not having given clear-cut guidance in that regard. It is, after all, solely confined by the question referred to it and the surrounding case facts. Indeed, the CJEU instructed the referring court in *YO and CT* exactly what it had to take into account, and even – subtly – indicated its view on whether the application was likely to (or should) succeed (*YO and CT*, 2026, paras.42-44). On the other hand, the Court left the question of reasonableness of the time limit open again, leaving it to the national courts' case-by-case assessment.

The Court's indeterminate stance in *YO and CT* therefore gives way to a tension between uniformity and predictability. The more open-ended its stance, the less uniformity it creates, but the fairer the consideration of each case's specific circumstances. Conversely, the more rigid its stance, the more predictability it generates, but a higher risk of unfair outcomes at the domestic level. The CJEU's flexible standard is therefore legally sound and consistent, but it is questionable whether it provides sufficient predictability when national authorities must apply it retrospectively to past circumstances, i.e. cases that arose between the two judgments and are still pending, including those on appeal.

Conclusion

A and S bolstered the protection afforded to unaccompanied minors' families under the FRD, while *YO and CT* added a protective layer to the case at hand combined with a potentially beneficial jurisprudential clarification. While both judgments are legally consistent and provide a reasonable level of legal certainty, the CJEU nevertheless provokes a certain amount of practical uncertainty in the national legal systems. This uncertainty stems from the fact that certain procedural frameworks might not allow claims anymore, an unfortunate reality, but one that is not attributable to the CJEU itself. However, one can find support for the argument that its open-ended stance for assessing reasonableness risks creating unfair outcomes for family reunification applicants, ultimately reducing the clarification's practical effectiveness.

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