

**LEGAL AND PROTECTION POLICY  
RESEARCH SERIES**



**The “Essential Right” to Family Unity of Refugees and  
Others in Need of International Protection in the  
Context of Family Reunification**

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JANUARY 2018**

**PPLA/2018/02**

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The paper is available online at <http://www.unhcr.org/protection-policy-and-legal-advice>.

The author is grateful for insightful comments from UNHCR staff and from various experts, including those participating at a roundtable organized by UNHCR in cooperation with the Odysseus Network on 4 December 2017.

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## LIST OF ABBREVIATIONS

ACAT	Action des chrétiens pour l'abolition de la torture (France)
ACVZ	Adviescommissie voor Vreemdelingenzaken/Advisory Committee on Migration Affairs (Netherlands)
AIDA	Asylum Information Database
ARC	Austrian Red Cross
BAMF	Federal Office for Migration and Refugees (Germany)
CALL	Council for Aliens Law Litigation (Belgium)
CCPR	Committee on Civil and Political Rights (UN)
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights (UN)
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile (France)
CFR	Code of Federal Regulations (United States)
CIS	Citizenship and Immigration Services (United States)
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CONARE	National Refugee Commission (Bolivia)
CPP	Community Proposal Pilot (Australia)
CRC	Convention on the Rights of the Child
CSIH	Court of Session, Inner House (Scotland, UK)
CSP	Community Support Programme (Australia)
CTD	Convention Travel Document
CUP	Cambridge University Press
DHHS	Department of Health and Human Services (United States)
DHS	Department of Homeland Security (United States)
DRC	Democratic Republic of Congo
EASO	European Asylum Support Office (EU)
ECF	Exceptional case funding (UK)
ECHR	European Convention for the Protection of Fundamental Rights and Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EJML	<i>European Journal of Migration and Law</i>
ELENA	European Legal Network on Asylum
EMN	European Migration Network
EU	European Union
EWCA	England and Wales Court of Appeal (UK)
EWHC	England and Wales High Court (UK)
ExCom	UNHCR Executive Committee
FAP	Family Assistance Programme
FMR	<i>Forced Migration Review</i>
FRA	Fundamental Rights Agency (EU)

FRHAP	Family Reunification Humanitarian Admission Programme (Ireland)
GAS	Groupe accueil et solidarité (France)
H&C	Humanitarian and compassionate (application for permanent residence) (Canada)
HRC	Human Rights Committee (UN)
IAB	Institute for Labour Market and Employment Research/Institut für Arbeitsmarkt- und Berufsforschung (Germany)
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights (UN)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IEHC	Ireland: High Court
IESC	Ireland: Supreme Court
IJRL	<i>International Journal of Refugee Law</i>
INA	Immigration and Nationality Act (United States)
INS	Immigration and Naturalization Service (Netherlands)
IOM	International Organization for Migration
IRCC	Immigration, Refugees, Citizenship Canada
IRPA	Immigration and Refugee Protection Act (Canada)
IRPR	Immigration and Refugee Protection Regulations (Canada)
ISS	International Social Services
KHO	Supreme Court (Finland)
LGBTI	Lesbian, gay, bisexual, transgender and intersex
LTV	Limited territorial validity visa (Schengen)
MFA	Ministry of Foreign Affairs
MIG	Migration Court of Appeal (Sweden)
MJELR	Minister for Justice, Equality and Law Reform (Ireland)
NASC	Irish Immigrant Support Centre (Ireland)
NGO	Non-governmental organization
OASA	Ordonnance relative à l'admission, au séjour et à l'exercice d'une activité lucrative (Switzerland)
OCMW/CPAS	Public Centres for Social Welfare (Belgium)
OECD	Organization for Economic Cooperation and Development
OFPRA	Office français de protection des réfugiés et apatrides/French Office for the Protection of Refugees and Stateless Persons (France)
OJ	Official Journal (EU)
OUP	Oxford University Press
OVG	Oberverwaltungsgericht (Germany)
OYW	One-year window of opportunity provision (Canada)
PACE	Parliamentary Assembly of the Council of Europe
RCOA	Refugee Council of Australia
RTBF	Radio télévision belge francophone (Belgium)
SAR	State Agency for Refugees (Bulgaria)
SEM	State Secretariat for Migration (Switzerland)
SHEV	Safe Haven Enterprise Visa (Australia)
SHP	Special Humanitarian Programme (Australia)
SIAC	Special Immigration Appeals Commission (UK)

TAF	Tribunal administrative fédéral (Switzerland)
TFEU	Treaty on the Functioning of the European Union
TPV	Temporary Protection Visa (Australia)
UDI	Directorate of Immigration (Norway)
UK	United Kingdom
UKAIT	United Kingdom Asylum and Immigration Tribunal
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UKUT	United Kingdom Upper Tribunal
UN	United Nations
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNTS	UN Treaty Series
USC	United States Code
USCIS	US Citizenship and Immigration services
VAC	Visa Application Centre (UK)
VwGH	Administrative Court (Verwaltungsgericht, Austria)



## 1 INTRODUCTION

Many people fleeing persecution and conflict become separated from their families. They may have had to leave family members behind or to leave without being able to ensure or know if they are safe. They may become separated or lose track of each other during flight. Finding and reuniting with family members can be one of the most pressing concerns of asylum-seekers, refugees, and others in need of international protection.

Family reunification in the country of asylum is often the only way to ensure respect for their right to family life and family unity. Acknowledging that “the circumstances in which refugees leave their countries of origin frequently involve the separation of families”, the Summary Conclusions of the 2001 expert roundtable on family unity organized by the Office of the United Nations High Commissioner for Refugees (UNHCR) note that “State practice demonstrates that family reunification is generally recognized in relation to refugees and their families, and that practical difficulties related to its implementation in no way diminish a State’s obligations thereto”. They also affirm that “family reunification for refugees and other persons in need of international protection has special significance because of the fact that they are not able to return to their country of origin”.<sup>1</sup>

Restoring family unity is a fundamental aspect of bringing back greater normality to the lives of refugees and others in need of international protection. It can ease the sense of loss felt by many who, in addition to family, have lost their country, network and life as they knew it. Family support in this sense goes beyond any traditional and cultural understanding of a family to include those who rely and depend on each other. Being able to bring family members to join refugees and other beneficiaries of international protection may well also be a key way to ensure their safety and protect them from danger.

As one young Hazara woman, whose father fled Afghanistan and reached Australia by boat, who was able to bring his wife and children to Australia after five years, stated: “That’s the thing that my father always emphasises – to be together you are stronger. ... That’s why, I reckon I wouldn’t be doing as well if I didn’t have the support of my family”.<sup>2</sup>

In addition, being able to reunite with family members can play an essential role in helping beneficiaries of international protection rebuild their lives and provide critical support as they adapt to new and challenging circumstances. It can fundamentally affect their ability to integrate in their new country and is often a crucial step in their integration. Ultimately it can help support broader economic and social cohesion. Accessible and prompt family reunification procedures also help promote safe and legal avenues to safety for family

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<sup>1</sup> United Nations High Commissioner for Refugees (UNHCR), “Summary Conclusions: Family Unity, Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001”, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Feller et al. eds), Cambridge University Press (CUP), 2003, pp. 604-608, available at: <http://www.unhcr.org/419dbfaf4.pdf> (UNHCR, Summary Conclusions, Family Unity), paras. 9 and 10.

<sup>2</sup> H. Davidson, “Australia’s Immigration Measures are Keeping Families Apart, Study Says”, *The Guardian*, 21 November 2016, available at: <https://www.theguardian.com/australia-news/2016/nov/19/australias-immigration-measures-are-keeping-families-apart-study-says>.

members, thereby helping reduce their exposure to the dangers of irregular movement and reducing demand for smugglers and the risk of trafficking.

Bearing all these factors in mind UNHCR advocates for family reunification mechanisms that are swift and efficient in order to bring displaced families together as early as possible.<sup>3</sup> Yet, as outlined in this paper, in an increasingly restrictive environment in many countries, it has become even more difficult for them to realize this fundamental and essential right.

## 1.1 Content and scope

This study draws on and complements the research paper entitled: “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”.<sup>4</sup>

The present study examines:

- The international and regional standards and related jurisprudence underpinning the right to family life and family unity of refugees and other beneficiaries of international protection in the context of family reunification;
- Legal challenges securing family reunification faced by beneficiaries of international protection, including the family definition applied, documentation, income, accommodation, and other requirements, such as to apply within a period of time to benefit from preferential terms, or only after a certain period of residence, and related international, regional and national jurisprudence and practice;
- Practical challenges faced by beneficiaries of international protection, including lack of timely information, difficulties accessing embassies and obtaining visas and travel documentation, costs involved, administrative delays and obstacles, and related international, regional and national jurisprudence and practice;
- Restrictions on access to family reunification applied to persons with complementary/subsidiary protection and the compatibility of these restrictions with States’ international and regional obligations ;
- The situation of couples in different types of marriage/partnership;
- The situation of children in the context of family reunification, including the child’s best interests, unaccompanied child beneficiaries of international protection, adopted and foster children, questions of guardianship and custody, child beneficiaries of international protection who reach the age of majority, married unaccompanied children, and other issues;
- Family tracing;
- The question of restrictions as a means to combat fraud and misuse;

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<sup>3</sup> See generally, UNHCR, *Refugee Family Reunification. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, available at: <http://www.refworld.org/docid/4f55e1cf2.html>, pp. 3-4.

<sup>4</sup> UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, F. Nicholson, Protection Policy and Legal Advice Series, December 2017, available at: <http://www.refworld.org/docid/5a3ce9604.html>.

- The consequences of delay or impossibility of securing family reunification; and
- Humanitarian visas and other pathways to family reunification.

The right to family life and family unity is a right that applies to everyone, including asylum-seekers whose status has not yet been determined. This study does not, however, cover issues such as the right of asylum-seekers to family unity in the context of reception, nor the increased protections for this right in the context of the Dublin III Regulation,<sup>5</sup> even though, as the 2001 Summary Conclusions note: “Preparation for possible family reunification in the event of recognition should, in any event, begin in the early stages of an asylum claim, for instance, by ensuring that all family members are listed on the interview form.”<sup>6</sup>

Neither does the paper cover situations where a protection status, sometimes known as derivative status, is granted to family members already present in the country of asylum to enable family unity to be maintained. In addition, the paper does not attempt to examine the series of Executive Orders the Trump Administration issued in the United States during 2017 that affect refugee resettlement, including at times family reunification.<sup>7</sup>

Nor does paper address the question of family unity in the context of mass influx, although the Member States of UNHCR’s Executive Committee have agreed that in situations of large-scale influx “minimum basic human standards” require that “family unity should be respected” and that “all possible assistance should be given for the tracing of relatives”.<sup>8</sup> Finally, the paper does not go into detail regarding the question of family reunification in the context of resettlement, although this can be an important route to family unity.<sup>9</sup>

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<sup>5</sup> Council of the European Union (EU), *Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L 180/31-180/59, available at: <http://www.refworld.org/docid/51d298f04.html>. For more on the application in practice of this Regulation, see UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at: <http://www.refworld.org/docid/59d5dcb64.html>.

<sup>6</sup> UNHCR, Summary Conclusions, Family Unity, above fn. 1, para. 13.

<sup>7</sup> See e.g. *Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States*, 27 January 2017, available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> with the revised version of 6 March 2017 available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>. Currently, the following-to-join process has been suspended for derivative refugees (but not derivative asylees) until additional security measures can be implemented. As with the previous orders, a lawsuit is expected.

<sup>8</sup> UNHCR, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (XXXII), 21 October 1981, available at: <http://www.refworld.org/docid/3ae68c6e10.html>, para. II.B.2(h) and (i). See also, for instance, UNHCR, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, No. 100 (LV), 8 October 2004, available at: <http://www.refworld.org/docid/41751fd82.html>, para. (d) referring to the importance of “maintaining family unity wherever possible”.

<sup>9</sup> See generally, UNHCR, *Resettlement Handbook*, July 2011, available at: <http://www.refworld.org/docid/4ecb973c2.html>, pp. 269-283.

## 1.2 Methodology

The research for the study builds on existing UNHCR and other research and documents,<sup>10</sup> including notably the paper written by Jastram and Newland<sup>11</sup> as part of the commemoration of the 50<sup>th</sup> anniversary of the 1951 Convention relating to the Status of Refugees<sup>12</sup> in 2001 and on the Summary Conclusions<sup>13</sup> of the expert roundtable held at that time. It sets out applicable international and regional legal standards and seeks to reflect developments since then in international, regional and national jurisprudence and practice and to identify ways to ensure that respect for the right to family life, family unity, and family reunification can be strengthened.

Research for the study involved analysing relevant international, regional and national jurisprudence and reviewing academic literature and publications on the issue. This was complemented by responses to a brief questionnaire sent out to numerous UNHCR offices around the world to garner relevant State practice and jurisprudence and by discussions with UNHCR staff, notably at UNHCR headquarters in Geneva and during a mission to the Regional Representation for Northern Europe in Stockholm, where consultations were also held with the Swedish Red Cross and the Swedish Refugee Advice Centre.

Responses and information were provided by UNHCR offices in or covering all 28 Member States of the European Union (EU), Australia, Canada, the Republic of Korea, Iceland, Japan, New Zealand, Norway, Switzerland, the United States of America, and UNHCR bureaux covering the Americas, Asia, Europe, and North Africa and the Middle East. Thanks go to the librarians at the law libraries at the University of Cambridge and University of Edinburgh for their assistance. The inputs of those consulted have been essential to enabling this study to have global scope, although responsibility for any errors ultimately lies with the author.

The study has also benefitted from the many valuable contributions made by participants at the expert roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification organized by UNHCR in cooperation with the Odysseus Network in Brussels, Belgium, on 4 December 2017. A provisional draft of this paper was circulated at the meeting for comments. The presentations made by Professor Kees Groenendijk, Radboud University Nijmegen; Gisela Thäter, Swedish Red Cross; and Dr Jason Pobjoy, Blackstone Chambers, were particularly useful.

The study endeavours to provide as comprehensive a picture as possible within the available time and resources. It includes examples of developments in law and practice from every (habited) continent, but is not comprehensive and remains a snapshot at a time of rapid change in legislation, jurisprudence and practice. Where positive law and practice in line with international standards regarding the right to family life and family unity, which in the context

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<sup>10</sup> See e.g. UNHCR, *Note on Family Reunification*, 18 July 1983, available at: <http://www.refworld.org/docid/3bd3f0fa4.html> and other publications listed in the bibliography.

<sup>11</sup> K. Jastram and K. Newland, "Family Unity and Refugee Protection", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Feller et al eds), CUP, 2003, available at: <http://www.refworld.org/docid/470a33be0.html>, pp. 555-603.

<sup>12</sup> UN General Assembly (UNGA), *Convention relating to the Status of Refugees*, 28 July 1951, UN Treaty Series (UNTS), vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> (1951 Convention).

<sup>13</sup> UNHCR, Summary Conclusions, Family Unity, above fn. 1.

of refugees and others in need of international protection also involves a right to family reunification, has been found, this has been brought out with a view to ensuring that international standards can be upheld and to assuring refugees and others in need of international protection the widest possible exercise of this fundamental right. It is also hoped that the extensive comparative practice and jurisprudence at regional and national level can provide useful inspiration for legislators, policy makers and lawyers seeking to ensure law, policy and practice are in line with international obligations.

**Note:** The State practice set out in the study is generally listed with more problematic practice in Europe coming first, followed by contrasting better European practice, and concluding with practice from other States on other continents. Within these three sub-categories, State practice is listed in alphabetical order according to the country name.

## 2 INTERNATIONAL STANDARDS AND JURISPRUDENCE ON FAMILY REUNIFICATION

The international and regional standards and jurisprudence outlined below and in section 3 provide the framework against which the obstacles to family reunification faced by many refugees and persons with complementary/subsidiary protection<sup>14</sup> need to be assessed, so as to ensure that the States concerned are upholding their international obligations. Further information on international standards regarding the right to family life and family unity in international and regional refugee law, human rights law and humanitarian law is provided in the companion research paper to this paper.<sup>15</sup>

In international refugee law, the **1951 Convention** does not itself refer to family reunification, but the Final Act of the Conference of Plenipotentiaries at which it was adopted affirms that “the unity of the family ... is an essential right of the refugee” and recommends that governments

“take the necessary measures for the protection of the refugee’s family, especially with a view to ensuring that the unity of the family is maintained ... [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption”.<sup>16</sup>

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<sup>14</sup> In some jurisdictions, individuals who do not meet the refugee definition under international refugee law but who are nevertheless in need of international protection are granted complementary forms of international protection. See UNHCR, Executive Committee, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI), 7 October 2005, available at: <http://www.refworld.org/docid/43576e292.html>, para. (i). In the EU, this status is known as subsidiary protection. For more on these terms, see UNHCR, *Persons in need of international protection*, June 2017, available at: <http://www.refworld.org/docid/596787734.html>.

<sup>15</sup> See UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, 2017, section 2, above fn. 4.

<sup>16</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.refworld.org/docid/40a8a7394.html>. For more on the drafting history, see A. Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law (IJRL)*, vol. 17, no. 2 (2005), pp. 293–330, at p. 309.

Article 25 of the 1951 Convention concerning administrative assistance may also be relevant in the family reunification context. Article 25(1) requires Contracting States in which a refugee is residing to “arrange that such assistance be afforded to him by their own authorities or by an international authority”, “[w]hen the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse”. Legal commentary indicates that “any right to which an individual refugee is lawfully entitled, whether under domestic or international law, could form the basis of the obligation to furnish a refugee with administrative assistance”.<sup>17</sup> This could therefore include the refugee’s right to family unity.

Article 25(2) refers to “such documents or certifications as would normally be delivered to aliens by or through their national authorities”, which the explanatory note to the Secretary-General’s original proposal defines as referring to such documentation as needed to enable the refugee “to perform the acts of civil life”, including e.g. “marriage, divorce, adoption, ... etc.”.<sup>18</sup> Legal commentary states that “such documents or certifications” “should be given a broad meaning, and may be regarded as including certificates relating to family position (attesting e.g. to birth, marriage, adoption, death or divorce), ... copies or translations of originals, and attestations as to the regularity of documents or their conformity with the law.”<sup>19</sup> Article 25(3) affirms that “[d]ocuments or certifications so delivered ... shall be given credence in the absence of proof to the contrary” and Article 25(4) that any fees charged for these services “shall be moderate”.

Arguably, therefore, if a refugee is to exercise his or her right to family unity, he or she could be seen as entitled to assistance (at moderate cost) regarding the issuance of such documents or certification concerning his or her family members as are needed for him or her to enjoy this right. This could include documents or certification, whether on the basis of an affidavit or sworn statement, issued in lieu of the original document by the national authority of the refugee’s country of residence or by an international authority, including notably documentation issued by UNHCR. At least Article 25 could be taken to require States to show greater readiness to give such documents “credence in the absence of proof to the contrary”.

The experience of Mr Tanda-Muzinga with regard to documentation issued on the basis of Article 25 of the 1951 Convention suggests, however, that sufficient credence is not always given to such documentation.<sup>20</sup> He was seeking to reunite with his family in France and ended up taking his case to the European Court of Human Rights (ECtHR). In the course of his efforts to reunite with his family, the fact that the French Office for the Protection of Refugees and Stateless Persons (OFPRA) had issued him with a marriage certificate and a family book, as provided for under French law,<sup>21</sup> appears to have carried little weight in supporting his

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<sup>17</sup> A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press (OUP), 2011, p. 1138.

<sup>18</sup> Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex, 1950, pp. 43-44.

<sup>19</sup> Robinson, *Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)*, 1997, p. 109; Zimmermann (ed), above fn. 17, p. 1143.

<sup>20</sup> *Tanda-Muzinga c. France*, Requête no. 2260/10, ECtHR, 10 July 2014, available only in French at: <http://www.refworld.org/docid/53be80094.html>.

<sup>21</sup> France: *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA), 22 February 2005, version of 1 September 2017 available at:

application, as numerous further elements of proof were required. The Court's judgment notes the difficulties Mr Tanda-Muzinga faced participating in the process and proving filiation by other means, when in fact he had consistently declared his family relations from the beginning when claiming asylum and OFPRA had certified the composition of his family.<sup>22</sup>

In terms of soft law, Member States of UNHCR's Executive Committee have addressed the question of family reunification of refugees on a number of occasions.<sup>23</sup> Conclusion No. 24 on Family Reunification reiterates the principle of the unity of the family and provides that "every effort should be made to ensure the reunification of separated refugee families". In particular, it states that countries of origin "should facilitate family reunification by granting exit permission to family members of refugees to enable them to join the refugee abroad", while countries of asylum should "apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family".<sup>24</sup>

In terms of international human rights law, the **Human Rights Committee** (HRC), it has confirmed, in *Ngambi and Nébol v. France*, that Article 23 of the International Covenant on Civil and Political Rights (ICCPR) "guarantees the protection of family life including the interest in family reunification".<sup>25</sup> In its General Comment No. 19 the Committee states:

"[T]he possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."<sup>26</sup>

The Committee further confirms that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of ... respect for family life arise".<sup>27</sup>

Article 17 of the ICCPR is also relevant and affirms that no one shall be subject to arbitrary or unlawful interference with his or her family and that everyone has the right to the protection of the law against such interference.<sup>28</sup> The HRC's case law concerning this Article in the context

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<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158&dateTexte=20161206>, Article 721-2 alinéa 2.

<sup>22</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, paras. 7, 76, and 79. The judgment refers to the views of UNHCR, the Council of Europe and NGOs regarding the importance of enlarging the means of proof accepted and to one NGO arguing that the authorities should take into consideration the certificate of marriage and the family book issued by OFPRA, which had already been checked by OFPRA. For more on the judgment see text at fn. 86 in section 3.2.2 below.

<sup>23</sup> UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th edition, June 2014, available at: <http://www.refworld.org/docid/5698c1224.html>, pp. 223-229.

<sup>24</sup> UNHCR ExCom, *Family Reunification*, Conclusion No. 24 (XXXII), 21 October 1981, available at: <http://www.refworld.org/docid/3ae68c43a4.html>, paras. 4 and 5.

<sup>25</sup> *Benjamin Ngambi and Marie-Louise Nébol v. France*, CCPR/C/81/D/1179/2003, UN Human Rights Committee (HRC), 16 July 2004, available at: <http://www.refworld.org/docid/4162a5a46.html>.

<sup>26</sup> UN HRC, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, available at: <http://www.refworld.org/docid/45139bd74.html>, para. 5.

<sup>27</sup> UN HRC, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html>, para. 5.

<sup>28</sup> See also similar language in CRC, Article 16; CMW, Article 14.

of expulsion considers elements that need to be balanced against the State's interests in such cases. A more detailed examination of this case law is beyond the scope of this paper, but factors the HRC has taken into account include the existence of "long-settled family life"<sup>29</sup> and the fact that "the author's family ties would be irreparably severed if he were to be deported to Somalia, as his family could not visit him there and the means to keep up a regular correspondence between the author and his family in Canada are limited".<sup>30</sup> Where family life cannot be enjoyed in the country of origin due to the family member's need for international protection, such criteria could also be relevant considerations in the context of family reunification.

With regard specifically to refugees and family reunification, the HRC has clearly affirmed in *El Dernaoui v. Libya* that a refugee "cannot reasonably be expected to return to his [or her] country of origin" to enjoy his or her right to family unity. The case concerned a Libyan recognized as a refugee in Switzerland, whose reunification there with his wife and children had been approved, but whose family was unable to leave Libya. The HRC found a violation of Articles 17 and 23 of the ICCPR, as well as of Article 24 "in view of the advantage to a child's development in living with both parents", since Libya's action preventing their departure had "failed to respect the special status of the children".<sup>31</sup>

The case of *Gonzalez v. Guyana*, also concerned a couple who were unable to enjoy their right to family life elsewhere. In this case, the HRC held that the Guyanese authorities' refusal to grant a residence permit to the Cuban husband of a Guyanese national constituted a violation of Article 17(1) ICCPR, it being evident that the couple could not live in Cuba and that Guyana had "not indicated where else they might live as a couple".<sup>32</sup>

The case of *El-Hichou v. Denmark* is also relevant.<sup>33</sup> It concerned the son of a Moroccan, whose parents were divorced and who had been brought up by his grandparents in Morocco, although his mother had custody over him. His father had moved to Denmark and married and had further children there. When the grandparents died and his mother was unable to care for him, his father obtained custody of his son and sought permission for him to join him in Denmark, but this was repeatedly refused. As a result, the son travelled to Denmark, entered irregularly and was allowed to remain pending the outcome of the case. It was not disputed that the son and father "have a family life, both before he joined his father in [Denmark] and afterwards". The HRC ruled:

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<sup>29</sup> *Francesco Madafferi and Anna Maria Immacolata Madafferi v. Australia*, CCPR/C/81/D/1011/2001, UN HRC, 26 August 2004, available at: <http://www.refworld.org/docid/4162a5a36.html>; *Mansour Leghaei and Others v. Australia*, Communication No. 1937/2010, UN HRC, CCPR/C/113/D/1937/2010, 15 May 2015, available at: <http://www.refworld.org/docid/58c15852d.html>, para. 10.5.

<sup>30</sup> *Jama Warsame v. Canada*, Communication No. 1959/2010, CCPR/C/102/D/1959/2010, UN HRC, 1 September 2011, available at: <http://www.refworld.org/docid/4ee0f0302.html>, para. 8.10.

<sup>31</sup> *Farag El Dernaoui v. Libya*, No. 1143/2002, UN HRC, CCPR/C/90/D/1143/2002 (2007), available at: <http://www.refworld.org/cases,HRC,5a0d63514.html>, para. 6.3.

<sup>32</sup> *Gonzalez v. Republic of Guyana*, CCPR/C/98/D/1246/2004, UN HRC, 21 May 2010, available at: <http://www.refworld.org/cases,HRC,4c1895262.html>, para. 14.3. See also HRC, CCPR General Comment No. 16 adopted on 8 April 1988 (Article 17 ICCPR) paras. 3-4.

<sup>33</sup> *Mohamed El-Hichou v. Denmark*, No. 1554/2007, UN HRC, CCPR/C/99/D/1554/2007 (2010), available at: <http://www.refworld.org/cases,HRC,5a0d624f4.html>.



“... The fact that the author has remained illegally in the territory of the State party does not influence the fact that he developed family ties not only with his father, but with his half-siblings and their mother. It is also undisputed that the author learned the local language and developed certain ties with the local culture and society”.<sup>34</sup>

While in this case it would have been possible for father and son to maintain “the same degree of family life” in Morocco, the HRC noted two important changes in his circumstances: the death of the son’s “grandparents, who were his de facto caregivers during the first 10 years of his life” and his mother’s transfer of custody to his father, with the result that “primary responsibility for his support and upbringing after that lie with his father”.<sup>35</sup> The HRC found that the son’s separation from his father was “caused entirely” by the latter’s decision to move to Denmark and leave his son behind and “he made no attempts to bring his son join him with his new family until he was 11 and a half years old”. Nevertheless it ruled that “when those circumstances changed, the author’s father started to make attempts to reunite with him in order to assume the role of a primary caregiver”, observing that “at stake in the present case are the author’s rights as a minor to maintain a family life with his father and his half-siblings and to receive protection measures as required by his status as a minor. The Committee notes that the author cannot be held responsible for any decisions taken by his parents in relation to his custody, upbringing and residence”.<sup>36</sup> “In these very specific circumstances”, the HRC considered that continued refusal of the authorities to allow father and son to reunify in Denmark and the order [for the son] to leave Denmark would, if implemented, violate Article 23 and 24 of the Covenant”.<sup>37</sup> These issues and lines of argument could also be relevant in the context of family reunification of beneficiaries of international protection.

For its part, the **Committee on the Rights of the Child** (CRC Committee) states in its 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin:

“In order to pay full respect to the obligation of States under article 9 of the Convention [on the Rights of the Child (CRC)] to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views. ...

“Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations. ... Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is

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<sup>34</sup> Ibid., para. 7.3.

<sup>35</sup> Ibid., para. 7.3.

<sup>36</sup> Ibid., para. 7.4.

<sup>37</sup> Ibid., paras. 7.5 and 8.

concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.

“Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country’s decisions on family reunification therein. In this context, States parties are particularly reminded that ‘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’ and ‘shall entail no adverse consequences for the applicants and for the members of their family’ (art. 10 (1)). Countries of origin must respect ‘the right of the child and his or her parents to leave any country, including their own, and to enter their own country’ (art. 10 (2)).”<sup>38</sup>

Finally, the heads of State and government at the UN General Assembly in 2016 committed themselves in the **New York Declaration for Refugees and Migrants** amongst other things to consideration of “flexible arrangements to assist family reunification”.<sup>39</sup>

### 3 REGIONAL STANDARDS AND JURISPRUDENCE ON FAMILY REUNIFICATION

Regional standards and jurisprudence on family reunification are most developed in the European context, as outlined in the subsections 3.2, 3.3, 3.4, 3.5 and 3.6 below which cover:

- Refugees’ right to family reunification in the Americas and the jurisprudence of the Inter-American Court of Human Rights (IACtHR);
- The development since the 1980s of the jurisprudence of the European Court of Human Rights (ECtHR) as relevant to the family reunification of refugees and persons with complementary/subsidiary protection;
- Key provisions of the EU’s Family Reunification Directive;
- The more recent jurisprudence of the CJEU on the interpretation of this Directive; and
- The right to good administration and related principles.<sup>40</sup>

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<sup>38</sup> CRC Committee, *General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>, paras. 81-83. For more on the best interest principle and other rights under the CRC, see section 8.1 below.

<sup>39</sup> UNGA, *New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html>, para. 79.

<sup>40</sup> For more on regional legal standards regarding the right to family life and family unity, see UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, 2017, section 2.2, above fn. 4. See also, C. Costello, *The Human Rights of Migrants and Refugees in European Law*, OUP, 2016. Selected judgments of the European Court of Human Rights (ECtHR) and Court of Justice of the EU (CJEU) on family reunification and resulting national judgments and policy changes can also be found in European Migration Network (EMN), *EMN Synthesis Report for the EMN Focussed Study 2016 – Family*

In terms of other regional standards on family reunification, in **Africa**, the African Charter on the Rights and Welfare of the Child builds on the rights set out in the CRC and specifies a number of resulting State obligations, including in the area of family life.<sup>41</sup> The Charter requires States Parties “to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a [separated] child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family” (Article 23(2)). Further, it entitles any child “permanently or temporarily deprived of his family environment for any reason ... to special protection and assistance” and requires States to “take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters” (Article 25).

### 3.1 Standards regarding family reunification in the Americas

In Latin America, the 1984 Cartagena Declaration acknowledges that the “reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of humanitarian treatment in the country of asylum, as well as for facilities granted in cases of voluntary repatriation.”<sup>42</sup>

On the 20<sup>th</sup> anniversary of the Cartagena Declaration in 2004, the Mexico Plan of Action recognized the unity of the family as a fundamental human right of refugees and recommended the adoption of mechanisms to ensure its respect.<sup>43</sup> In 2014, the Brazil Declaration recommended “[s]trengthen[ing] the differentiated approach to age, gender and diversity, ... in decisions regarding applications for family reunification, as appropriate” and emphasized that the assessment of the protection needs of accompanied and unaccompanied children and adolescents, ... should be governed by the principles recognized in the Convention on the Rights of the Child, in particular the best interests of the child and non-discrimination, seeking to preserve family unity and recognizing children as persons entitled to rights and special protection”.<sup>44</sup>

In addition, the IACtHR ruled in its 2002 *Advisory Opinion on Juridical Condition and Human Rights of the Child*:

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*Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, Migrapol EMN [Doc 382], April 2017, available at: <http://www.refworld.org/docid/5a0d5b524.html>, Annex 5, pp. 90-95.

<sup>41</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights* (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html>. The Charter also protects the child’s privacy and family home and gives the child the protection of the law against such interference (Article 10). Article 19 affirms: “Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents” and reiterates the language of Article 9 of the CRC on the separation of children from their parents.

<sup>42</sup> *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>.

<sup>43</sup> *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America*, 16 November 2004, available at: <http://www.refworld.org/docid/424bf6914.html>.

<sup>44</sup> *Brazil Declaration and Plan of Action*, 3 December 2014, available at: <http://www.refworld.org/docid/5487065b4.html>.

“To respect unity of the family, the State must not only abstain from acts that involve separation of the members of the family, but must also take steps to keep the family united or to reunite them, if that were the case.

“In this regard, there must be a presumption that remaining with his or her family, or rejoining it in case they have been separated, will be in the best interests of the child. However, there are circumstances in which said separation is more favorable to the child. Before reaching this decision, all parts involved must be heard. The State is also under the obligation not only to abstain from measures that might lead to separation of families, but also to take steps that will allow the family to remain united, or for its members to reunite if they have been separated.”<sup>45</sup>

Further, in its 2014 *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, the IACtHR ruled:

“In the case of children who are unaccompanied or separated from their family, it is essential that States try to trace the members of their family, as long as this has been assessed as being in the best interest of the child. If possible and in keeping with the child’s best interest, the State should proceed to reunify such children with their families as soon as possible.”<sup>46</sup>

The Court has also found that part of the right to seek and enjoy asylum, as guaranteed by Articles 22(7) of the American Convention on Human Rights and XXVII of the American Declaration on the Rights and Duties of Man, entails the obligation “if refugee status is granted, [to] proceed to carry out family reunification procedures, if necessary in view of the best interest of the child”.<sup>47</sup>

### 3.2 ECtHR jurisprudence relevant to family reunification

Article 8 of the European Convention for the Protection of Fundamental Rights and Freedoms (ECHR)<sup>48</sup> states:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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<sup>45</sup> *Advisory Opinion on Juridical Condition and Human Rights of the Child*, OC-17/02, Inter-American Court of Human Rights (IACtHR), 28 August 2002, available at: <http://www.refworld.org/cases/IACRTHR,4268c57c4.html>, p. 36.

<sup>46</sup> *Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, IACtHR, 19 August 2014, available at: <http://www.refworld.org/docid/54129c854.html>, para. 105.

<sup>47</sup> *Ibid.*, para. 261, referring to Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: <http://www.refworld.org/docid/3ae6b3710.html> and Organization of American States, *American Convention on Human Rights*, “Pact of San Jose”, Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html>.

<sup>48</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

“2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The case law of the ECtHR regarding Article 8 has provided some protection against expulsion for long-settled migrants. By contrast, the rights for family members to enter are, as Costello observes, more precarious and less well protected in the Court’s jurisprudence.<sup>49</sup> The scope of States’ negative obligations not to divide families in the expulsion context are thus more developed, than that of their positive obligations to admit family members so that individuals are enabled to enjoy their right to family life and family unity.

As the Court has noted: “While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective ‘respect’ for family life”. In this context, “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation”.<sup>50</sup> In cases involving immigration, the Court’s starting point is the right of the State to control the entry of aliens into its territory and their residence there. Where family life as well as immigration are concerned, “the extent of a State’s obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest”.<sup>51</sup>

The State’s prerogative to control entry must therefore be balanced against the requirement of Article 8(2) ECHR that any interference with the right to family life must be “in accordance with the law”, in the interests of one or more legitimate aims, and “necessary in a democratic society” for achieving them, that is to say “justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued”.<sup>52</sup> As outlined in greater detail below and summarized at the end of the section, while the State’s margin of appreciation in the exercise of this right is generally quite wide, it is nonetheless circumscribed by a range of factors.

Spijkerboer suggests that the Court’s integration of the positive and negative obligations under Article 8(1) and 8(2) ECHR means that “the Court avoids having to articulate clear

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<sup>49</sup> C. Costello, *The Human Rights of Migrants and Refugees in European Law*, above fn. 40, p. 138 and for more on the *Dereci* judgment, p. 104.

<sup>50</sup> *Jeunesse v. The Netherlands*, Application no. 12738/10, ECtHR Grand Chamber, 3 October 2014, available at: <http://www.refworld.org/docid/584a96604.html>, para. 107 See also generally, Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, prepared by Dr C. Costello, Professor K. Groenendijk and Dr L. Halleskov Storgaard, June 2017, available at: <http://www.refworld.org/docid/5a0d5eae4.html>, paras. 3-8, 15-21, 244-246.

<sup>51</sup> See, e.g. *Jeunesse v. The Netherlands*, *ibid.*, para. 107; *Biao v. Denmark*, Application no. 38590/10, ECtHR, Grand Chamber, 24 May 2016, available at: <http://www.refworld.org/docid/574473374.html>, para. 117.

<sup>52</sup> See e.g. *Moustaquim v. Belgium*, Application no. 12313/86, ECtHR, 18 February 1991, available at: <http://www.refworld.org/docid/3ae6b7018.html>, paras. 37-46.

principles, with the result ... that it tends to 'assess the facts of each case separately, and minimise the precedential value of its judgments'".<sup>53</sup>

### 3.2.1 ECtHR jurisprudence concerning expulsion and the right to family life

A detailed examination of the ECtHR's jurisprudence in the context of expulsion and the extent of States' obligations under Article 8 ECtHR is beyond the scope of this research paper. Nevertheless, the ECtHR's 2001 judgment in *Boultif v. Switzerland* sets out a range of criteria that need to be taken into account when determining whether removal is in line with Article 8(2) ECHR where the person has committed criminal offences as follows:

- the nature and seriousness of the offence committed by the applicant;
- the duration of the applicant's stay in the country from which he or she is going to be expelled;
- the time which has elapsed since the commission of the offence and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage;
- other factors revealing whether the couple lead a real and genuine family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children in the marriage and, if so, their age; and
- the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin.<sup>54</sup>

Since then, the ECtHR's Grand Chamber judgment in *Üner v. the Netherlands* has made explicit two more criteria:

- the best interests and well-being of any children of the applicant, in particular the seriousness of the difficulties which any children were likely to encounter in the country to which the applicant was to be expelled;
- the solidity of social, cultural and family ties with the host country and with the country of destination.<sup>55</sup>

The requirement to consider the best interests of the child in expulsion cases where children are involved has been increasingly recognized by the ECtHR over the last decade or so. Court

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<sup>53</sup> Costello, *The Human Rights of Migrants and Refugees in European Law*, above fn. 40, p. 113 referring to Spijkerboer, "Structural Instability: Strasbourg Case Law on Children's Family Reunion", (2009) 11 *EJML*, 271, at 291.

<sup>54</sup> *Boultif v. Switzerland*, Application no. 54273/00, ECtHR, 2 August 2001, available at: <http://www.refworld.org/docid/468cbc9e12.html>, para. 48.

<sup>55</sup> *Üner v. The Netherlands*, Application no. 46410/99, ECtHR, Grand Chamber, 18 October 2006, available at: <http://www.refworld.org/docid/45d5b7e92.html>, para. 58. The Grand Chamber also confirmed that in assessing the impact of removal (or a refusal to renew residence permission): "[T]he totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life', therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life." (para. 59).

judgments frequently reiterate that individuals who arrive on a temporary visa or illegally and then start a family should not be allowed to present the authorities with a “*fait accompli*” to secure legal residence.<sup>56</sup> In some cases, however, the child’s best interests have shifted the balance decisively against the removal of a parent on the basis of exceptional circumstances, as in the cases of *Rodrigues de Silva and Hoogkamer v. The Netherlands*,<sup>57</sup> *Nunez v. Norway*,<sup>58</sup> *Butt v. Norway*,<sup>59</sup> *Kaplan v. Norway*,<sup>60</sup> and *Jeunesse v. The Netherlands*.<sup>61</sup> In each case, the Court found a violation of Article 8 ECHR.

Thus, while the ECtHR continues to assume that migration control amounts to a “pressing social need”, it has gradually refined the criteria to be considered as part of the Article 8 ECHR analysis in expulsion cases, building on the well-established criteria set out in *Boultif*. In particular, it has increasingly emphasized the importance of taking into account the best interests of the child, setting out in progressively more detail what this process involves. The child’s best interests are now seen as of “paramount importance”, which although not decisive alone must certainly be afforded “significant weight”.<sup>62</sup>

Factors the ECtHR takes into the consideration of the child’s best interests include: the length and closeness of the bond with the parent or other family members, any custody proceedings, any disruption and stress already experienced, any special needs and care requirements, the severity of any crime and the age at which it was committed, whether the children were aware of the precarious stay of their parents, and any delay on the part of the authorities in seeking to expel the parent. The Court also takes into account whether the child or children are “of adaptable age” and can therefore adapt to the deportation of a parent, although the separation of older children from their parents has also been accepted as able to result in a breach of Article 8 ECHR in exceptional circumstances. While some authors have critiqued the “casuistry” of the Court’s approach and highlighted its “necessarily inconsistent” nature,<sup>63</sup> the Court has by now developed a wide range of factors that need to be evaluated when States seek to balance the public and individual interests in specific circumstances.

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<sup>56</sup> On this issue see e.g. the cases cited in *Jeunesse v. The Netherlands*, ECtHR Grand Chamber, 2014, above fn. 50, para. 103, and generally, M.-B. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights: Study of European Court of Human Rights with an Inter-American Counterpoint*, OUP, 2015, pp. 464-466; C. Costello, *The Human Rights of Migrants and Refugees in European Law*, above fn. 40, pp. 126-130.

<sup>57</sup> *Rodrigues de Silva and Hoogkamer v. The Netherlands*, Application no. 50435/99, ECtHR, 31 January 2006, available at: <http://www.refworld.org/docid/464dcaca2.html>.

<sup>58</sup> *Nunez v. Norway*, Application no. 55597/09, ECtHR, 28 June 2011, available at: <http://www.refworld.org/docid/4e26e22c2.html>, para. 84.

<sup>59</sup> *Butt v. Norway*, Application no. 47017/09, ECtHR, 4 December 2012, available at: <http://www.refworld.org/docid/583ff1167.html>.

<sup>60</sup> *Kaplan and Others v. Norway*, Application no. 32504/11, ECtHR, 24 July 2014, available at: <http://www.refworld.org/docid/53d0de724.html>.

<sup>61</sup> *Jeunesse v. The Netherlands*, ECtHR Grand Chamber, 2014, above fn. 50.

<sup>62</sup> *Ibid.*

<sup>63</sup> Costello, *The Human Rights of Migrants and Refugees in European Law*, above fn. 40, pp. 128-130, 163, 168-169; T. Spijkerboer, “Structural Instability: Strasbourg Case Law on Children’s Family Reunion”, (2009) 11 *EJML*, 271, 291; J. Werner and M. Goeman, “Families Constrained: An analysis of the best interests of the child in family migration policies”, Defence for Children The Netherlands and Adessium Foundation, October 2015, available at: [http://www.defenceforchildren.org/wp-content/uploads/2015/12/20151021\\_DC\\_Families-constrained.pdf](http://www.defenceforchildren.org/wp-content/uploads/2015/12/20151021_DC_Families-constrained.pdf), p. 17.

### 3.2.2 Issues the ECtHR takes account of in the context of family reunification

In the context of State's obligations regarding family reunification, as opposed to those circumscribing States' prerogatives in the expulsion context, the starting point of the Court is very much a statist one that refusing admission does not normally require positive justification.

Where the **admission of spouses of foreigners with legal residence** in a Council of Europe country is concerned, the 1985 case of *Abdulaziz, Cabales and Balkandali*<sup>64</sup> is still the decisive ruling in the jurisprudence of the ECtHR. The judgment affirms that "the expression 'family life', in the case of a married couple, normally comprises cohabitation" and that "it is scarcely conceivable that the right to found a family should not encompass the right to live together".<sup>65</sup> More generally, the court has also determined that

"where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable the family to be reunited".<sup>66</sup>

The jurisprudence of the ECtHR outlined below is often based on cases involving immigrants, rather than refugees. In the immigration context, the Court generally finds that where family members can enjoy family life elsewhere, there is not an obligation to admit family members – an approach sometimes called the "elsewhere approach".

For many years the two leading ECtHR judgments epitomizing this approach were the 1996 judgments in *Gül v. Switzerland*<sup>67</sup> and *Ahmut v. The Netherlands*.<sup>68</sup> In both, the parents were seeking to bring their children to join them. In both, the Court found no violation of Article 8 ECHR on the grounds that it was possible for those involved to enjoy family life elsewhere.

In *Gül*, the Court ruled that the denial of the request by Turkish parents, who were living in Switzerland with residence permits issued on humanitarian grounds because of the wife's state of health, for the entry for their then six-year-old son living in Turkey did not violate Article 8 ECHR. While the couple had lived for many years in Switzerland and had a daughter there, they had also returned in recent years to Turkey to see their son there. The Court found that while "it would admittedly not be easy for them to return to Turkey, ... there are, strictly

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<sup>64</sup> *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, Applications nos. 9214/80; 9473/81; 9474/81, ECtHR, 28 May 1985, available at: <http://www.refworld.org/docid/5183e6b34.html>. For more on this case see UNHCR, "The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied", above fn. 4, section 3.3.1.

<sup>65</sup> *Ibid.*, para. 62.

<sup>66</sup> *Mehemi v. France (No. 2)*, Application no. 53470/99, ECtHR, 10 April 2003, available at: <http://www.refworld.org/cases/COECOMMHR/58a72f704.html>, para. 45, referring also to earlier caselaw.

<sup>67</sup> *Gül v. Switzerland*, ECtHR, 1996, Application no. 23218/94, ECtHR, 19 February 1996, available at: <http://www.refworld.org/docid/3ae6b6b20.html>.

<sup>68</sup> *Ahmut v. The Netherlands*, ECtHR, 1996, Application no. 73/1995/579/665, ECtHR, 28 November 1996, available at: <http://www.refworld.org/docid/3ae6b69014.html>.



speaking, no obstacles preventing them from developing family life in Turkey” and that the son had lived and grown up in Turkey.<sup>69</sup>

*Ahmut v. The Netherlands* concerned the denial of a request by a father, who had dual Netherlands and Moroccan nationality and was living in the Netherlands, for his nine-year old son to join him there after the son’s mother died. The Court found that the applicant was “not prevented from maintaining the degree of family life which he himself had opted for when moving to the Netherlands in the first place, nor is there any obstacle to his returning to Morocco”. It also noted that father and son had visited each other on numerous occasions.<sup>70</sup>

There are nevertheless elements in these judgments concerning immigration generally that are relevant to ensuring that refugees and beneficiaries of complementary/subsidiary protection are able to enjoy their right to family life and family unity with their families. Underlying the analysis on these specific issues is the requirement that States must demonstrate that any restriction on the right of beneficiaries of international protection to enjoy their right to family unity must be in accordance with the law, necessary in a democratic society and proportionate to the aim pursued.<sup>71</sup> Other cases relevant to specific issues and obstacles faced are also cited at relevant subsections below.

As Jastram and Newland have noted, the importance of this “elsewhere approach” is that it “leaves an opening for refugees and other persons in need of international protection seeking family reunion, since they are not able to return to their country of origin”.<sup>72</sup> Central to the right to family reunification of refugees and beneficiaries of complementary/subsidiary protection is thus the fact that, unlike other migrants, they are unable to enjoy the right to family unity and family reunification in their country of origin, due to the risk of persecution and/or serious human rights abuses to which this would expose them. The situation of refugees and beneficiaries of complementary/subsidiary protection is thus fundamentally different from that of other migrants.

In more recent jurisprudence, this “elsewhere approach” has been tempered in cases concerning the **admission of children wishing to join their parents**. The Court has further refined its approach, though always on a case-by-case basis, setting out additional considerations that need to be taken into account in weighing the interests of the family members in reunification and that of the State in controlling immigration.

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<sup>69</sup> *Gül v. Switzerland*, ECtHR, 1996, above fn. 67, para. 42. Factors the Court took into account included the mother’s health, the situation of the daughter in Switzerland who was in care, and the agreement between Switzerland and Turkey which would permit payment of the father’s invalidity benefit in Turkey.

<sup>70</sup> *Ahmut v. The Netherlands*, ECtHR, 1996, above fn. 68, para. 70.

<sup>71</sup> As stated in Article 8 ECHR and reiterated in numerous ECtHR judgments, including e.g. *Boultif v. Switzerland*, above fn. 54, paras. 46 and 55.

<sup>72</sup> Jastram and Newland, “Family Unity and Refugee Protection”, 2003, above fn. 72,, pp. 555-603, at p. 581. For more on the situation of couples of different nationalities, where the “elsewhere approach” might apply even in the refugee context, see section 7.2 below.

Two judgments are of particular relevance in this context: *Sen v. The Netherlands*<sup>73</sup> and *Tuquabo-Tekle v. The Netherlands*.<sup>74</sup> In both, violations of Article 8 ECHR were found. Both involved couples with children who had been born in the Netherlands and a request to bring an older child to join the family there.

The case of *Sen v. The Netherlands* concerned Turkish parents, who were living with a residence permit in the Netherlands with two of their daughters who had been born there, and who wished to bring their eldest daughter to live with them. The Court ruled in 2001 that under the circumstances, bringing the eldest daughter to the Netherlands would be the most appropriate means of developing family life with her, given her young age (nine years, at the time the application to bring her to the Netherlands was made) and her parents' capacity and willingness to care for her.

In *Sen*, the Court found in 2001 that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion.<sup>75</sup> Interestingly, although the Court had hitherto required applicants to show that admission was the "only way" they could enjoy family life together, in the *Sen* judgment, it found rather that admission was the most appropriate means of developing family life.<sup>76</sup>

*Tuquabo-Tekle v. The Netherlands*<sup>77</sup> is a case that is particularly relevant for persons fleeing armed violence and conflict. The Court's 2005 judgment determined that an Eritrean mother should be allowed to bring her daughter to the Netherlands, where she was living with her second husband, with whom she had two further children. The Court questioned whether she could be said to have left her daughter "behind of 'her own free will', bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad following the death of her [first] husband". Even though the daughter was older (15 years old at the time of the family reunification application) than in the *Sen* case and thus "not as much in need of care as young children", the Court found that she had been taken out of school and was a risk of being "married off".<sup>78</sup> Older children seeking to join their parents may thus also face protection risks in the country where they are living, which may need to be taken into account when assessing family reunification applications.

By contrast, an (in)admissibility decision in the case of *I. M. v. The Netherlands*,<sup>79</sup> issued in 2003, concerned a Dutch woman of Cape Verdean origin, who had had a second child in the Netherlands and was seeking to regularize the stay of S. (her first child) in the Netherlands.

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<sup>73</sup> *Sen c. Pays-Bas*, Application no. 31465/96, ECtHR, 21 December 2001, available in French only at: <http://www.refworld.org/docid/402a26b74.html>, para. 40.

<sup>74</sup> *Tuquabo-Tekle and Others v. The Netherlands*, Application no. 60665/00, ECtHR, 1 December 2005, available at: <http://www.refworld.org/docid/43a29e674.html>, paras. 47-50.

<sup>75</sup> *Sen c. Pays-Bas*, ECtHR, 2001, above fn. 73, para. 40.

<sup>76</sup> *Ibid.*, para. 40, stating: "la venue de Sinem [the eldest child] aux Pays-Bas constituait le moyen le plus adéquat pour développer une vie familiale avec celle-ci".

<sup>77</sup> *Tuquabo-Tekle and Others v. The Netherlands*, ECtHR, 2005, above fn. 74, paras. 47-50.

<sup>78</sup> *Ibid.*, paras. 47-50.

<sup>79</sup> *I.M. v. The Netherlands*, Application no. 41226/98, ECtHR, Admissibility Decision, 25 March 2003, available at: <http://www.refworld.org/docid/583ffca44.html>.

The Court declared the case inadmissible, deciding that “by the time a final decision had been taken on the applicant’s request, S. had reached an age where she was presumably not as much in need of care as a young child, and also that she has a considerable number of relatives living in the Cape Verde Islands”. I.M.’s daughter and indeed I.M. herself were thus found not to face risks in Cape Verde, unlike in the case of *Tuquabo-Tekle*, where return of the mother to Eritrea was not an option and the daughter faced protection risks (notably early and possibly forced marriage) there as well.

The ECtHR’s 2011 judgment in *Osman v. Denmark*<sup>80</sup> is the first of two judgments that year finding a violation of Article 8. It concerned a Somali national who had been living with her parents and siblings in Denmark since the age of seven. At the age of 15 her father, a recognized refugee, sent her against her will to a refugee camp in Kenya to take care of her paternal grandmother. Two years later, when still a minor, she applied to be reunited with her family in Denmark, but her application was rejected on the grounds that her residence permit had lapsed, as she had been absent from Denmark for more than a year. She was not entitled to a new residence permit, following a change in the law permitting only children below the age of 15 to apply for family reunification.

The ECtHR found in *Osman* that the applicant had spent her formative years in Denmark, spoke Danish and had received schooling in Denmark and that all her close family lived in Denmark. Accordingly, she could be considered a settled migrant who had lawfully spent all or the major part of her childhood and youth in the host country so that very serious reasons would be required to justify the refusal to renew her residence permit.<sup>81</sup> Although the aim pursued by the law on which that refusal was based was legitimate – discouraging immigrant parents from sending their children to their countries of origin to be “re-educated” in a manner their parents considered more consistent with their ethnic origins – the child’s “right to respect for private and family life could not be ignored”.<sup>82</sup>

The second 2011 judgment, *Saleck Bardi v. Spain*,<sup>83</sup> addressed **the impact of delays on the part of the authorities in responding to a mother’s request to be reunited with her daughter**. The case concerned a stateless Sahrawi mother from Tindouf refugee camp in Algeria, who was seeking to be reunified with her daughter, who had been living in Spain since 2002. Judicial proceedings there had eventually ended with the granting of guardianship of the girl to a Spanish host family after a long period of uncertainty and despite her biological mother’s request for her return. In its judgment, the Court determined that the mother’s relationship

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<sup>80</sup> *Osman v. Denmark*, Application no. 38058/09, ECtHR, 14 June 2011, available at: <http://www.refworld.org/docid/5852b1b94.html>. The case distinguishes this judgment from the inadmissibility decision in *Ebrahim and Ebrahim v. The Netherlands*, (dec.), 18 March 2003, available at: <http://www.refworld.org/docid/583fef07.html> in which the son had entered the Netherlands with his family when he was 10 years old and applied for asylum or a residence permit, before being returned to Lebanon to stay with his maternal grandmother in a refugee camp to become acquainted with his native country. Neither the boy nor any members of his family had at that time been granted a residence permit in the Netherlands. The son was thus older than the daughter in *Osman* and his period of residence in the Netherlands was both shorter and not on a settled basis.

<sup>81</sup> *Ibid.*, para. 66.

<sup>82</sup> *Ibid.*, para. 69.

<sup>83</sup> *Saleck Bardi c. Espagne*, Requête no. 66167/09, ECtHR, 24 May 2011, available at: <http://www.refworld.org/docid/5183e3e64.html>.

with her daughter was covered by the definition of family life under Article 8, even though there were de facto separated. Reiterating that in seeking to reconcile the interests of the parent, child and host family, the best interest of the child must be a primary consideration, the Court found that the passage of time, the lack of diligence on the part of the authorities responsible, and the lack of coordination among the relevant services had contributed to the daughter's sense of abandonment by her mother and her refusal to rejoin her. It therefore concluded that the national authorities had failed to fulfil their obligation to act promptly as is particularly required in such cases and that the Spanish authorities had not made appropriate and sufficient efforts to ensure respect for Mrs Saleck Bardi's right to her child's return and had lacked the requisite promptness for such a case.<sup>84</sup>

Two further judgments both handed down on 10 July 2014 are particularly relevant to the **family reunification of refugees and persons with complementary/subsidiary protection** and to cases where the **authorities handling of family reunification applications has involved excessive delay**. In the cases of *Mugenzi v. France*<sup>85</sup> and *Tanda-Muzinga v. France*<sup>86</sup> the Court held, unanimously, that there had been a violation of Article 8 of the ECHR.<sup>87</sup>

The first two cases concerned recognized refugees and in *Tanda-Muzinga v. France* the judgment stated:

“The Court recalls that family unity is an essential right of refugees and that family reunification is a fundamental element allowing persons who have fled persecution to resume a normal life. It recalls also that it has also recognized that obtaining such international protection constitutes a proof of the vulnerability of the persons concerned. It notes in this respect that the necessity for refugees to benefit from a family reunification procedure that is more favourable than that available to other foreigners is a matter of international and European consensus, as indicated in the mandate and activities of UNHCR and the norms set out in Directive 2003/86 of the EU. In this context, the Court considers that it was essential for the national authorities to take account of the vulnerability of the applicant and his particularly difficult personal experience, for them to pay great attention to the pertinent arguments he raised in the matter, for them to provide reasons for not implementing his family reunification, and for them to rule on the visa request promptly.”<sup>88</sup>

Both refugees in these two cases had encountered difficulties participating effectively in the family reunification procedure and especially in putting forward “other elements” of proof of their parent-child relationship and/or the children's ages. The Court found that they had been

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<sup>84</sup> Ibid., paras. 49, 55, 57, 58, and 64-66.

<sup>85</sup> *Mugenzi c. France*, Requête no. 52701/09, ECtHR, 10 July 2014, available only in French at: <http://www.refworld.org/docid/53be81784.html>.

<sup>86</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20.

<sup>87</sup> For a summary of the judgments in English see ECtHR, *Family reunification procedure: need for flexibility, promptness and effectiveness*, Press release, ECHR 211 (2014), 10 July 2014, available at: <http://hudoc.echr.coe.int/eng-press?i=003-4817913-5875206>.

<sup>88</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, para. 75 (author's translation, references omitted). The ECtHR's judgment in *Mugenzi c. France*, ECtHR, 2014, above fn. 85 contains similar language on applicable standards, the corresponding para. being para. 54.

confronted with multiple difficulties over the years, in spite of the fact that they had already undergone traumatic experiences and had endured delays that were excessive (being in Tanda-Muzinga’s case over three-and-a-half years and in Mugenzi’s case over five years),<sup>89</sup> given their specific situations and what was at stake for them in the verification procedure.

A third judgment, *Senigo Longue and Others v. France*,<sup>90</sup> also handed down on 10 July 2014, did not concern a refugee, but contains useful guidance on the assessment of the **best interests of the child in family reunification cases**. The Court ruled that it was necessary to institute a procedure that took into account the best interests of the children in family reunification cases<sup>91</sup> and that the protracted nature and accumulation of the difficulties encountered had not enabled the mother to assert her right to live with her children, whose situation ought to have been given greater consideration.<sup>92</sup>

*El Ghatet v. Switzerland*<sup>93</sup> is another case focusing on the determination of the child’s best interests. In its 2016 judgment, the ECtHR underlined the importance of ensuring that “in all decisions concerning children, their best interests must be paramount”. It continued:

“For that purpose, in cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents. While the best interests of the child cannot be a ‘trump card’ which requires the admission of all children who would be better off living in a Contracting State, the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it.”<sup>94</sup>

The case concerned a divorced Egyptian man, who had come to Switzerland and obtained a legal right to stay on the basis of his relationship with a Swiss woman with whom he had a child. He then sought to bring his son by his first marriage to Switzerland. The Court, finding that the domestic authorities had not undertaken “a thorough balancing of the interests in issue, particularly taking into account the child’s best interests”, ruled that “no clear conclusion can be drawn whether or not the applicants’ interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory”. It determined that the failure of the domestic authorities to undertake a “thorough balancing of the interests in issue” that placed the child’s best interests “sufficiently

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<sup>89</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, paras. 55 and 58; *Mugenzi c. France*, ECtHR, 2014, above fn. 85, para. 61. For further details of these cases in relation to documentation and delays, see respectively sections 4.3 and 5.5 below.

<sup>90</sup> *Senigo Longue et autres c. France*, Requête no. 19113/09, ECtHR, 10 July 2014, available in French at: <http://www.refworld.org/docid/53be7dc94.html>. For more on the best interest of the child in the family reunification context, see section 8.1 below.

<sup>91</sup> *Ibid.*, paras. 67-69.

<sup>92</sup> *Ibid.*, para. 74. For more on the requirement that procedures guarantee flexibility, speed and effectiveness (para. 75), see section 5.5 below.

<sup>93</sup> *El Ghatet v. Switzerland*, Application no. 56971/10, ECtHR, 8 November 2016, available at: <http://www.refworld.org/docid/5836a1854.html>.

<sup>94</sup> *Ibid.*, para. 46 (references removed).

at the center of the balancing exercise and its reasoning” meant that there had been a violation of Article 8.<sup>95</sup>

This judgment contrasts with the ECtHR’s admissibility decision in *I.A.A. v. United Kingdom*,<sup>96</sup> which concerned the request of a Somali woman, who had joined her second husband in the UK, to be joined by five of her children, who had been living in Ethiopia for the preceding nine years. While her husband was a refugee, the court found that “neither she nor any of her children ... have been granted refugee status and the applicants have not sought to argue that they would be at risk of ill-treatment were they to return to Somalia”. It ruled that “while it would undoubtedly be difficult for [her] to relocate to Ethiopia, there is no evidence before it to suggest that there would be any ‘insurmountable obstacles’ or ‘major impediments’ to her doing so”.<sup>97</sup> Although the domestic courts had accepted that it would be in the applicants’ best interests to be allowed to join their mother in the UK, the ECtHR reiterated that the best interest of the children could not be a “trump card” requiring their admission. While their situation was “certainly ‘unenviable’”, the ECtHR found they were “no longer young children”, that they had “in the meantime reached an age where they were presumably not as much in need of care as young children and are increasingly able to fend for themselves”, had all “grown up in the cultural or linguistic environment of their country of origin, and for the last nine years they have lived together as a family unit in Ethiopia with the older children caring for their younger siblings”.<sup>98</sup> The absence of a risk of ill-treatment was thus a decisive factor in the case in the Court’s decision that family life could be enjoyed elsewhere, while the weight to be accorded to the children’s best interests was not found to be sufficient.

Another 2016 judgment, *Biao v. Denmark*,<sup>99</sup> addresses the requirement that **restrictions on family reunification should not be discriminatory**, in this case on grounds of ethnic origin. As is examined below in Section 6.3 below on the compatibility of restrictions on the right of beneficiaries of subsidiary protection to family unity with States’ international and regional obligations, this case may be amongst those relevant in the context of the differential treatment as regards family reunification that is accorded to refugees and beneficiaries of subsidiary protection in some States.

In *Biao v. Denmark*, the Grand Chamber of the ECtHR overturned the Chamber judgment of 2014 and ruled that the refusal to grant family reunion to a Ghanaian couple in Denmark violated Article 14 ECHR in conjunction with Article 8 ECHR. Danish legislation provided for a residence permit to be granted if an “attachment requirement” is fulfilled, showing that a couple’s aggregate ties to Denmark are stronger than those in any other country, but changes introduced in 2003 established a “28-year rule” under which this attachment requirement does not have to be satisfied if one spouse has been a Danish national for at least 28 years or, in case of non-Danish nationality, has been born and/or raised in Denmark and has lived there

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<sup>95</sup> *Ibid.*, paras. 46-52.

<sup>96</sup> *I.A.A. and Others v. United Kingdom*, Application no. 25960/13, ECtHR (in)admissibility decision, 31 March 2016, available at: <http://www.refworld.org/cases,ECHR,5a2fa56f4.html>, paras. 44-45. See also, Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 22.

<sup>97</sup> *Ibid.*, paras. 44-45.

<sup>98</sup> *Ibid.*, para. 46.

<sup>99</sup> *Biao v. Denmark*, ECtHR, Grand Chamber, 2016, above fn. 51. For lower chamber judgment see *Biao v. Denmark*, Application no. 38590/10, ECtHR, 25 March 2014, available at: <http://www.refworld.org/docid/583ee29c7.html>.

lawfully for 28 years. It is this 28-year rule that the Court found was at odds with the prohibition of indirect discrimination on grounds of ethnic origin. The Grand Chamber analysed the impact of the 28-year rule on different groups of people and found that it “places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.”<sup>100</sup> Following the ruling, the authorities decided to disregard the 28-year-rule (subsequently amended to be a 26-year-rule) and to apply the attachment requirement in all cases.<sup>101</sup>

Thus, the Court’s case law as outlined above has identified numerous factors relevant to the family reunification of beneficiaries of international protection. Many are also reflected in its jurisprudence on expulsion as summarized very briefly in section 3.2.1 above. Depending on the circumstances of each case,<sup>102</sup> factors the ECtHR takes into account include:

- Whether the family separation was voluntary or not;
- Whether there are (insurmountable) obstacles to family life being enjoyed elsewhere;
- Whether the family member(s) concerned faced protection risks in their country of origin;
- Whether entry/residence were irregular or deception was involved;
- Whether there was a delay in seeking family reunification;
- Whether the authorities have shown the required flexibility, speed and effectiveness in procedures;
- Whether the authorities have taken into account the vulnerability and the particularly difficult personal history of applicants in their handling of family reunification applications;
- Whether children are involved;
- Whether domestic courts have placed the best interests of the child at the heart of their considerations and attached crucial weight to them, even if the child’s best interests are not a “trump card”;
- Where child(ren) are involved, their age, their situation in their country of origin;
- The extent to which they are dependent on their parents, with young children being viewed as in greater need of the care of their parents and older ones as more able to fend for themselves;
- The responsibility of the parent for initial separation from the child;
- Whether there are further child(ren), including in the destination country;
- The level of attachment, whether this be to the country or origin or residence, of both parents and children; and
- Whether family reunification legislation or policy is directly or indirectly discriminatory.

For more on national practice regarding family reunification and the child including their best interests, see section 8.1 below.

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<sup>100</sup> *Biao v. Denmark*, Application no. 38590/10, ECtHR Grand Chamber, 2016, *ibid.*, para. 138.

<sup>101</sup> Danish Immigration Service, *Change in the Attachment Requirement in Family Reunification Cases*, 8 July 2016.

<sup>102</sup> Some of these factors are outlined e.g. in *Jeunesse v. The Netherlands*, ECtHR, Grand chamber, 2014, above fn. 50, paras. 107-109.

### 3.3 The EU Family Reunification Directive

The EU Family Reunification Directive sets out the conditions for the exercise of the **right to family reunification** by third country nationals, including refugees, who are residing lawfully in the territory of the EU Member States. It affirms:

“Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion ....”<sup>103</sup>

The Directive refers specifically to refugees, stating:

“Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.”<sup>104</sup>

It sets out the terms for the exercise of the right to family reunification of third country nationals residing lawfully in the territory of the Member States.<sup>105</sup> This right extends only to nuclear family members, although Member States *may* extend the right more broadly to other family members.<sup>106</sup>

The Directive contains preferential terms for refugees in Chapter V, although Member States may limit the application of these more favourable rules to certain situations. For example by applying it only to family relationships which were formed prior to the entry of the refugee to a Member State (Article 9(2)), or requiring the applications for family reunification to be submitted within a period of three months after the granting of the refugee status (Article 12(1)). As set out in more detail below, these possible limitations do not take sufficiently into account the particular situation of refugees.<sup>107</sup>

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<sup>103</sup> Council of the EU, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification* (Family Reunification Directive), OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, 3 October 2003, available at: <http://www.refworld.org/docid/3f8bb4a10.html>, Recital 4. See also *European Parliament v. Council of the European Union*, C-540/03, CJEU, 27 June 2006, available at: <http://www.refworld.org/docid/4a54bc1cd.html>, para. 69; *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, C-558/14, EU CJEU, 21 April 2016, available at: <http://www.refworld.org/docid/583ed1484.html>, para. 26. See also similar language in Council of Europe: Parliamentary Assembly (PACE), *Recommendation 1686 (2004) on human mobility and the right to family reunion*, 23 November 2004, available at: <http://www.refworld.org/docid/583ed1c77.html>, para. 6.

<sup>104</sup> *EU Family Reunification Directive*, *ibid.*, above fn. 103, Recital 8.

<sup>105</sup> Article 3 of the Directive states that it does not apply to asylum-seekers, persons with temporary protection or persons granted “a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States”. See discussion on this issue a 6.2 below.

<sup>106</sup> See Article 4 of the Directive and section 4.1 below for further details.

<sup>107</sup> See also, European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, COM/2011/0735 final, 15 November 2011, available at: <http://www.refworld.org/docid/583d7a567.html>, p. 6.



### 3.4 CJEU jurisprudence concerning the Family Reunification Directive

Unlike the ECtHR, which in its jurisprudence regarding family reunification is essentially applying the principles that underpin one Article of the ECHR (Article 8, sometimes in conjunction with other Articles), the CJEU in its jurisprudence on the issue is interpreting much more detailed provisions, notably, in this context, the Family Reunification Directive. In particular, the CJEU is required to interpret the EU *acquis* on asylum and immigration in line with Member States' obligations under the Charter of Fundamental Rights, including notably the right to family life (Article 7); to non-discrimination (Article 21); the best interests principle (Article 24(2)); the right to good administration (Article 41); and to effective judicial protection (Article 47).

Costello has expressed the hope that the "EU law's bright lines may compensate for the ECtHR's casuistry, while the ECtHR's case-specificity and gradualism may temper EU law's rigidity in defining family life".<sup>108</sup>

As with the ECtHR's jurisprudence, it is necessary in drawing on the CJEU's jurisprudence to take into account the fact that the situation of refugees and other beneficiaries of international protection is different from that of other immigrants and third country nationals, in that the former are unable to enjoy a right to family life and family unity in their country of origin.

The first case to examine provisions of the Family Reunification Directive was *European Parliament v. Council of the EU*,<sup>109</sup> in which the European Parliament claimed that Articles 4(1), 4(6) and 8 of the Directive breached the fundamental right to family life. In its 2006 judgment, the CJEU rejected this claim, arguing that "Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation" and that the Directive's provisions preserve only a limited margin of appreciation for Member States.<sup>110</sup> The Court found that the Directive does not confer on Member States a greater discretion than other international instruments to weigh, in each situation, the different interests at stake, particularly the effective integration of immigrants, the right to family life, and the best interest of the child.<sup>111</sup>

In its judgment, the CJEU also ruled that the different treatment under the Article 4(1) of the Directive regarding children aged over 12 years, concerning whom Member States are entitled to require integration conditions to be met unlike younger children, did "not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that

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<sup>108</sup> C. Costello, *The Human Rights of Migrants and Refugees in European Law*, above fn. 40, p. 106.

<sup>109</sup> *European Parliament v. Council*, C-540/03, CJEU, 2006, above fn. 103.

<sup>110</sup> *Ibid.*, paras. 60 and 98.

<sup>111</sup> *Ibid.*, paras. 103-104.

integration in another environment is liable to give rise to more difficulties".<sup>112</sup> Nor did the CJEU find that

"the fact that a spouse and a child over 12 years of age are not treated in the same way [could] be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents. It was therefore justifiable for the Community legislature to take account of those different situations, and it adopted different rules concerning them without contradicting itself."<sup>113</sup>

The CJEU therefore concluded:

"[T]he final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way."<sup>114</sup>

With regard to Article 4(6) of the Directive, the CJEU likewise found that Article 4(6) permitting Member States "not to apply the general conditions of Article 4(1) of the Directive to applications submitted by minor children over 15 years of age" was not discriminatory, since the State was "still obliged to examine the application in the interests of the child and with a view to promoting family life".<sup>115</sup>

With regard to Article 8 of the Directive, which permits Member States to require lawful stay "in their territory for a period not exceeding two years, before having his/her family members join him/her", the Court determined that such "a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors". It found that the same is true regarding the possibility of States imposing "a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members", where existing national legislation allowed the State to take into account its reception capacity. It found that the criterion of the Member State's reception capacity "may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases". Rather the Court ruled that "when carrying out that analysis, the Member States must ... also have due regard to the best interests of minor children."<sup>116</sup>

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<sup>112</sup> Under the last subparagraph of Article 4(1) of the Family Reunification Directive, Member States may verify whether a child aged over 12 years meets a condition for integration provided for under existing legislation before deciding on whether to admit other family members, while no such restriction is applied to younger children.

<sup>113</sup> *European Parliament v. Council*, C-540/03, CJEU, above fn. 103, paras. 74-75.

<sup>114</sup> *Ibid.*, para. 76.

<sup>115</sup> *Ibid.*, para. 88.

<sup>116</sup> *Ibid.*, paras. 9, 100-101.

The case of *Chakroun v. Minister van Buitenlandse Zaken*<sup>117</sup> concerned the interpretation of Article 7(1)(c) of the Directive and is one of three CJEU judgments that have addressed this Article's requirement that the sponsor show evidence of "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family". In its 2010 judgment, the Court held that, "[s]ince authorisation of family reunification is the general rule", the requirement regarding sufficient resources "must be interpreted strictly", while the "margin for manoeuvre" which EU Member States are recognized as having "must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification". The CJEU also specified that the Directive and in particular Article 7(1)(c) "must be interpreted in the light of the right to respect for family life enshrined in both the ECHR and the Charter"<sup>118</sup> (*Chakroun* also examined the distinction between family formation and family reunification, as discussed in section 4.2 below.)

This was reiterated in the CJEU's 2012 judgment in the joined cases of *O. and S. v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L.*,<sup>119</sup> which concerned two reconstituted families. In each case, the legally resident third country mother had sole custody of her EU citizen child by a first marriage and was seeking to obtain a residence permit in Finland for her second husband and their third country national child. The Court ruled *inter alia*:

"when determining in particular whether the conditions laid down in Article 7(1) of Directive 2003/86 are satisfied, the provisions of that directive must be interpreted and applied in the light of Articles 7 and 24(2) and (3) of the Charter [referring respectively to the right to respect for family life, the best interest principle, and the right of the child to maintain on a regular basis a personal relationship and direct contact with both parents], as is moreover apparent from recital 2 in the preamble and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life."<sup>120</sup>

In its *O. and S.* judgment, the CJEU referred to its *Zambrano* and *Dereci*<sup>121</sup> judgments and went on to set out elements to be examined in order to determine in the cases of *O. and S.* and *L.* whether it was necessary to permit the second husband and second child to enter and reside in the EU Member State concerned. Amongst these elements, the Court notes that "while the principles stated in the *Ruiz Zambrano* judgment apply only in exceptional circumstances, it does not follow from the Court's case-law that their application is confined to situations in which there is a blood relationship" between the family members concerned.<sup>122</sup> The Court also referred to it being "the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise

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<sup>117</sup> *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, CJEU, 4 March 2010, available at: <http://www.refworld.org/docid/4b962e692.html>.

<sup>118</sup> *Ibid.*, paras. 43-44.

<sup>119</sup> *O. and S. v. Maahanmuuttovirasto* (C-356/11), and *Maahanmuuttovirasto v. L.*, (C-357/11), Joined Cases C-356/11 and C-357/11, CJEU, 3 December 2012, [http://www.refworld.org/cases/E CJ\\_58ab07d44.html](http://www.refworld.org/cases/E CJ_58ab07d44.html).

<sup>120</sup> *Ibid.*, para. 80 (cited also in *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, CJEU, above fn. 103, para. 28).

<sup>121</sup> *O. and S.*, CJEU, 2012, above fn. 119, paras. 47-48. For further details regarding the *Zambrano* and *Dereci* cases, see text at footnotes 137 and 141 respectively below.

<sup>122</sup> *O. and S.*, CJEU, 2012, *ibid.*, above fn. 119, para. 55.

the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal".<sup>123</sup>

The third case regarding the sufficient resources requirement is that of *Khachab v. Subdelegación del Gobierno en Álava*,<sup>124</sup> which concerned whether a prospective assessment of the likelihood that the sponsor would be able to retain his resources was compatible with the Directive. In its 2016 judgment the Court found:

"Article 7(1)(c) of Directive 2003/86 must be interpreted as allowing the competent authorities of a Member State to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of that Member State, in the year following the date of submission of that application, that assessment being based on the pattern of the sponsor's income in the six months preceding that date."<sup>125</sup>

The case of *Noorzia v. Bundesministerin für Inneres*<sup>126</sup> concerned the interpretation of Article 4(5) of the Family Reunification Directive which "[i]n order to ensure better integration and to prevent forced marriages [permits] Member States [to] require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her". The case concerned an Afghan couple where the wife's request to join her husband had been rejected on the grounds that her husband was not yet 21 years of age at the time she had made her request.

In its 2014 judgment, the Court found that

"by not specifying whether national authorities must, in order to determine whether the minimum age condition is satisfied, consider the matter by reference to the date when the application seeking family reunification is lodged or the date when the application is ruled upon, the EU legislature intended to leave to the Member States a margin of discretion, subject to the requirement not to impair the effectiveness of EU law".<sup>127</sup>

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<sup>123</sup> *Ibid.*, para. 56, referring to the 2012 Opinion of Advocate General Bot, 27 September 2012, available at: [http://www.refworld.org/cases/COUNCIL\\_58ab05f64.html](http://www.refworld.org/cases/COUNCIL_58ab05f64.html); *Zambrano*, below fn. 137, paras. 43 and 45; *Dereci and Others*, below fn. 141, paras. 65-67. For more on the question of dependency generally, see also UNHCR, "The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied", above fn. 4.

<sup>124</sup> *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, CJEU, above fn. 103.

<sup>125</sup> *Ibid.*, para. 48.

<sup>126</sup> *Noorzia v. Bundesministerin für Inneres*, C-338/13, CJEU, 17 July 2014, available at: <http://www.refworld.org/docid/53ccd5634.html>.

<sup>127</sup> *Ibid.*, para. 14.

It therefore ruled: “Article 4(5) of Directive 2003/86 must be interpreted as meaning that that provision does not preclude a rule of national law requiring that spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged.”<sup>128</sup>

In this case the CJEU did not follow the Opinion of the Advocate General, who in a longer analysis took the view that “the objective of restricting forced marriages, however legitimate and appropriate, must be counterbalanced by the right of genuinely married couples to exercise their right to family reunification which arises directly from the right to respect for their family life”. Drawing on the language in the CJEU’s *Chakroun* judgment,<sup>129</sup> he noted that under the Directive “the authorisation of family reunification is the general rule” with the result that “the conditions which the Member States may place on the exercise of the right to such reunification must be interpreted strictly”, and that the Directive “must be interpreted in the light of its general objective, which is to promote rather than prevent family reunification”. He therefore concluded:

“Article 4(5) Directive 2003/86 on the right to family reunification precludes a rule whereby the minimum age which, pursuant to that provision, the Member States may require to be reached before the spouse may join the sponsor must necessarily have been reached by both of them by the time the application for family reunification is submitted in order for it to be possible to grant that application.”<sup>130</sup>

The 2015 judgment in *Minister van Buitenlandse Zaken v. K. and A.*<sup>131</sup> concerned the interpretation of Article 7(2) of the Directive, which permits Member States to “require third country nationals to comply with integration measures, in accordance with national law”. K. and A. were wives seeking to join their husbands, who were legally resident foreign nationals. In their applications for reunification they had sought to be dispensed from having to meet this requirement on the grounds of the medical and psychological problems they each faced. In its judgment, the CJEU ruled:

“Member States may require third country nationals to pass a civic integration examination, ... which consists in an assessment of basic knowledge both of the language of the Member State concerned and of its society and which entails the payment of various costs, before authorising that national’s entry into and residence in the territory of the Member State for the purposes of family reunification, provided that the conditions of application of such a requirement do not make it impossible or excessively difficult to exercise the right to family reunification. In circumstances such as those of the cases in the main proceedings, in so far as they do not allow regard to be had to special circumstances objectively forming an obstacle to the applicants passing the examination and in so far as they set the fees relating to such an

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<sup>128</sup> *Ibid.*, para. 19.

<sup>129</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, above fn. 117 and text at that fn.

<sup>130</sup> *Noorzia v. Bundesministerin für Inneres*, Opinion of Advocate General Mengozzi, C-338/13, CJEU, 30 April 2014, available at: <http://www.refworld.org/cases/E CJ,58ab00d44.html>, paras. 44 and 68.

<sup>131</sup> *Minister van Buitenlandse Zaken v. K. and A.*, C-153/14, CJEU, 9 July 2015, available at: <http://www.refworld.org/cases/E CJ,58ab01dd4.html>.

examination at too high a level, those conditions make the exercise of the right to family reunification impossible or excessively difficult.”<sup>132</sup>

The judgment also states:

“[I]n accordance with the principle of proportionality, which is one of the general principles of EU law, the measures implemented by the national legislation transposing ... Directive 2003/86 must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary to attain them [which] would, in particular, be the case if the application of that requirement were systematically to prevent family reunification of a sponsor’s family members where ... they have demonstrated their willingness to [do so] and they have made every effort to achieve that objective”.<sup>133</sup>

While integration measures may only be applied to refugees and/or their family members once the persons concerned have been granted family reunification, the general points regarding the requirement to take account of special circumstances and for fees not to be so high as to “make the exercise of the right to family reunification impossible or excessively difficult” are pertinent. In addition, the judgment is relevant where refugees are unable to apply for family reunification within three months (if this or a similar deadline applies) and in the case of beneficiaries of subsidiary protection who in some EU States are unable to benefit from more preferential terms otherwise applying to refugees. As set out further below, this judgment is also relevant in relation to other provisions of the Family Reunification Directive.<sup>134</sup>

### **3.5 CJEU jurisprudence concerning the right to family life of EU citizens with third country national family members**

A number of other CJEU judgments concern EU citizens and situations which may require the grant of a right of residence to their third country national family members, if they are to be able to enjoy their right as EU citizens to live a normal family life.<sup>135</sup> These cases have arisen in the course of the development of internal free movement within the EU, with the circumstances of these cases requiring some cross-border element to engage EU law.<sup>136</sup> At first sight, they may not seem relevant to persons in need of international protection, but as this

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<sup>132</sup> Ibid., para. 71.

<sup>133</sup> Ibid., paras. 51 and 56.

<sup>134</sup> See sections 4.3 and 4.10.

<sup>135</sup> See, for instance, *Mary Carpenter v. Secretary of State for the Home Department*, C-60/00, CJEU, 11 July 2002, available at: <http://www.refworld.org/cases,E CJ,58ab0b424.html> and *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, C-200/02, CJEU, 19 October 2004, available at: <http://www.refworld.org/cases,E CJ,58c15be94.html>. See also generally, EMN, *Case Law of the Court of Justice of the European Union relating to legal migration and national developments*, October 2014, available at: <http://www.refworld.org/docid/58a4692c4.html>.

<sup>136</sup> For instance, through the exercise of a business (see *Carpenter*) or having the nationality of one EU State (Ireland) and living in another (UK) (see *Zhu and Chen*).

jurisprudence evolves it may prove relevant. This could, for instance, be the case where a child born in an EU Member State to one or more parents with international protection may acquire citizenship of that country with potentially consequent rights for their parents. This would depend on the applicable nationality law(s) and could be relevant if the parents with international protection were stateless.

The case of *Zambrano*<sup>137</sup> concerned a Colombian couple and their child whose asylum claims in Belgium were rejected but who could not be returned because of the ongoing conflict in Colombia and Belgium's resulting *non-refoulement* obligations. The couple's applications to regularize their status had been unsuccessful, but they had had two further children who had acquired Belgian nationality by operation of Belgian law. These children sought to establish a derivative right of residence (and a work permit) for their father on the basis of the children's rights as EU citizens. Since the children had never left Belgium, the Court found that the Free Movement Directive did not apply,<sup>138</sup> but it did find obligations on the basis of the free movement rights under Article 20 of the Treaty on the Functioning of the EU (TFEU).<sup>139</sup>

In its 2011 judgment the CJEU ruled that Article 20 TFEU:

“precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.”<sup>140</sup>

Later the same year, in *Dereci and Others*,<sup>141</sup> the Court emphasized the exceptional nature of the *Zambrano* case, adding that the obligation to provide a right of residence on that basis only applied if a failure to do so would require the EU citizen “in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole”.<sup>142</sup>

The *Dereci* case involved five third country nationals who were part of five different families and were each seeking a right of residency in Austria on the basis of their family link with an

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<sup>137</sup> *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, C-34/09, CJEU, Grand Chamber, 8 March 2011, available at: <http://www.refworld.org/docid/4f2a49f12.html>.

<sup>138</sup> Council of the EU, *Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, 29 April 2004, 2004/38/EC, available at: <http://www.refworld.org/docid/4a54bbb00.html> (Free Movement Directive).

<sup>139</sup> EU, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <http://www.refworld.org/docid/52303e8d4.html> (TFEU).

<sup>140</sup> *Zambrano*, CJEU, above fn. 137, para. 45.

<sup>141</sup> *Murat Dereci and Others v. Bundesministerium für Inneres*, C-256/11, CJEU, 15 November 2011, available at: <http://www.refworld.org/docid/4ff17d622.html>.

<sup>142</sup> *Ibid.*, para. 66. This is assumed by the CJEU in para. 44 of its judgment in *Zambrano*, although the Belgian authorities had acknowledged their *non-refoulement* obligations towards the non-national family members, as reported in para. 15 of that judgment.

Austrian national. The CJEU left verification of how this precept should be applied in each case to the referring national court.<sup>143</sup> The Court concluded:

“European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union.”<sup>144</sup>

Most recently, the CJEU ruled in May 2017 on whether Ms Chavez-Vilchez, and several other parents in broadly similar circumstances, could gain a derived right of residence under Article 20 TFEU. The case concerned a Venezuelan national who had entered the Netherlands on a tourist visa and subsequently had a child with a Dutch national. She later applied for social assistance and child benefit but this was rejected on the basis that she did not have a right of residence. In its judgment, the Grand Chamber of the Court found that a third country national may, as the parent of an EU citizen minor, rely on a derived right of residence in the EU. The Court found that in deciding to compel a third country national parent to leave the EU, the Member State must consider any relationship of dependency that exists between that parent and the EU citizen child. It ruled that the fact that the other parent, an EU citizen, could assume sole responsibility for the primary day-to-day care of the child is a relevant factor, though this is not in itself a sufficient ground to refuse a derived right of residence to the third country national parent. It must be determined that there is not, between the child and the third country national parent, such a relationship of dependency that a decision to refuse a derived right of residence to that parent would compel the child to leave the EU, thereby depriving that child of the genuine enjoyment of the substance of the rights attached to their status as an EU citizen. When assessing the relationship, authorities must take into account the right to respect for family life and the best interests of the child.<sup>145</sup>

### **3.6 The right to good administration and related principles**

A number of general legal principles also apply to the proper handling and administration of applications for family reunification needed to ensure effective enjoyment of the right to family unity and family reunification. The right to an effective remedy and to equal protection of the law without discrimination are embedded in international human rights law, for instance, in Articles 2(3) and 26 of the ICCPR.

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<sup>143</sup> *Dereci*, CJEU, above fn. 141, para. 74. In four of the cases, the family members were already in Austria seeking to regularize their status there; in the fifth a Serbian national was seeking family reunification for herself, her husband and three adult children with her Austrian national father.

<sup>144</sup> *Ibid.*, para. 102.

<sup>145</sup> *Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*, Case C-133/15, CJEU, 10 May 2017, available at: <http://www.refworld.org/docid/5a2fab84.html>.



In the EU, these rights are encapsulated in the rights to good administration and to an effective remedy, as set out in Articles 41 and 47 of the Charter of Fundamental Rights. Article 41 affirms:

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.”

“2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.”

Article 47 on the right to an effective remedy states:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

“Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

These provisions reflect general principles of EU law. As the CJEU has ruled, “where ... a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable”.<sup>146</sup> The CJEU has likewise confirmed that “when the authorities of the Member States take measures which come within the scope of EU law, they are, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests”.<sup>147</sup>

The requirement of effective, manageable, transparent and fair procedures that offer “appropriate legal certainty” is also set out in recital 13 of the Family Reunification Directive as follows:

“A set of rules governing the procedure for examination of applications for family reunification and for entry and residence of family members should be laid down.

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<sup>146</sup> *H.N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, CJEU, 8 May 2014, available at: <http://www.refworld.org/cases/ECI,5375e84f4.html>, paras. 49-50. (The case concerned procedures for granting subsidiary protection, but the general principle applies.)

<sup>147</sup> *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, C-166/13, CJEU, 5 November 2014, available at: <http://www.refworld.org/cases/ECI,5476e46a4.html>, para. 50. (The case concerned the right to be heard of illegally staying third country nationals facing return.)

Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned."

The principles of an effective remedy and non-discrimination are also enshrined in Articles 13 and 14 of the ECHR. The Council of Europe's Committee of Ministers has identified the following principles as elements of good administration: lawfulness, equality, impartiality, proportionality, legal certainty, of taking action within a reasonable time limit, participation, respect for privacy, transparency.<sup>148</sup>

A detailed analysis of these component principles of the right to good administration is beyond the scope of this paper, but effective adherence to them underpins the effective enjoyment of the right to family unity and family reunification for beneficiaries of international protection.

#### 4 LEGAL OBSTACLES TO FAMILY REUNIFICATION

Legislation and regulations on family reunification have become increasingly complex and restrictive in many countries in recent years. In Europe, the significant increases in arrivals in the numbers of asylum-seekers in some European countries in 2014 and 2015 have been followed by significant increases in the numbers of applications for family reunification.<sup>149</sup> As a result, many – though not all – European States have introduced legislation restricting family reunification in various ways, most notably for beneficiaries of subsidiary protection, as outlined in the latter case in section 6 below.

At the same time, in some other regions, the foundations of the right to family unity are stronger. For instance, in the Americas, legislation in **Bolivia**, **Costa Rica** and **Ecuador** echoes the language of the 1951 Convention and declares that family unity is an essential right of refugees.<sup>150</sup> The principle of family unity is defined as one of the principles guiding refugee protection in **Argentina**, **Bolivia**, **Chile**, and **Colombia**.<sup>151</sup> In **Honduras**, legislation states that

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<sup>148</sup> See Appendix to *Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*, adopted by the Committee of Ministers on 20 June 2007, 20 June 2007, available at: <http://www.refworld.org/docid/5a4cac754.html>; *Resolution (77) 31 on the Protection of the Individual in Relation to Acts of Administrative Authorities*, adopted by the Committee of Ministers on 28 September 1977, available at: <http://www.refworld.org/docid/5a4caf0a4.html>.

<sup>149</sup> For instance, in 2015 there were 6,680 applications for entry visas in Austria under the Asylum Act, 74 per cent of which came from Syrians, representing an increase of 239 per cent, according to the Federal Interior Ministry. See Austria: Federal Ministry of the Interior, "Familiennachzug: Rechtliche Entwicklung und aktuelle Trends", Medienserviceestelle, 12 May 2016.

<sup>150</sup> Bolivia: *Ley No. 251 de 2012, Ley de protección a personas refugiadas*, 20 June 2012, available at: <http://www.refworld.org/docid/55b634b84.html>, Article 9(I); Costa Rica: *Ley No. 8764 de 2009 - Ley General de Migración y Extranjería*, 1 March 2010, available at: <http://www.refworld.org/docid/4b0273cb2.html>, Article 106; Ecuador: *Decreto Ejecutivo No. 1182 de 2012, Reglamento para la aplicación en Ecuador del Derecho de Refugio*, 19 June 2012, available at: <http://www.refworld.org/docid/54f427764.html>, Article 6.

<sup>151</sup> Argentina: *Ley No. 26.165 de 2006, Ley general e reconocimiento y protección al refugiado*, 8 November 2006, available at: <http://www.refworld.org/docid/46d559e92.html>, Article 2; Bolivia: *Ley No. 251 de 2012, Ley de protección a personas refugiadas*, 2012, *ibid.*, Article 9; Chile: *Ley No. 20.430 de 2010, Establece disposiciones sobre Protección de Refugiados*, 8 April 2010, available at: <http://www.refworld.org/docid/4bcc66112.html>, Article 3.

every refugee is entitled to family reunification with relatives with whom there are blood or emotional ties or dependency and that applications for family reunification will be considered of special interest and priority.<sup>152</sup> In **Ecuador, Mexico, Peru, and Uruguay**, legislation affirms the right of refugees to family reunification, while legislation in **Venezuela** guarantees the refugee's right to family unity.<sup>153</sup>

In **South Africa**, the Constitutional Court has addressed the question of the right of couples to live together in the context of the right to human dignity. It ruled: "A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impaired the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity."<sup>154</sup>

The Organization for Economic Cooperation and Development (OECD) has reported that "limitations on family reunification are widely designed to facilitate returns to countries of origin if the situation there improves" with the type of permit granted having implications for family reunification where a temporary residence status has the effect of restricting the rights of holders to be joined by their families.<sup>155</sup> It has further observed that

"some countries may allow family migration only once the principal asylum applicant has settled into the labour market and become self-sufficient. And when inflows are high, measures that postpone or restrict family reunification are also seen as a means of easing the pressure on host countries' integration systems. Equally, however, they may produce adverse effects on the integration prospects of family members, particularly where young children are involved.... Here, too, possible costs must be weighed against potential benefits."<sup>156</sup>

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<sup>152</sup> Honduras: *Decreto No. 208-2003, Ley de Migración y Extranjería*, 3 March 2004, available at: <http://www.refworld.org/docid/409a2c1a4.html>, Article 47.

<sup>153</sup> Ecuador: *Regulatory Decree of the Human Mobility Law*, N° 111, 3 August 2017, available at: <http://www.refworld.org/docid/59ad53874.html>, Article 77; Mexico: *Ley de 2010 de Refugiados y Protección Complementaria*, 28 January 2011, available at: <http://www.refworld.org/docid/4d4293eb2.html>, Article 58; Peru: *Decreto legislativo n. 1350 de 2017 Decreto legislativo de migracionesde*, 2017, available at: <http://www.refworld.org/docid/58aef9d4.html>, Articles V and 37; Uruguay: *Ley N° 18.076, Estatuto del Refugiado*, 14 November 2006, available at: <http://www.refworld.org/docid/46d804c82.html>, Article 21; Venezuela: *Ley orgánica sobre refugiados o refugiadas asilados o asiladas*, 3 September 2001, available at: <http://www.refworld.org/docid/3dbeb6934.html>, Article 2(6).

<sup>154</sup> *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others*, CCT35/99 2000 (8) BCLR 837 (CC), South Africa: Constitutional Court, 7 June 2000, available at: <http://www.refworld.org/docid/58501f464.html>, para. 37. In the absence of a specific provision on family life in the South African Constitution, the Court considered marriage, including under civil or common law, African customary law, and Islamic personal law and including the right to cohabit, in the context of the right to human dignity. This right is guaranteed not only under the South African Constitution, but also under those of numerous other States, including Belgium, Canada, the Czech Republic, Estonia, Finland, Greece, Hungary, Israel, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain, and Sweden. See C. O'Mahony, "There is no such thing as a right to dignity", *International Journal of Constitutional Law*, vol. 10, Issue no. 2, 30 March 2012, available at: <https://academic.oup.com/icon/article/10/2/551/666082>, pp. 551-574 and generally A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, CUP, 2015.

<sup>155</sup> OECD, *Making Integration Work: Refugees and others in need of protection*, OECD Publishing, 2016, Paris, available in at: <http://www.refworld.org/docid/56af089d4.html>, pp. 8-9.

<sup>156</sup> *Ibid.*, pp. 8-9.

The subsections below examine the following legal obstacles encountered:

- Family definition applied
- Marriages and families formed outside the country of origin before arrival in the country of asylum
- Documentation requirements
- Requirement to undertake DNA testing
- Restrictions based on manner of arrival
- Requirement to apply within a limited time frame in order to benefit from preferential terms as a refugee/beneficiary of subsidiary protection
- Income/subsistence, accommodation and other requirements
- Requirement to seek family reunification from outside the country of asylum
- Entitlement to apply for family reunification only after a period of time
- High fees
- Lack of legal aid/support and appeal possibilities
- Status granted upon family reunification
- Lack of implementing regulations or effective remedy

For more on the practical obstacles refugees and beneficiaries of complementary/subsidiary protection also face, see section 5 and for more specifically on the situation of beneficiaries of subsidiary protection see section 6 below.<sup>157</sup>

#### 4.1 Family definition applied

UNHCR's Executive Committee Conclusion No. 24 calls for the facilitated entry of family members and hopes that "countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family".<sup>158</sup>

UNHCR encourages States "to adopt inclusive definitions of family members, in recognition of the severe hardship separation causes to individuals who depend on the family unit for social and economic support even if they are not considered by the prospective country of reception to belong to what is known as the 'nuclear family'". While it acknowledges that "there is justification in giving priority to safeguarding this basic unit", UNHCR calls on governments "to give positive consideration to the inclusion of other family members –

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<sup>157</sup> See also generally, European Council on Refugees and Exiles (ECRE) and Red Cross EU Office, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, November 2014, available at: <http://www.refworld.org/docid/58514a054.html>; UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, December 2012, available at: <http://www.refworld.org/docid/588b4f164.html>; and for a general overview EMN, *EMN Synthesis Report for the EMN Focussed Study 2016 – Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, 2017, above fn. 40.

<sup>158</sup> UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 24, para. 5. For more on the concept of family applied in practice at international level, see UNHCR, "The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied", above fn. 4, section 3.

regardless of age, level of education, marital status or legal status – whose economic and social viability remains dependent on the nuclear family”.<sup>159</sup>

In the Americas, the IACtHR has taken an approach that goes beyond “the traditional notion of a couple and their children” to include other blood relatives and others with no biological relation among whom there are “close personal ties”. In its 2014 *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* the IACtHR defines the family as follows:

“[T]he family to which every child has a right is, above all, her or his biological family, including extended family, and which should protect the child and also be the priority object of the measures of protection provided by the State. Nevertheless, the Court recalls that there is no single model for a family. Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes.”<sup>160</sup>

In Europe, the Parliamentary Assembly of the Council of Europe (PACE) acknowledged in its 2004 Recommendation on Human Mobility and Family Reunion that “the concept of ‘family’ underlying that of family reunion has not been defined at European level and varies in particular according to the value and importance attached to the principle of dependence”.<sup>161</sup> In this context, PACE has urged Council of Europe member States to interpret the concept of “family” as including “de facto family members (natural family), for example [...] a partner or natural children as well as elderly, infirm or otherwise dependent relations”.<sup>162</sup>

PACE’s Committee on Migration, Refugees and Displaced Persons provided further guidance in its 2012 “Position Paper on Family Reunification”.<sup>163</sup> This states that a common, broad interpretation of the term “family” “should include in particular members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, as well as dependent adult children and dependent parents on the

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<sup>159</sup> UNHCR, *Resettlement Handbook*, 2011, above fn. 9, p. 180.

<sup>160</sup> Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, IACtHR, 2014, above fn. 46, (footnotes omitted), para. 272.

<sup>161</sup> PACE, *Recommendation 1686 (2004)*, above fn. 103, para. 7. See also on the concept of dependency, UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, section 3.6.

<sup>162</sup> PACE, *Recommendation 1327 (1997) on Protection and Reinforcement of the Human Rights of Refugees and Asylum-seekers in Europe*, available at: <http://www.refworld.org/docid/583ed2e57.html>, para. 8.7(o); PACE, *Recommendation 1686 (2004)*, above fn. 103, para. 8; and others.

<sup>163</sup> PACE, Committee on Migration, Refugees and Displaced Persons, *Position Paper on Family Reunification*, 2 February 2012, AS/Mig (2012) 01, available at: <http://www.refworld.org/docid/583ed4ef7.html>.

basis of the principle of dependency ... in line with the interpretation of the concept of family life of the European Court of Human Rights".<sup>164</sup>

With regard to the Family Reunification Directive in the EU, Article 4(1) defines core family members whom States *shall* admit<sup>165</sup>. Member States *may* also permit reunification with the parents of an adult applicant or of his or her spouse, as well as his or her or his or her spouse's adult unmarried children where they are dependent (Article 4(2)), and with an unmarried partner, persons in a registered partnership, their unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health (Article 4(3)).<sup>166</sup> Article 10(2) takes into account the specific situation of, and challenges facing, refugee families by permitting their reunification with other dependent family members. In addition, the CJEU has recalled that "authorisation of family reunification is the general rule", that any limitations "must be interpreted strictly", while States' "margin for manoeuvre ... must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof".<sup>167</sup>

With regard to the concept of dependency, the CJEU has held that the status of a "dependent" family member is the result of a factual situation characterized by the fact that legal, financial, emotional or material support for that family member is provided by the sponsor or by his or her spouse/partner and "the extent of economic or physical dependence and the degree of relationship between the family member" and the person he or she wishes to join.<sup>168</sup> While this determination relates to the Free Movement Directive, the European Commission has noted that this definition may "serve as guidance to [Member States] to establish criteria to appreciate the nature and duration of the dependency".<sup>169</sup>

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<sup>164</sup> *Ibid.*, para. 11.

<sup>165</sup> Family members under Article 4(1) are listed as: the sponsor's spouse; the minor children of the couple (i.e. unmarried children below the legal age of majority in the EU country concerned), or of one member of the couple, where he or she has custody and the children are dependent on him or her, including in each of these cases adopted children.

<sup>166</sup> Family members under (Article 4(2)) are listed as: first-degree ascendants in the direct line (father and mother of the foreign national) where they are dependent on them and do not enjoy proper family support in the country of origin); adult unmarried children where they are objectively unable to provide for their own needs on account of their state of health, and under Article 4(3) as unmarried partners in a duly attested stable long-term relationship, persons in a registered partnership, their unmarried minor children, including adopted children, and their adult unmarried children who cannot provide for their own needs on account of their state of health.

<sup>167</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 117, para. 43.

<sup>168</sup> *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others*, C-83/11, CJEU, 5 September 2012, available at: [http://www.refworld.org/cases,E CJ,58c15b054.html](http://www.refworld.org/cases/E CJ,58c15b054.html), para. 23. See also, *Reyes v. Migrationsverket*, C-423/12, CJEU, 16 January 2014, available at: [http://www.refworld.org/cases,E CJ,58aafd564.html](http://www.refworld.org/cases/E CJ,58aafd564.html), paras. 21-24, on the question of financial dependency in the context of the Free Movement Directive, which in Article 2(2) defines "family" more broadly as meaning the spouse; registered partner; direct descendants under the age of 21 or dependants and those of the spouse or partner; dependent direct relatives in the ascending line and those of the spouse or partner.

<sup>169</sup> European Commission, *Communication from the Commission to the European Parliament and the Council of 2014 on guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210 final, 3 April 2014, available at: <http://www.refworld.org/docid/583d7d0b7.html>, p. 6.

In family reunification cases, however, many States apply a narrow definition of family based on the traditional notion of the “nuclear” family although there are exceptions. Such a “nuclear” or “close” family is generally accepted as consisting of married spouses and their minor or dependent, unmarried children. In some countries, as outlined in examples given below, it also includes partners, adopted children, whether adopted legally or on a customary basis, as well as married minor children where it is in their best interests to consider them as family members. Parents and minor siblings of an applicant (including where the applicant or sibling is married), if it is in their best interests, may occasionally also be considered.<sup>170</sup>

Family reunification is usually carried out within an immigration framework. Yet it is important not to “overlook the reality of people in need of international protection”, as the European Council on Refugees and Exiles (ECRE) and the Red Cross have observed. They continue:

“Beyond the fact that the nuclear family concept does not reflect how the family unit is constituted and evolving globally, including in European societies, such an understanding disregards the profound changes to the family structure which come about as a result of forced displacement. In regions of conflict and following severe crisis, it is not unusual for households to be composed of children whose parents are no longer alive or are missing as a result of the conflict. Furthermore, it is not rare that families are formed during flight, as people may spend years in transit countries or in camps before finally settling in the EU.”<sup>171</sup>

*In Europe, examples of law and practice regarding the family definition applied for family reunification purposes that essentially follows the definition in the Family Reunification Directive are listed below. Various judgments on the question of dependency also provide insights into national understandings of this and other issues:*

In **Austria**, family members are defined as “the parent of an under-age child, the spouse or the under-age unmarried child of an asylum-seeker at the time of filing the application, or of an alien to whom subsidiary protection status or asylum status has been granted, insofar as in case of spouses the family already existed before the entry of the refugee/beneficiary of subsidiary protection into Austria, as well as the legal representative of a person to whom international protection has been granted if that person is an unmarried under-age person insofar as such legally relevant relationship already existed in the country of origin; the foregoing shall also apply to registered civil partners insofar as the registered civil partnership already existed in the country of origin”.<sup>172</sup>

In limited cases, adult dependents may also be included. For instance, the Federal Administrative Court acknowledged in a 2016 judgment that there may be exceptional circumstances where an adult child can qualify for family reunification if there is continued

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<sup>170</sup> See in addition to the information below: UNHCR, *Refugee Family Reunification. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3; UNHCR *Resettlement Handbook*, 2011, above fn. 9, p. 271.

<sup>171</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 157, p. 11.

<sup>172</sup> Austria: *Federal Act Concerning the Granting of Asylum (2005 Asylum Act - Asylgesetz 2005)*, 1 January 2006, available at: <http://www.refworld.org/docid/46adc62c2.html>, Article 2(1)(22).

dependency, in this case on account of the applicant's disability. It overturned a decision denying an entry visa to a disabled adult stateless Palestinian from Syria seeking to join his parents and siblings who all had asylum in Austria. The Court ruled that an individualized assessment was required of whether there were Article 8 ECHR grounds for allowing his entry, as provided for in legislation, because of his dependency on his parents, even though he was an adult and that the authorities should also have provided him with a reasoned opinion as to whether or not exceptional circumstances existed in his particular case.<sup>173</sup>

In a later case, however, the same Court upheld a decision to deny a visa to an adult son to join his Somali father, who had subsidiary protection in Austria, even though his mother and minor siblings had been given visas and even though he had diabetes and a bone fracture. In this case, the Court ruled that his case fell under private life not family life under the ECHR and that his family could provide financial assistance from abroad to treat his chronic illness or could seek to bring him to Austria on the basis of national legislation transposing the Family Reunification Directive.<sup>174</sup> The case cites not only relevant ECtHR jurisprudence but also the CJEU's ruling in *Khachab*<sup>175</sup> on the forward-looking requirement to show "stable and regular resources". Key differences in this case appear to be the nature of the dependency and the subsidiary protection status of the sponsor.

In **Belgium**, family members entitled to join a beneficiary of international protection comprise: his or her spouse, registered partner equivalent to marriage or the legally registered partner if the couple concerned are over 21 years old, or over 18 years old if the marriage or partnership predated the arrival of the beneficiary of international protection in Belgium; their unmarried, minor children; adult children with a disability, if they cannot meet their own needs; and, if the beneficiary is an unaccompanied child, his or her parents.<sup>176</sup> Other family members may seek to join beneficiaries of international protection by applying for a humanitarian visa, which may be issued on a discretionary basis.<sup>177</sup>

In **Croatia**, family members of a beneficiary of international protection comprise his or her spouse, unmarried partner or life partner recognized under Croatian law; their minor children, including minor adopted children and step children; his or her adult unmarried child who due to his or her state of health is not able to take care of his/her own needs; the parent or other legal representative of a minor; and a second degree, direct blood relative, with whom he or she lived in a shared household, if it is established that he or she is dependent on the care of the beneficiary of international protection.<sup>178</sup>

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<sup>173</sup> *W161 2121583-1*, Austria: Bundesverwaltungsgericht (Federal Administrative Court), 8 March 2016, available in German at: <http://www.refworld.org/docid/5859333d4.html>. See also Austria: *Asylum Act*, 2005, *ibid.*, above fn. 172, Article 55(1).

<sup>174</sup> *W205 2118262-1*, Austria: Bundesverwaltungsgericht, 17 June 2016, available in German at: <http://www.refworld.org/docid/58592f2a4.html>.

<sup>175</sup> *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, CJEU, above fn. 103.

<sup>176</sup> Belgium: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, 15 December 1980, available at: <http://www.refworld.org/docid/4e803ea82.html>, Section 10(4), 10(6) and 10(7).

<sup>177</sup> See also *X. et X. c. État belge*, C-638/16 PPU, CJEU, 7 March 2017, available at: <http://www.refworld.org/cases,ECJ,58c2bfd34.html> and Belgian Refugee Council, *Guide pratique demandes de visa humanitaire pour membres de la famille des bénéficiaires de protection internationale en Belgique*, April 2016, available at: <http://www.refworld.org/docid/5a4df9d34.html>.

<sup>178</sup> Croatia: *Act on International and Temporary Protection 2015*, 2 July 2015, available at:



In **Denmark**, only the closest nuclear family members are permitted to reunite with a sponsor i.e. spouses, cohabiting partner (if a permanent, lasting relationship can be shown, normally through proof of that they have been living together for 18 months before applying for family reunification) and unmarried children under 18 years of age.<sup>179</sup> A refugee's minor siblings, adult dependent children or other dependent family only have a right to family reunification if a denial would result in a violation of Article 8 of the ECHR.<sup>180</sup>

In **Estonia**, the definition of who are considered family members of a refugee or person with subsidiary protection comprises his or her spouse (but not unmarried or same-sex partners); his or her and his or her spouse's unmarried minor child, including an adopted child; an unmarried and minor child under their or his or her spouse's custody, including an adopted child; their or his or her spouse's unmarried adult child if he or she is unable to cope independently due to his or her state of health or disability; and a parent or grandparent maintained by them or his or her spouse if other family members are not providing support in the country of origin. Family members of an unaccompanied child refugee or beneficiary of subsidiary protection are his or her parent(s); his or her guardian or other family member if he or she has no parents or if the parents cannot be traced unless this is contrary to the rights and best interests of the child. The family link must have existed in the country of origin and the marriage must have taken place before entry to Estonia.<sup>181</sup>

In **France**, both spouses and partners are accepted, if they are over 18 years of age. In addition, unmarried children of the beneficiary of international protection and his or her spouse who are seeking reunification who are not over the age of 19 (not 18) are entitled to family reunification, as are children of the beneficiary of international protection and his or her spouse from previous relationships, if they are under the age of 18. This concerns children whose blood relationship has been established to the beneficiary of international protection or his or her spouse or whose other parent has died or been deprived of their parental rights or who, depending on the case, are entrusted to their parental authority, as the result of a decision taken by a foreign court. The parents of unaccompanied children are also accepted.<sup>182</sup>

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<http://www.refworld.org/docid/4e8044fd2.html>, Article 4(18). Family members for whom reasons for exclusion exist were they to seek asylum do not have the right to family reunification (Article 66(5)).

<sup>179</sup> Denmark: *Aliens Act of 2003*, 24 July 2003, available at: <http://www.refworld.org/docid/3ae6b5634.html>, Section 9(1). While family reunification in Denmark is normally denied to children over the age of 15 years, this provision is not applied if the parent in Denmark holds a residence permit as a refugee or has protected status. New to Denmark, *Children between the ages of 15 and 18*, available at: [https://www.nyidanmark.dk/en-us/coming\\_to\\_dk/familyreunification/children/children-between-15-and-18.htm](https://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/children/children-between-15-and-18.htm).

<sup>180</sup> UNHCR, "Family Reunification for Persons who have Family Members in Denmark", 18 October 2017.

<sup>181</sup> Estonia: *Act on Granting International Protection to Aliens*, 1 July 2006, available at: <http://www.refworld.org/docid/5047550b2.html>, section 7.

<sup>182</sup> France: CESEDA, above fn. 21, Articles L314-11 8°, L313-13 and L752-1; OFPRA, *Vous êtes bénéficiaire du statut de réfugié, d'apatride ou de la protection subsidiaire en France, vous êtes installé régulièrement en France, vous souhaitez faire venir votre famille en France*, (OFPRA Family Reunification Leaflet), 2 December 2015, available in French, English and Arabic at: <https://www.ofpra.gouv.fr/fr/protection-etat-civil/reunification-familiale>. See also in relation to recent reforms, UNHCR, *Note du HCR sur le projet de loi relatif à la réforme de l'asile*, October 2014, available at: <http://www.refworld.org/docid/55793c684.html>, pp. 23-25; UNHCR, *Note révisée du HCR sur le projet de loi relatif à la réforme de l'asile - Sénat*, March 2015, available at: <http://www.refworld.org/docid/55793b9f4.html>, pp. 29-32.

In **Germany**, a refugee and a person granted asylum are permitted to reunite with his or her spouse (who must be at least 18 years of age) and minor, unmarried child(ren). Beyond the core family, there is only a provision granting discretion to the authorities to allow the subsequent entry and stay of members of the broader family in order “to avoid undue hardship”, for instance in cases of dependency resulting from disabilities or severe illness, where no other person can sufficiently support the individual and further assistance can only be provided in Germany. Family reunification may not be granted if family reunification is possible in a third country with which the family has special links, including legal residence; it is still possible, but not under preferential terms.<sup>183</sup>

In **Hungary**, dependency is reportedly interpreted solely as financial dependency. In practice, the application is rejected if the refugee is found not to be able to maintain his or her parent in Hungary, even if the claim was submitted within three months of recognition during which preferential terms should apply.<sup>184</sup>

In **Latvia**, family members of an asylum-seeker, refugee or person with alternative or temporary protection are defined as his or her spouse; his or her minor children by the spouse, who are unmarried and dependent on both or one of the spouses or are adopted, if such family already existed in the country of origin; and, if the beneficiary is an unmarried, unaccompanied child, his or her parents or another adult responsible for the child if the family already existed in the country of origin.<sup>185</sup>

In **Malta**, a refugee is entitled to reunite with his or her spouse, providing the spouse is aged 22 or over; the unmarried minor children of the sponsor and of his or her spouse, including children adopted in a manner recognized by Maltese law; and the unmarried minor children, including adopted children, of the sponsor or of the spouse, as the case may be, where the sponsor or the spouse has custody and the children are dependent on him or her. If the refugee is an unaccompanied minor, he or she is entitled to reunify with his or her first-degree relatives in the direct ascending line and may be reunited with his or her “legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.”<sup>186</sup>

In **Poland**, the family definition used for family reunification is quite narrow, notably in relation to the spouse, as the marriage must be one recognized by Polish law, thus excluding exclusively religious marriages (not registered with the civil authorities), same-sex, or polygamous unions, as well as partners in a long-standing stable relationship. The situation is better for children, since accepted family members also comprise the couple’s minor children,

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<sup>183</sup> Germany: *Residence Act of 30 July 2004*, 30 July 2004, available at: <http://www.refworld.org/docid/48e5cd7f2.html>, Part 6, Sections 27-36, notably Sections 29, 30, and 36(2).

<sup>184</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 38.

<sup>185</sup> Latvia: *Asylum Law 2015*, 17 December 2015, entered into force 19 January 2016, available at: <http://www.refworld.org/docid/5a324f2e4.html>, section 1(5); Latvia: *Regulation No. 564, Regulations Regarding Residence Permits: Cabinet Regulation No. 564*, 21 June 2010, status as at 6 October 2015, available at: <http://www.refworld.org/docid/5a3251df4.html>.

<sup>186</sup> Malta: *Family Reunification Regulations*, 5 June 2007, as amended by Legal Notice 148 of 2017, available at: <http://www.refworld.org/docid/55118b6a4.html>, Articles 4(1) and 24(1).

including adopted children; a minor child, including an adopted child, who is dependent on him or her and of whom he or she has actual parental custody (i.e. step children); and, for unaccompanied minor children, their parents, grandparents or the person responsible for him or her.<sup>187</sup>

In **Romania**, asylum legislation accepts the spouse and unmarried minor children of the beneficiary or of the spouse, whether born in or outside marriage or adopted, as family members for the purposes of family reunification, as well as the parents of the beneficiary if he or she is an unmarried minor.<sup>188</sup> In addition, an Emergency Ordinance permits the General Inspectorate for Immigration to approve, if the conditions required by law are met, the family reunion of first degree relatives in ascendant line of the sponsor or of his/her spouse, if they cannot support themselves and do not have adequate material support in their country of origin; adult children of the sponsor or of the spouse if they cannot support themselves for medical reasons. Unaccompanied child beneficiaries of international protection may also apply for family reunion with first-degree relatives in ascendant line or the legal guardian, or where they do not exist or cannot be identified, any other relative.<sup>189</sup> This Ordinance is part of the regime regulating the presence of aliens more generally; in law and practice its conditions for family reunion are more complex and difficult to meet, compared to those applying for family reunification under the Law on Asylum. As a result, despite the more flexible approach to the family definition, securing reunion of family members under the Ordinance is problematic.

In **Slovakia**, family members are permitted to seek reunification with third country nationals with a temporary or permanent residence permit comprise a spouse, if the married couple is at least 18 years of age; a minor child of the third country national and his or her spouse; a minor child of one or other spouse; an unaccompanied unmarried adult child or the dependent unmarried adult child of his or her spouse unable to take care of him- or herself due to long-term unfavourable health condition; and his or her parent or a parent of his or her spouse who is dependent on his or her care and lacks appropriate family support in the country of origin.<sup>190</sup>

In **Sweden**, beneficiaries of international protection who are permitted to reunite with their family are only able to reunite with their husband, wife, registered partner or cohabiting

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<sup>187</sup> Poland: *Act of 2013 on Foreigners*, 12 December 2013, available at: <http://www.refworld.org/docid/54c0b9384.html>, Article 159; Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland: Law and Practice*, 2016, available in English at: [http://programy.hfhr.pl/uchodzcy/files/2016/08/EN\\_laczenie-rodzin.final.pdf](http://programy.hfhr.pl/uchodzcy/files/2016/08/EN_laczenie-rodzin.final.pdf), pp. 9-10.

<sup>188</sup> Romania: *Law No. 122/2006 on Asylum in Romania*, 25 August 2006, available at: <http://www.refworld.org/docid/44ace1424.html>, Articles 71(2) and 72 in conjunction with Article 2(1)(j), while Articles 135 and 136 concern family unity in the context of temporary protection. Recent legislative changes have not affected family reunion provisions. Romanian civil legislation does not recognize heterosexual partnerships/cohabitation as such nor its legal effects, while the Civil Code explicitly bans recognition of any marriage or partnership between same sex couples.

<sup>189</sup> Romania: *Government Emergency Ordinance No. 194/2002 on the regime of aliens in Romania*, 2002, available at: <http://www.refworld.org/docid/544676df4.html>, Articles 46(2) and 46(3).

<sup>190</sup> Slovakia: *Act No. 404/2011 on Residence of Aliens and Amendment and Supplementation of Certain Acts*, 21 October 2011, available at: <http://www.refworld.org/docid/4fe08a7a2.html>, Article 27(2); UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 71.

partner, and their minor children, and if the beneficiary is a child, her or his parents.<sup>191</sup> This position was reflected in a 2015 ruling of the Migration Court of Appeal, which upheld the refusal of family reunification to an adult son seeking to join his mother who had a residence permit in Sweden. The Court decided that the son could live independently in his home country and the mother had seven other children supporting her in Sweden and that neither of them therefore met the requirement of significant dependency. The Court further noted that contact between adult family members could be maintained in other ways than in a joint household and stated that the refusal was not incompatible with Article 8 ECHR.<sup>192</sup>

In **Switzerland**, a refugee with asylum has since February 2014 only been able to reunite with his or her spouse, registered or cohabiting partner and his or her minor children, if particular circumstances do not preclude this and if they were separated by flight.<sup>193</sup> Family reunification for spouses, registered partners and minor children of persons granted provisional admission is only allowed after a three-year waiting period has ended and if it can be shown that there is suitable housing and the family will not rely on social assistance.

Other family members, particularly the parents and minor siblings of minor children in the case of recognized refugees with B-permit, have not been eligible for family reunification since the relevant legislative provision was repealed in February 2014.<sup>194</sup> In certain situations other family members of B-permit holders may nevertheless be eligible for family reunification pursuant to Article 8 ECHR, in particular in the case of adult disabled children, foster children and other persons who permanently shared a household with the applicant and who

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<sup>191</sup> Swedish Migration Agency, *Family Reunification*, available at: <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Family-reunification.html>. See section 6.1 below for two-year suspension of the right to family reunification introduced for beneficiaries of subsidiary protection who sought protection after 24 November 2015.

<sup>192</sup> Sweden: Migration Court of Appeal, 2015:21.

<sup>193</sup> See Article 1a(e), *Ordonnance 1 sur l'asile relative à la procédure du 11 août 1999*, état le 1er mars 2017, available at: <https://www.admin.ch/opc/fr/classified-compilation/19994776/index.html>. The situation of refugees who have been granted asylum with a residence permit (a so-called "B-permit") differs from persons granted provisional admission to Switzerland with an "F-permit", who include, *inter alia*, refugees recognized on the basis of *sur place* activities, persons facing a real risk of a violation of Article 3 ECHR, and persons fleeing from war, civil war, and generalized violence. The rights of refugees with an F-permit and persons with an F-permit to family reunification are more limited than those who have a B-permit, notably in that they may only apply for family reunification three years after being granted provisional admission and must be able to provide suitable housing and must not rely on social assistance, as set out in subsequent sections of this study. See Suisse: *Loi sur l'asile de 26 juin 1998*, 142.31, 26 June 1998 (état le 1er octobre 2016), available at: <http://www.refworld.org/docid/403346947.html>, Article 51, applying to refugees with a B-permit and Suisse: *Loi fédérale sur les étrangers (LEtr) du 16 décembre 2005*, état le 1er janvier 2017, available at: <https://www.admin.ch/opc/fr/classified-compilation/20020232/index.html>, Articles 83 and 85(7), applying to refugees with an F-permit and persons with an F-permit; and more generally, Suisse: Département fédéral de justice et police (DFJP), *Manuel Asile et retour: Article F8 Le regroupement familial des personnes admises provisoirement et des réfugiés admis provisoirement (réunification de la famille)*, available at: <https://www.sem.admin.ch/dam/data/sem/asyl/verfahren/hb/f/hb-f8-f.pdf>.

<sup>194</sup> *Ibid.*, Article 51(2), which had permitted other near relatives of refugees living in Switzerland to be included in family asylum if there were special grounds in favour of family reunion, was repealed in February 2014, there being no corresponding provision for refugees and persons with provisional admission. See also A., (*Turquie*), *recourant, en faveur de B.*, (*Turquie*), c. *Secrétariat d'Etat aux migrations (SEM)*, D-205/2017, D-205/2017, Suisse: Tribunal administratif fédéral (TAF), 19 January 2017, refusing entry to the mother of a refugee with asylum from Turkey, as well as section 8.2 on the situation of parents of minor refugees.

existentially depended on this common household. In the case of family members of provisionally admitted refugees/persons who do not belong to the nuclear family, a referral to Article 8 ECHR is only allowed if the status of the F-permit holders is considered stable. In this regard, the case law of the Federal Supreme Court and the Federal Administrative Tribunal is inconsistent.<sup>195</sup> Other family members may also apply for a humanitarian visa if the family member's life or physical integrity is directly, seriously and tangibly endangered,<sup>196</sup> but this is rarely granted.

In **Turkey**, a family residence permit for a maximum duration of two years at a time may be granted to the foreign spouse of a refugee or beneficiary of subsidiary protection, as well as his or her foreign children or the foreign minor children of his or her spouse and the dependent foreign children or dependent foreign children of his or her spouse.<sup>197</sup>

In the **United Kingdom**, adults with refugee status or humanitarian protection may be joined by immediate family members, that is, a spouse or partner over the age of 18; an unmarried or same-sex partner over the age of 18, provided the parties were living together in a relationship akin to either a marriage or a civil partnership for at least two years before the date of application; and minor, unmarried, dependent children. The family members must have been part of their family before the refugee/person with humanitarian protection fled to claim asylum. There is, however, no provision permitting children recognized as refugees or granted humanitarian protection to bring their parents or siblings to the UK.<sup>198</sup>

Other family members, including dependent children over 18, other dependent adult relatives, "post-flight" family members, family members of refugees who have naturalized as British citizens, are subject to the same family migration rules that apply to British citizens and people

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<sup>195</sup> See e.g. *E-1484/2016, Suisse: TAF, 22 March 2016*, finding an interference with, but no violation of, Article 8 ECHR in the family reunification case of an F-permit holder who had in the meantime obtained a B-permit; *X., agissant par sa mère A. et son père B., tous trois représentés par le Service d'Aide Juridique aux Exilé-e-s, recourante, c. Service de la population du canton de Vaud, 2C\_639/2012*, Switzerland: Federal Court, 13 February 2013, available at: <http://www.refworld.org/docid/5a0dc4a54.html>, holding that an F-permit holder mother had a settled status and could rely on Article 8 ECHR, as she could not be expected to return to her country of origin, although she was also married to a B-permit holder, and holding that the refusal of family reunification in this case would amount to a violation of Article 8 ECHR; *E-4190/2016, Suisse: TAF, 7 September 2016*, finding that an F-permit refugee mother had a settled status in Switzerland, but that the existence of family life between married spouses had to be assessed by reference to whether an intense and active relationship was being enjoyed, paras. 7.2.1 and 7.2.2; *F-2186/2015, Suisse: TAF, 6 December 2016*, finding that an F-permit holder who had come to Switzerland over four years ago and had held her F-permit for just under three years did not have a sufficiently settled status yet in order to be able to rely on Article 8 ECHR, para. 6.3.2.

<sup>196</sup> See generally UNHCR, *Resettlement and Other Admission Pathways for Syrian Refugees*, 31 December 2016, available at: <http://www.refworld.org/docid/588b4af44.html>, referring to Switzerland issuing 4,700 humanitarian visas to persons who have fled the conflict in Syria.

<sup>197</sup> Turkey: *Law No. 6458 of 2013 on Foreigners and International Protection*, 4 April 2013, available at: <http://www.refworld.org/docid/5167fbb20.html>, Article 34(1).

<sup>198</sup> UK Home Office: *Immigration Rules, Immigration Rules part 11: Asylum (paragraphs 326A to 352H)*, 3 January 2017, available at: <http://www.refworld.org/docid/58b016334.html>, paras. 352A-352F and 352FA-352FI. These provide more detail on requirements e.g. that applicants must demonstrate an intention to live together permanently; that they must not fall within the exclusion clauses of the 1951 Convention; and that children must have been part of the family unit of the person granted asylum at the time he or she left the country of habitual residence to seek asylum. See section 8.2.1 below for further information on the situation of child beneficiaries of international protection in the UK who are denied family reunification.

with indefinite leave to remain. The sponsor may therefore only apply after a five-year probationary period and must meet income, accommodation, language and other requirements. In exceptional circumstances, refugees and persons with humanitarian protection may also “sponsor a child relative, e.g. the child of a dead or displaced brother or sister, and without having to meet the income threshold”.<sup>199</sup> In most cases it must be shown that the relative is living overseas in the “most exceptional compassionate circumstances”, is wholly or mainly financially dependent on the relative in the UK, has no other relatives who could provide support, and can be accommodated and maintained without recourse to public funds. It is also possible to obtain permission to come to the UK as an exception to the rules, or on the basis of Article 8 rights.<sup>200</sup>

*By contrast, European States that more readily allow reunification with non-close family members, for instance, in relation to adult unmarried, dependent children and elderly parents, generally requiring dependency to be shown, are listed below. Once again, various judgments on the question of dependency provide insights into national understandings of this and other issues:*

In **Bulgaria**, the Law on Asylum and Refugees defines family members as comprising not only the spouse or person with whom the alien can show a stable, long-term relationship and their unmarried, underage children, but also others as follows: adult unmarried children who are unable to provide for themselves due to serious health conditions; the parents of either of the spouses if they are unable to take care of themselves due to old age or a serious health condition and who have to share the household of their children; and in the case of a minor, unmarried beneficiary of international protection, his or her parents or another adult member of the family who is responsible, by law or custom, for him or her.<sup>201</sup> In addition, a beneficiary of temporary protection has the right to be reunited with his or her spouse and unmarried minor children, if they also indicate their wish to do so; the State Agency for Refugees also has discretion to permit reunification with other close relatives who lived together as part of the household and who were his or her dependants in his or her country of origin, taking into consideration in each individual case, any additional difficulties that might arise for them, should they not be reunited.<sup>202</sup>

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<sup>199</sup> M. Gower and T. McGuinness, *The UK's Refugee Family Reunion Rules: Striking the Right Balance?*, House of Commons Library Briefing Paper, No. 07511, 28 November 2016, available at: <http://www.refworld.org/docid/58ac50564.html>, pp. 7-10; UK Home Office, *Statement of Intent: Family migration*, June 2012, available at: <http://www.refworld.org/docid/58a6f9614.html>, p. 33.

<sup>200</sup> Gower and McGuinness, *ibid.*, pp. 7-10. See, for instance, *AT and another (Article 8 ECHR - Child Refugee - Family Reunification) Eritrea*, [2016] UKUT 227, UK: Immigration and Asylum Chamber, 29 February 2016, available at: [http://www.refworld.org/cases,GBR\\_UTIAC,58a7045d4.html](http://www.refworld.org/cases,GBR_UTIAC,58a7045d4.html). For more on this case, see section 8.1 below. See by contrast, *AD (Qualification Directive – Family Member) Afghanistan v. Secretary of State for the Home Department*, [2007] UKAIT 00065, UK: Asylum and Immigration Tribunal, 23 July 2007, available at: [http://www.refworld.org/cases,GBR\\_AIT,46a499292.html](http://www.refworld.org/cases,GBR_AIT,46a499292.html), finding that a refugee's brother could not be considered part of his family and was not entitled to a UK residence permit.

<sup>201</sup> Bulgaria: *Law on Asylum and Refugees*, 16 May 2002 (including amendments up to October 2015), available at: <http://www.refworld.org/docid/47f1faca2.html>, Additional provisions, § 1(3)(c). Adopted children are not explicitly referred to in the family definition in this legislation, though in practice they would be covered. They are, however, referred to in Bulgaria: *Foreigners in the Republic of Bulgaria Act*, 23 December 1998, as amended to April 2016, available at: <http://www.refworld.org/docid/4c2db89d2.html>, Art. 2(3). See also UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, December 2013, available at: <http://www.refworld.org/docid/532164584.html>, pp. 71-72.

<sup>202</sup> Bulgaria: *Law on Asylum and Refugees*, *ibid.*, Article 39a.

In the **Czech Republic**, a refugee may apply to be reunited with family members as follows: his or her spouse or partner; his or her unmarried minor child; the parent of a refugee under 18 years of age; an adult responsible for an unaccompanied minor refugee; and his or her unmarried sibling under 18 years of age. Other family members eligible for family reunification under aliens legislation generally are in addition: the sponsor's adult dependent children; adult dependent children of his or her spouse; minor children legally resident in the territory of the spouse or authorized foster or adoptive parent; a direct relative in the ascending line of a minor child granted asylum; and lone foreign nationals older than 65 years or foreign nationals regardless of age who are objectively unable to provide for their own needs on account of their state of health. Refugees wishing to reunite with these more broadly defined family members and beneficiaries of subsidiary protection must, however, be able to show they have adequate accommodation and health insurance (though not income) if they wish to reunite on the basis of the Aliens Act.<sup>203</sup>

The Czech Constitutional Court ruled in 1999 on the meaning of the term family member in the Aliens Act, defining it in broad terms as including emotional and other links and referring to the tight bond between family members that can continue into adulthood. It determined that the term family should be understood as referring to the harmonious coexistence principally of spouses with minor children and under certain circumstances also adult children, in situations where all members feel their common coexistence fulfils their emotional and other links which thereby creates a tight bond, including once children become adults, in which each member finds satisfaction and mutual support. The Court found that conditions for family reunification are therefore usually not met in cases where the original family/marriage has disintegrated.<sup>204</sup>

In **Finland**, family members are considered to be the beneficiary of international protection's spouse; his or her minor, unmarried children over whom he or she and/or his or her spouse has guardianship; and if the beneficiary is an unmarried minor, his or her parents or guardian. Someone of the same sex in a nationally registered partnership is considered a family member, as are persons regardless of their sex who have been living continuously in a marriage-like relationship in the same household for at least two years. Other relatives of beneficiaries of international protection also qualify, if refusing them a residence permit would be unreasonable because they intend to resume their close family life in Finland or because they are fully dependent on the sponsor living in Finland.<sup>205</sup>

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<sup>203</sup> Czech Republic: *Act No. 325/1999 Coll. on Asylum*, 11 November 1999, available at: <http://www.refworld.org/docid/4a7a97bfc33.html>, Section 13; Czech Republic: *Act no. 326/1999 on the Residence of Foreign Nationals in the Territory of the Czech Republic*, 1 January 2000, available at: <http://www.refworld.org/docid/3affe8b64.html>, Sections 31 and 42a which applies to aliens generally. Under section 178a(2) of the Czech Aliens Act the dependency of a child is determined on the basis of the Law 117/1995 on State Social Support, which considers a dependent child to be a child up to a maximum of 26 years if he or she is seeking employment or is not able to do so due to illness, injury, or long-term poor health.

<sup>204</sup> *Decision 534/98*, Czech Republic: Constitutional Court, 11 February 1999.

<sup>205</sup> Finland: *Act No. 301/2004 of 2004, Aliens Act*, 30 April 2004, available at: <http://www.refworld.org/docid/4b4d93ad2.html>, sections 37, 114 and 115.

Minor siblings may under certain circumstances also be included, even if they are not explicitly mentioned in Section 37 of the Act, as they may be issued a residence permit on compassionate grounds under Section 52. This provides for the issue of a continuous residence permit if refusing to do so would be manifestly unreasonable with regard to their health, ties to Finland or on other compassionate grounds, particularly in consideration of the circumstances they would face in their home country or their vulnerable position. In such circumstances the alien is not required to have secure means of support. The minor siblings of an unaccompanied minor child in Finland with a residence permit may also be issued with a continuous residence permit, if the child and his or her sibling(s) have lived together and their parents are no longer alive or the parents' whereabouts are unknown and if this is in the best interest of the children.<sup>206</sup>

Two recent decisions of the Finnish Supreme Administrative Court regarding who may be considered a dependent family member in the context of family reunification are relevant. In the first case, the Court examined whether refusing to grant a residence permit to the parents of an Iraqi beneficiary of subsidiary protection was unreasonable in relation to the sponsor's intention to continue close family life in Finland, as referred to in Section 115 of the Aliens Act.<sup>207</sup> The Court noted that the purpose of this provision was to allow family life with extended family members to continue in Finland. It found that the sponsor had lived with his parents for his whole life, including after his marriage and until he fled Iraq and that there was no reason to suspect that the sponsor, his wife and children and his parents did not plan to continue living together in Finland. It considered that since the sponsor could not return to his country of origin, his family life with his parents could not be considered to have ended voluntarily, that his parents had applied for a residence permit without delay, and that, considering his parents did not have any relatives in the country of origin and that they needed to move regularly, the denial of residence permit to them was unreasonable. It ruled that the parents must therefore be granted residence permits.

In contrast, another judgment upheld the decision of the Finnish Immigration Service and the Administrative Court that the sponsor's mother-in-law could not be considered an extended family member.<sup>208</sup> Rather the Court found that dependent family members under the Aliens Act referred only to the sponsor's own relatives and not to those of his or her spouse.

In **Greece**, family members who may seek reunification with a refugee comprise not only close family members, but also adult unmarried children of the refugee or his /her spouse, where they are objectively unable to provide for their own needs on account of their state of health; parents, who lived with and were dependent on the refugee before his or her arrival in Greece and who do not enjoy the necessary family support in the country of origin; and his or her unmarried partner with whom the sponsor is in a duly attested stable long-term relationship. Unaccompanied minor child refugees are entitled to reunify with their first-degree relatives in

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<sup>206</sup> Ibid., Section 52(4).

<sup>207</sup> KHO:2016:167, Finland: Supreme Administrative Court Decision of 8 November 2016; Finland: *Aliens Act*, *ibid.*, above fn. 205, Section 115.

<sup>208</sup> KHO:2016:177, Finland: Supreme Administrative Court Decision of 14 November 2016.



the direct ascending line and their legal guardian or any other member of the family, where the minor has no relatives in the direct ascending line or such relatives cannot be traced.<sup>209</sup>

In **Hungary** persons accepted for family reunification as family members in addition to the nuclear family, comprise adopted and foster minor children of the beneficiary of international protection if the beneficiary has custody of them and they are dependent on him or her; the minor child (including adopted and foster children) of the beneficiary's spouse, if he or she has parental custody and they are dependent on him or her; and dependent adult children who cannot care for themselves due to serious health problems. Minor beneficiaries of international protection under the age of 18 when the application for family reunification is submitted, may also reunite with their parents or guardian by law. Those recognized as refugees may also reunite with their parents, if the refugee is over 18 years and his or her parents are financially dependent and cannot meet their living expenses in their country of origin, and with their brother or sister and their grandparents or grandchildren, if they cannot care for themselves due to health problem. A broader family definition thus applies for refugees than for beneficiaries of subsidiary protection.

A 2014 judgment of the Curia (highest court in Hungary) determined that when seeking the admission of a family member on grounds of serious health problems it is necessary to submit medical documents indicating why the family member is unable to care for him- or herself and not simply documents on his or her health status.<sup>210</sup>

In **Iceland**, under legislation that came into force on 1 January 2017 beneficiaries of international protection whose family ties were formed before asylum was sought have the right not only to reunite with their spouse and unmarried children under the age of 18 years, but also with their parents above the age of 65, provided in the latter case that the family member with protection in Iceland can demonstrate that she or he has a minimum income to support the parent(s). Unaccompanied minor beneficiaries of international protection may reunite with their parents and minor siblings.<sup>211</sup>

In **Ireland**, the 2015 International Protection Act which came into force in December 2016 no longer permits family reunification of beneficiaries of international protection with non-nuclear family members on grounds of dependency or a mental or physical disability, as was previously permitted. Those accepted as family members are thus now only the nuclear family (i.e. the spouse or civil partner and the sponsor's unmarried children aged under 18 years),

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<sup>209</sup> Greece: Presidential Decree No. 167 of 2008: Complementing Presidential Decree No. 131 of 2006, harmonization of the Greek legislation to Council Directive 2003/86/EC on the right to family reunification, 4 November 2008, available at: <http://www.refworld.org/docid/4cc699bc2.html>, Articles 4, 13(1)(a) and generally Z. A. Zoi Anna Kasapi, *The Impact of European Union Law on Family Reunification in Greece*, 9 March 2016, available at: <http://www.asylumlawdatabase.eu/en/journal/impact-european-union-law-family-reunification-greece>.

<sup>210</sup> Hungary: Act LXXX of 2007 on Asylum, 1 January 2008 (status at July 2016), available at: <http://www.refworld.org/docid/4979cc072.html>, section 2(j), *Kfv.III.37.968/2014/6*, Hungary: Curia, 2014.

<sup>211</sup> Iceland: Act on Foreigners No. 80/2016, 16 June 2016, available in Icelandic at: <http://www.althingi.is/altext/145/s/1467.html>; UNHCR, *UNHCR Observations on the proposed amendments to the Icelandic Act on Foreigners: Frumvarp til laga um breytingu á lögum um útlendinga, nr. 96 15. maí 2002, með síðari breytingum (kærunefnd, fjölgun nefndarmanna) (Lagt fyrir Alþingi á 145. löggjafarþingi 2015–2016)*, 10 May 2016, available at: <http://www.refworld.org/docid/5731f3d84.html>, para. 19 (this proposal having since been approved).

except that unmarried child beneficiaries of international protection may seek to reunited with their parents and the latter's unmarried minor children.<sup>212</sup>

Nonetheless in November 2017, the Minister for Justice and Equality announced a new family reunification scheme intended to admit up to 530 family members of refugees as part of the country's Refugee Protection Programme.<sup>213</sup> The family reunification humanitarian admission programme (FRHAP) is intended to address the issue of family reunification for some immediate family members falling outside the scope of the 2015 Act and is to be administered under the minister's discretionary powers. The exact terms of the FRHAP have yet to be issued, but the scheme offers a more flexible approach to the family definition applied compared to that under the 2015 Act. At the same time, a private member's bill to expand the family reunification programme by permitting grandparents, cousins, nephews, nieces and siblings to be brought to Ireland was going through parliament.<sup>214</sup> If passed, the bill would provide a clear legislative footing for family reunification on the basis of a broader definition, rather than possibilities dependent on the minister's discretionary powers.

Two earlier judgments of the Irish High Court that predate the 2015 Act also set out some key principles regarding the question of dependency and the rationale for including dependants among those accepted for family reunification. These judgments remain relevant more generally in their analysis of the concept of dependency.

First, the case of *Ducale* concerned a refugee from Somalia who had unsuccessfully sought family reunification with her niece and nephew, who had been orphaned as infants and had been part of her family ever since even though she had been unable to adopt them formally owing to the absence of available procedures in Somalia or where they were living in Ethiopia.<sup>215</sup> The children had been minors at the time of the application but had attained the

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<sup>212</sup> Ireland: *International Protection Act*, 2015, N. 66, 30 December 2015, available at: <http://www.refworld.org/docid/56ded0f24.html>, Section 56(9). A Private Members' Bill broadening the family definition for beneficiaries of international protection also to include "any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the sponsor who is dependent on the qualified person or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully" has since been introduced. It has passed the second stage in the Seanad and will return to the Seanad for committee stage in late 2017 before proceeding to the Dáil (lower house of parliament). See *International Protection (Family Reunification) (Amendment) Bill 2017*, available at: <http://www.oireachtas.ie/documents/bills28/bills/2017/10117/b10117s.pdf>.

<sup>213</sup> Department for Justice and Equality, "Minister Flanagan and Minister of State Stanton announce new family reunification scheme in support of refugees and their families under the Irish Refugee Protection Programme", 14 November 2017, available at: <http://www.justice.ie/en/JELR/Pages/PR17000383>. See also, Irish Immigrant Support Centre (NASC), "NASC Welcomes Introduction of Humanitarian Admission Programme for Refugee Families", 14 November 2017, available at: <http://www.nascireland.org/campaign-for-change/family-unity/nasc-welcomes-introduction-humanitarian-admission-programme-refugee-families/>.

<sup>214</sup> Ireland: *International Protection (Family Reunification) (Amendment) Bill*, available at: <https://beta.oireachtas.ie/en/bills/bill/2017/101/>. See also M. O'Regan, "Government defeated in Seanad on Private Member's refugee Bill", *Irish Times*, 8 November 2017, available at: <https://www.irishtimes.com/news/politics/oireachtas/government-defeated-in-seanad-on-private-member-s-refugee-bill-1.3284829>.

<sup>215</sup> *Ducale and Another v. Minister for Justice and Others*, [2013] IEHC 25, Ireland: High Court, 22 January 2013, available at: <http://www.refworld.org/docid/51275baa2.html>. See also on the appropriate "yard stick" for determining financial dependency *A.A.M. v. Minister for Justice & Equality*, [2013] IEHC 68, Ireland: High Court, 15 February 2013, available at: [http://www.refworld.org/cases,IRL\\_HC\\_5a3249b94.html](http://www.refworld.org/cases,IRL_HC_5a3249b94.html).

age of majority by the time the minister rejected the application on the grounds that they were not dependent on her. The High Court found in 2013 that the minister had erred in restricting the assessment of dependency to the narrow issue of being financially dependent. Rather, it found that

“‘dependency’ is not confined to total financial dependence but involves a wider concept taking account of all relevant economic, social, personal, physical, familial, emotional and cultural bonds between the refugee and the family member who is the subject of the [family reunification] application. Moreover there is support for the contention that financial dependency must be seen as a flexible state of affairs which is not necessarily determined by the size of a contribution but rather on its effect in the context of the specific country of residence and personal circumstances of the person in receipt of the contribution.”<sup>216</sup>

The second case, *A.M.S.*, dating from 2014, concerned a Somali refugee seeking to bring his mother, wife, daughter, two sisters and two brothers to join him, an application initially rejected in the case of his mother and siblings.<sup>217</sup> The judgment found that the “central and often exclusive focus placed on financial dependency in family reunification decisions [was] misplaced”, when this was not the only form of dependency advanced by the sponsor. It also noted that “at all times, the applicant, his wife, his daughter, his mother and his siblings lived together as a family unit” and that they continued to live together (apart from the applicant) when they fled to Ethiopia. At the Court notes, the sponsor was, “it would appear, the father figure in his own marital family and in the family of his birth”.<sup>218</sup> The judge states that parliament, in allowing for family reunification where dependant family members are involved, “acknowledged the benefit of facilitating family reunification for refugees where dependency is established” and that he could not:

“imagine that the legislators intended that such advantages would be available only for those lucky few refugees who have sufficient resources to support not only themselves but also their dependents in Ireland. It is inconceivable that the legislature was not aware that genuine refugees almost invariably arrive in Ireland penniless and with numerous disadvantages.”<sup>219</sup>

In **Italy**, family members include the spouse; minor, unmarried children regardless of whether they were born in or out of wedlock or adopted as defined under national law, including children of the spouse if the other parent has given written consent; and, for a minor unmarried beneficiary of international protection, his or her father and mother or another adult responsible if the applicant or the beneficiary of international protection is a minor and unmarried. In addition, adult children may be accepted if they cannot provide for their own needs because of serious health conditions implying total disability, as well as parents of adult beneficiaries of international protection, if they are dependent and have no other children in

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<sup>216</sup> *Ibid.*, para. 56.

<sup>217</sup> *A.M.S. v. The Minister for Justice and Equality*, [2014] IEHC 57, Ireland: High Court, 13 February 2014, available at: <http://www.refworld.org/docid/5319c49d4.html>.

<sup>218</sup> *Ibid.*, paras. 6, 41 and 61.

<sup>219</sup> *Ibid.*, para. 42.

the country of origin or parents who are over 65 years of age, have a certified health problem, and no other children able to provide for them.<sup>220</sup>

In terms of jurisprudence, a Rome court overturned a decision to deny family reunification of an Afghan refugee with his mother, who was aged over 65 and living on her own in Afghanistan. The court ruled that since the appellant's mother was over 65 years old and was living on her own in Afghanistan, a country where insecurity was increasing in anticipation of the withdrawal of 86,000 foreign soldiers, the reasons for rejecting the application advanced by the authorities were irrelevant, since the parent was over 65 and the law does not require proof that the latter is the responsibility of the applicant.<sup>221</sup> Thus, although the Italian embassy had required that parents be dependent to be eligible for family reunification, the court ruled that in case of parents over 65, the dependency criteria did not have to be met. It ruled that in this case the reasons for refusal provided by the authorities were irrelevant regarding the situation of the parent to be reunited, since she was over 65 and the law does not require proof of dependency.

In **Luxembourg**, family members entitled to admission and residence for reunification with an alien are defined as his or her spouse; his or her partner in a registered partnership; his or her unmarried, minor children and/or those of his spouse/partner, provided he or she has custody of the child(ren) or, if it is shared, the other parent has given consent; and, in the case of an unaccompanied minor beneficiary of international protection, his or her parents. The spouse or partner must be aged over 18 years at the time family reunification is requested. Family members must not represent a danger to public order, public security or public health. The minister may also approve the reunification of first-degree relatives in the direct ascending line of the sponsor or his or her spouse/partner, where they are dependent on them and do not enjoy proper family support in the country of origin; adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health; and the legal guardian or any other family member of an unaccompanied beneficiary of international protection, if he or she has no parents or they cannot be traced.<sup>222</sup>

A 2014 judgement by the Luxembourg Administrative Tribunal concerning a refugee's request for family reunification with his mother in Guinea whom he said was without other family support and was exclusively dependent upon him is relevant. The Tribunal overturned the rejection of the application, which had been turned down on grounds including that payments the applicant said he made to his mother had been by an intermediary who brought the money to his mother. The Tribunal accepted that the son had not been able to make a direct transfer because as an asylum-seeker he did not have the required identity card and that his mother was disabled and could not get out easily herself. The Tribunal found that the sums transferred were not too small, given that they were more than double the average monthly salary in

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<sup>220</sup> See Italy: *Legislative Decree No. 286 of 1998, Testo Unico sull'Immigrazione*, 25 July 1998, Consolidated act of provisions concerning regulations on immigration and rules about the conditions of aliens in force as of 26 June 2014 (unofficial translation), available at: <http://www.refworld.org/docid/54a2c23a4.html>, Articles 29 and 29bis.

<sup>221</sup> Italy: Rome Court, Civil Section, (R.G) 81291/2014 of 5 October 2015, published on 16 October 2015.

<sup>222</sup> Luxembourg: *Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, 29 August 2008, available at: <http://www.refworld.org/docid/48ca6e0b2.html>, Article 70.

Guinea, and that the son's account of his family relations tallied with that given in his asylum claim, which was deemed credible at the time and that he could not be expected to provide proof of his brother's disappearance and his non-reappearance.<sup>223</sup>

In **the Netherlands**, persons considered family members for the purposes of family reunification of persons with an asylum permit (i.e. persons recognized as refugees or granted subsidiary protection) are the spouse or the minor child; the partner or an adult child if they are dependent on the refugee and considered part of his family for that reason; and, in the case of an unaccompanied child, his or her parents.<sup>224</sup>

Two policy changes in recent years have enhanced the family reunification prospects of family members of persons with an asylum permit. In April 2013 a requirement to show "factual family life" previously applied was removed, so that the tie with family members cared for in another household will not be considered broken. This is in line with the ECtHR's ruling in *Saleck Bardi*,<sup>225</sup> which found that family life persists even if family members are separated for a long period.

In addition, in May 2015 the policy regarding unmarried adult children seeking to rejoin their parents was made more flexible for parent(s) with an asylum permit. The government had previously required adult children of refugees to prove "more than normal emotional ties" with their parents in order to be allowed to reunify, a provision that in practice was only applied if the adult child was medically dependent on his or her parent(s). Under the new policy, adult children who were part of the family at the time the parent(s) fled their country are now able to reunify with their family, unless the adult children have started a family of their own, have established their own life, or are financially independent.<sup>226</sup> (For removal of the requirement for family life to have existed in the country of origin, see section 4.2 below.)

In **Slovenia**, family members for the purposes of family reunification with refugee and subsidiary protection beneficiaries are a spouse, registered partner or partner in a long-term partnership; unmarried minor children; unmarried minor children of the spouse, a registered partner or partner in a long-term partnership; adult unmarried children and parents of the beneficiary of international protection alien, spouse, registered partner or partner in a long-

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<sup>223</sup> *Monsieur ... (Guinée) c. deux décisions du ministre du Travail, de l'Emploi et de l'Immigration en matière de police des étrangers*, N° 31989 du rôle, Luxembourg: Tribunal administratif, 3 March 2014, available at: [http://www.refworld.org/cases/LUX\\_TA\\_58b840664.html](http://www.refworld.org/cases/LUX_TA_58b840664.html).

<sup>224</sup> Netherlands: *Aliens Act*, 1 April 2001, available at: <http://www.refworld.org/docid/3b5fd9491.html> and *Vreemdelingenwet*, in Dutch, version of 1 October 2017, at: <http://wetten.overheid.nl/BWBR0011823/2017-10-01>, Section 29(2).

<sup>225</sup> *Saleck Bardi c. Espagne*, ECtHR, above fn. 83.

<sup>226</sup> The changes followed a number of judgments on the issue. See e.g. *AWB 14/20107*, Rechtbank Amsterdam, 7 November 2014 (Iraq, Yezidi daughter above 18 belongs to the core family, the most favourable arrangement relating to the right to family life must be applied); *AWB 14/13413*, Netherlands: Rechtbank Den Haag/The Hague District Court, 27 November 2014 (Syria, more than normal emotional dependence resulting from detention despite the foreigner being over 18 years old mentioned in the request for a residence permit); *AWB 14/11619*, Rechtbank Groningen, 13 January 2015 (Syria, the personal circumstances of the child above 18 years old have not sufficiently been taken into account during the assessment of interests), cited in European ECRE/European Legal Network on Asylum (ELENA), *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, June 2016, available at: <http://www.refworld.org/docid/5770c6124.html>, p. 24.

term partnership if the latter are obliged to maintain them; and, in the case of an unaccompanied, minor beneficiary of international protection, their parents.<sup>227</sup>

A Constitutional Court judgment in 2015, concerning a recognized Somali refugee seeking to bring her minor sister to Slovenia, ruled that the scope of the right to family life set out in Article 53(3) of the Constitution includes both the nuclear family and, where specific factual circumstances dictate, members of the family who are not part of the nuclear family but who are similar or perform the same function. The Court therefore required the legislator to amend legislation which limited the right to family reunification by providing an exhaustive definition of eligible family members for reunification, thus excluding other family members, so as to allow the refugee actually to exercise her right to respect for family life on its territory.<sup>228</sup>

Following the judgment, legislation in Slovenia was amended exceptionally to permit other relatives of the beneficiary of international protection to be considered a family member, if special circumstances speak in favour of family reunification in Slovenia. Such special circumstances apply, where a community of other relatives exists as a result of specific factual circumstances, which are in essence similar to the primary family and have the same function as the primary family, as is especially of true family ties between family members where there is physical care, protection, defence, emotional support and financial dependence.<sup>229</sup>

In **Spain**, the family unity of refugees and beneficiaries of subsidiary protection alike can be restored by the extension of their protection status to family members, whether they are already in Spain or abroad. Family members are defined as the beneficiary of international protection's spouse or a person bound by a similar relationship of affection and cohabitation (except in cases of divorce, legal separation, de facto separation, different nationality or where refugee status has been granted due to gender-related persecution by the spouse or partner) and minor unmarried children. Refugee or subsidiary protection status may also be extended to other members of the family, provided dependence and prior cohabitation in the country of origin are sufficiently established, as well as to any other adult legally responsible under Spanish law of a minor beneficiary of international protection.<sup>230</sup> Until recently, it was not necessary to prove dependency for relatives in the ascending line, but this is now required. In practice it appears that dependency is construed as financial dependency as demonstrated

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<sup>227</sup> Slovenia: *Aliens Act*, 27 June 2011, available at: <http://www.refworld.org/docid/4c407cbd2.html>, Articles 47a(2) and 47b(2).

<sup>228</sup> *U-I-309/13, Up-981/13*, Slovenia: Constitutional Court, 14 January 2015, available in Slovenian at: <http://www.asylumlawdatabase.eu/en/case-law/slovenia-constitutional-court-republic-slovenia14-january-2015-judgment-u-i-30913-98113> and <http://odlocitve.us-rs.si/documents/33/1b/u-i-309-13-up-981-132.pdf>. See also <http://fra.europa.eu/en/caselaw-reference/slovenia-constitutional-court-republic-slovenia-u-i-30913-98113>. See also another 2015 Constitutional Court judgment concerning same-sex partners and the family definition in the Law on International Protection referred to in text at fn. 760 below.

<sup>229</sup> Slovenia: *Aliens Act*, 2011, above fn. 227, Articles 47a(4) and 47b(4). See also: [http://www.mnz.gov.si/en/services/slovenia\\_your\\_new\\_country/residence\\_permit\\_for\\_the\\_third\\_country\\_nation\\_al/family\\_reunion/](http://www.mnz.gov.si/en/services/slovenia_your_new_country/residence_permit_for_the_third_country_nation_al/family_reunion/).

<sup>230</sup> España: *Ley No. 12/2009 reguladora del derecho de asilo y de la protección subsidiaria*, 30 October 2009, available at: <http://www.refworld.org/docid/4b03bd9f2.html>, Article 40. See section 4.13 below for more on family reunification under Article 41 of the Act, for which implementing regulations are not yet in place.

through regular financial contributions, which can be difficult to prove for those whose relatives still live in conflict zones where access to financial services may be impeded.<sup>231</sup>

Thus, **European States** generally accept a right to family reunification in relation to close family members, that is, spouses (including generally but not always partners and couples in stable relationships) and unmarried minor children, as well as, for the parents of unaccompanied child beneficiaries of international protection. States may also permit family reunification for wider or extended family members in cases of dependency, most often as regards adult unmarried, dependent children and parents and often only on an exceptional and discretionary basis.

Dependency is defined in different ways. For instance, generally in relation to dependent adult, unmarried children, but sometimes in relation to other family members, legislation, regulations and practice as outlined above define dependency as existing where family members:

- Are dependent on account of disability (Austria, Belgium, Estonia, Germany, Switzerland);
- Were part of a shared household in the country of origin and dependent on the care of the beneficiary of international protection (Croatia, Netherlands, Switzerland, the latter case requiring also existential dependence on the common household);
- Are unable to provide for themselves due to serious health conditions (Bulgaria), their state of health (Croatia, Czech Republic, Estonia, Greece, Hungary, Luxembourg), serious health conditions implying total disability (Italy), medical reasons (Romania), long-term unfavourable health condition (Slovakia); and
- Where this is necessary “to avoid undue hardship”, for instance in cases of dependency resulting from disabilities or severe illness, where no other person can sufficiently support the individual and further assistance can only be provided in Germany.

Dependency may also be accepted in relation to parents who:

- Are unable to take care of themselves due to old age or a serious health condition and who have to share the household of their children (Bulgaria);
- Are lone foreign nationals older than 65 years objectively unable to provide for their own needs on account of their state of health (Czech Republic);
- Lived with and were dependent on the refugee before his or her arrival in Greece and do not enjoy the necessary family support in the country of origin (Greece);
- Are financially dependent and cannot meet their living expenses in their country of origin (Hungary);
- Are dependent and have no other children in the country of origin or are over 65 years of age (Italy);
- Are dependent on them and do not enjoy proper family support in the country of origin (Luxembourg);
- Cannot support themselves and do not have adequate material support in their country of origin (Romania); and

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<sup>231</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 38.

- Are dependent on the sponsor's care and lack appropriate family support in the country of origin (Slovakia).

Legislation in some States refers to family reunification being necessary on the basis of the State's obligations under Article 8 ECHR, as for instance in Austria, Denmark, Switzerland, and the United Kingdom. These obligations apply of course to all Council of Europe States, although such a provision in national legislation or regulations provides a specific criterion that can be relied upon by families seeking to reunite.

The provisions outlined above are in legislation and regulations. Much turns on their implementation in practice and in national jurisprudence. Many beneficiaries of international protection face numerous other obstacles securing recognition of their family ties and of dependency, as outlined in later sections below.

By contrast, in **Latin America**, the broad approach to the definition of the family adopted by the IACtHR outlined in section 3.1 above is generally reflected in the definitions of family members entitled to reunify with a recognized refugee provided for in national legislation.<sup>232</sup> The legislation tends to recognize broader definitions of family including partners who are not formally married and both affectional and blood ties, as well as others who are economically dependent on the refugee. National Commissions are responsible for assessing family reunification cases. Some legislation requires specific consideration of cultural and social values that need to be taken into account in the analysis of such applications.

*Examples of State practice regarding the family definition applied in Latin America include:*

In **Argentina**, the National Commission for Refugees is responsible for authorizing entry for family reunification on the basis of a family defined as comprising the refugee's spouse, the person with whom he or she has a bond of affection and cohabitation, parents, children, and first degree relatives who are economically dependent on the refugee. A decision rejecting an application based on the principle of family unity cannot be based on the lack of legal recognition of the relationships invoked.<sup>233</sup>

In **Bolivia**, the refugee's family is defined as his or her spouse or partner, ascendants, descendants, and his or her siblings who are economically dependent upon him or her, as well as children, adolescents and adults who are under his or her guardianship (unless exclusion applies).<sup>234</sup>

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<sup>232</sup> See UNHCR, "A Broad Concept of Family Favours Family Reunification", available at: [http://www.acnur.org/fileadmin/scripts/doc.php?file=fileadmin/Documentos/Proteccion/Buenas\\_Practicas/10800](http://www.acnur.org/fileadmin/scripts/doc.php?file=fileadmin/Documentos/Proteccion/Buenas_Practicas/10800), providing extracts from the legislation of Latin American States concerning the family definition in Spanish and summaries of these extracts in English. See also generally, P. Nabuco Martuscelli, *Mapping the Right to Family Life and Family Reunification in South America*, November 2017.

<sup>233</sup> Argentina: *Ley No. 26.165 de 2006, Ley general e reconocimiento y protección al refugiado*, 2006, above fn. 151, Articles 2, 6, and 25.

<sup>234</sup> Bolivia: *Ley No. 251 de 2012, Ley de protección a personas refugiadas*, 2012, above fn. 150, Article 9. Article 24 assigns responsibility for dealing with family reunification applications to the National Refugee Commission (CONARE).



In **Brazil**, the Refugee Act provides for derivative refugee status to be accorded to the refugee's spouse, ascendants and descendants, in addition to other members of the family group who are economically dependent of the refugee, provided such members are within the national territory."<sup>235</sup> Since then, the Act has been further clarified and expanded, notably by a Resolution defining family members as including not only a refugee's legal companion and minor children, but also parents and minor orphan siblings, grandchildren, great grandchildren, nephew and nieces.<sup>236</sup>

In **Chile**, the Commission for the Recognition of Refugee Status has responsibility *inter alia* for deciding applications for family reunification, with derivative refugee status being granted to a refugee's spouse or cohabiting partner, their ascendants, descendants and minors under their guardianship. Decisions on family reunification applications must consider the existence of genuine dependency and the social and cultural customs and values of the refugee's country of origin. Derivative refugee status cannot be accorded where exclusion applies.<sup>237</sup>

In **Ecuador**, family members entitled to derive refugee status from a refugee are defined as his or her spouse or partner in a *de facto* union under Ecuadorian law, his or her minor children, and other relatives in his or her legal custody, up to the fourth degree of consanguinity and second of affinity, providing the refugee can provide documentation proving custody, as well as adult sons and daughters, other family members or members of the household who are economically dependent on the refugee.<sup>238</sup>

In **Mexico**, the authorities may authorize entry into the territory of a refugee's spouse, partner, children, blood relatives to the fourth degree, blood relatives of the spouse/partner to the second degree, who are financially dependent on the refugee, who must show the economic means to maintain them.<sup>239</sup>

In **Paraguay**, derivative refugee status is to be accorded to the refugee's spouse, *de facto* partner and to his or her descendants and ascendants to the first degree by the National Refugee Commission, which is responsible *inter alia* for examining and determining family reunification requests.<sup>240</sup>

In **Uruguay**, the refugee's right to family reunification means that he or she may seek and be reunited with his or her spouse or partner, his or her children, and any other blood relative up

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<sup>235</sup> Brazil: Law No. 9.474 of 1997, establishing arrangements for the implementation of the 1951 Status of Refugees and related provisions, 23 July 1997, <http://www.refworld.org/docid/3f4dfb134.html>, Article 2.

<sup>236</sup> M.B. Nogueira and C.C. Marques, "Brazil: ten years of refugee protection", *Forced Migration Review* 30, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR30/57-58.pdf>, p. 57.

<sup>237</sup> Chile: *Ley No. 20.430 de 2010, Establece disposiciones sobre Protección de Refugiados*, 2010, above fn. 151, Articles 3, 9, 22.

<sup>238</sup> Ecuador: *Decreto Ejecutivo No. 1182 de 2012, Reglamento para la aplicación en Ecuador del Derecho de Refugio*, 2012, above fn. 150, Article 6.

<sup>239</sup> Mexico: *Ley de 2010 de Refugiados y Protección Complementaria*, 2011, above fn. 153, Article 58.

<sup>240</sup> Paraguay: *Ley No. 1938 de 2002, General Sobre Refugiados*, 9 July 2002, available at: <http://www.refworld.org/docid/3d48f0984.html>, Articles 2 and 14(i).

to the fourth degree or another relative with whom there ties of affection up to the second degree, unless the exclusion or cessation clauses under the 1951 Convention apply.<sup>241</sup>

*In North America, State practice regarding the family definition applied in the context of family reunification is as follows:*

In **Canada**, one of the objectives of the Immigration and Refugee Protection Act is “to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada”.<sup>242</sup> Persons arriving independently in Canada who are recognized as refugees have two main ways by which they can bring family members to join them: either under the “one-year window of opportunity programme”<sup>243</sup> or by applying for a visa as a member of the “family class”. The former is intended specifically for refugees, while the latter is open to Canadian citizens and permanent residents, including recognized refugees, provided the prospective sponsor is 18 years of age or older.

The family definition applied under the one-year window programme comprises the refugee’s spouse or his or her common-law partner; his or her dependent child or a dependent child of his or her spouse or common-law partner; and a dependent child of the dependent child.<sup>244</sup> Under this programme, therefore the family definition applied includes essentially only close family members, although there is no requirement that the child be under 18 years old, only that he or she be dependent on the refugee.

Legislation defines persons eligible for family reunification with a sponsor as a member of the “family class” on a broader basis as “the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident”.<sup>245</sup> Regulations define a dependent child as being an unmarried child under 22 years of age and, since October 2017, children over 22 who remain dependent because of a physical or mental condition.<sup>246</sup> Other family members who can be sponsored under the family class include the sponsor’s parents; grandparents; and the dependent children of dependent children as well as brothers, sisters, nephews, nieces or grandchildren who are orphans, under the age of 18, and not married or in a common-law relationship.<sup>247</sup>

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<sup>241</sup> Uruguay: *Ley N° 18.076, Estatuto del Refugiado*, 18.076, 2006, above fn. 153, Article 21.

<sup>242</sup> Canada: *Immigration and Refugee Protection Act (IRPA)*, SC 2001, c. 27, 1 November 2001, current to 20 November 2017, available at: <http://www.refworld.org/docid/4f0dc8f12.html>, s. 3(2)(f).

<sup>243</sup> See text at fn. 388 et seq. below for further details.

<sup>244</sup> Canada: *Immigration and Refugee Protection Regulations (SOR/2002-227) (IRPR)*, consolidated to December 2016, available at: <http://www.refworld.org/docid/58a70e914.html>, s. 1(3).

<sup>245</sup> Canada: *Immigration and Refugee Protection Act (IRPA)*, above fn. 242, s. 12(1).

<sup>246</sup> Canada: *Immigration and Refugee Protection Regulations (SOR/2002-227) (IRPR)*, above fn. 244, s. 2

<sup>247</sup> *Ibid.*, s. 117(1). In January 2017, Immigration, Refugees, Citizenship Canada (IRCC) changed the application process for parent and grandparent sponsorship to a lottery type system where 10,000 potential sponsors were selected to submit sponsorship applications after having filled out an online submission form to show interest in sponsoring a parent or grandparent. As the sponsorship process is still limited and lengthy, IRCC offers an option to apply for the ‘Parent and Grandparent Super Visa’ which is a multi-entry visa allowing a parent or grandparent to remain in Canada for up to two years at a time without the need for renewal of their status. It is valid for up to 10 years.

As a limitation to this broader definition, however, the Regulations state that a person is not a family member if they were not examined when the person sponsoring them immigrated to Canada as a result of not being disclosed on the application.<sup>248</sup> Since they are not considered a “family member”, they cannot be sponsored under the “family class”. This clause was added in 2002 to deter fraud and prevent the immigration of family members who would have been barred if they had been originally declared. For those who knowingly or unknowingly fail to identify all of their dependents to a visa officer at the time of the original application face being permanently unable to apply for family reunification for such unnamed dependent family members. In practice it affects many families where no fraud was involved and where there were compelling reasons the family member was not disclosed. Refugee families are disproportionately affected.<sup>249</sup>

Cases have arisen where family members of refugees coming to Canada have had to leave behind other, sometimes vulnerable, family members.<sup>250</sup> The Canadian Council for Refugees has identified reasons for family members not being disclosed as including gender-based oppression that prevents some women from declaring a marriage or a baby, who may have been born out of wedlock; the applicants were in danger and needed to leave as soon as possible for their safety; declaring a child would expose the family to political persecution; the applicant was unaware that the dependant existed or was alive at the time of application; and the applicant was incorrectly advised. In such cases, it is possible to apply for a residence permit on the basis of (discretionary) humanitarian and compassionate considerations is possible.<sup>251</sup> In practice, some visa officers have on occasion shown discretion with refugees whose family members would otherwise be unable to reunite, although they usually require a (discretionary) DNA test by an accredited laboratory. This possibility may assist some refugee families seeking to reunite, but it has been described as a “flawed remedy”.<sup>252</sup>

In the **United States**, there are two ways refugees (resettled refugees) and asylees (persons who have sought and been granted asylum in the United States) can seek family reunification: either through an asylee/refugee petition, known as the I-730 or “following-to-join” process or through the Priority Direct Access Program.<sup>253</sup>

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<sup>248</sup> Ibid., s. 117(9)(d).

<sup>249</sup> Canadian Council for Refugees, “Family Reunification for All!”, March 2017, available at: <http://www.refworld.org/docid/5a4cba9e4.html>.

<sup>250</sup> Canadian Council for Refugees, *Excluded Family Members: Brief on R. 117(9)(d)*, May 2016, <http://www.refworld.org/docid/58b0558a4.html>. See *Azizi v. Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2005 FCA 406; [2006] 3 F.C.R. 118, Canada: Federal Court of Appeal, 5 December 2005, available at: <http://www.refworld.org/docid/4716146527.html> dismissing an appeal arguing that s. 117(9)(d) should not apply to refugees, while *De Guzman v. The Minister of Citizenship and Immigration*, [2006] 3 FCR 655, Canada: Federal Court of Appeal, 20 December 2005, available at: [http://www.refworld.org/cases,CAN\\_FCA,58a711074.html](http://www.refworld.org/cases,CAN_FCA,58a711074.html) dismisses an appeal that had argued this provision rendered the IRPA non-compliant with international human rights instruments to which Canada is a signatory.

<sup>251</sup> Canada: *Immigration and Refugee Protection Act (IRPA)*, above fn. 242, s. 25.

<sup>252</sup> Canadian Council for Refugees, *Excluded Family Members*, above fn. 250, pp. 6-8.

<sup>253</sup> Once a refugee or asylee adjusts status to that of legal permanent resident or later naturalizes, they are also eligible for the additional family reunification avenues available to individuals with those statuses, see <https://www.uscis.gov/i-130>. See also generally, UNHCR, “US Family Reunification”, available at: <http://www.unhcr.org/uk/us-family-reunification.html>.

Under the I-730 process, a refugee or asylee who has been granted refugee or asylee status directly (i.e. not on a derivative basis) and who has had such status for less than two years, and who has not naturalized as a US citizen, may petition for their spouse and/or children to join them, if the family relationship existed before the individual came to the United States as a refugee or was granted asylum.<sup>254</sup> A limited waiver of the two-year deadline is available for humanitarian reasons. To be considered a “child”, the person must be unmarried and under 21 years of age (as of the date of the first overseas interview with US authorities for derivative refugees or the date US authorities received the asylum application for derivative asylees).<sup>255</sup> This means that married children, siblings, cousins, and other family members are not eligible to petition under the I-730 process. Under Federal Regulations, parents are ineligible for accompanying or “following to join” benefits, even when the principal refugee or asylee is a minor child.<sup>256</sup>

A wider family definition applies under the Priority Direct Access Program, which is open only to a refugee or asylee who has been living in the United States for less than five years (whether or not he or she has become a Permanent Resident or a US citizen) and who is from a limited list of countries of origin.<sup>257</sup> Under this Program a refugee or asylee may file an affidavit of relationship<sup>258</sup> to petition for a spouse (including same-sex and domestic partners under certain circumstances); unmarried children under the age of 21; and parents for access to the US Refugees Admissions Program. Other members of the individual’s previous household (whether or not they are related) could also qualify as family members if such individuals lived together in the country of nationality, and can demonstrate “exceptional and compelling humanitarian circumstances” that justify inclusion. All non-derivative applicants must meet the definition of a refugee under US law and be otherwise admissible. In addition, family members must be registered as refugees or have legal status in the country of asylum and have been cleared by the Department of Homeland Security (DHS)/US Citizenship and Immigration Services (USCIS) Refugee Access Verification unit. Applicants may also be asked to provide DNA evidence. Persons must be 18 years of age to file an affidavit of relationship.<sup>259</sup> The Priority Direct Access Program is carried out under a special family reunification category also referred to as “Priority 3”. In fiscal year 2017, the United States reported that only 228

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<sup>254</sup> See United States: *Immigration and Nationality Act* (last amended February 2013), February 2013, available at: <http://www.refworld.org/docid/58a49c5f4.html>, para. 101; 8 United States Code (USC), available at: <https://www.gpo.gov/fdsys/granule/USCODE-2011-title8/USCODE-2011-title8-chap12-subchap1-sec1101>, para. 1101.

<sup>255</sup> The term “child” is defined in INA, *ibid.*, above fn. 254, para. 101(b)(1)(A), (B), (C), (D), and (E).

<sup>256</sup> United States: 8 *Code of Federal Regulations* (CFR), available at: <https://www.gpo.gov/fdsys/pkg/CFR-2016-title8-vol1/pdf/CFR-2016-title8-vol1-sec207-7.pdf>, § 207.7(b)(6). See also section 8.2.1 below.

<sup>257</sup> Priority 3 is open to selected nationalities, which the US Government designates each year. The specific family relationships and nationalities eligible for consideration under the US Refugee Admissions Program are outlined in the annual Presidential Report to Congress on Proposed Refugee Admissions. See, US Department of State, US Department of Homeland Security (DHS), and US Department of Health and Human Services (DHHS), *Proposed Refugee Admissions for Fiscal Year 2015: Report to the Congress*, available at: <https://www.state.gov/documents/organization/232029.pdf>, p. 13 and US Department of State, US DHS and US DHHS, *Proposed Refugee Admissions for Fiscal Year 2018 Report to the Congress*, available at: <https://www.state.gov/documents/organization/274857.pdf>.

<sup>258</sup> An Affidavit of Relationship is a legal document including a sworn statement testifying to the nature of a relationship and is commonly required for immigration purposes.

<sup>259</sup> See US Department of State, Instructions: DS 7656, *Affidavit of Relationship*, available at: <https://cliniclegal.org/sites/default/files/ds-7656-final-8-2012.pdf>.

persons were admitted under this program. Refugees and asylees are eligible to file both I-730 and Priority 3 applications.

*In Asia, examples of State practice regarding the family definition applied in the context of family reunification include:*

In **Australia**, only “members of the immediate family”, i.e. a spouse or de facto partner, a dependent child and, if the proposer/sponsor is a child under 18, a parent, can apply for a permanent humanitarian visa to join a refugee under the offshore humanitarian programme.<sup>260</sup> These are known as “split-family cases” and the proposer must have a permanent visa. People arriving in Australia by boat after August 2012 cannot become a proposer, as outlined in section 4.5 below. If other family members wish to apply for a humanitarian visa, they must be a “member of the family unit” of the proposer. A “member of the family unit” comprises a spouse or de facto partner, a dependent child (of the main applicant and/or their partner), a dependent child of a dependent child, and a relative of the main applicant (or their partner) who does not have a spouse or de facto partner, is usually resident in the household and is dependent on the main applicant.<sup>261</sup> The cases of these so-called “non-split family” cases are first assessed to determine whether they are “financially, psychologically or physically dependent on the main applicant”, for which an interview is often necessary. If a claimed family member does not meet the definition of member of the family unit or member of the immediate family, that applicant is separated administratively from the original application, given their own file and considered against primary criteria in their own right. They should also be considered against dependency based on financial, psychological or physical support, including requesting further information where appropriate, prior to any administrative separation. In many circumstances, an interview may need to be conducted to assess this.<sup>262</sup> The cases are only assessed together where applicants are not members of the immediate family but are under 18 years old, in particular where the applicants live as a family group and there are no other adults responsible for the care of the children.<sup>263</sup>

In **New Zealand**, there are two ways in which a resettled refugee can sponsor family members to come to New Zealand; each has a different definition of family. Under the Refugee Quota Programme, a refugee may sponsor “immediate family”, defined as their “spouse and dependent children” provided that these individuals were declared during the refugee’s initial offshore interview with Immigration New Zealand. The places available for reunification of immediate family with refugees resettled in New Zealand under the Refugee Quota Programme are included within New Zealand’s quota for resettlement. New Zealand also has a Refugee Family Support Category, which allows extended family members of resettled refugees in New Zealand to apply for Permanent Residence. The definition of “family members” is broader in the context of this category. The places available under this category

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<sup>260</sup> Australia: Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian Offshore humanitarian program Visa application and related procedures*, regulation 1.12AA, pp. 48-51.

<sup>261</sup> Australia: Department of Immigration and Border Protection, *ibid.*, pp. 30-35; *PAM3: Refugee and Humanitarian - Protection visas - All applications - Common processing guidelines*, pp. 56-60.

<sup>262</sup> Australia: Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian - Offshore humanitarian program - Visa application and related procedures*.

<sup>263</sup> Australia: Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian - Offshore humanitarian program - Visa application and related procedures*, pp. 51-52.

are limited to 300 places per year. (Currently, resettled refugees may register to sponsor family members where they have no immediate family living lawfully and permanently in New Zealand.)<sup>264</sup> In 2016, the New Zealand Human Rights Commission reported on the question of refugee resettlement, including family reunification. It found that “[t]he reality of wider family interdependence needs to be acknowledged” and recommended that “a generous, culturally sensitive and flexible definition of family should be applied”.<sup>265</sup>

Other examples include the **Republic of Korea**, where legislation requires the Minister of Justice to permit the entry into the country of the spouse and minor children of a recognized refugee.<sup>266</sup>

#### 4.1.1 Conclusion: A broad, flexible family definition that includes dependants

In conclusion, legislation defining family members in the case of the family reunification of beneficiaries of international protection needs to be sufficiently broad and flexible to include not only nuclear or close family members, as accepted in international, regional and national practice, but also dependent children and adults with de facto family ties.<sup>267</sup>

As the ECtHR has on numerous occasions ruled, the “existence or non-existence of ‘family life’ ... is essentially a question of fact depending upon the real existence in practice of close personal ties”.<sup>268</sup> Taking account of “close personal ties” involves acknowledging the different concepts of family that may apply in different societies, which may mean that persons who may be considered extended family members in the country of asylum are de facto members of the family unit. It also involves taking into account the impact that flight from persecution and conflict can have on families and their composition, which often results in changing and varying family combinations, as families and individuals seek to survive and where families consisting of blood relations and formally married spouses are not necessarily the norm.

The concept of dependency, as developed in international, regional and national level, has been shown to be an important tool for determining who may qualify as a family member beyond the nuclear or close family. UNHCR explains the concept as follows:

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<sup>264</sup> See generally, Immigration New Zealand, *How We Define Family*, available at: <https://www.immigration.govt.nz/new-zealand-visas/options/join-family/how-family-is-defined>.

<sup>265</sup> New Zealand Human Rights Commission, *New Zealand Refugee Resettlement: Fulfilling its obligations as a good international citizen*, [2016] NZHRCSUB 3, 1 February 2016, available at: <http://www.nzlii.org/nz/other/NZHRCSub/2016/3.html>.

<sup>266</sup> Republic of Korea: *Law No. 11298 of 2012, Refugee Act*, 1 July 2013, available at: <http://www.refworld.org/docid/4fd5cd5a2.html>, Article 37. While the exclusions referred to in this Article, which refers to Article 11 of the Immigration Act, include “a mentally handicapped person, vagabond, destitute or other person in need of relief”, it is understood that this is unlikely to present a problem to refugees, since the Refugee Act is a specific law that applying to refugees that has priority over general immigration law.

<sup>267</sup> See also, UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, 2017, section 2, above fn. 4, section 3.6.

<sup>268</sup> See e.g. *L. v. The Netherlands*, Application no. 45582/99, ECtHR, 1 June 2004, available at: <http://www.refworld.org/docid/5852a7e54.html>, para. 36.

“The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific. Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a *nuclear* family (husband, wife and minor children). In some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience. A broad definition of a family unit – what may be termed an extended family – is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process.”<sup>269</sup>

In order to assess the extent of dependency and the closeness of personal ties, States have tended to focus on financial or economic dependency. This may be easier to assess in the sense that documentary evidence of money transfers is more readily available, although it is important to acknowledge that in situations of conflict and insecurity the means used to deliver financial support may not be so easily evidenced. National courts have, for instance, found that “financial dependency must be seen as a flexible state of affairs which is not necessarily determined by the size of a contribution but rather on its effect in the context of the specific country of residence and personal circumstances of the person in receipt of the contribution” (Ireland).

It is in addition important to review and take into account situations of dependence that encompasses social and emotional ties.<sup>270</sup> Beyond financial dependence, courts have in specific circumstances accepted that emotional dependence and tight bonds can extend into adulthood (Czech Republic); that a married adult child may be a dependant (Finland); that it is necessary to take into account “all relevant economic, social, personal, physical, familial, emotional and cultural bonds” (Ireland); and that dependence can be evidence through physical care, protection, defence, emotional support and financial dependence (Slovenia).

Otherwise, where States strictly apply a narrow family definition, comprising only the father, mother and minor children, the result is that some family reunification decisions permit only some family members to join the beneficiary of international protection, leaving his or her next of kin behind in the country of origin or a country of first refuge, in sometimes insecure locations and precarious conditions, thus splitting rather than reuniting families. As one New Zealand report that is relevant more generally notes:

“[W]here there is an interdependent family grouping (such as a parent with an adult child and grandchildren, or two widowed sisters living together raising their children), sponsors are put in the invidious position of having to select only some family

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<sup>269</sup> UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: [www.refworld.org/docid/4ae9aca12.html](http://www.refworld.org/docid/4ae9aca12.html), para. 1(c).

<sup>270</sup> For more on dependency criteria in the legislation of European states see text following fn. 231 above.

members – with the potential of further separating the family and leaving some members behind in an even more vulnerable position.”<sup>271</sup>

It would thus seem important for States also to be aware of, and take into account, the consequences for family members who may be left behind, since the right to family unity affects the whole family.

In situations and where legislation does not provide a broad, flexible family definition, the practice of numerous States that permits family reunification on humanitarian and compassionate grounds or grounds of undue hardship could usefully be replicated in other States and, where this possibility exists, it could be used more regularly.<sup>272</sup> This prerogative is often a discretionary and exceptional one, but it is also an important tool to protect often very vulnerable individuals and to enable States to uphold their obligations to respect the right to family life and family unity and the best interests of the child under international and regional human rights law.

#### **4.2 Marriages and families formed outside the country of origin before arrival in the country of asylum**

State practice varies in Europe as to what requirements may be imposed regarding the date at which a marriage must have been entered into for refugees to be able to benefit from the preferential terms available to them in Chapter V of the Family Reunification Directive. In other regions, no distinction is made between pre- and post-flight spouses.

Article 9(2) of the Directive permits Member States to “confine the application of this Chapter to refugees whose family relationships predate their entry”.<sup>273</sup> Some States require the marriage of a beneficiary of international protection to predate departure from the country of origin. Others specify that it must predate entry to the country of asylum (or the EU), or predate the date asylum was sought, or even the date refugee status was recognized. These different stipulations can also have consequences for families, notably children, who were not born in the country of origin.

Countries that require the family to have been formed before departure from the country of origin exclude families from reunification where the marriage/relationship was established during flight or while in a transit country. Such practice may severely restrict the right to family life of beneficiaries of international protection, as it can be very hard for them to meet requirements otherwise imposed on third country nationals. This may deprive them of the support of their family members and ultimately limit their prospects for integration.

Yet it is important to acknowledge the realities faced by people fleeing persecution and conflict. Armed violence, conflict and flight can all lead to separation from, and the death of,

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<sup>271</sup> Changemakers Refugee Forum Inc. et al, *Refugee Family Reunification in Wellington*, July 2009, available at: [http://crf.org.nz/sites/default/files/staff/FAMILY\\_REUNIFICATION\\_0.pdf](http://crf.org.nz/sites/default/files/staff/FAMILY_REUNIFICATION_0.pdf), pp. 5-6.

<sup>272</sup> For more on this possibility see section 12.1 below.

<sup>273</sup> It should be noted that Article 2(e) of the Directive defines family reunification without distinction as to whether “the family relationship arose before or after the resident’s entry”.



family members, leaving families as single-headed households or reconstituted families, including as a result of new relationships and the acceptance into the home of children or other family members who have lost their own closer family or who may simply live nearby. Many refugees have spent years in exile in their region of origin or while seeking asylum in another country before they are eventually granted protection and may well have formed new family relationships.

In terms of international and regional standards on this issue, it is useful to recall that in international and regional human rights law the rights to marry and form a family apply regardless of when or where a marriage takes place.<sup>274</sup> The members of a family formed after flight have as equal a right to respect for their right to family life and family unity as families formed before flight. Indeed, the provisions of Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>275</sup> which call for protection and assistance to the family “particularly for its establishment”, may be taken to include family “formation”.<sup>276</sup>

There may thus be concerns as to whether such a distinction breaches States’ non-discrimination obligations under international and regional human rights law. In Europe, for instance, the protection afforded by Article 8 ECHR does not distinguish between relationships formed before during or after flight, so that where such distinctions are made, they may violate Article 8 in conjunction with Article 14 ECHR. The ECtHR’s judgment in *Hode and Abdi*<sup>277</sup> is pertinent, as the Court found that the difference in treatment between the applicants – a recognized refugee and his wife, whom he had married in Djibouti after his recognition as a refugee in the UK – on the one hand, and students and workers, on the other, was not objectively and reasonably justified. It also saw “no justification for treating refugees who married post-flight differently from those who married pre-flight” and therefore ruled that there had been a violation of Article 14 ECHR read together with Article 8.

In terms of the CJEU’s jurisprudence, the Court has noted in its judgment in *Chakroun*, both Article 8 ECHR and Article 7 of the EU Charter do “not draw any distinction based on the circumstances in and time at which a family is constituted”.<sup>278</sup> It ruled that the Family Reunification Directive must be interpreted as preventing national legislation from drawing a distinction as to whether the family relationship arose before or after the sponsor entered the territory of the host Member State when applying the income requirement, except for refugees, since Article 9(2) of the Directive provides that “Member States may confine the application of [the provisions of Chapter V of the Directive] to refugees whose family relationships predate

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<sup>274</sup> For instance, in the Universal Declaration of Human Rights and ICCPR, as outlined in greater detail in UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, section 2.1.

<sup>275</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>.

<sup>276</sup> A. Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law (IJRL)*, vol. 17, no. 2 (2005), pp. 293–330, at p. 312.

<sup>277</sup> *Hode and Abdi v. United Kingdom*, Application no. 22341/09, ECtHR, 6 November 2012, available at: <http://www.refworld.org/docid/509b93792.html>, paras. 54–56. The Court also noted that the situation giving rise to the breach no longer existed as the Immigration Rules had since been amended. See also, K. Kessler and D. Zipfel, “Der Asylrechtliche Ehegattenbegriff und das Erforderniss der im Herkunftsland bestandenen Ehe”, *Migralex*, 2014, pp. 30–37, setting out relevant ECtHR jurisprudence in more detail.

<sup>278</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 117, para. 63.

their entry". The CJEU found that this "provision is explained by the more favourable treatment granted to refugees on their arrival in the territory".<sup>279</sup> The point in time referred to is thus the moment of entry to the EU, not the time of departure from the country of origin.

As for the European Commission's 2016 Proposal for a Regulation to Replace the Qualification Directive, this recognizes a need to "reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged period of time in transit". It therefore refers to "close relatives who lived together as part of the family at the time of leaving the country of origin or before the applicant arrived on the territory of the Member States, and who were wholly or mainly dependent on the beneficiary of international protection at the time".<sup>280</sup>

While this does not mean that countries of asylum are obliged to permit all couples married after they have fled their country of origin to stay together, the ECtHR has ruled that, where it is not possible for the couple concerned to develop family life elsewhere, States may be required to them (and their family) to reunite. The case of *Megesha Kimfe c. Suisse* concerned a couple whose asylum claims had been rejected but who could not be returned to their country of origin, but the rationale applies equally to beneficiaries of international protection, unless family life can be enjoyed in a third country.<sup>281</sup>

*A number of European States require the marriage to have taken place or family life to have existed in the country of origin. This is more restrictive than Article 9(2) of the Directive which refers to "entry" not departure as noted above.*

Legislation in **Estonia** requires the marriage to have been concluded in the country of origin and before the entry of the sponsor to Estonia.<sup>282</sup> The former requirement is additional to those in the Directive and would appear not to further the Directive's objectives of promoting family reunification and the effectiveness thereof.

In the **United Kingdom**, which has opted out of the Family Reunification Directive, the family member must have been part of the family unit with the sponsor in the UK before that person left his or her country or habitual residence. As a result, "post-flight" family members have to meet income and other requirements.

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<sup>279</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 117, paras. 59-60.

<sup>280</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (European Commission Proposal for a Regulation to Replace the Qualification Directive)*, COM(2016) 466 final, 2016/0223 (COD), 13 July 2016, available at: <http://www.refworld.org/docid/58ac43474.html>, p. 16, Article 25 (emphasis added) and recital 38.

<sup>281</sup> *Mengesha Kimfe c. Suisse*, Requête no 24404/05, ECtHR, 29 July 2010, available at: <http://www.refworld.org/cases,ECHR,4c56cc952.html>, para. 68.

<sup>282</sup> Estonia: *Act on granting international protection to aliens*, 1 July 2006, available at: <http://www.refworld.org/docid/5047550b2.html>, section 7(5).

Among non-EU member States, in **Norway**, refugee couples formed post-flight are subject to the ordinary family reunification rules requiring four years of full-time study or full-time work, an existing and likely future income above a certain threshold, an unlimited employment contract and no reliance on social security, which are extremely demanding.<sup>283</sup>

In **Switzerland**, family members are eligible for family reunification with a refugee (B-permit holder) if they were separated during flight and the relationship already existed at that time.<sup>284</sup> In principle this wording appears sufficiently open-ended to include family members who became a family during flight and were separated in a transit country, but the Federal Administrative Tribunal has held that this does not apply to family members who were separated outside the country of origin. Thus, even where family members have been separated during flight, particularly in a transit country, they no longer meet the pre-flight requirement and are considered post-flight family members. In such circumstances, refugees who are B-permit holders cannot benefit from the more favourable requirements laid down in Article 51 (Loi sur l'asile de 26 juin 1998). Instead, they must meet the requirements applicable to spouses and children of persons with a residence permit, notably of being able to provide accommodation and not relying on social assistance.<sup>285</sup>

*Among European States requiring the marriage to have been entered into before entry to the country of asylum are:*

In line with Article 9(2) of the Family Reunification Directive, EU Member States requiring the family relationship to have existed before entry include **Finland, Luxembourg, Malta, and Slovenia**.<sup>286</sup>

In **Austria**, legislation on family reunification was recently brought into line with Article 9(2) of the Directive as part of a series of other legislative amendments. As of 1 November 2017, Austrian asylum law requires the marriage to have existed before entry to Austria. Until then, legislation had required the marriage to have already existed in the country of origin and the Federal Administrative Court generally upheld first instance decisions denying family reunification to couples who were married outside their country of origin.<sup>287</sup> In 2014, the Constitutional Court nevertheless overturned a decision concerning an Afghan couple who were married in Pakistan and had four children, but who had also lived together in Afghanistan. The application made by the wife to join her husband, who had subsidiary protection in Austria, was rejected, but that for the children was approved. The Constitutional

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<sup>283</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 40.

<sup>284</sup> Suisse: *Loi sur l'asile de 26 juin 1998*, état le 1er octobre 2016, above fn. 193, Article 51(4). See also S. Motz, *Family Reunification for Refugees in Switzerland Legal Framework and Strategic Considerations*, UNHCR and Centre suisse pour la défense des droits des migrants, October 2017, available at: <http://www.refworld.org/docid/5a0971d54.html>.

<sup>285</sup> Suisse: *Loi fédérale sur les étrangers*, état le 1er janvier 2017, above fn. 193, Article 44. See also text at fn. 410 below for the situation of F-permit holders, who must meet this requirements in any case.

<sup>286</sup> Malta: *Family Reunification Regulations*, as amended by Legal Notice 148 of 2017, above fn. 186, Article 26; Slovenia: *Aliens Act*, 2011, above fn. 227, Articles 47a(1) and 47b(1).

<sup>287</sup> Austria: *Asylum Act*, 2005, above fn. 172, Article 35(6). See, e.g. *W161 2100708-1/2E*, Austria: Bundesverwaltungsgericht (Federal Administrative Court), 13 May 2015, available in German at: <http://www.refworld.org/docid/585933b24.html>; *W192 2017047-3*, Austria: Bundesverwaltungsgericht, 31 March 2016, available in German at: [http://www.refworld.org/cases,AUT\\_FAC,58dd0baa4.html](http://www.refworld.org/cases,AUT_FAC,58dd0baa4.html).

Court found that the decision was arbitrary and violated the right to equal treatment amongst foreigners<sup>288</sup> and that there had been no assessment of a possible violation of Article 8 ECHR.<sup>289</sup> Even though at that time there was a requirement for the relationship to have existed in the country of origin, the reunification of a couple who were only married later was thus sometimes permissible in family reunification applications.<sup>290</sup>

Some other States adopt a slightly different approach, requiring marriage to have taken place rather than simply the family relationship to have been established before taking up ordinary residence, as in **Germany**,<sup>291</sup> or arrival of the beneficiary of international protection, as in **Hungary**.<sup>292</sup> This approach appears not to recognize that a family relationship may exist before marriage. While it is recognized that it may be more difficult to show the existence of a family relationship than a marriage, such provisions may not be fully in keeping with Article 9(2) of the Directive or indeed Article 8 ECHR.

In **the Netherlands**, the requirements that family ties must already have been formed in the country of origin and that family members must have the same nationality were lifted from January 2014. As a result families formed outside the country of origin during flight but before entry into the Netherlands now benefit from more favourable family reunification provisions on the same basis as the families of beneficiaries of international protection that were formed in the country of origin.<sup>293</sup>

Further, a February 2017 Council of State judgment ruled that cohabitation before flight is not a requirement to be able to apply Chapter V of the Family Reunification Directive concerning refugees. The case concerned a couple of Palestinian origin, who met in Lebanon in 2009 and were married in a proxy ceremony in 2013. After the wife fled Syria, where she had been residing, and was recognized as a refugee in the Netherlands, the husband who was from Lebanon but was residing in Belgium at the time of the marriage, applied to join his wife in the Netherlands. The Council of State overturned the Secretary of State's rejection of the application, finding that Article 9(2) of the Directive does not allow a Member State to require the applicant and the sponsor actually to have lived together. It found that Article 11(2) in

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<sup>288</sup> Austria: *Federal Constitutional Law on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination*, Bundesverfassungsgesetzes zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassistischer Diskriminierung, BGBl. 390/1973, available in German at: <http://www.refworld.org/docid/58590bf94.html>, Article 1.

<sup>289</sup> B369/2013, Austria: Verfassungsgerichtshof (Constitutional Court), 6 June 2014, available in German at: <http://www.refworld.org/docid/58592db97.html>. (Also *E1510/2015 ua*, Austria: Verfassungsgerichtshof, 23 November 2015, available at: [http://www.refworld.org/cases,AUT\\_FCCA,58590ea64.html](http://www.refworld.org/cases,AUT_FCCA,58590ea64.html)).

<sup>290</sup> Austria: Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum), *Generalerlass Familienverfahren, Verfahren vor den Vertretungsbehörden und Einreiseverfahren*, BMI-BA1210/0220-BFA-B/I/1/2014, 12 August 2015, pp. 9, 16-17.

<sup>291</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 30(1). Family reunification is theoretically possible if the marriage was not established before entry, but some basic knowledge of German is required, see Section 30 (1)2, *Residence Act*.

<sup>292</sup> Hungary: Office of Immigration and Nationality, *Residence Permit for the Purpose of Family Reunification*, available at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=54&Itemid=808&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=54&Itemid=808&lang=en).

<sup>293</sup> Adviescommissie voor Vreemdelingenzaken (ACVZ)/Advisory Committee on Migration Affairs, *Na de vlucht herenigd: advies over de uitvoering van het beleid voor nareizende gezinsleden van vreemdelingen met een verblijfsvergunning asiel* (ACVZ, "Reunited after Flight"), October 2014, available in Dutch with English summary at the end at: [http://acvz.org/wp-content/uploads/2015/04/31-10-2014\\_ACVZ\\_Advies\\_41.pdf](http://acvz.org/wp-content/uploads/2015/04/31-10-2014_ACVZ_Advies_41.pdf), p. 134.

conjunction with Article 9(2) of the Directive require that a valid marriage before entry into the Netherlands existed in accordance with Dutch international private law. Referring to the settled case law of the CJEU, it noted that Member States cannot use their margin of appreciation, in this case the discretion to refuse to apply the more favourable provisions of Chapter V where family ties existed before the sponsor entered the Netherlands, in a manner which would undermine the Directive's objective of promoting family reunification and the effectiveness thereof.<sup>294</sup>

This approach tallies with a 2014 judgment of the Migration Court of Appeal In **Sweden**, which ruled that the lowered requirement of proof when applying for family reunification does not require both the parents and children to have lived in a joint household in their home country.<sup>295</sup>

In **Norway**, the families of refugees (whether granted international protection under the 1951 Convention or on Article 3 ECHR grounds) that were established before arrival in Norway do not have to meet the requirement that the sponsor must have worked full-time or taken full-time education for a total of four years (so-called past income requirement) and not relied on social security before lodging an application for family reunification.<sup>296</sup> Norwegian immigration law distinguishes between situations where the family relations existed prior to the sponsor's entry into Norway (family reunification) and situations where the family relations are established after that (family formation). While there are not separate provisions for the different forms of family immigration in legislation, the requirements to be granted family immigration are generally stricter in family formation cases.<sup>297</sup>

Outside Europe, in **Canada**, no distinction is made between pre- and post-flight spouses/families, the focus being rather on whether the marriage is genuine or if it was entered into for the purposes of establishing a status in Canada.

In the **United States**, legislation requires the family relationship to have existed before the individual came to the United States as a refugee or was granted asylum.

*Among European States requiring the marriage to have been entered into at a later date are:*

In **France**, the spouse or partner linked by civil union of a beneficiary of international protection is accepted for family reunification, if he or she is over the age of 18 and if the civil union or marriage took place before the date asylum was sought.<sup>298</sup>

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<sup>294</sup> *Uitspraak 201601089/1/V1*, Netherlands: Council of State, 20 February 2017, available in Dutch at: <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=90376>, referring to *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, above fn. 117, para. 43.

<sup>295</sup> *UM3485-13*, Sweden: Migration Court of Appeal, *MIG: 2014:16*, 15 August 2014, available in Swedish at: <https://lagen.nu/dom/mig/2014:16>. See text at fn. 335 below for more on the standard of proof.

<sup>296</sup> Norway, *Immigration Act*, Sections 40, 41, 48 and *Immigration Regulations*, Sections 9-1, 9-2, 10-23.

<sup>297</sup> Information form UNHCR Regional Representation for Northern Europe, Stockholm, November 2017.

<sup>298</sup> France: CESEDA, above fn. 21, Articles L314-11 8°, L313-13 and L752-1; OFPRA Family Reunification Leaflet.

In **Ireland**, legislation requires the marriage to have taken place before the asylum claim was submitted.<sup>299</sup>

Furthermore, in the **Czech Republic**, the spouse or partner of a recognized refugee is only accepted for family reunification if the marriage/partnership existed before asylum was granted to the recognized refugee, thus allowing for the possibility of including marriages/partnerships formed outside the country of origin up until recognition of refugee status.<sup>300</sup>

### 4.3 Documentation requirements

Beneficiaries of international protection often face great difficulties providing the extensive documentation required for family reunification. The documents needed may have been left behind in haste, lost or destroyed during flight. Seeking replacements may expose family members of the beneficiary of international protection to repeated contact with the authorities of the country of origin, which may put them in a difficult situation or even in direct danger. It may simply be impossible to obtain documents if the country of origin is a failed State or in the midst of serious conflict or indeed if the beneficiary is stateless.<sup>301</sup>

Despite these obstacles, multiple attestations may have to be obtained from different State authorities at various levels in the country where the document was issued or from an embassy of that State abroad. They may include replacement birth or marriage certificates, documents confirming a child's age where no formal birth certificates available or medical documentation are regarding the health status of family members where dependency is claimed. Single-parent families may be required to provide proof of parental authority or the death of the other parent, which may be impossible, if one parent remains in a conflict zone or administrative services are not otherwise functioning in the country where the family members are. Non-biological children also face particular challenges proving family membership, since adoption is not a formal process in many refugees' states of origin.<sup>302</sup> Even if there are minor discrepancies among these documents, this can result in the rejection of applications, leaving families divided between the country of origin and asylum.

Recognizing these challenges, UNHCR's Executive Committee underlines that "[w]hen deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment".<sup>303</sup> As the Summary Conclusions on family unity of 2001 state:

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<sup>299</sup> Ireland: *International Protection Act*, 2015, 2015, above fn. 212, Section 56(9)(a).

<sup>300</sup> Czech Republic: *Act No. 325/1999 Coll. on Asylum*, 1999, above fn. 203, Section 13; Czech Republic: *Act no. 326/1999 on the Residence of Foreign Nationals in the Territory of the Czech Republic*, 1 January 2000, available at: <http://www.refworld.org/docid/3affe8b64.html>, Section 13(3).

<sup>301</sup> See generally, UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, p. 6; UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 8.

<sup>302</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 43.

<sup>303</sup> UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 24, para. 6.

“The requirement to provide documentary evidence of relationships for the purposes of family unity and family reunification should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin. A flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences. An example was given where strict documentation requirements had created a market for forged documents in one host country.”<sup>304</sup>

With regard to evidence of family ties, the Council of Europe, recommends that member States “should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way”, while “[t]he absence of such documents should not per se be considered as an impediment to the application and member states may request the applicants to provide evidence of existing family links in other ways”.<sup>305</sup>

As for the ECtHR, it has recognized that the evaluation of documents in family reunification cases is a delicate issue.<sup>306</sup> At the same time, it has also ruled that family reunification procedures must take account of the events that disrupted and disorganized the sponsor’s family life and led to recognition of refugee status.<sup>307</sup> Given this acknowledgement, the Court’s statement that “owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereto”<sup>308</sup> can be seen to apply not only to the determination of asylum claims but also to the situation of beneficiaries of international protection seeking to fulfil documentation requirements in the context of family reunification.

It would therefore seem more appropriate, taking into account the special situation of refugees and their family members seeking to reunite, to expect them to make their identity and/or family relationship *probable* rather than proven and to allow for the benefit of the doubt, just as has been recognized by the ECtHR to be the case for asylum-seekers. Where country of origin information used for assessing asylum claims indicates that there are difficulties accessing the authorities or obtaining documentation in the country of origin, this can also be seen as an indication of the likely similar problems in the family reunification context and allowances should accordingly be made.

It may be arguable that requiring beneficiaries of international protection to provide documentation, where this is impossible either because of the dangers to which this would expose the family member or where the State is unable to issue it, may constitute indirect

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<sup>304</sup> UNHCR, Summary Conclusions, Family Unity, above fn. 1, para. 12.

<sup>305</sup> Council of Europe: Committee of Ministers, *Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, 15 December 1999, Rec(99)23, available at: <http://www.refworld.org/docid/3ae6b39110.html>, para. 4.

<sup>306</sup> *Longue c. France*, ECtHR, 2014, above fn. 90, para. 66.

<sup>307</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, para. 73; *Mugenzi c. France*, ECtHR, 2014, above fn. 85, para. 52.

<sup>308</sup> See e.g. *N.A.N.S. v. Sweden*, Application no. 68411/10, ECtHR, 27 June 2013, available at: <http://www.refworld.org/cases,ECHR,51d2e4744.html>, para. 25; *F.N. and Others v. Sweden*, Application no. 28744/09, ECtHR, 18 December 2012, available at: <http://www.refworld.org/cases,ECHR,58c165774.html>, para. 67.

discrimination vis-à-vis other persons seeking to bring family members to their country of residence, who do not face such obstacles. In similar vein, the CESCR gives as an example of indirect discrimination how “requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates”.<sup>309</sup> The principle of non-discrimination in international human rights law requires that similarly situated individuals should enjoy the same rights and receive similar treatment except where such distinctions can be objectively justified.<sup>310</sup> Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of rights as distinguished by prohibited grounds of discrimination.<sup>311</sup> Section 6.3 also looks at the jurisprudence of the ECtHR that concerns States’ positive obligations of non-discrimination. The rationale set out there may arguably also apply where document requirements have the effect of discriminating against beneficiaries of international protection compared to other immigrants.

In this context, the CJEU’s judgment in *Minister van Buitenlandse Zaken v. K. and A.* is also relevant. While the case concerned the fees levied in relation to integration tests, the judgment stated that “specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor’s relevant family members must be taken into consideration” and that where “circumstances ... do not allow regard to be had to special circumstances objectively forming an obstacle to the applicants [meeting the requirements] ... those conditions make the exercise of the right to family reunification impossible or excessively difficult”.<sup>312</sup>

Indeed, the Family Reunification Directive recognizes that there may be situations where “official documentary evidence of the family relationship” cannot be provided. Article 11(2) of the Directive requires Member States to “take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship”. It specifies: “A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.”<sup>313</sup> Article 5(2) of the Directive also provides for the possibility of carrying out

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<sup>309</sup> Drawn from UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html>, para. 10.

<sup>310</sup> For further information, see UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, section 2.1.2.

<sup>311</sup> CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, ICESCR)*, 2009, above fn. 309, para. 10; CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, available at: <http://www.refworld.org/docid/43f3067ae.html>, para. 13.

<sup>312</sup> *Minister van Buitenlandse Zaken v. K. and A.*, CJEU, 2015, above fn. 131, paras. 58 and 71.

<sup>313</sup> As for instance, in **Hungary** (Hungary: *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals*, 1 July 2007, available at: <http://www.refworld.org/docid/4979cae12.html>, Article 19(3), subsequent changes having not affected this provision); **Luxembourg** (Luxembourg: *Loi sur la libre circulation des personnes et l’immigration*, 2008, above fn. 222, Article 73(3) of the law of 29 August 2008 and *Monsieur ... et son épouse Madame ... (Iran)*, c.un jugement du tribunal administratif du 11 mars 2013 (n° 30462 du rôle) en matière de police des étrangers, Jugement n° 32328C, Luxembourg: Administrative Court, 22 April 2013, available at: [http://www.refworld.org/cases,LUX\\_CA,5a4cdc624.html](http://www.refworld.org/cases,LUX_CA,5a4cdc624.html); **Estonia**; **Latvia** (UNHCR staff at Regional Representation for Northern Europe, Stockholm, October 2016); and **Italy** (Italy: Legislative Decree no. 286/1998, above fn. 220, Article 29bis (2)).



interviews to determine family links, although the Commission has stated that “in order to be admissible under EU law these interviews must be proportionate – thus not render the right to family reunification nugatory – and respect fundamental rights, in particular the right to privacy and family life”.<sup>314</sup>

A preliminary question referred to the CJEU by The Hague District Court on 14 November 2017 may help clarify the proper interpretation of Article 11(2) of the Directive. The case concerns a request for an Eritrean minor living in Sudan to be reunited with his foster mother who has subsidiary protection in the Netherlands. The applicant was unable to present official documents proving the family relationship and the authorities dismissed the application on the grounds that no plausible explanation had been given for this or for the sponsor’s statement that she was not yet able to submit them. The District Court asked (i) whether Article 11(2) of the Directive must be interpreted as precluding the rejection of a family reunification request by a refugee merely because she does not submit official evidence showing the family connection with her application, or (ii) whether Article 11(2) must be interpreted as meaning it only precludes the rejection of such a request solely because of the lack of official evidence evidencing the family relationship, if the sponsor has given a plausible explanation for not having submitted these documents and for her statement that she can not present these documents yet?<sup>315</sup>

The European Commission acknowledges in its 2014 guidance on the application of the Family Reunification Directive:

“[Member States] have a certain margin of appreciation in deciding whether it is appropriate and necessary to verify evidence of the family relationship through interviews or other investigations, including DNA testing. The appropriateness and necessity criteria imply that such investigations are not allowed if there are other suitable and less restrictive means to establish the existence of a family relationship. Every application, its accompanying documentary evidence and the appropriateness and necessity of interviews and other investigations need to be assessed on a case-by-case basis.

“Besides factors such as a common child, previous cohabitation and registration of the partnership, the family relationship between unmarried partners can be proven through any reliable means of proof to show the stable and long-term character of their relationship, for instance, correspondence, joint bills, bank accounts or ownership of real estate, etc.”<sup>316</sup>

Another possibility includes accepting a declaration of honour by another family member, for instance, regarding the death of one parent, in lieu of a formal death certificate which cannot

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<sup>314</sup> European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, 2011, above fn. 107, section 5.1.

<sup>315</sup> AWB 16/26862, Netherlands: Rechtbank Den Haag/The Hague District Court, 14 November 2017, available at: <http://deelink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2017:13124>.

<sup>316</sup> European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 169, p. 9.

be issued due to a state of conflict, so as to enable children left without parental care in the country of origin to join their other parent in the country of asylum.

For further information on DNA testing, which may be offered/required where official documentation is lacking or other evidence is insufficient, see section 4.4, and on difficulties obtaining visa and travel documentation, see section 5.3 below.

*Examples of European State practice regarding documentation requirements include:*<sup>317</sup>

In **Austria**, if applicants do not produce documentary evidence of the family relationship, an interview is required before a DNA-analysis is conducted.

In **Belgium**, documents accepted as showing family/marriage ties include foreign court decisions (e.g. a decree of divorce or adoption) or foreign certificates (e.g. birth or marriage certificates). If no valid documents are available or should the documents produced not comply with common international standards, the Immigration Office can use other methods such as interviews or investigation and take into account other official or non-official documents.<sup>318</sup> Any claim that it is not possible to provide documents must be “real and objective”, that is, independent of the will of the applicant. Other valid types of evidence indicating family ties need only be provided when official documents cannot be obtained. If such evidence cannot be provided, the Belgian authorities may conduct interviews or any other inquiry necessary to verify the validity of the facts or documents in question. In the absence of “valid” evidence, the Immigration Office may offer the possibility of a DNA test to determine the family ties.<sup>319</sup>

In **France**, in the absence of civil status documents or if the civil status documentation of the country of origin is not reliable, the sponsor and family members must evidence “possession of status”, indicating the lived reality of the family relationship. An affidavit issued by a judge can be required and the consistency of declarations made by the beneficiary of international protection to OFPRA at the time of seeking asylum is taken into consideration.

The Bureau des familles de réfugiés has identified the most difficult part of the process as being ascertaining filiation between the refugee and his or her family. NGOs and refugees alike have argued that birth certificates can be difficult to provide when refugees come from failed States, from places without a civil registry or where birth certificates are not issued, or where it is risky to approach the authorities. For instance, consultations undertaken by UNHCR indicated that the 10-year-old daughter of an Ivorian refugee had had to be left behind while the rest of the family travelled to France. It appeared that a difference of one letter in her name on the register and on the birth certificate – a common transcription mistake

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<sup>317</sup> EMN, *Checking Identity and Family Relationships in Case of Family Reunification with a Beneficiary of International Protection, Ad hoc query from the Netherlands requested 10 June 2016, 18 July 2016*, available at: <http://www.refworld.org/docid/58ac4ba34.html> provides a useful overview of applicable provisions and has been used to inform this section in addition to the other sources cited.

<sup>318</sup> Belgique: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, above fn. 176, Section 12bis(5) and 12bis(6).

<sup>319</sup> EMN, *Ad-Hoc Query on policies for family members of beneficiaries of international protection*, Requested by NL EMN NCP, 12 February 2014, available at: <http://www.refworld.org/docid/588b600f4.html>, p. 3.

– together with limited information on the procedure meant her application was refused while that of the rest of the family had been accepted.<sup>320</sup> In another case, the French authorities refused to accept the age on the children’s birth certificates, as this did not tally with a summary age assessment the children had been required to undergo, as described by the ECtHR in its *Mugenzi* judgment.<sup>321</sup> The challenges faced regarding documentation in the ECtHR case of *Tanda-Muzinga* has also been outlined above.<sup>322</sup>

In **Luxembourg**, the Directorate of Immigration may accept, in principle, all types of documents serving to establish the identity and/or nationality of the family member, and/or the veracity of the applicant’s statements. Official identity documents and travel documents prevail over other administrative documents, such as a driver’s licence, military record, municipal identification, qualification certificates. If there are discrepancies between identity documents, their validity is examined on a case-by-case basis. For example, a more recent document cannot always be considered more reliable than an older one, since it is possible that in certain circumstances in the past, the applicant sought to hide his identity or nationality through a new identity document in order to leave the country of origin. The submission of divergent documents tends to raise doubts about the statements made in the application and this needs to be explained. Where applicants cannot provide documentary proof of their identity and relationship, the authorities may interview the sponsor or applicants or do so by other means.<sup>323</sup> There must be serious doubts if the application is rejected due to the impossibility of proving identity.

In terms of jurisprudence, the Administrative Tribunal overturned the rejection of an application by an Afghan man to be joined by his wife. He was not a beneficiary of international protection but had legal residence in Luxembourg and his application had been rejected on grounds including that the photos on a marriage certificate provided to the Belgian embassy in Islamabad had been tampered with and that the woman’s birth certificate had only been on the basis of a later declaration. The Tribunal accepted that the applicant had not provided a certificate of marriage issued at the time of the marriage, but found that the applicants had provided a series of documents showing the reality of their marriage, notably an act and an attestation of marriage provided by the Afghan embassy in Brussels.<sup>324</sup> For beneficiaries of international protection who are unable to approach the authorities of their country of origin, the situation is more difficult.

In **the Netherlands**, only official documents issued by the authorities are accepted as evidence of a family relationship. If these are not available, the beneficiary of international protection

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<sup>320</sup> UNHCR, *Towards a New Beginning: Refugee Integration in France*, September 2013, available at: <http://www.refworld.org/docid/524aa9a94.html>, pp. 63-66 at p. 64 and more generally pp. 34, 73.

<sup>321</sup> *Mugenzi c. France*, ECtHR, 2014, above fn. 85, paras. 51, 52, 58, 59.

<sup>322</sup> See *Tanda-Muzinga c. France*, ECtHR, 2014, text above fn. 20 and 86-89.

<sup>323</sup> Luxembourg: *Loi portant sur la libre circulation des personnes et l’immigration*, 2008, above fn. 222, Articles 73(2) and 73(3).

<sup>324</sup> *Monsieur et consort (Afghanistan) c. une décision du ministre du Travail, de l’Emploi et de l’Immigration en matière de police des étrangers*, N° 29176 du rôle, Luxembourg: Tribunal administratif, 2 May 2012, available at: [http://www.refworld.org/cases,LUX\\_TA,58b936434.html](http://www.refworld.org/cases,LUX_TA,58b936434.html). See also *Monsieur (Afghanistan) et consort c. une décision du ministre du Travail, de l’Emploi et de l’Immigration en matière de police des étrangers*, N° 29414 du rôle, Luxembourg: Tribunal administratif, 8 October 2012, available at: [http://www.refworld.org/cases,LUX\\_TA,58b935054.html](http://www.refworld.org/cases,LUX_TA,58b935054.html), involving circumstances where corroborating evidence of an Afghan couple’s marriage was accepted.

must provide a plausible explanation as to why in his or her individual case he or she and/or his or her family members cannot provide official documents. If the explanation is deemed plausible, the applicants will be given the possibility of undergoing a DNA test and/or an identity interview; if not, the application will be rejected without a DNA test and/or interview being possible.

In **Norway**, applicants for family reunification must submit a passport with their application, though citizens of countries where it is difficult to get a passport may prove their identity, e.g. through provision of ICRC documents or a Convention Travel Document. Only official documents such as birth or marriage certificates are accepted as evidence of a family relationship, although there is some flexibility regarding documentary requirements for religious marriages not registered with the State in Syria where it is recognized that this is not currently practically possible.<sup>325</sup> Instead, where both parties' accounts of the wedding tally, this is accepted as evidence and once the couple has children or the wife is pregnant this is accepted, DNA testing being offered to test blood relationships.

In **Poland**, it has been observed that nothing can replace marriage certificates and birth/adoption certificates as a means of proving identity and family membership. If a foreigner is unable to submit the required documents owing to circumstances beyond his or her control, they may apply for the deadline to be extended. The reasons for failing to meet the deadline must be serious and impossible to have been foreseen, such as an accident or medical emergency followed by hospitalization.<sup>326</sup>

In **Switzerland**, applicants should at least make the existence of family ties credible, although the standard of proof applied by the authorities and courts is often high. Spousal family reunification applications often fail because the authorities and courts do not find it established that the couple were married or used to cohabit before flight.<sup>327</sup>

*By contrast other EU States adopt a perhaps more flexible approach to document requirements:*

In **Bulgaria**, applicants who do not have documentation certifying marriage or birth are permitted to provide a declaration listing the names, dates of birth and address(es) of family members for whom reunification is sought that is certified by a notary.<sup>328</sup> What the sponsor said when seeking asylum is also taken into account.

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<sup>325</sup> See Norway: Directorate of Immigration (UDI), *Information about DNA-test in family immigration cases to the applicant*, November 2016, guidance at: <https://www.udiregelverk.no/PageFiles/12808/RS%202010-035V6%20Information%20about%20the%20DNA-test%20in%20family%20immigration%20cases%20to%20the%20applicant%2011.11.2016.pdf>, referring to Afghanistan, Syria, Iraq, Yemen and all African countries south of the Sahara (except South Africa) as being countries from which it is difficult to obtain birth certificates and other documents that are accepted by the Norwegian authorities.

<sup>326</sup> Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187, pp. 14-15, 27.

<sup>327</sup> Suisse: *Loi sur l'asile de 26 juin 1998*, 1998, état le 1er octobre 2016, above fn. 193, Article 7, using the phrase "au moins rendre vraisemblable". For jurisprudence see e.g. *D-4847/2006*, Suisse: TAF, 19 July 2007; *E-2944/2015*, Suisse: TAF, 28 December 2015.

<sup>328</sup> Bulgaria: *Law on Asylum and Refugees*, 2002, above fn. 201, Article 34(5) and <http://www.asylum.bg/en-8/>.

In **Estonia**, the authorities reportedly adopt a flexible approach to documentation required to show family relationships.<sup>329</sup>

In **Finland**, if the family members are unable to provide documentary evidence of their identity or family ties, they must provide a written explanation with their application. The Finnish Immigration Service may request further clarification of family ties. An interview is held if there are no other means of establishing sufficient grounds for granting a residence permit. Instead of a passport, a certificate issued by UNHCR or an authority in the country where the family members are staying may be provided, stating that the family members(s) are registered as a refugee or as an asylum applicant in the country where the application is submitted.

Exceptions can be made to the requirement to provide a valid passport or other travel documents on the basis of international human rights obligations or if the applicant cannot obtain a travel document for reasons beyond their control. Essentially this has been recognized in relation to family members from Somalia where it is impossible to obtain a travel document acceptable in Finland. This follows rulings by the Supreme Administrative Court, which found, in the case of a Somali family member seeking family reunification, that requiring a travel document as otherwise required would have led to a situation where the applicant could not have been issued with a residence permit.<sup>330</sup> It was recognized that as a Somali citizen the applicant could not obtain a valid travel document accepted by Finland from the country of origin for reasons beyond their control. In its judgment, the Court referred to the jurisprudence of the ECtHR concerning protection of family life and stressed that, both in the case of a State's positive and negative obligations, a fair balance between the competing interests of the society and the individual must be found.

In **Germany**, the principal family member and those family members wishing to come to Germany are, if necessary, given the opportunity to be heard in person in an identity interview and they will also be informed of the possibility to undergo a DNA test. Where official documentation cannot be provided, a plausible explanation is not mandatory for refugees, as the authorities assume in principle that refugees typically experience difficulties providing documentary evidence, so this is taken into account in their favour. Information provided in an identity interview serves only as circumstantial evidence. This was indicated, for instance, in a 2015 government reply to a parliamentary question stating that credible evidence (*qualifizierte Glaubhaftmachung*) of a family relationship was sufficient rather than full documentary proof, accepting, for instance, an excerpt from the official Syrian family register, rather than the usual requirement to provide original civil registration documents which have been legalized.<sup>331</sup> In practice, however, the German authorities are very strict concerning document requirements and DNA tests are regularly required. The Ministry of Foreign Affairs

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<sup>329</sup> UNHCR staff at Regional Representation for Northern Europe, Stockholm, October 2016.

<sup>330</sup> *KHO:2015:130*, Finland: Supreme Administrative Court, 8 September 2015, and *KHO:2014:22*, Finland: Supreme Administrative Court, 6 February 2014, available at: <http://www.refworld.org/docid/5319daa64.html>.

<sup>331</sup> Deutscher Bundestag, *Antwort des Parlamentarischen Staatssekretärs auf schriftlichen Fragen*, Drucksache 18/4993, Frage 27, 11 May 2015, available at: <https://www.bundesanzeiger-verlag.de/fileadmin/Betrifft-Recht/Dokumente/edrucksachen/pdf/1804993.pdf>, pp. 20-22.

has informed UNHCR that some kind of proof of identity is generally necessary – also for refugees.<sup>332</sup>

In **Ireland**, the High Court has ruled that where questions arise as to the veracity of documents submitted in an application for family reunification, “constitutional justice requires that the Minister must enter into communication with the applicant and afford him or her an opportunity to explain inconsistencies and/or dispel doubts in that regard”.<sup>333</sup>

In **Italy**, when a beneficiary of international protection cannot provide official documentary evidence of the family relationship, whether because of his or her status, the absence of a recognized State authority, or the presumed unreliability of the documents issued by the authority, Italian legislation provides that evidence concerning family links can also be provided by other means including certificates issued by Italian consulate/embassy or documentation issued by international organizations recognized by the Ministry of Foreign Affairs.<sup>334</sup>

In **Latvia**, if family members seeking to join a beneficiary of international protection are unable to submit the required documentation and have indicated a justified reason in writing, the Latvian diplomatic or consular mission may accept other documents for family reunification and send them to the Office of Citizenship and Migration Affairs. The Office shall examine the documents, compare them with the information at the disposal of the Office and, if necessary, request clarifying information from the State and local government institutions in Latvia, from foreign countries, and from a beneficiary of international protection or his or her family members.

In **Sweden**, the Migration Court of Appeal ruled in 2012 that the threshold of proof regarding proof of identity to be applied when assessing applications for family reunification can in certain situations be lowered for the nuclear family from “prove” (*styrka*) to “make probable” (*göra sannolik*). The case concerned family reunification between spouses in which the applicant could not prove his identity by providing documents since these were not available in the country of origin. A DNA test showed that the couple had a child together, while they had a joint household in the home country. The Court ruled that the applicant had made his identity probable and he was granted residence permit.<sup>335</sup>

A subsequent judgment in 2016 concerned a mother and her children who had applied for family reunification with the spouse/father who had a permanent residence permit in Sweden as a “person otherwise in need of protection”. The court applied the lower “make probable” standard of proof when assessing the identity of the whole family, including an adult daughter. In assessing proportionality, the Court argued that the family’s interest in living

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<sup>332</sup> Communication from UNHCR office, Berlin, Germany, October 2017.

<sup>333</sup> *T. v. Minister for Justice, Equality and Law Reform*, [2008] IEHC 361, Ireland: High Court, 19 November 2008, available at: [http://www.refworld.org/cases/IRL\\_HC.5a4cd4004.html](http://www.refworld.org/cases/IRL_HC.5a4cd4004.html), para. 18.

<sup>334</sup> Italy: *Legislative Decree no. 286/1998*, above fn. 220, Article 29bis (2). This provision applies to beneficiaries of subsidiary protection as well as refugees even though they are not mentioned.

<sup>335</sup> MIG: 2012:1, Sweden: Migration Court of Appeal, 18 January 2012, available in Swedish at: <https://lagen.nu/dom/mig/2012:1>.

together was more important than the public interest of regulated immigration. Each family member was granted a residence permit.<sup>336</sup>

In the **United Kingdom**, there is no requirement in the Immigration Rules for specified evidence to support a family reunion application. The onus is on the applicant and their sponsor to provide sufficient evidence of their relationship and satisfy the caseworker that they are related as claimed.

A 2015 judgment by the Upper Tribunal recognized the difficulties in providing documentary proof. The case concerned a refugee seeking to reunite with her Somali husband, whom she had met and married in an Islamic ceremony in a refugee camp in Ethiopia, but who had been separated from her husband and fled to the UK, where she was granted asylum and later gave birth to a son. Her family reunification application had been denied on the grounds that they had failed to show they were married in any legal sense, but the judge found that DNA evidence confirmed that the father of the son was her husband, that she had been supporting him financially in Ethiopia, that she had visited him in Ethiopia, that she had been found to be credible in her own application for asylum, and therefore that the requisite standard of proof had shown that “reasonably speaking, there is a genuine and subsisting marriage relationship between [them] in circumstances where documentary evidence is difficult to come by”.<sup>337</sup>

Another UK Upper Tribunal judgment handed down in 2017 concerned the Kuwaiti Bidoon family of Mr Al-Anizy, who was seeking to bring his wife and two young sons in the UK, but whose application the Secretary of State had refused to consider due to the applicants not having passports. The Upper Tribunal found that the Secretary of State had acted unlawfully. Mr Al-Anizy’s family had attended multiple appointments at UK Visa Application Centres but had their application refused since they could not provide passports, despite the fact that the Red Cross had lodged a formal complaint explaining why, as Kuwaiti Bidoons, they did not have identity documents or travel documents, since they are not recognized as citizens in Kuwait and are discriminated against there. The Upper Tribunal ruled that caseworkers must be mindful of the difficulties that people may face in providing documentary evidence of their relationship and that they had failed to enforce the Home Office family reunification policy that embraces a series of flexible possibilities for proof of identity. Moreover, the caseworkers had failed to take into account the best interests of the children involved (in recomposing the family unit in the UK).<sup>338</sup>

The challenges faced by refugees when seeking to provide the documentation required are shown in a British Red Cross survey in the United Kingdom. Of 91 family reunification applications reviewed, 74 per cent were missing at least one form of required

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<sup>336</sup> MIG: 2016:13, Sweden: Migration Court of Appeal, summary in English available at: <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-1-june-2016-um-3266-14#content>.

<sup>337</sup> *Khaled Yousuf Abdu Mohamed Sharif v. Secretary of State for the Home Department*, Appeal No. OA/08826/2014, UK: Upper Tribunal (Immigration and Asylum Chamber), 10 November 2015, available at: [http://www.refworld.org/cases,GBR\\_UTIAC,58ac50d24.html](http://www.refworld.org/cases,GBR_UTIAC,58ac50d24.html).

<sup>338</sup> *R. (on the application of Al-Anizy) v. Secretary of State for the Home Department*, UK Upper Tribunal, 11 May 2017, available at: [http://www.refworld.org/cases,GBR\\_UTIAC,5a32540c4.html](http://www.refworld.org/cases,GBR_UTIAC,5a32540c4.html). Permission to appeal to the Court of Appeal was refused.

documentation. Of the 67 cases with child applicants, 46 per cent did not have birth certificates, while of the 61 cases with a spousal applicant, 34 per cent did not have a marriage certificate. In the applications, 33 per cent of sponsors relied on witness statements and statutory declarations, produced by legal advisers, to support their applications.<sup>339</sup>

*Outside Europe, practice regarding documentation requirements includes:*

In **Australia**, challenges faced by families regarding documentation requirements have been reported, as follows:

“Difficulties in sourcing documentation or evidence to substantiate family relationships and denial of family reunion opportunities to people who had not been formally registered as refugees have also been raised as barriers. ... [I]n some cases, required documents to evidence family relationships never existed or had been lost or destroyed while fleeing.

“Some people also highlighted the challenges of obtaining identity documents for children who were born in exile. ... [E]vidence of ongoing relationships (such as phone or email records) may be very difficult to provide due to lack of access to communication technologies in displacement situations.

“The most common issue raised in relation to documentation, however, was the difficulty of formally registering as refugees. Several former refugees reported that they had been unable to sponsor relatives for resettlement who had not registered their status with UNHCR – even if it was impossible for them to do so.”<sup>340</sup>

In **Canada**, visa officers consider any documentary and oral evidence that is provided in support of establishing a dependent family relationship. If, after reviewing the documentary evidence submitted, the officer is still not able to determine the relationship, he or she can invite the principal applicant to undergo voluntary DNA testing. If no notification of intent to undertake DNA testing is received within a 90-day period, the visa officer will make a final decision based on the information available on file.<sup>341</sup>

In the **United States**, those seeking family reunification face difficulties obtaining the identity documents required and providing acceptable secondary evidence of identity and/or family relationship.<sup>342</sup>

Common factors identified in national practice regarding documentation requirements thus include:

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<sup>339</sup> British Red Cross, *Not So Straightforward: The need for qualified legal support in refugee family reunion*, 2015, available at: <http://www.refworld.org/docid/560cfcde4.html>, p. 8.

<sup>340</sup> Refugee Council of Australia (RCOA), *Addressing the Pain of Separation for Refugee Families*, November 2016, available at: <https://www.refugeecouncil.org.au/publications/reports/family-separation/>, p. 3, referring in the latter case to Afghans in Iran and Karen from Myanmar in Thailand.

<sup>341</sup> Communication from UNHCR office, Ottawa, 18 October 2017.

<sup>342</sup> Communication from UNHCR office, Washington DC, November 2017.



- Most States provide for interviews if required documentation is lacking (for more on DNA testing see section 4.4);
- Other means recognized as able to show family life/relationships include providing a declaration listing family composition certified by a notary (Bulgaria) or a certificate issued by an embassy of the country in which the family member is legally present (Italy);
- Many States recognize that a decision rejecting an applicant cannot be based solely on the lack of documentary evidence;
- The standard of proof applied when applicants are unable to provide certified documentation can be high, though some States recognize that that applied to refugees should be lower, so that the standard required is a “plausible explanation” (Netherlands), “make probable” (Sweden), or “make credible” (Switzerland);
- Taking into consideration other evidence of family links, as provided for in the Family Reunification Directive, is another way of taking into account the situation of beneficiaries of international protection and expanding the means of proof available;<sup>343</sup>
- Some States recognize documents issued by organizations such as ICRC and UNHCR, as well as Convention Travel Documents, when official identity documentation issued by the country of origin is not available (e.g. Finland, Norway);
- Several States check declarations made at the time asylum was sought and when seeking family reunification (a check that is not possible for ordinary immigrants);
- Some States recognize that there may be reasons beyond the applicant’s control for not providing required documentation (e.g. Finland); and
- Some States recognize the challenges providing documentation faced by beneficiaries of international protection from countries such as Eritrea, Somalia, and Syria and have acknowledged that requiring a travel document as otherwise required when this was not possible for reasons beyond their control, would lead to a situation where the applicant could not have been issued with a residence permit (e.g. Finland).

#### 4.4 Requirement to undertake DNA testing

Many States view DNA testing as an important tool for verifying parent-child relationships, though other States do not resort to it. It should also be recalled that DNA testing is not always affordable or available in locations accessible to refugees. UNHCR affirms that “[d]ocumentary proof, registration records, interviews with the individuals concerned and other forms of verification of the claimed family relationship should normally be relied on first”. It advises:

“DNA testing to verify family relationships may be resorted to only where serious doubts remain after all other types of proof have been examined, or, where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud.”<sup>344</sup>

<sup>343</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, para. 76.

<sup>344</sup> UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <http://www.refworld.org/docid/48620c2d2.html>, paras. 28 and 13.

In the EU, Article 5(2) of the Family Reunification Directive provides for the possibility of conducting other investigations if necessary, although the European Commission has noted that the “Directive is silent on this type of evidence”. In its view, in order to be admissible under EU law, “these other investigations must be proportionate – thus not render the right to family reunification nugatory – and respect fundamental rights, in particular the right to privacy and family life.”<sup>345</sup>

*Examples of State practice in Europe regarding DNA testing include:*<sup>346</sup>

In **Austria**, if applicants cannot show the family relationship by documents or other suitable, equivalent means and no other means are available, the Federal Office for Immigration and Asylum is required to enable foreigners to undertake a DNA test at their own expense, with the expense being reimbursed by the Austrian authorities if the result is positive. Refusal to cooperate with a DNA test results in the family reunification application being denied.<sup>347</sup>

In **Belgium**, if the family relationship cannot be sufficiently established through documents or if there are substantial contradictions between the applications for family reunification and the sponsor’s asylum application, the Immigration Office can propose a voluntary DNA test, but will otherwise refuse the application. In practice, the requirement to undertake a DNA test is becoming increasingly common, even in cases where all required documents have been provided (birth certificates, etc.), as the latter’s authenticity tends to be questioned.<sup>348</sup> Regardless of the status of the sponsor, the cost of the DNA test is 200 euros per tested person to be paid by the applicants. Even if the result is positive, the costs will not be reimbursed.

In **Denmark**, a DNA test is not generally required, but it can be the case if there is doubt about the family relation. If a DNA test is required, the applicant/family does not have to pay for it. In practice, there may still be problems. For instance, between December 2014 and February 2016, the Danish Immigration Service asked 495 people seeking family reunification to take a DNA test. For the 230 people who took the test 90 per cent proved kinship and led to family reunification in Denmark. Yet more than half of those requested did not take the test, the primary reason for this apparently being that “most of the children concerned are staying in countries without a Danish embassy, that is, in Syria, Afghanistan, Iraq and Eritrea”. Danish embassies/ consulates there do not handle DNA tests and there is no collaboration with other States on this issue.<sup>349</sup>

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<sup>345</sup> European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, 2011, above fn. 107, p. 7.

<sup>346</sup> EMN, *Checking Identity and Family Relationships in Case of Family Reunification with a Beneficiary of International Protection*, 2016, above fn. 317, provides an overview and has been used to inform this section in addition to the other sources cited.

<sup>347</sup> Austria: *Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG)*, 2012, available at: <http://www.refworld.org/docid/5326beb84.html>, Section 13(4).

<sup>348</sup> Communication from UNHCR Brussels, October 2017.

<sup>349</sup> Clante Bendixen, *Refugee Children Not Able to Meet Demand for DNA Test*, 2016, above fn. 842.

In **Finland**, the Immigration Service may invite an applicant to undergo a DNA test to prove biological kinship if there are no other means of sufficiently establishing the biological relationship. The authorities will pay for this, unless the result is negative, in which case the applicant will be ordered to pay, unless this is unreasonable under the circumstances.<sup>350</sup> In practice, mutually coherent answers on family life in interviews with the sponsor and the applicant and DNA tests are required.

In **France**, legislation providing for the use of DNA tests, subject to certain limitations, to resolve cases where family members seeking reunification are unable to prove their relation through official documents was approved in 2007.<sup>351</sup> Its passage was, however, the subject of considerable controversy and, after the end of a trial phase, the then Minister of Immigration decided in 2009 not to sign the requisite implementing decree.

In **Germany**, as noted above in section 4.3, the principal family member and those family members wishing to come to Germany are informed of the possibility of undergoing a DNA test and this is regularly required. The beneficiary of international protection or his or her family members must themselves order any DNA test and must pay the costs themselves. In practice, a DNA test is regarded as part of the proof; additional documents are normally also required.

In **Italy**, if there are doubts as to the existence of a family relationship or the authenticity of documentation produced, either the applicants or the diplomatic/ consular authorities responsible for issuing the family reunification visa may request DNA testing to be undertaken.<sup>352</sup> Costs are to be borne by the applicant. In practice, if no official documents are available to prove family links, a DNA test often is required.

In a 2013 case concerning the family reunification of an Eritrean refugee with her daughter, the Appeal Court of Milan ruled that a DNA test should not have been required, since adequate certification had been provided. At the hearing, the mother provided a certified copy, together with the birth certificate (already produced at first instance, but not then certified), attesting her motherhood, as well as a certified copy with annexed translation of the judicial decision of a court in Asmara entrusting her with the child's protection and the original copy of the child's baptism certificate.<sup>353</sup> Although the DNA test had shown that the appellant was not the natural mother of the girl, the Court determined that the certified parent-child relationship between mother and child could not be questioned by the outcome of the DNA test. The Court ruled that a DNA test should only be used as a means to prove the parent-child relationship in those cases where serious doubts arise even after other types of evidence have already been used, as indicated in Article 5(2) of Family Reunification Directive 86/2003, which does not refer specifically to DNA tests.<sup>354</sup>

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<sup>350</sup> Finland: *Aliens Act*, 2004, above fn. 205, sections 65 and 66.

<sup>351</sup> France: *Loi n° 2007-1631 du 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile*, 20 November 2007, available at: <http://www.refworld.org/docid/478f896d2.html>.

<sup>352</sup> Italy: *Legislative Decree no. 286/1998*, above fn. 220, Article 29(1) bis.

<sup>353</sup> The Court found that the different dates indicated in the English translation and the original Tigrinya version of the baptism certificate, which had been highlighted by the Foreign Ministry during the hearing, were easily explained by the fact that in the Tigrinya version the dates are indicated according to the Orthodox Coptic calendar.

<sup>354</sup> *R.G. 101/2012*, Italy: Appeal Court, Milan, judgment published 12 February 2013.

In **Lithuania**, if an applicant for family reunification is unable otherwise to prove kinship, the Migration Department may oblige the alien and the person related to the alien by kinship to undertake a DNA test to confirm kinship. Costs are to be met by the refugee.

In **Luxembourg**, applicants for family reunification may undergo a DNA test voluntarily to prove family links. This was accepted by the first instance Administrative Court in 2008.<sup>355</sup> The Immigration Directorate accepts this kind of proof, but since it is not foreseen in the law, it cannot require it. Costs must be borne by the applicant or a third party.

In **the Netherlands**, applicants who are able to provide a plausible explanation as to why they were not able to submit the documents required will be given the possibility of undergoing a DNA test and/or an identity interview; if they do not agree to this, the application will be rejected without a DNA test and/or interview being possible. If the DNA matches family reunification is granted. The Dutch government covers the costs of DNA tests.

In **Norway**, the authorities ask both applicants without documents and applicants with documents issued by countries issuing documents of insufficient reliability to take DNA tests to determine the family relationship. Where DNA tests are requested by Norwegian immigration authorities, the authorities pay for them.

In **Romania**, an Afghan beneficiary of international protection, whose application for reunification with his family had been rejected in 2015 because the authorities did not find the documentation provided credible, appealed against the decision to the local court, which allowed the appeal and ordered DNA tests to be conducted.<sup>356</sup> Once these were undertaken, the beneficiary of international protection was eventually reunified with his wife and children in 2016 (except for one adult child who was absent when the DNA tests were carried out).

In **Sweden**, a DNA test is generally not required. It is an additional measure that may complement the interview. Applicants, who are unable to prove their identity through a valid passport when applying for a residence permit, will need to submit a DNA sample (subject to consent). DNA testing is free of charge when initiated by the Swedish Migration Agency. When family members have organized and paid for DNA research on their own, they may apply to the Migration Agency to be reimbursed.

In **Switzerland**, a DNA test may be requested if there are well-founded doubts about the identity and blood relationship. Refusal to undertake a DNA test will result in a finding that the family tie has not been made credible. Refugees with a B-permit can apply for an exemption from the costs of the DNA-test on grounds of destitution.

In the **United Kingdom**, the authorities stopped funding DNA testing in June 2014, although it is open to an applicant to submit such evidence at their own expense. Applicants for family

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<sup>355</sup> *Madame ... c. deux décisions du ministre des Affaires étrangères et de l'Immigration en matière de police des étrangers*, Judgment no. 23176, Luxembourg; Tribunal administratif, second chamber, 27 February 2008, available at: [http://www.refworld.org/cases,LUX\\_TA,5a4cde104.html](http://www.refworld.org/cases,LUX_TA,5a4cde104.html). The Court considered that the burden of proving the relationship is on the applicant if there is no documentary evidence of the family link.

<sup>356</sup> Judecatoria Sector IV court, Bucharest, unpublished decision.

reunification are not obliged to submit DNA evidence in family reunion applications, but the need to establish they are related as claimed and one way to do so is to provide DNA evidence at their own expense. In 2016, the Independent Chief Inspector of Borders and Immigration opined:

“The effect [of this change] has been to delay issuing entry clearance to applicants who qualify for family reunion. Prior to June 2014, ECOs [Entry Clearance Officers] were able to commission DNA tests and did so routinely for applications, including minors, that did not provide sufficient documentary evidence in support of the claimed relationship. Testing was often used with Somali and Eritrean nationals, for example. Since 2013, refusal rates for Somali and Eritrean applicants have doubled, and while other factors may have played a part, it is reasonable to assume that the change to DNA testing has been a major cause.”<sup>357</sup>

**Croatia, Latvia, Poland and Slovenia** are among countries that do not use DNA testing to verify family relationships.

Outside Europe, in the **United States** the requirement to provide DNA tests and associated high costs also present obstacles.<sup>358</sup>

Thus, many States require a DNA test where documentary evidence is deemed insufficient. In some of these States the costs are met by the State; in others they are reimbursed by the authorities if the results are positive; in others, the beneficiary of international protection must meet the costs incurred. By contrast, a few States do not use DNA testing to verify family relationships.

#### 4.5 Restrictions based on manner of arrival

Both Australia and New Zealand significantly restrict the right to family reunification of refugees who arrive by sea without a valid visa. Such policies bar refugees from being able to enjoy their right to family life, since they are unable to enjoy family life in their country of origin, despite States’ obligations under international law to ensure respect for the right to family life and family unity. Such policies also raise questions as to whether the principle of non-discrimination, which requires that similarly situated individuals should enjoy the same rights and receive similar treatment, is being upheld. This principle applies in relation to measures impacting individuals’ right to family life and family unity, regardless of their immigration or other status, except where such distinctions can be objectively justified.<sup>359</sup>

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<sup>357</sup> UK: Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, above fn. 440, pp. 5 and 26.

<sup>358</sup> Communication from UNHCR office, Washington DC, November 2017.

<sup>359</sup> For more on the principle of non-discrimination see section 6.3.5 below and UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, section 2.1.2.

In **Australia**, under amendments to the Migration Act 1958<sup>360</sup> approved in 2014, refugees arriving in Australia on or after 13 August 2012 are not eligible to propose any family under the Humanitarian Programme. Refugees who arrived before 13 August 2012 may do so, but until they become Australian citizens, the applications they propose are given the lowest priority for processing and only applications found to be compelling will be further considered for grant of a visa. In December 2014, the Temporary Protection Visa (TPV) was reintroduced and a Safe Haven Enterprise Visa (SHEV) was introduced. A TPV is valid for up to three years. A SHEV is a temporary protection visa that is valid for five years. Both require refugees' claims to be re-assessed upon expiration of the term of the visa. Refugees cannot sponsor family members for a visa through the Australian Humanitarian or Family Migration Programme while holding a TPV or SHEV. Refugees who meet the SHEV pathway requirements, can apply for certain other visas in Australia, including permanent visas such as skilled and family visas (but not a Permanent Protection Visa).<sup>361</sup> Refugees who arrived in Australia by boat and have yet to achieve citizenship thus have virtually no opportunities for family reunion.<sup>362</sup>

As the Refugee Council of Australia reports, the primary avenue through which people, who arrive in Australia legally and are found to be refugees and for resettled refugees, seek to reunite with family members under the Refugee and Humanitarian Program is the Special Humanitarian Program (SHP). Demand under this program far outstrips the number of places available, even taking into account increases in SHP visa grants in 2013-14 and 2014-15.<sup>363</sup> Family visa applications by such persons under the SHP or under the family stream of the Migration Program are given the lowest priority for processing.

Generally, priority for processing is based on the relationship between sponsor and visa applicant in descending order, with those with the closest relationship are given highest priority. Applications by those who came by boat are placed at the lowest processing priority level, regardless of their relationship, with the result that their applications will not be processed for several years.<sup>364</sup> Under a September 2016 policy change, family visa applications by people who have come by boat are still given the lowest processing priority, but decision makers may depart from this priority order if the application involves special circumstances of a compassionate nature or where processing of applications would otherwise be unreasonably delayed. The "special circumstances of a compassionate nature" or reasonable timeframe are not defined. For this group of people obtaining citizenship – a process in which

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<sup>360</sup> Australia: *Act No. 62 of 1958, Migration Act 1958 - Volume 1*, 8 October 1958, available at: <http://www.refworld.org/docid/4e23f3962.html>, these amendments also concerning the Migration Regulations 1994.

<sup>361</sup> For further information see: <http://www.border.gov.au/Trav/Visa-1/790->. For further details on the different types of temporary visas, see Kaldor Centre for International Refugee Law, *Factsheet: Temporary Protection Visas and Safe Haven Enterprise Visas*, University of New South Wales, 17 May 2016, available at: <http://www.kaldorcentre.unsw.edu.au/publication/temporary-protection-visas>.

<sup>362</sup> RCOA, *Recent changes in Australian refugee policy*, 8 June 2017, available at: <https://www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/>.

<sup>363</sup> RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, p. 3.

<sup>364</sup> Australia: Department of Immigration and Border Protection, *What changes have been made to priority processing for Family stream visa applications sponsored by illegal maritime arrivals (IMAs)?*, 19 December 2013, available at: <https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-changes-have-been-made-to-priority-processing-for-family-stream-visa>.

former refugees can encounter significant delays – is virtually the only means through which they can become eligible for family reunion.<sup>365</sup>

In addition, the fact that asylum-seekers arriving in Australia by sea after 19 July 2013 have been transferred to Papua New Guinea or Nauru for the processing of their claims and are not permitted to settle in Australia if found to be refugees, has resulted in situations where immediate family members are separated between Australia and Nauru or Papua New Guinea and are not permitted to reunite in Australia. Family reunification applications in Papua New Guinea are permitted under the Papua New Guinea National Refugee Policy, but this also requires that the refugee first establish effective settlement and financial independence, which is unlikely to be possible in practice.

Recent proceedings before the High Court of Australia (the court of highest jurisdiction) concerned an Afghan male granted a protection visa in Australia after arriving by sea as an unaccompanied child. His wife, daughter and siblings had applied for visas to Australia as members of his family and the case challenged the Minister's decision to refuse to consider processing the applications. The Minister relied on a Ministerial Direction, which directed that family visa applications sponsored by asylum-seekers who arrived by sea be afforded the lowest processing priority. This Ministerial Direction was subsequently revoked, possibly due to the High Court proceedings, and consequently the High Court discontinued proceedings.<sup>366</sup>

Most recently, following a Community Proposal Pilot (CPP) from 2013, a Community Support Programme (CSP) was introduced in July 2017.<sup>367</sup> This programme is intended to enable communities and businesses, as well as families and individuals, to propose humanitarian visa applicants with employment prospects and support new humanitarian arrivals in their settlement journey. Up to 1,000 places were allocated for the CSP in the 2017-18 Humanitarian Program.

In **New Zealand**, legislation passed in 2013 was intended to address “mass arrivals” of asylum-seekers (defined as those arriving in a group of 30 or more). If such persons are found to be refugees, they are to be granted temporary visas and to have their status reassessed after three years before they are eligible for permanent residence. Under the changes, immediate family members may be sponsored only after residence has been granted and extended family members are ineligible for sponsorship. Although to date, asylum-seekers have only ever arrived in New Zealand by air, not by sea, the Immigration Minister Michael Woodhouse has stated:

“These policy changes are considered to be an important deterrent to a mass arrival. Asylum seekers may be less likely to endanger their lives by attempting to travel to New Zealand by sea if they know they must wait for three years and have their claim

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<sup>365</sup> *Ibid.*, pp. 3, 6-7.

<sup>366</sup> *Plaintiff S61/2016 v. Minister for Immigration and Border Protection*, Australia: High Court. Documents from the proceedings may be accessed at: [http://www.hcourt.gov.au/cases/case\\_s61-2016](http://www.hcourt.gov.au/cases/case_s61-2016).

<sup>367</sup> For further information see: <https://www.border.gov.au/Trav/Refu/Offs/community-support-programme>.

reassessed before they can apply for residence, and if they are unable to reunite with extended family members.”<sup>368</sup>

#### **4.6 Requirement to apply within a limited time frame in order to benefit from preferential terms**

Some States impose deadlines within which applications for family reunification must be submitted if refugees and other beneficiaries of international protection are to benefit from more preferential terms than other foreigners. This time frame is sometimes quite short and does not appear to take adequate account of the challenges faced. Beneficiaries of international protection may lack information and/or understanding of these deadlines. They may not be able to trace family members in time. Numerous hurdles have to be surmounted to meet documentation requirements, including being able to leave a war zone, approaching sometimes hostile or non-functioning authorities, crossing borders, travelling to another country to seek access to embassies, securing required translations and certifications.

Article 12(1) of the Family Reunification Directive permits Member States to require applications for family reunification with refugees to be submitted within a period of three months after the granting of refugee status, after which requirements to provide evidence of adequate accommodation, sickness insurance and stable and regular resources may apply. Recent changes in several EU Member States have reduced the deadline applied to three months where this was not already the case.

In UNHCR’s view a three-month deadline,

“does not take sufficiently into account the particularities of the situation of beneficiaries of international protection or the special circumstances that have led to the separation of refugee families, and may prove to be a serious obstacle to family reunification for refugees. Refugees may not be aware if their family members are still alive, or of their whereabouts if they were separated during flight. Tracing of family members is a lengthy process which exceeds three months in many cases.”<sup>369</sup>

European Commission guidance on the application of the EU Family Reunification Directive recommends that

- States refrain from applying a time frame within which an application has to be submitted in order to be exempt from the income requirement;
- If they opt to apply such a deadline, “they should take into account objective practical obstacles the applicant faces as one of the factors when assessing an individual application”;

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<sup>368</sup> M. Woodhouse, *Mass Arrivals Bill Passes into Law*, 14 June 2014, available at: <https://www.beehive.govt.nz/release/mass-arrivals-bill-passes-law>.

<sup>369</sup> UNHCR, *Refugee Family Reunification*. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification, 2012, above fn. 3, p. 6.



- “Especially when applying a time limit”, Member States “should allow for the possibility of the sponsor submitting the application in the territory of the [Member State] to guarantee the effectiveness of the right to family reunification”.
- “If an applicant is faced with objective practical obstacles to meeting the three month deadline”, Member States “should allow them to make a partial application, to be completed as soon as documents become available or tracing is successfully completed”.<sup>370</sup>

States could also take account of the particular challenges faced by beneficiaries of international protection by:

- Permitting them to make an initial application with such documentation as is available before any deadline that may be applied and allowing remaining documentation to be submitted later once it has been gathered;
- Allowing them to deviate from any deadline applied in unforeseen and exceptional circumstances, if it can be plausibly established that there were well-founded reasons for not applying for family reunification within this period; and
- Improving provision of information regarding family reunification procedures, as outlined in section 5.1 below.

A number of preliminary questions referred to the CJEU in June 2017 by the Dutch Council of State may serve to clarify how the three-month deadline States are permitted to impose under the third subparagraph of Article 12(1) of the Directive should be interpreted.

In light of Article 3(2)(c) of the Family Reunification Directive, which states that the Directive shall not apply to persons granted a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States, the Council of State asked whether the CJEU was competent to answer preliminary questions of the Dutch judge on the interpretation of provisions in that Directive in a dispute concerning the right of residence of a family member of a beneficiary of subsidiary protection, if this Directive is declared applicable directly and unconditionally in Dutch law. It also asked whether the provisions in the Family Reunification Directive preclude a national rule under which a request for family reunification on the basis of more favourable provisions (Chapter V of that Directive) can be refused for the sole reason that it has not been lodged within the three-month time frame mentioned in Article 12(1). Finally, the Council of State asked whether it matters if, in the event of exceeding the aforementioned time frame, and regardless of whether the request has already been refused or not, it is possible to lodge a request for family reunification by assessing if the conditions under Article 7 of the Family Reunification Directive (requiring the sponsor to show sufficient accommodation, sickness insurance and stable and regular resources) are fulfilled and the interests and circumstances under Articles 5(5) concerning the

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<sup>370</sup> European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 169, pp. 23, 24.

best interests of minor children and Article 17 concerning the nature and solidity of family relationships are taken into account?<sup>371</sup>

As outlined in the following paragraphs, States apply a range of deadlines within which applications for family reunification must be submitted to benefit from more preferential terms than other migrants, ranging from three, six, and 12 months to longer or no deadlines.

*European States applying a three-month deadline within which family reunification applications must be submitted to be exempt from accommodation, sickness insurance, and stable and regular resources otherwise applied include:*

In **Austria**, a deadline of three months from recognition as a refugee has been imposed since 1 June 2016, whereas before no time limit applied.<sup>372</sup>

In the **Czech Republic**, refugees who apply for family reunification within three months of recognition are exempt from the requirement to show minimum subsistence income and accommodation, but must in any case always show family members have medical insurance covering the period of stay in the Czech Republic.<sup>373</sup> This latter practice appears not to be in line with the Directive.

In **Germany**, a three-month deadline applies if persons entitled to asylum or granted refugee status are to be able to benefit from preferential terms, although measures have been adopted enabling sponsors to register online within the three-month period, while waiting for their embassy appointment.<sup>374</sup>

In **Hungary**, the deadline by which applications for family reunification with a refugee must be submitted in order to benefit from preferential terms was reduced in July 2016 from six to three months from the date refugee status was granted. Beneficiaries of subsidiary protection must meet accommodation, sickness insurance and resources requirements regardless of when the application is submitted.<sup>375</sup>

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<sup>371</sup> *STAATSECRETARIS VAN VEILIGHEID EN JUSTITIE v. K. AND B. (OTHER PARTIES H.Y. v. STAATSECRETARIS VAN VEILIGHEID EN JUSTITIE)*, REQUEST FOR A PRELIMINARY RULING FROM THE RAAD VAN STATE/COUNCIL OF STATE (NETHERLANDS), CASE C-380/17, CJEU, 26 JUNE 2017, AVAILABLE AT: [HTTP://CURIA.EUROPA.EU/JURIS/DOCUMENT/DOCUMENT.ISF?TEXT=&DOCID=194239&PAGEINDEX=0&DOCLANG=EN&MODE=REQ&DIR=&OCC=FIRST&PART=1&CID=606304](http://curia.europa.eu/juris/document/document.jsf?text=&docid=194239&pageindex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=606304).

<sup>372</sup> Austria: *Asylum Act*, 2005, above fn. 172.

<sup>373</sup> Czech Republic: *Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic*, 1 January 2000, available at: <http://www.refworld.org/docid/3affe8b64.html>, Sections 42b(3), 42b(5); *Aliens Act*, 1999, Section 180j.

<sup>374</sup> Germany: Foreign Office, *Timely Notification (Fristwahrende Anzeige)* according to Residence Act, Section 29(2)1, available at: <https://fap.diplo.de/webportal/desktop/index.html#start>; Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, pp. 41-42.

<sup>375</sup> EU Fundamental Rights Agency (FRA), *Monthly data collection on the current migration situation in the EU: Thematic focus: Family tracing and family reunification*, September 2016 monthly report, available at: <http://www.refworld.org/docid/58ac453d4.html>, p. 9; Hungarian Office of Immigration and Nationality at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=54&Itemid=808&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=54&Itemid=808&lang=en).

In **Malta**, refugees whose family relationships post-date the grant of refugee status or whose application for family reunification has not been submitted within a period of three months after the grant of such refugee status are required to provide evidence that they have accommodation and stable and regular resources which have not been obtained by recourse to social assistance.<sup>376</sup>

In **the Netherlands**, a three-month deadline is applied, although the Secretary of State has discretion to disregard this deadline in situations where the delay is not attributable to the individual.<sup>377</sup> If the application is made after this deadline and no exception is made by the Secretary of State, family member(s) must in addition pass a civic integration test before travelling to the Netherlands.

In **Sweden**, under a temporary law approved in 2016 and valid until 2019, family members of refugees must now apply for reunification within three months of the refugee's recognition to qualify for exemption from maintenance requirements otherwise imposed.<sup>378</sup>

Other States already applying a three-month deadline from recognition as a refugee include: **Cyprus, Finland, Greece, Lithuania, Luxembourg, Slovakia, and Slovenia** (where the deadline is 90 days of being granted refugee status).<sup>379</sup> Beneficiaries of subsidiary protection are excluded from this preferential treatment.

*European States applying a six-month deadline within which family reunification applications must be submitted to be exempt from accommodation, sickness insurance, and stable and regular resources otherwise applied include:*

In **Estonia**, applications for family reunification should be submitted within six months, after which accommodation, income and health insurance requirement apply on a discretionary basis, this provision reportedly being applied flexibly.<sup>380</sup>

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<sup>376</sup> Malta: *Family Reunification Regulations*, as amended by Legal Notice 148 of 2017, above fn. 186, Article 27.

<sup>377</sup> Netherlands: *Aliens Act 2000*, above fn. 224, Article 29 (2) and (4), and Parliamentary Documents II 2012/13, no. 33 293, no. 21, p. 2, referred to in *Uitspraak no. 201505478/1/V1 en 201605532/1/V1*, Netherlands: Council of State, ECLI:NL:RVS:2017:1609, 21 June 2017, available at: <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=91576>.

<sup>378</sup> Swedish Migration Agency, *New law that affects asylum seekers and their families*, 20 July 2016, available at: <https://www.migrationsverket.se/English/About-the-Migration-Agency/Legislative-changes-2016/Nyheter/2016-07-20-20-July-2016-New-law-that-affects-asylum-seekers-and-their-families.html>

<sup>379</sup> Cyprus: Refugee Law, Section 25(12)(a), and Future Worlds Centre, *Cyprus: Country Report*, AIDA, 2017, available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_cy\\_2016update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_cy_2016update.pdf), p. 93; Finland: *Act No. 301/2004 of 2004, Aliens Act*, 2004, above fn. 205, Section 114 (the English language version of the Act does not include amendments which now include this requirement); Germany: *Residence Act*, 2004, above fn. 183, Section 29(2); Greece: *Presidential Decree No. 167 of 2008*, above fn. 209, Article 14(3); Lithuania: *Law No. IX-2206 of 2004 on the Legal Status of Aliens*, 29 April 2004, available in Lithuanian at: <https://www.e-tar.lt/portal/lt/legalAct/TAR.42837E5A79DD/GltorBmgae>, Article 26(3); Luxembourg: *Loi portant sur la libre circulation des personnes et l'immigration*, 2008, above fn. 222, Article 69; Slovakia: *Act No. 404/2011 on Residence of Aliens*, above fn. 190, Article 32(14); UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 73; Slovenia: *Aliens Act*, 2011, above fn. 227, Articles 47a(3) and 47b(3).

<sup>380</sup> UNHCR staff at Regional Representation for Northern Europe, Stockholm, October 2016.

In **Poland**, legislation requires refugees and beneficiaries of subsidiary protection to apply for family reunification within six months of their recognition, after which accommodation, income and health insurance requirements must be met. Proof of housing is, however, always required from all family reunification applicants regardless of whether they lodge the application within the six months or not.<sup>381</sup> Requiring the latter from refugees appears to be contrary to Article 12 of the Family Reunification Directive.

*European States applying a 12-month deadline within which family reunification applications must be submitted to be exempt from accommodation, sickness insurance, and stable and regular resources otherwise applied include:*

In **Belgium**, refugees and subsidiary protection beneficiaries alike may apply for family reunification without having to provide evidence of adequate housing, health insurance for members, or sufficient, stable and regular means of subsistence, if they do so within one year of receiving international protection and if family life existed before arrival in Belgium.<sup>382</sup> In practice the Aliens Office will extend this deadline to 13 months; it does not apply a deadline to minor child beneficiaries of international protection.<sup>383</sup>

In **Ireland**, legislation requires both refugees and beneficiaries of subsidiary protection to apply for family reunification within 12 months of their recognition as a refugee/grant of subsidiary protection.<sup>384</sup>

In **Norway**, two deadlines apply. Recognized refugees (whether under the 1951 Convention or on Article 3 ECHR grounds) do not have to meet the future income requirement when seeking reunification with the spouse or minor children, if the application for family reunification is submitted on line/electronically within six months of the sponsor/refugee being recognized and an in-person application at a Norwegian representation abroad in within one year of the sponsor being granted refugee status in Norway, provided that the marriage was contracted before the sponsor entered Norway.<sup>385</sup> These two deadlines, both of which must be met, can be very confusing for refugees. Exemptions from the general application deadlines may apply. If the family reunification application is not lodged within these two deadlines, the applicant is required to have secure means of support in Norway from other sources than social security benefits, for example, an income from employment or business activities of the sponsor living in Norway. A total annual future income of the sponsor must

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<sup>381</sup> Poland: *Act of 2013 on Foreigners*, above fn. 187, Article 159; UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 73.

<sup>382</sup> Belgium: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, above fn. 176, Article 10(2), para. 5. See also *Arrêt n° 121/2013*, Belgium: Cour constitutionnelle, 26 September 2013, available at: <http://www.refworld.org/docid/5270ce364.html>, points B.15.6 & B.18.6, clarifying that this is independent of whether the residence permit granted to the beneficiary of international protection is for a determined or undetermined period.

<sup>383</sup> Communication from UNHCR Brussels, October 2017.

<sup>384</sup> Ireland: *International Protection Act*, 2015, above fn. 212, Section 56(8) and 57(7).

<sup>385</sup> Norway, *Regulations of 15 October 2009 on the entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Regulations)*, 15 October 2009, up-to-date as of 2014, available at: <http://www.refworld.org/docid/507523212.html>, Section 10-8; interview with UNHCR Stockholm. 31 October 2016. See also <https://www.udi.no/en/word-definitions/income-requirement-in-family-immigration-cases/>.

be at least 256,256 NOK (32,254 USD) before tax. As a general rule, the sponsor must not have received any social security benefits during the previous 12 months.<sup>386</sup>

*European States applying no deadline within which family reunification applications must be submitted include:*

No deadline is imposed in **Bulgaria, France, Iceland, Italy, Romania, Spain** or the **United Kingdom** within which beneficiaries of international protection must apply for family reunification in order to be exempted from accommodation income and health insurance requirements otherwise imposed.<sup>387</sup>

In **Switzerland**, refugees granted asylum (B-permit) do not have to meet deadlines in order to be exempted from income, accommodation and other requirements, although provisionally admitted refugees and others with an F-permit must in any case fulfil income, accommodation and other requirements.

*In North America, State practice in regarding the time frame within which family reunification applications must be submitted is as follows:*

Refugees recognized in **Canada** who are not accompanied by their family benefit from facilitated family reunification procedures enabling them to bring their family to join them. Refugees must first apply for permanent residence status within 180 days of receiving protected person status and can include any family members in their application when they apply for permanent residence.<sup>388</sup> Family members included on the application then have one year to apply for permanent residence under what is known as the “one-year window of opportunity” programme.<sup>389</sup> Proceeding in this manner removes the potential delay of requiring the recognized refugee in Canada to first obtain permanent resident status before commencing the process of family reunification. Within that year, family members may effectively “derive” the primary applicant’s refugee status and can be granted permanent

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<sup>386</sup> See Norway: Directorate of Immigration (UDI), *New Deadline for Registering your Application for you who are Applying for Family Immigration with a Refugee in Norway*, 30 June 2017, available at: <https://www.udi.no/en/important-messages/new-deadline-for-registering-your-application-for-you-who-are-applying-for-family-immigration-with-a-refugee-in-norway/> and <https://www.udi.no/en/word-definitions/income-requirement-in-family-immigration-cases/>

<sup>387</sup> See e.g. Bulgaria: *Law on Asylum and Refugees*, 2002, above fn. 201, as amended to October 2015; Italy: *Decree no. 286/1998*, above fn. 220, Article 29bis; Romania: *Law No. 122/2006 on Asylum in Romania*, above fn. 188, Articles 71 and 72. In **Iceland**, it had been suggested that a new Law on Foreigners should require applications for family reunification to be submitted no later than six months after the issuance of a residence permit, but this was not in the end approved. In the UK, this applies to both refugees and persons with humanitarian protection and there is no requirement to have adequate income to support core family members.

<sup>388</sup> Canada: *Immigration and Refugee Protection Regulations (IRPR)*, above fn. 244, s. 175(1), 176(1); Canada: *Immigration and Refugee Protection Act (IRPA)*, above fn. 242, s. 21(2). (Resettled refugees are granted permanent residence when they arrive in Canada.)

<sup>389</sup> Canada: *IRPR*, *ibid.*, s. 176(2). See also, Immigration, Refugees and Citizenship Canada, *In-Canada Processing of Convention Refugees Abroad and Members of the Humanitarian Protected Persons Abroad Classes – Part 3 (IP 3)*, 25 February 2016; Citizenship and Immigration Canada, *Procedure: One-year window of opportunity provision (OYW)*, available at: <http://www.cic.gc.ca/english/resources/tools/refugees/resettlement/processing/OYW.asp>. See also text at fn. 244 above for more on the family definition applied under this programme.

residence without having to apply through family class sponsorship, as would otherwise be necessary.

Refugees who have not applied for concurrent permanent resident status, but who instead first obtain permanent resident status for themselves, can apply subsequently for their dependent family members, and have up to one year from the date of receipt of permanent resident status to do so without having to meet the financial requirements of the Family Class. However, they are required to pay a Canadian processing fee. The one-year window is essentially an expedited process that allows family members who did not accompany the refugee when he or she first arrived to join them in Canada as permanent residents. As Bradley has noted, however: “Despite these procedures, many refugees in Canada are separated from their family members abroad for extended periods of time.”<sup>390</sup>

For resettled refugees, dependent family members who are separated from the resettled refugee and could not be processed concurrently, have one year from the date of arrival of the resettled refugee in Canada to present themselves to a Canadian mission for processing. To be eligible for this ‘one-year window of opportunity’, however, they must have been identified on the resettled refugee’s original Canadian application. Once identified, Canada considers the separated family members to have derivative status and they are processed to come to Canada as resettled refugees instead of the family class, thus enabling them to avoid the potential barriers of the family class programme. They may thereby also benefit from services for resettled refugees.

Dependent family members who approach a Canadian mission after the one-year window of opportunity ends have two remaining alternatives. If they are refugees in their own right, they may be referred for resettlement in Canada;<sup>391</sup> if not, they may need to be sponsored under the normal immigration rules for family class immigration.

In the **United States**, the time frame within which applications for family reunification must be made are significantly longer. Reunification under the I-730 process is open to a refugee or asylee who has lived in the United States with such status for less than two years and who has not naturalized as a US citizen. Waivers of the two-year deadline are available for humanitarian reasons only. Reunification under the Priority Direct Access Program is open to a refugee or asylee who has been living in the United States for less than five years (whether or not he or she has become a green card holder or a US citizen) and who is from a limited list of countries of origin.<sup>392</sup>

#### **4.7 Income/subsistence, accommodation and other requirements**

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<sup>390</sup> A. Bradley, “Beyond Borders: Cosmopolitanism and Family Reunification of Refugees in Canada”, *IJRL*, 2010, Vol. 22(3), pp. 379-403, at p. 392.

<sup>391</sup> Not all Canadian missions are willing to receive resettlement submissions for individuals who have family members in Canada. Instead, they prefer that the family members in Canada apply to sponsor their refugee relatives through Canadian family reunification programs.

<sup>392</sup> For an outline of these programs, see text at fn. 253-259 above.

Quite a few States, as outlined below do not require refugees and other beneficiaries of international protection applying for family reunification to meet the income/subsistence, accommodation, health insurance and other requirements required of other immigrants. Such practice is in line with UNHCR's Executive Committee Conclusion No. 24, which recommends:

“In appropriate cases family reunification should be facilitated by special measures of assistance to the head of family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members.”<sup>393</sup>

In other countries, refugees and other beneficiaries of international protection are expected to meet the same requirements as other migrants. One consequence in such situations may be to oblige the parents of larger families, who therefore have to provide larger accommodation and show higher income and wider healthcare insurance, to choose only to apply for family reunification with some of their children and leave others behind. UNHCR has noted such instances and they raise serious concerns.<sup>394</sup> Such practices have the effect of dividing rather than reuniting families.

The imposition of such requirements does not take into account the particular circumstances of persons who have been forced to flee and have generally left their belongings and livelihoods behind them. Courts have recognized the particular vulnerability of asylum-seekers and refugees.<sup>395</sup> These circumstances, their vulnerability and the physical harm and traumatizing experiences they may have encountered justifies their differentiated treatment vis-à-vis other migrants.

In Europe, the Parliamentary Assembly of the Council of Europe (PACE) in its 2004 Recommendation on Human Mobility and Family Reunion has urged member States “to impose less strict conditions for applicants in respect of financial guarantees, health insurance and housing and, in particular, to avoid any discrimination against women migrants and refugees which could result from their imposition”.<sup>396</sup>

The ECtHR has ruled in *Konstatinov v. The Netherlands*:

“In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought.”<sup>397</sup>

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<sup>393</sup> UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 24, para. 9.

<sup>394</sup> UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 12.

<sup>395</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09, ECtHR, 21 January 2011, available at: <http://www.refworld.org/docid/4d39bc7f2.html>, para. 251.

<sup>396</sup> PACE, *Recommendation 1686 (2004)*, above fn. 103, para. 12.3(d).

<sup>397</sup> *Konstatinov v. The Netherlands*, Application no. 16351/03, ECtHR, 26 April 2007, available at: <http://www.refworld.org/cases,ECHR,4667da4a2.html>, para. 50.

As the Court noted, it is, however, necessary to go on to consider “the question whether such a requirement was reasonable in the instant case”, one of the factors to be taken into account being “whether there are any insurmountable obstacles for the exercise of the family life at issue outside [in that case] the Netherlands”.<sup>398</sup> For refugees and other beneficiaries of international protection, this factor is unlikely to be met (unless perhaps the spouse is the national of another State where it would be possible for the family to live).

In the EU, the CJEU has provided guidance on the proper interpretation of Article 7 of the Family Reunification Directive concerning requirements that may be imposed regarding accommodation, sickness insurance and stable and regular resources in its judgments in *Chakroun, O. and S. and L.*, as outlined in section 3.4 above. These refer notably to the requirement that “[s]ince authorisation of family reunification is the general rule”, the sufficient resources provision “must be interpreted strictly”, while the “margin for manoeuvre” which EU Member States are recognized as having “must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification”. The Court has also recalled the duty to interpret the Article in the light of Articles 7 and 24(2) and (3) of the Charter and “to examine ... applications for reunification ... in the interests of the children concerned and with a view to promoting family life”.<sup>399</sup>

*Legislation and jurisprudence in European States showing how conditions regarding accommodation, sickness insurance and resources are applied include:*

In **Austria**, legislation and jurisprudence provide some protection. The Asylum Act requires the authorities to issue a visa even where accommodation, health insurance and sufficient income requirements are not met in cases (concerning either family members of refugees or subsidiary protection beneficiaries) where this is necessary to ensure compliance with Article 8 ECHR.<sup>400</sup>

As for the courts, a 2011 judgment of the Administrative Court addressed the question of a husband’s application for a residence permit to join his family in Austria that had been denied on the grounds that the wife did not have sufficient financial resources. The Court found that such applications could not automatically be rejected on these grounds, since in order to comply with the legislative provision above, it was necessary in each case to assess a range of eight criteria, including the length and nature of the third country national’s previous residence, whether this had been on regular basis or not, whether family life had originated at a time when the third country national’s residency was legal or not, and to weigh them against the public interest. The Court found that these issues had not been sufficiently assessed and balanced in the particular case.<sup>401</sup> The Administrative Court confirmed in a March 2016

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<sup>398</sup> *Ibid.*, paras. 50 and 52 and *Üner v. The Netherlands*, ECtHR, Grand Chamber, 2006, above fn. 55, para. 58, for other factors listed by the ECtHR.

<sup>399</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 117, paras. 43-44; *O. and S.*, CJEU, 2012, above fn. 119, para. 80.

<sup>400</sup> Austria: *Asylum Act*, 2005, above fn. 172, Article 55(1).

<sup>401</sup> 2009/21/0363, Austria: Administrative Court (Verwaltungsgericht), 20 October 2011, available at: [http://www.refworld.org/cases/AUT\\_FAC.58d90e3b4.html](http://www.refworld.org/cases/AUT_FAC.58d90e3b4.html). See also the similar case *N. v Federal Asylum Review Board*, 2010/21/0494, Austria: Administrative Court (Verwaltungsgericht), 17 November 2011, available in German



judgment that there must be an assessment of the risk of violating Article 8 ECHR in every case when family members of someone with refugee status or subsidiary protection in Austria apply for a visa to join them.<sup>402</sup>

In a 2011 judgment, the Administrative Court also ruled that the family reunification of refugees may not be rejected on the sole grounds of representing a potential financial burden to the State.<sup>403</sup> The case concerned the family reunification of a Chechen husband/father, recognized as a refugee in Germany, with his wife and children who were recognized as refugees in Austria and integrated there.

In **Belgium**, where beneficiaries of international protection are unable to apply within 12 months of recognition and must therefore meet the same income and other requirements as other third country nationals, income from temporary work is often not accepted as proof of sufficient, stable and regular means of subsistence, nor is income derived from the employment through the Public Centres for Social Welfare (OCMW/CPAS) undertaken as a condition of receiving unemployment benefit. In a case concerning a recognized refugee who was subject to the condition of sufficient, stable and regular means of subsistence, however, the Council for Aliens Law Litigation (CALL) specifically stated that the fact that the person was a recognized refugee should have been taken into consideration in the decision on the granting of family reunification visa.<sup>404</sup>

Practice in Belgium regarding persons with international protection who are disabled whose family members are unable to seek reunification within the one-year deadline is problematic following a 2015 Council of State judgment.<sup>405</sup> This defined assistance to persons with a disability as “social assistance”, as a result of which the Immigration Office no longer takes such assistance into consideration when assessing whether an application for family reunification meets the conditions a stable means of subsistence. The effect of this 2015 judgment is that if family reunification with a beneficiary of international protection with a disability cannot sought before the one-year deadline, such persons are de facto deprived of the possibility of family reunification.

In **Finland**, while refugees are only exempt from the sufficient resources requirement if they apply for family reunification within three months of recognition, this deadline does not apply

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at: [http://www.refworld.org/cases,AUT\\_AHAC,58a6caa24.html](http://www.refworld.org/cases,AUT_AHAC,58a6caa24.html) concerning the severely disabled adult daughter in a Turkish family who were otherwise long settled in Austria.

<sup>402</sup> *Ro 2015/18/0002 bis 0007-4*, Austria: Administrative Court (Verwaltungsgericht), 1 March 2016, available in German at: [http://www.refworld.org/cases,AUT\\_FAC,58a6c8ff4.html](http://www.refworld.org/cases,AUT_FAC,58a6c8ff4.html), para. 30. The case concerned a Somali mother and six of her (at that time minor) children who were seeking to join another son of the mother, who had subsidiary protection in Austria.

<sup>403</sup> *2009/21/0080*, Austria: Administrative Court (Verwaltungsgericht), 29 September 2011, available at: [http://www.refworld.org/cases,AUT\\_FAC,58d90f9a4.html](http://www.refworld.org/cases,AUT_FAC,58d90f9a4.html).

<sup>404</sup> *Judgment no. 135.900*, Belgium: CALL, 7 January 2015, available at: [http://www.refworld.org/cases,BEL\\_CCE,58b04f604.html](http://www.refworld.org/cases,BEL_CCE,58b04f604.html).

<sup>405</sup> *Arrêt n°. 232.033*, Belgium: Conseil d'état, No. de rôle A. 214.679/XI-20.469 12 August 2015, available at: [http://www.refworld.org/cases,BEL\\_CDE,58d913e14.html](http://www.refworld.org/cases,BEL_CDE,58d913e14.html). This judgment is not withstanding *Judgment no 121/2013* of the Constitutional Court, above fn. 382, which had determined that a different type of assistance paid to persons with disabilities could be taken into account when assessing sufficient means of subsistence.

if the delay is due to the Finnish authorities.<sup>406</sup> The sufficient resources requirement is also not applied to minor siblings of an unaccompanied child if they have previously lived together and if their parents are no longer alive or their whereabouts are unknown.

Two recent judgments of the Finnish Supreme Administrative Court regarding the requirement under the Aliens Act to show sufficient resources for a residence permit to be issued<sup>407</sup> are relevant, even though they do not concern beneficiaries of international protection. In the first case, the Court considered not only the sponsor's irregular income and his search for a job, but also the support of his mother and father-in-law, who had for 18 months significantly supported the sponsor's family financially nearly every month and that there were sufficient funds in the sponsor's bank account.<sup>408</sup> It therefore found that the sponsor's livelihood was secure in compliance with the Aliens Act.

In its second judgment, the Supreme Administrative Court ruled that when assessing the stability and regularity of a sponsor's earnings, it was necessary to take into account labour market practices other than that of permanent, full-time jobs in accordance with the principle of proportionality.<sup>409</sup> It found that the sponsor's earnings came from a part-time job distributing newspapers and numerous short fixed-term contracts mainly in the food industry. Since the sponsor's net earnings had for many years exceeded the sufficient resources requirement, it was presumed that the sponsor would, at most, end up needing income support or other subsistence benefits on a temporary basis; these average net earnings were therefore sufficient to show a secure livelihood.

In **Switzerland**, among the conditions imposed on persons with provisional admission, who include recognized refugees not granted asylum but with provisional admission, seeking family reunification is that they have appropriate accommodation and that the family will not depend on social assistance.<sup>410</sup> The accommodation requirement is reportedly interpreted strictly, with one bedroom required for each child. The accommodation must also be secured at the time the application is made.<sup>411</sup>

Two judgments of the Federal Administrative Tribunal on this issue concern these two latter issues. Both concerned Eritreans recognized as refugees with provisional admission. In the first, the Tribunal recognized that someone seeking to reunify with family members cannot reasonably be expected to have appropriate accommodation in place at the moment of application. Rather, it found that the applicant had consistently expressed his willingness to

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<sup>406</sup> Finnish Immigration Service, "As of 1 July, the family member of a person who has been granted international protection must as a rule have secure means of support", 29 June 2016, available at: [http://www.migri.fi/our\\_services/customer\\_bulletins/bulletins\\_family/1/0/as\\_of\\_1\\_july\\_the\\_family\\_member\\_of\\_a\\_person\\_who\\_has\\_been\\_granted\\_international\\_protection\\_must\\_as\\_a\\_rule\\_have\\_secure\\_means\\_of\\_support\\_685\\_71](http://www.migri.fi/our_services/customer_bulletins/bulletins_family/1/0/as_of_1_july_the_family_member_of_a_person_who_has_been_granted_international_protection_must_as_a_rule_have_secure_means_of_support_685_71).

<sup>407</sup> Finland: *Aliens Act*, above fn. 205, Section 39.

<sup>408</sup> *KHO:2016:155*, Finland: Supreme Administrative Court Decision of 24 October 2016.

<sup>409</sup> *KHO:2016:198*, Finland: Supreme Administrative Court Decision of 2 December 2016.

<sup>410</sup> Suisse: *Loi fédérale sur les étrangers*, 2005, état le 1er janvier 2017, above fn. 193, Article 85(7). See also the text at fn. 416 below for Federal Supreme Court judgment allowing some discretion on these issues.)

<sup>411</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 41.

find appropriate accommodation large enough for his family and that there was no reason to consider that he would not be able to find appropriate accommodation in the canton where he was living.<sup>412</sup> In the second judgment, the Federal Administrative Tribunal refused the family reunification request of an Eritrean woman seeking reunification with her husband and three minor children, two of whom were with the husband in Ethiopia and another with a grandmother in Eritrea. The Tribunal excluded consideration of the husband's situation, since the request concerning him had not initially been submitted and considered only that of the children. It ruled that although the mother had an open-ended employment contract, this was only at 60 per cent, which left her partially dependent on social support, and therefore rejected the reunification request. The possibility that accepting that the reunification with the husband/father would enable him to look after the children and therefore allow the wife/mother to work full-time was not accepted.<sup>413</sup>

*European States where there is some discretion to permit exceptions to accommodation and other requirements to be waived include:*

In the **Czech Republic**, the Supreme Administrative Court ruled in 2015 that, when assessing the proof of total monthly family income required for long-term residence for family reunification, this proof can be taken into consideration, but it cannot be unconditionally required.<sup>414</sup>

In **Germany**, if beneficiaries of international protection are unable to apply for family reunification within three months of receiving protection and are therefore required to meet accommodation, sickness insurance and stable resources requirements, the authorities have discretion as to whether or not to oblige these requirements to be met. Basic level German language capacities for a spouse/partner that are required of other applicants for family reunification are waived,<sup>415</sup> (but see section 6.1 below for information regarding the two-year suspension of any family reunification for beneficiaries of subsidiary protection).

In **Switzerland**, the Federal Supreme Court has found that the requirement not to rely on social assistance under the Aliens Act may be qualified somewhat in the context of an Article 8 ECHR assessment. In the case of an Eritrean refugee, who sought family reunification with his post-flight spouse, the Court held in 2013 that, if he could show that he would in the foreseeable future be in a position to earn sufficient money so as not to rely on social assistance after family reunification, the application for family reunification should be granted on the basis of Article 8 ECHR.<sup>416</sup> In the appellant's case, he already had a foot on the employment

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<sup>412</sup> *A., B., C., D., E., c. Secrétariat d'Etat aux migrations (SEM)*, Switzerland: Federal Administrative Tribunal, F-7288/2014, 5 December 2016, available at: [http://www.refworld.org/cases,CHE\\_TFS,5a0ead684.html](http://www.refworld.org/cases,CHE_TFS,5a0ead684.html), section 5.2.

<sup>413</sup> *A. v. State Secretary for Migration*, F-2043/2015, Switzerland: Federal Administrative Court, 26 July 2017, available at: <http://www.refworld.org/cases,SFOM,5a0ea76a4.html>.

<sup>414</sup> *Decision no. 10 Azs 245/2014 – 41*, Czech Republic, Supreme Administrative Court, 29 January 2015, interpreting Section 42b(1)(d) of the Aliens Act in contrast to Section 71(1) of that Act.

<sup>415</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 29(2)), Section 30(1) sentence 3 no. 1.

<sup>416</sup> *X. & Y. (Sudan) v. Migrationsamt des Kantons Zürich, Sicherheitsdirektion des Kantons Zürich*, 2C\_1018/2012, Switzerland: Federal Court, 6 December 2013, available at: [http://www.refworld.org/cases,CHE\\_FC,58b94d334.html](http://www.refworld.org/cases,CHE_FC,58b94d334.html), para. 4.2.

ladder. This approach does not appear to provide for a more general exception from the financial requirement under the Aliens Act.

*In some European States, adequate maintenance and accommodation requirements are not imposed on core family members but are applied for wider family members:*

For instance, in **Greece**, while a sponsor is exempt from meeting accommodation, sickness insurance and income requirements with regard to close family members if the application for reunification is submitted within three months, adult refugees wishing to reunite with dependent parents must meet these requirements in any case.<sup>417</sup>

In **Norway**, if recognized refugees (whether under the 1951 Convention or on Article 3 ECHR grounds) wish to bring non-close family members to join them, then income requirements apply.<sup>418</sup>

In the **United Kingdom**, refugees and persons with humanitarian protection seeking to bring core family members to the UK do not have to show adequate maintenance and accommodation without recourse to public funds and the family members do not have to demonstrate any proficiency in English before coming to the UK.<sup>419</sup> Refugees and persons with humanitarian protection in “post-flight” relationships or seeking to reunite with extended family members must, however, show a minimum income of at least £18,600 annually and meet other requirements, thus rendering reunification of such persons with other family members much more difficult.

In a February 2017 judgment,<sup>420</sup> the Supreme Court upheld in *MM and Others v. Secretary of State for the Home Department* the government’s imposition of a minimum income requirement, but found that “[r]ather than treating the best interests of children as a primary consideration”, instructions laid down a “highly prescriptive criterion” that did not comply with the Secretary of State’s duty under the Borders, Citizenship and Immigration Act 2009<sup>421</sup> to safeguard and promote the welfare of children when making decisions which affect them. In addition, the Court found that, rather than requiring the minimum income to be met by the sponsor alone, “a broader approach may be required in drawing the ‘fair balance’ required by the Strasbourg

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<sup>417</sup> Greece: *Presidential Decree No. 167 of 2008*, above fn. 209, Article 14(3).

<sup>418</sup> Norway, *Regulations of 15 October 2009 on the entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Regulations)*, above fn. 385, Section 10-8; interview with UNHCR Stockholm, 31 October 2016. See also <https://www.udi.no/en/word-definitions/income-requirement-in-family-immigration-cases/>.

<sup>419</sup> Gower and McGuinness, *The UK’s Refugee Family Reunion Rules: Striking the Right Balance?*, above fn. 199, p. 6, and generally <https://www.freemovement.org.uk/refugee-family-reunion-a-users-guide/>.

<sup>420</sup> *R (on the application of MM (Lebanon)) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *R (on the application of Abdul Majid (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *R (on the application of Master AF) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *R (on the application of Shabana Javed (Pakistan)) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *SS (Congo) (Appellant) v. Entry Clearance Officer, Nairobi (Respondent)*, [2017] UKSC 10, UK: Supreme Court, 22 February 2017, available at: [http://www.refworld.org/cases,UK\\_SC,58c26e274.html](http://www.refworld.org/cases,UK_SC,58c26e274.html).

<sup>421</sup> UK: *Borders, Citizenship and Immigration Act 2009*, Chapter 11, 21 July 2009, available at: <http://www.refworld.org/docid/4a681f372.html>, section 55. The judgment noted at para. 91 that “although section 55 is in terms directed to children in the UK, the Secretary of State has accepted that the same approach should be applied to the welfare of children elsewhere”.

court” with the result that officers “are not precluded from taking account of other reliable sources of earnings or finance”.<sup>422</sup> Finally, one of the appellants concerned a refugee from the Democratic Republic of Congo (DRC) who had naturalized as a British citizen (and was therefore required to meet the income threshold), who was seeking to reunite with his post-flight spouse who was also from the DRC. The Court recognized that in this couple’s case there were insurmountable obstacles to the couple carrying on family life in the DRC (from which both spouses originated). Applying the “*Jeunesse* criteria” the Court upheld the lower court ruling that “if there are insurmountable obstacles to the couple carrying on family life in the DRC it follows that there are exceptional circumstances which would mean that refusal of the application results in unjustifiably harsh consequences for the sponsor and the claimant”.<sup>423</sup>

The different elements of this judgment seem relevant not only with regard to the source from which any income requirements may be met – the judgment refers not only to the spouse seeking to come to the UK, but also to other family members and even the community – but also with regard to the requirement to ensure the best interest of the child are a primary consideration, and to refugees who may have naturalized but are nevertheless recognized as not being able to enjoy family life in their country of origin.

*European States applying other additional requirements include:*

In **Denmark**, legislation has long been in place requiring couples seeking to reunify have a greater attachment to Denmark than to another country. In 2004, this rule was applied only to couples whose resident partner had not been a Danish citizen for 28 years or more, though after the 2016 ECtHR ruling in *Biao v. Denmark*, finding this distinction to be discriminatory, the attachment requirement was reapplied to all couples applying for spousal reunification.<sup>424</sup>

In June 2016, **Norway** approved the introduction of an “attachment requirement” or “overall ties requirement” permitting the Norwegian authorities to deny family reunification with a refugee in Norway if the family is able to obtain a valid residence permit in a third country, although this requirement does not apply if the person is living in a refugee camp.<sup>425</sup> As a result, from 1 July 2017, an application for family immigration may be rejected where it is determined that the refugee is able to exercise his or her right to family life in a safe third country, to which the refugee family as a whole has a stronger attachment than to Norway.<sup>426</sup>

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<sup>422</sup> *MM and Others v. Secretary of State for the Home Department*, UKSC, 2017, above fn. 420, para. 100.

<sup>423</sup> *Ibid.*, paras. 102-108, referring to *Jeunesse v. The Netherlands*, ECtHR Grand Chamber, 2014, above fn. 50.

<sup>424</sup> See generally, E. Cochran Bech, K. Borevi and P. Mouritsen, “A ‘Civic Turn’ in Scandinavian Family Migration Policies? Comparing Denmark, Norway and Sweden”, *Comparative Migration Studies* (2017) 5:7, available at: <https://comparativemigrationstudies.springeropen.com/track/pdf/10.1186/s40878-016-0046-7?site=comparativemigrationstudies.springeropen.com>, pp. 5-10. For more on *Biao v. Denmark*, ECtHR, Grand Chamber, 2016, above fn. 51, see section 3.2 above.

<sup>425</sup> UNHCR, *UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring – Endringer i utlendingslovgivningen (Innstramninger II)*, 12 February 2016, available at: <http://www.refworld.org/docid/56c1c6714.html>, paras. 76-94, setting out the proposed changes and UNHCR’s views. (See generally, Norway: Ministry of Justice and Public Security, “Necessary tightening of Norway’s asylum rules”, 22 June 2016, available at: <https://www.regjeringen.no/en/aktuelt/nodvendige-innstramninger/id2505028/> though there is not much detail on the family reunification changes.)

<sup>426</sup> Bech et al. “A ‘Civic Turn’ in Scandinavian Family Migration Policies? Comparing Denmark, Norway and Sweden”, *ibid.*, pp. 10-13.

In **Poland**, refugees and beneficiaries of subsidiary protection alike have equal access to family reunification and are not required to meet additional income, accommodation and healthcare insurance otherwise imposed on other migrant if they apply for family reunification within six months of the grant of status.<sup>427</sup> Once a residence permit is granted to the family member, however, he or she must obtain a visa from a Polish consulate. At this stage, just like other foreigners, the EU Visa Code<sup>428</sup> applies and the family members of beneficiaries of international protection must provide evidence of stable financial means and of health insurance.<sup>429</sup> UNHCR is aware of some cases where families of beneficiaries of international protection have nonetheless been able to reunify successfully.<sup>430</sup>

In **Turkey**, in order to reunify with a family member the beneficiary of international protection must meet requirements including income and accommodation requirements and must show an absence of criminal conviction in the preceding five years.<sup>431</sup> In addition, while refugees and beneficiaries of subsidiary protection are entitled to family reunification, “complementary refugees”, that is, refugees with a well-founded fear of persecution as a result of events occurring *outside* European countries, are not entitled to family reunification.<sup>432</sup>

*By contrast, European States that do not require beneficiaries of international protection to meet requirements regarding accommodation, sickness insurance, and sufficient and stable resources include:*

In **Bulgaria**, both refugees and beneficiaries of subsidiary protection (who in Bulgaria are granted humanitarian status) are not required to show appropriate accommodation, sickness insurance, and stable and regular resources, otherwise imposed on applicants for family reunification.<sup>433</sup> The same is true for beneficiaries of international protection in **Croatia, France, Italy, and Romania**.<sup>434</sup>

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<sup>427</sup> Poland: *Act of 2013 on Foreigners*, above fn. 187, Article 159.

<sup>428</sup> EU: European Parliament, *Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, 13 July 2009, available at: <http://www.refworld.org/docid/588b51a04.html>.

<sup>429</sup> Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187, pp. 11 and 19; UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 73.

<sup>430</sup> Communication from UNHCR office, Warsaw, October 2017.

<sup>431</sup> Turkey: *Law No. 6458 of 2013 on Foreigners and International Protection*, 4 April 2013, available at: <http://www.refworld.org/docid/5167fbb20.html>, Article 35(1).

<sup>432</sup> Turkey: *Law on Foreigners and International Protection*, 2013, above fn. 431, Articles 34(1) and 62. See also Council of Europe, *Report of the fact-finding mission to Turkey by Ambassador Tomáš Bocěk, Special Representative of the Secretary General on migration and refugees*, 30 May – 4 June 2016, SG/Inf(2016)29, 10 August 2016, available at: <http://www.refworld.org/docid/5a4cb0604.html>, p. 7.

<sup>433</sup> Bulgaria: *Law on Asylum and Refugees*, 2002, above fn. 201, as amended to October 2015, Article 34, which makes no requirements as regards accommodation, sickness insurance or sufficient and stable resources.

<sup>434</sup> See respectively, Croatia: *The Foreigners Act 2011*, 13 November 2011, available at: <http://www.refworld.org/docid/3fcc6cd54.html>, Article 58 in conjunction with Article 54; France: CESEDA, above fn. 21, Articles L314-11 8°, L313-13 and L752-1; OFPRA Family Reunification Leaflet, above fn. 182; Italy: *Legislative Decree no. 286/1998*, above fn. 220, Article 29bis (1); Romania: *Law No. 122/2006 on Asylum in Romania*, above fn. 188, Articles 71 and 72; UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 71.

In practice, in Romania, UNHCR has reported a gap between the legal provisions and their practical implementation. Thus, even though the law does not require proof of sufficient economic resources, “in practice it is considered necessary for a successful application”. In one family reunification request, an employment contract was explicitly requested, while in other cases “proof of housing and health insurance have been requested from beneficiaries of international protection in Romania and considered as advantageous for their application process”.<sup>435</sup>

Outside Europe, in **Canada**, citizens or permanent residents (including refugees) applying for a visa as a member of the “family class” as referred to briefly in section 4.1 above, must not be on social assistance, must not be in default with respect to repayments to the government (such as being in arrears in the repayment of his or her transportation loan) and must be able to pay both a processing fee and the right of permanent residence fee to be eligible dependents to come to Canada. In addition, the sponsor in Canada is responsible for supporting their sponsored family member for three years.<sup>436</sup> Recognizing that these financial requirements for under the family class programme are potential barriers for refugees to sponsor their dependent family members, Canada has nonetheless established additional alternative family reunification processing routes for refugees, as outlined in section 4.6 above. In addition, any person being admitted to Canada as a permanent resident must meet Canadian medical requirements (i.e. the person must not be a danger to Canadian health or safety) as well as Canadian criminal and security requirements.

In conclusion, with regard to accommodation, sickness insurance and stable and regular resources requirements, several European States require refugees to meet these requirements if they are unable to apply for family reunification before any deadline that may be applied. (Most do so for beneficiaries of subsidiary protection as outlined in section 6.1 below.) A few States impose other additional requirements that present further obstacles to family reunification. By contrast, a number of other States do not require refugees and indeed beneficiaries of subsidiary protection to meet any such requirements.

There is nevertheless evidence that some States recognize the need for discretion and flexibility in implementing these requirements in the case of beneficiaries of international protection, not least as a result of States’ obligations under Article 8 ECHR and in light of the best interests of the child principle, whether determined in legislation and/or jurisprudence.

Where income and other requirements are imposed, the national jurisprudence outlined above, indicates that:

- it remains necessary to ensure compliance with Article 8 ECHR (Austria);
- the family reunification of refugees may not be rejected on the sole grounds of representing a potential financial burden to the State (Austria);

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<sup>435</sup> UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, pp. 72-73.

<sup>436</sup> For spouses and partners, the sponsorship undertaking is three years after arrival. For dependent children, the undertaking is 10 years or until the child turns 22 years old, whichever comes first, in all provinces except Québec. In Québec, the sponsorship undertaking for dependent children is a minimum of 10 years, or until age 18, whichever is longer for children under 13 years of age, or a minimum of three years, or until the age of 22, whichever is longer, for children above the age of 13.

- decisions on the granting of a family reunification visa need to take into consideration the fact that the sponsor was a recognized refugee (Belgium);
- any deadline within which applications must be submitted should not be applied if the delay is due to the authorities (Finland);
- significant financial support by other family members and even the community may be taken into account (Finland, UK);
- it is necessary to take into account labour market practices other than that of permanent, full-time jobs in accordance with the principle of proportionality (Finland); and
- a sponsor who is a beneficiary of international protection cannot reasonably be expected to have appropriate accommodation in place at the moment of application, but that his or her willingness to find appropriate accommodation and the likelihood of him or her being able to do so need to be taken into account (Switzerland).

Additionally, in situations where a sponsor is partially dependent on social support, it would seem reasonable to take into account that permitting reunification with a spouse would enable the latter to look after the children and thereby allow the sponsor to work full-time. Further, flexibility is required where beneficiaries of international protection seeking reunification are children and/or persons with disabilities, as they should not be required to meet such requirements, bearing in mind their additional vulnerability. In these and other circumstances, it would seem important for the authorities to be able to exercise discretion, if legislation or regulations do not address these issues adequately.

#### **4.8 Requirement to seek family reunification from outside the country of asylum**

State practice varies as to where applications for family reunification must be submitted and as to who may present them – whether the sponsor or the members of his or her family. A number of States permit the application to be made in the country of asylum, while others require it to be submitted outside the country before the family member(s) arrives(s) in the country where reunification is sought. Still others allow a combination of both approaches.

Where family members are required to submit the application outside the country of asylum, this can involve significant costs especially where more than one visit to an embassy/consulate is required. In addition, family members may be exposed to considerable danger if they have to travel to an embassy/consulate in their country of origin where security may be precarious or conflict is ongoing or if they have to travel abroad in cases because there is no embassy/consulate in the country concerned. Family members, of whom the majority are women and children, may need to travel great distances. For instance, Afghans may need to travel to India or Eritreans to Egypt, sometimes several times to submit documentation, attend interview(s), or later to obtain a visa. Where this is necessary, a meaningful exercise of the right to family reunification can be rendered costly, potentially dangerous, and difficult if not impossible. For more on difficulties faced by family members approaching embassies and consulates, see also section 5.2 below.

Where States permit beneficiaries of international protection to apply for family reunification in the country of asylum, this reduces the number of times that family members may be



required to go to an embassy or consulate and thus the costs and dangers to which they may be exposed. It may well also be that the beneficiaries of international protection can be better informed about the national regulations applying than family members in the country of origin. In UNHCR's view, such a solution better serves the interest and safety of the family members in the country of origin or a third country.<sup>437</sup>

Increasingly States provide for the possibility of applying for family reunification on line. This may help reduce the number of times the sponsor or family members are obliged to approach the authorities (whether in the country of asylum or at an embassy/consulate), but it is important that sufficient account is taken of the obstacles that may be faced where family members are in remote locations with limited access to computers, the internet, and little experience or advice on the procedures involved.

Family members face additional challenges where they are required to have **legal residence or habitual residence** in the country, from which they seek reunification. For refugees who are either already living in precarious circumstances in a first country of asylum, where it may not be possible for them to have official legal residence, and/or for refugees who are obliged to travel to another country to reach an embassy/consulate at which an application can be made, their situation there is often precarious. This requirement can thus present insurmountable difficulties for such refugees.

*States requiring applications to be made from outside the country of asylum, include:*

States requiring applications to be made at an embassy or consulate outside the country of asylum include: **Australia, Austria, the Czech Republic, Finland,**<sup>438</sup> **France, Hungary, Norway, Slovenia,**<sup>439</sup> **Sweden,** and the **United Kingdom.**<sup>440</sup>

*Among European States requiring the application to be made in the country of asylum of the sponsor include:*

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<sup>437</sup> UNHCR's *Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, p. 12.

<sup>438</sup> Finland: *Act No. 301/2004 of 2004, Aliens Act*, 2004, above fn. 205, Section 62.

<sup>439</sup> Slovenia: *Aliens Act*, 2011, above fn. 227, Article 47a(1).

<sup>440</sup> Family reunification applications for persons outside the UK must be made online; they must complete an application form, provide supporting documents, and have photographs and fingerprints taken at a visa application centre or at a British embassy/consulate. If there is no embassy, consulate or visa application centre in the country, the family members must travel to the nearest such office in another country. See UK Home Office, *Settlement: Refugee or humanitarian protection*, 4. *Family reunion*, available at: <https://www.gov.uk/settlement-refugee-or-humanitarian-protection/family-reunion>; [www.gov.uk/apply-uk-visa](http://www.gov.uk/apply-uk-visa); UK: Independent Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, September 2016, available at: <http://icinspector.independent.gov.uk/wp-content/uploads/2016/09/An-inspection-of-family-reunion-applications-january-to-may-2016.pdf>, p. 12. It is possible to apply in the UK only if family members are already in the country.

In **Bulgaria**, the sponsor must submit the application for family reunification to the State Agency for Refugees (SAR) in Bulgaria.<sup>441</sup> A SAR employee examines the case, interviewing the sponsor and requesting additional information, as applicable. If the SAR reaches a positive decision on family reunification, this is notified to the sponsor and forwarded to the Ministry of Foreign Affairs (MFA), which liaises electronically with the respective consulate/embassy. The family members concerned may then directly contact the relevant consulate/embassy regarding the issuance of entry visas on the basis of the SAR decision. The procedure can, however, take a very long time including on account of delays in sending the necessary information through the various institutions. In a number of cases, the process has not been smooth, especially for applicants living in Syria who may be required to travel in person a number of times to the Bulgarian embassies in Lebanon and Turkey.<sup>442</sup>

In **Germany**, an initial application (in order to meet the three-month deadline) can be made with the locally responsible aliens' authority in Germany. Personal appearance is generally required to initiate the procedure, including for practical reasons, although the application does not have to be initiated in person, as long as the sponsor appears at some other point during the procedure to clarify identity issues.<sup>443</sup> In order to initiate the necessary visa procedure, the family members abroad must make a personal appearance at the German embassy/consulate responsible. If there is no German mission in the country concerned, applicants are generally referred to an alternative German mission or exceptionally an embassy of another country. Legal residence at of least six months in the country is usually required or a UNHCR or asylum-seeker/refugee registration card in the State where the family member(s) wish to approach the relevant German mission.

In **Ireland**, applications must be submitted by the beneficiary of international protection in Ireland.

In **Italy**, a beneficiary of international protection seeking family reunification must first apply to the local prefecture to demonstrate that he or she has been recognized as being in need of international protection. The Italian embassy/consulate in the country where the family members then assesses the validity of the family links.

In **the Netherlands**, the sponsor must apply for family reunification at the Dutch Immigration and Naturalization Service (INS) in the Netherlands.

In **Poland**, the beneficiary of international protection initiates the family reunification procedure in Poland by submitting an application for temporary residence on behalf of the family member(s) seeking to be reunited with him or her. Even though the relevant proceeding is conducted in Poland, the family member residing outside the country must, for instance, have a photocopy of his or her travel document (passport) certified at a Polish consulate as a

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<sup>441</sup> See Bulgaria: *Procedures for Asylum and Protection in Bulgaria*, 8. Family reunification, available at: <http://www.asylum.bg/en-8/>; UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, 2012, above fn. 157, p. 20.

<sup>442</sup> Information provided by UNHCR in Bulgaria, October 2017.

<sup>443</sup> Communication from Ministry of Foreign Affairs to UNHCR Berlin, Germany, October 2017.

true copy, send it to Poland along with the required photographs, and subsequently obtain a visa from a Polish embassy/consulate.<sup>444</sup>

In **Romania**, the beneficiary of international protection must apply for family reunification to the asylum authorities of the Romanian General Inspectorate for Immigration; where the beneficiary is an unaccompanied minor, the process of family tracing and reunification is started by the Romanian General Inspectorate for Immigration automatically. If the Immigration Inspectorate considers that proof of the family connection has been provided by the beneficiary of international protection, it will request the Romanian diplomatic missions or consulates to grant a visa for the family members who have valid travel documents. For those who do not have such documents, cannot obtain them, and are outside their country of origin, the Immigration Inspectorate will ask the diplomatic missions or consulates to issue travel titles and a short stay visa to permit entry to Romania.<sup>445</sup>

In **Spain**, applications for family reunification must be made by the sponsor in Spain, though afterwards family members must approach the embassy or consulate to present the documentation proving the family relationship.<sup>446</sup>

In **Switzerland**, applications for family reunification must be submitted in Switzerland, after which the family member will then have to go to a Swiss embassy to submit a demand for entry. If there is no Swiss embassy in the country where the family member lives, the consular representation in another country is responsible for issuing the visa. Recognized refugees must file the application for family reunification with the State Secretariat for Migration (SEM) in Switzerland, while those with provisional admission must file their application with the competent cantonal authority in Switzerland.

*Among European States allowing for both possibilities (sometimes only on an exceptional basis) are:*

In **Belgium** family reunification applications must generally be made from outside the country. Legislation provides for such requests to be submitted in its territory “in exceptional circumstances”,<sup>447</sup> though it can be difficult to prove such circumstances. Two 2014 judgments of the Council for Aliens Law Litigation (CALL) found, for instance, that a mother with a young baby were required to return to their country of origin to apply for reunification and that there was no breach of Article 8 ECHR.<sup>448</sup> A 2013 CALL judgment nevertheless specified that decisions by the Immigration Office refusing applications made in Belgium on the basis

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<sup>444</sup> Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187, pp. 11-13.

<sup>445</sup> Romania: *Law No. 122/2006 on Asylum in Romania*, above fn. 188, Articles 71 and 72; Romania: *Methodological Norms 1251/2006, for the Enforcement of Law No 122/2006 on Asylum in Romania*, Official Gazette 805, 25 September 2006 with amendments to June 2014, Articles 30-35.

<sup>446</sup> Communication from UNHCR, Madrid, Spain, October 2017.

<sup>447</sup> Belgique: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, 1980, above fn. 176, Article 12bis, §1, para. 2, 3°, this being otherwise only possible for persons who already have a residence permit valid for more than three months duration.

<sup>448</sup> *Judgment no. 119.900*, Belgium: CALL, 28 February 2014, available in Dutch at: <http://www.rvv-cc.be/sites/default/files/arr/A119900.AN.pdf> and *Judgment no. 119.320*, Belgium: CALL, 21 February 2014, available in Dutch at: <http://www.rvv-cc.be/sites/default/files/arr/A119320.AN.pdf> (requiring return to Georgia and China respectively).

of exceptional circumstances must be reasoned. The rejection in that case, which concerned a mother claiming she had obligations towards her four young children in Belgium, was annulled on the basis that it was not sufficiently substantiated.<sup>449</sup> In 2016, the CALL annulled an Immigration Office decision refusing an application submitted in Belgium claiming exceptional circumstances, since it had not taken the best interest of the child into account in its decision.<sup>450</sup> In another 2016 judgment, the CALL annulled a decision of the Immigration Office to deny a humanitarian visa to an adult child of a recognized refugee who had epilepsy. The CALL took three aspects into account: the health the child, access to medication in Gaza, and the overall humanitarian situation in Gaza.<sup>451</sup>

In **Estonia**, family reunification procedures can be initiated either in Estonia or at embassies where the family members are or even at other EU embassies in the country.<sup>452</sup>

In **Latvia**, documentation is to be submitted to the Latvian diplomatic or consular mission, although exceptionally documents may also be submitted by the beneficiary of international protection to the Office of Citizenship and Migration Affairs in Latvia.

In **Luxembourg**, applications for family reunification should generally be made by the sponsor in Luxembourg, at the Directorate of Immigration of the Ministry of Foreign Affairs. Applications may also be lodged outside Luxembourg at some Luxembourg embassies as well as at Belgian embassies.

In **Sweden**, the ECtHR case of *Biraga and Others v. Sweden*<sup>453</sup> sets out the issues that may arise. The case concerned an Ethiopian couple and their daughter, where the woman had sought asylum in Sweden unsuccessfully and then, while still in Sweden, sought family reunification with her partner, who had a permanent residence permit. The ECtHR declared the case inadmissible on the grounds that although Swedish legislation provides for applications for family reunification exceptionally to be submitted within Sweden, if the alien can point to reasons why he or she cannot reasonably be required to travel to another country to submit an application there.<sup>454</sup> In this particular case, the Court found that “there are no elements in the case to show that before the domestic authorities the applicants have pointed to any real and concrete safety risk for the second and the third applicants to accompany the first applicant to Ethiopia” and therefore that there were “no grounds for concluding that the Migration Board ... failed to strike a fair balance between the applicants’ interests on the one hand and the State’s interest in controlling immigration on the other or that those decisions appeared at variance with Article 8 of the Convention”.<sup>455</sup>

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<sup>449</sup> *Judgment no. 96.544*, Belgium: CALL, 4 February 2013, available in Dutch at: [http://www.refworld.org/cases,BEL\\_CCE,58d912994.html](http://www.refworld.org/cases,BEL_CCE,58d912994.html).

<sup>450</sup> *Judgment no. 170.860*, Belgium: CALL, 29 June 2016, available in Dutch at: [http://www.refworld.org/cases,BEL\\_CCE,58d911914.html](http://www.refworld.org/cases,BEL_CCE,58d911914.html).

<sup>451</sup> *Judgment no. 168.363*, Belgium: CALL, 25 May 2016, available in French at: <http://www.refworld.org/docid/58593eae4.html>.

<sup>452</sup> UNHCR staff at Regional Representation for Northern Europe, Stockholm, October 2016.

<sup>453</sup> *Biraga and Others v. Sweden*, Application no. 1722/10, ECtHR, Admissibility Decision, 3 April 2012, available at: <http://www.refworld.org/cases,ECHR,58a72cee4.html>.

<sup>454</sup> Sweden: Aliens Act, Chapter 5, Section 18.

<sup>455</sup> *Biraga and Others v. Sweden*, ECtHR, 2012, above fn. 453, para. 64.

*European States requiring family members to be legally resident in the country where they are living before they can submit an application for family reunification include:*

In **Germany**, in practice the general rule is “habitual residence” – generally six months legal residence – even though the official foreign ministry guidelines (*Visumhandbuch*) are less strict.<sup>456</sup> Humanitarian exceptions may nonetheless apply. Before 2016, exceptions were made for Syrian nationals who were permitted to file their visa application at all embassies around the world. This exception has since been revoked and Syrian nationals can now generally file their application at the embassies in Turkey, Jordan, Lebanon and Egypt – except for “habitual residence” cases and other humanitarian exceptions.

In **Hungary**, family members must start the process in the country where they are legally residing – if family members are not legally residing in the country, the consul may refuse to accept the application of the family member.<sup>457</sup> Family members must go personally to a Hungarian consulate and start the process there, if it is not possible to make an application by post or electronically. According to the Hungarian authorities, in practice consular officials accept applications for family reunification without requiring residence. Imposing such a requirement in law nevertheless presents an additional and potentially insurmountable obstacle, including if family members have legal residence in a country that happens not to have Hungarian embassy/consulate.

In **Norway**, the family member of the refugee/sponsor must submit his or her application for family reunification in person to the Norwegian embassy or consulate in the country of which he or she is a citizen or at a Norwegian embassy or consulate in a country where he or she has had a legal residence permit for the previous six months.<sup>458</sup> The six-month legal residence requirement is strictly implemented.

In conclusion, positive practices regarding where family reunification applications must be submitted include:

- Permitting beneficiaries of international protection to apply for family reunification in the country of asylum, either in all cases or as an alternative to applying at an embassy or consulate, as such an approach exposes family members of beneficiaries of international protection to fewer dangers;
- At least reducing if not eliminating the number of times family members are required to approach national embassies, thus also exposing them to fewer dangers;
- Lifting any requirement applied by the country of asylum for family members to have legal residence in the country where applications must be made as far as refugees are concerned, at least in contexts where legal residence is not practically possible for them; and

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<sup>456</sup> Germany: Ministry of Foreign Affairs/Auswärtiges Amt, *Visumhandbuch*, Stand Oktober 2017, available at: <https://www.auswaertiges-amt.de/cae/servlet/contentblob/733442/publicationFile/216369/Visumhandbuch.pdf>.

<sup>457</sup> Hungary: *Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals*, Section 47(1-3).

<sup>458</sup> Norway, *Regulations of 15 October 2009 on the entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Regulations)*, above fn. 385, Section 10-2.

- Taking account of the obstacles for family members staying irregularly in transit countries, for instance, by prompt decision-making that allows any follow-up appointments needed to be held more quickly, ensuring that visas are ready if a positive decision is made so that another appointment is not necessary.

#### 4.9 Entitlement to apply for family reunification only after a period of legal residence

Some States only permit refugees and/or other beneficiaries of international protection to apply for family reunification after a certain period of residence in the country of asylum. Such practices fail to take account of the often precarious and even endangered situation of family members left behind in the country of origin or in a first country of asylum. Nor do they take into account that beneficiaries of international protection may well have spent considerable time in the asylum procedure before being recognized and have thus already left family members in an uncertain situation for some time. Imposing waiting periods exposes family members to greater vulnerability and additional threats and may well slow down integration.

In **Switzerland**, persons granted provisional admission (F-permit), including recognized refugees not granted asylum but with provisional admission, are required to wait until three years after being granted provisional admission before they can seek family reunification. Family members benefit from the same status as the person with provisional admission. The sponsor must show that they will live in a common household, that he or she has appropriate accommodation, and that the family will not depend on social assistance. Applications to join family members with provisional admission, including refugees, must be submitted within five years of the above-mentioned waiting period of three years elapsing. For children older than 12 years, the application must be submitted within one year of the three-year waiting period elapsing.<sup>459</sup> If the child turns 12 within the five-year period, the application must be submitted one year after his or her 12th birthday. If there is less than one year until the deadline expires, the original time limit of five years applies.<sup>460</sup> Applications submitted after this deadline can only be granted for “important family reasons”.<sup>461</sup> Such reasons exist where the best interests of the child can only be adequately protected through family reunification in

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<sup>459</sup> Suisse: *Loi fédérale sur les étrangers, état le 1er janvier 2017*, above fn. 193, Article 85(7); Suisse: *Ordonnance relative à l’admission, au séjour et à l’exercice d’une activité lucrative (OASA) du 24 octobre 2007 (Etat le 1er janvier 2017)*, 24 October 2007, SR 142.201, available at: <http://www.refworld.org/docid/58b937f34.html>, Article 74. B-permit refugees holding a residence permit wishing to reunite with post-flight family members must also apply within five years of either the date of the grant of the permit or the commencement of the family relationship, whichever is later (Aliens Act, Article 47 (1)).

<sup>460</sup> This situation results from a 2011 ruling of the Federal Court, concerning the interpretation of Article 47(1) Aliens Act. That Article concerns the reunion for Swiss nationals and foreign nationals with a residence permit or a permanent residence permit and not persons with provisional admission, who are covered by Article 85(7) of the Aliens Act and Article 74 of the OASA. Since Article 74 OASA provides for the same family reunification deadlines, the Court’s interpretation regarding Article 47 Aliens Act is applied to the situation of persons with provisional admission by analogy. See *X. v. Migrationsamt des Kantons St. Gallen*, 2C\_205/2011, Switzerland: Federal Court, 3 October 2011, available at: <http://www.refworld.org/docid/5a4ce0d84.html>, consideration E. 3.5.

<sup>461</sup> Suisse: *Loi fédérale sur les étrangers, état le 1er janvier 2017*, *ibid.*, above fn. 193, Article 47(4) for B-permit refugees; Suisse: *Ordonnance relative à l’admission, au séjour et à l’exercice d’une activité lucrative*, 2007, *ibid.*, above fn. 459, Article 74(4) for F-permit holders, with Article 74(5) requiring the authorities to take account of the “particular situation of refugees”.

Switzerland.<sup>462</sup> The Swiss Federal Council has reported that in practice these different requirements mean that only 30-50 applications for family reunification with persons with provisional admission are authorized annually, even though an average of 26,000 F-permits were issued each year over the five years to 2015.<sup>463</sup>

In **Turkey**, in order to reunify with a family member the beneficiary of international protection must have had a residence permit for a least one year.<sup>464</sup>

As an example of improved practice, in **Malta**, refugees have since 2017 been permitted to apply for family reunification as soon as they are recognized.<sup>465</sup> This had previously only been possible after at least 12 months of legal residence in Malta. The earlier Regulation was contrary to Article 12(2) of the Family Reunification Directive, which specifies that, while Member States may generally require lawful residence of up to two years, they “shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her”.

See also section 6.1 below outlining changes restricting family reunification for beneficiaries of subsidiary protection, including the introduction of waiting periods before family reunification can be sought notably in Austria, Denmark and Germany, as well as information regarding States where a waiting period or denial of family reunification for beneficiaries of subsidiary protection was already in place.

#### 4.10 High fees

Where States impose high fees for making family reunification applications this hampers the efforts of many refugees and beneficiaries of complementary/subsidiary protection to reunify with their families.<sup>466</sup> Beneficiaries of international protection may face particular difficulties paying these fees. They may not have had access to the labour market for lengthy periods while waiting for a decision on their status in the asylum procedure and can face difficulties accessing mainstream banking systems and even private loan schemes. In addition, their family members may themselves be refugees with restrictions on their rights to work and limited resources.

When combined with other family reunification costs (as also set out in section 5.4 below), this may thus put family members of beneficiaries of international protection in precarious, exploitative situations and even lead families to have to choose which family member to

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<sup>462</sup> Suisse: *Ordonnance relative à l'admission, au séjour et à l'exercice d'une activité lucrative*, 2007, *ibid.*, above fn. 459, Article 75.

<sup>463</sup> Switzerland: Conseil fédéral, *Admission provisoire et personnes à protéger: analyse et possibilités d'action*, 14 October 2016, available at: <http://www.refworld.org/docid/58b01ad54.html>, p. 22 and for statistics on the number of persons granted provisional admission and an F-permit each year, p. 29.

<sup>464</sup> Turkey: *Law on Foreigners and International Protection*, 2013, above fn. 431, Article 35(1).

<sup>465</sup> Malta: *Family Reunification Regulations*, Legal Notice 150 of 2007, available at: <http://www.refworld.org/docid/58c2c8fb27.html>, Article 3, now amended by Legal Notice 148 of 2017, fn. 186, Article 25.

<sup>466</sup> See, for instance, European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, 2011, above fn. 107, para. 5.3.

reunite with first, leaving other family members behind until they can gather sufficient resources. High fees may thus significantly delay or even prevent family reunification altogether.

As noted in section 2 above, Article 25 of the 1951 Convention concerning administrative assistance, may be relevant in the family reunification context. This requires States Parties to provide refugees with documents and certification “[w]hen the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse” and requires any fees applied to be “moderate”.

Two judgments, one by the ECtHR and the other by the CJEU, are relevant in this respect.

In *G.R. v. The Netherlands*,<sup>467</sup> the ECtHR addressed the question of how overly formalistic approaches to decision-making combined with high fees may affect *inter alia* enjoyment of the right to family life. While the case concerned the expulsion of the father of an Afghan family, the principles it sets out may also be relevant in the family reunification context. In its 2012 judgment, the ECtHR determined that there was an “arguable case” under Article 8 ECHR. It also found a violation of Article 13 ECHR on the grounds that “the disproportion between the administrative charge in issue and the actual income of the applicant’s family” and “the extremely formalistic attitude of the Minister – which, endorsed by the Regional Court, also deprived the applicant of access to the competent administrative tribunal – unjustifiably hindered the applicant’s use of an otherwise effective domestic remedy”.

The CJEU’s judgment in *Minister van Buitenlandse Zaken v. K. and A.* is also relevant. Although the case concerned the fees levied in relation to integration tests, the judgment stated that “in accordance with the principle of proportionality, the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult if it is not to undermine the objective of Directive 2003/86 and render it redundant”.<sup>468</sup>

For its part, the European Commission has advised:

“[Member States] are allowed to charge reasonable, proportional administrative fees for an application for family reunification and they have a limited margin of discretion in setting these charges, as long as they do not jeopardise the achievement of the objectives and the effectiveness of the Directive. The level at which fees are set must not have either the object or the effect of creating an obstacle to the exercise of the right to family reunification. ... To promote best interests of the child, the Commission encourages [Member States] to exempt applications submitted by minors from administrative fees. In case that an entry visa is required in a [Member State], the issuing conditions of such a visa should be facilitated and the visa should be granted without additional administrative fees.”<sup>469</sup>

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<sup>467</sup> *G.R. v. The Netherlands*, Application no. 22251/07, ECtHR, 10 January 2012, available at: <http://www.refworld.org/docid/4f193eac2.html>, para. 55.

<sup>468</sup> *Minister van Buitenlandse Zaken v. K. and A.*, CJEU, 2015, above fn. 131, para. 64.

<sup>469</sup> European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 169, p. 9.



Bearing in mind the particular vulnerability of beneficiaries of international protection and the challenges they face compared to other migrants wishing to reunite with family members, some States apply reduced administrative or visa fees or even waive them. They may also provide financial assistance schemes, such as interest free loans, for beneficiaries of international protection to cover the costs of family reunification.

*Among States that have either recently introduced fees for beneficiaries of international protection applying for family reunification or already do so are:*

In **Denmark**, applicants for family reunification are required to pay a fee for the processing of the family reunification application of 6,300 DKK (947 USD), per adult and first application.<sup>470</sup>

In **Finland**, refugees were required from May 2016 to pay a fee when making a first application for a resident permit for family members, when they had previously been exempt from paying a fee if the family ties already existed before the sponsor came to Finland.<sup>471</sup>

In **Norway**, fees for adults applying for family reunification for the first time are high. The fee for the processing of a first family reunification application is 8,000 NOK (1,003 USD) (except for children under 18 where there is no charge). In some countries, applications are received by an external service provider like VFS Global, which currently charges an extra service fee of 30 EUR (34 USD). This is in addition to the regular application fee.<sup>472</sup>

*Examples of other States that either waive fees for beneficiaries of international protection or provide support include:*

In **Canada**, refugees are exempt from having to pay fees, for instance, for permanent residence visas, work permit fees, and study permits.<sup>473</sup>

In **Germany**, the Ministry of Foreign Affairs, exempts Syrian nationals from costs otherwise charged for German replacement documents (travel document for foreigners) and for the “legalization” of documents.<sup>474</sup>

In **Slovenia**, legislation provides that “[w]hen authenticating family bonds”, a beneficiary of international protection “who does not understand Slovenian has the right to free translation and interpreting services for a language he understands” and that “[t]he funds for translations and interpreting services are provided by the ministry competent for internal affairs”.<sup>475</sup>

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<sup>470</sup> See New to Denmark, *Fee – User Manual*, available at: <https://www.nyidanmark.dk/en-GB/Words-and-concepts/Fælles/Fees/Fee—user-manual->

<sup>471</sup> Finnish Immigration Service, *All family members’ applications for a first residence permit subject to a fee starting from 16 May, 9 May 2016*, available at: [http://www.migri.fi/our\\_services/customer\\_bulletins/bulletins\\_family/1/0/all\\_residence\\_permit\\_applications\\_based\\_on\\_family\\_ties\\_are\\_subject\\_to\\_a\\_fee\\_starting\\_from\\_16\\_may\\_67439](http://www.migri.fi/our_services/customer_bulletins/bulletins_family/1/0/all_residence_permit_applications_based_on_family_ties_are_subject_to_a_fee_starting_from_16_may_67439).

<sup>472</sup> Information from UNHCR Regional Representation for Northern Europe, Stockholm, November 2017 .

<sup>473</sup> *Canada: Immigration and Refugee Protection Regulations (IRPR)*, above fn. 244, s. 295, 299, 300.

<sup>474</sup> Communication from UNHCR office, Berlin, December 2017.

<sup>475</sup> Slovenia: *Aliens Act*, 2011, above fn. 227, Articles 47a(4) and 47b(4).

In the **United Kingdom**, there is no charge for refugees and persons with humanitarian protection seeking to bring core family members to the UK (unlike most immigration application categories).<sup>476</sup>

#### 4.11 Lack of legal aid/support and appeal possibilities

Legislation or regulations denying access to legal aid or support in family reunification cases can present serious obstacles to the effective presentation of claims and thus to effective family reunification. Such advice and support can be critical for beneficiaries of international protection, as complex issues of fact and law must frequently be understood and presented. Lack of legal aid is especially problematic if the sponsor's command of the language of the country of asylum is limited and they do not understand the complex systems that often apply.

Similarly, it is important that there be an effective possibility to appeal against negative decisions in family reunification procedures.

Access to both legal aid and an appeal possibility are key to ensuring respect for the right to an effective remedy guaranteed under Article 13 ECHR and Article 41 of the Charter of Fundamental Rights. They are also part of the right to good administration in the application of EU law, as provided for in Article 47 of the Charter guaranteeing an "effective remedy before a tribunal" against violations of individual rights under EU law, as outlined in section 3.6 above. Article 18 of the Family Reunification Directive likewise requires Member States to ensure that "the sponsor has the right to mount a legal challenge where an application for family reunification is rejected, where a residence permit is either not renewed, or where a removal is ordered".

Further, the CJEU ruled on 13 December 2017 on the requirement for a judicial remedy in cases where a visa is denied under the Visa Code.<sup>477</sup> The Supreme Administrative Court in Poland had asked the CJEU whether Polish regulations were in conformity with EU law, since there is currently no possibility to appeal to the administrative court against a decision to deny a visa to someone seeking family reunification, who has been granted a temporary residence permit for family reunification.

In its judgment, the CJEU stated that while the EU legislature left to the Member States the task of deciding the nature and specific conditions of the remedies available to visa applicants, the requirements of the principles of "equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law" and that "a national procedural rule ... must not be such as to render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order".<sup>478</sup> The

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<sup>476</sup> Gower and McGuinness, *The UK's Refugee Family Reunion Rules: Striking the Right Balance?*, above fn. 199, pp. 3 and 6.

<sup>477</sup> Visa code EU: European Parliament, *Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, 13 July 2009 above fn. 428.

<sup>478</sup> *Soufiane El Hassani v. Minister Spraw Zagranicznych*, CJEU, Case C-403/16, 13 December 2017, available at: <http://www.refworld.org/cases/E CJ,5a4ca53b4.html>, paras. 28 and 30. For the Advocate General's Opinion, see

Court ruled that Article 47 of the Charter of Fundamental Rights requires “Member States to guarantee, at a certain stage of the proceedings, the possibility to bring the case concerning a final decision refusing a visa before a court”.<sup>479</sup> It therefore concluded that Article 32(3) of the the Visa Code, read in the light of Article 47 of the Charter,

“must be interpreted as meaning that it requires Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are a matter for the legal order of each Member State in accordance with the principles of equivalence and effectiveness. Those proceedings must, at a certain stage of the proceedings, guarantee a judicial appeal.”<sup>480</sup>

*Among States where access to legal aid and support is an issue are:*

In **Australia**, migration advice for family reunion funded through the Department of Immigration ceased in 2013, creating a need for greater access to low cost or pro bono migration advice and application assistance for people from a refugee background seeking to reunite with relatives. Existing services are limited and the cost of accessing private migration agents or lawyers is often prohibitive.<sup>481</sup>

In **Austria**, although the family reunification procedure has been subject to appeal since January 2014, there is no state-funded legal aid system available to applicants for family reunification.<sup>482</sup> The Austrian Red Cross (ARC) offers free-of-charge counselling services in this regard, including support with the filing of legal submissions and representing applicants at the appeal instance. Due to the ARC’s limited financial and personnel resources, however, all applicants for family reunification do not have access to such free-of-charge legal aid.

In **Germany**, a June 2016 judgment by the Federal Constitutional Court is relevant. In its judgment the Court overturned the decisions of lower courts denying a residence permit to the Nigerian father of three children, all three of whom had been born in Germany and lived there all their lives.<sup>483</sup> He was seeking a residence permit under the Residence Act<sup>484</sup> to be able to live with them and to marry his partner (their mother). The Court ruled that the appellant required qualified representation to be able to present complex issues of fact and law and to ensure the proper interpretation of the law, including Article 6 of the Basic Law on the

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*Soufiane El Hassani v. Minister Spraw Zagranicznych*, CJEU, Case C-403/16, Opinion of Advocate General Bobek, 7 September 2017, available at: <http://www.refworld.org/cases,ECJ,5a4ca1e44.html>.

<sup>479</sup> Ibid., para. 41.

<sup>480</sup> Ibid.

<sup>481</sup> RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, p. 4.

<sup>482</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 13.

<sup>483</sup> 2 BvR 748/13, Germany: Federal Constitutional Court, 20 June 2016, available in German at: [http://www.refworld.org/cases,DEU\\_BUNDESVERFASS,58b43ccb4.html](http://www.refworld.org/cases,DEU_BUNDESVERFASS,58b43ccb4.html). See also <http://www.asyl.net/rechtsprechungsdatenbank/suchergebnis/artikel/55751.html>.

<sup>484</sup> Germany: *Residence Act*, 2004, above fn. 183, Article 36, which permits the parents of a minor foreigner who holds a residence permit to be granted a residence permit to join the foreigner, if this is needed to avoid particular hardship.

protection of the family.<sup>485</sup> It also found that the denial of legal aid in such cases on the basis of the likelihood of a successful outcome to the case violated the right to effective and equal protection of the law as protected by Article 19(4) of the Basic Law.

In **Switzerland**, although applicants for family reunification may appeal the rejection of their case, legal aid is not generally provided. Even in cantons where legal aid services are available, these services often do not take such cases due to lack of resources and/or lack of awareness. Thus, very few free legal aid services take family reunion cases and most sponsors cannot afford a lawyer.

In the **United Kingdom**, family reunification applications ceased to be eligible for legal aid from April 2013 except in exceptional circumstances.<sup>486</sup> The government at the time took the view that such applications were straightforward and were an immigration rather than an asylum matter.<sup>487</sup> Others argued that they are often complex and require legal advice, while research by the British Red Cross showed that “complexities arise throughout the application process, in immigration rules and guidance, when compiling documentation, and in preparing and submitting an application, ... leaving family members in highly dangerous situations, [which] may also be drastically affecting the wellbeing and chances of successful integration of sponsors”.<sup>488</sup>

In a 2014 judgment concerning several decisions to deny legal aid through exceptional case funding (ECF), the Court of Appeal dismissed the government’s appeal against a High Court ruling holding that the Director of Legal Casework had been wrong to deny legal assistance. One of these decisions concerned a refugee woman from Iran seeking to bring her husband and 16-year-old son to the United Kingdom. The Court of Appeal determined in her case:

“We accept that family reunion is generally a matter of vital importance for refugees ... The particular circumstances of B, her husband and her son gave rise to issues of particular complexity. ... B was wholly unable to represent herself or her other family members. ... Without legal advice and assistance it was impossible for her to have any effective involvement in the decision-making process. The Director ought therefore to have concluded that failure to provide legal aid would amount to a breach of her

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<sup>485</sup> *Basic Law for the Federal Republic of Germany* (as amended July 2002), 23 May 1949, available at: <http://www.refworld.org/docid/3ae6b5a90.html>, Article 6.

<sup>486</sup> UK: *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, 1 May 2012, available at: <http://www.refworld.org/cases.UKHCL,58a6fbe94.html>.

<sup>487</sup> Not least, amendments to Home Office guidance require caseworkers to consider exceptional circumstances or compelling factors outside the Immigration Rules, necessitating applicants to set out their circumstances and show that a failure to consider factors outside the rules would amount to a breach of Article 8 ECHR. See UK Home Office, *Family Reunion: for refugees and those with humanitarian protection*, v. 2.0, July 2016, available at: <http://www.refworld.org/docid/58b014c94.html>, p. 19. See also UK Refugee Children’s Consortium, “Briefing for Westminster Hall Debate on Refugee Family Reunion”, 29 November 2016, available at: <http://refugeechildrensconsortium.org.uk/refugee-family-reunion-wh/>, paras. 14-16.

<sup>488</sup> British Red Cross, *Not So Straightforward: The need for qualified legal support in refugee family reunion*, 2015, above fn. 339, p. 69-70.

Convention [ECHR] rights. This alternative basis for [the High Court's] order directing the grant of legal aid was correct."<sup>489</sup>

The High Court found in another case in 2015 that until mid-2014 the success rate in grants of non-inquest exceptional case funding (ECF) amounted to a little over 1 per cent, which it termed "a very worrying figure". While the success rate had increased to about 13 per cent, this remained "a very low figure". The judgment also found:

"[T]he scheme as operated is not providing the safety net promised by Ministers and ... does not ensure that applicants' human rights are not breached or are not likely to be breached. There is a further defect in the failure to have any right of appeal to a judicial body where an individual who lacks capacity will otherwise be unable to access a court or tribunal."<sup>490</sup>

The Court of Appeal, while agreeing with many of the High Court's criticisms, nevertheless overturned the decision, finding that ministers may use secondary legislation to withhold legal aid from particular groups of people on cost-saving grounds alone, regardless of need and that the scheme was thus not unlawful.<sup>491</sup>

On a slightly different issue concerning the lawfulness of a proposal to introduce a residence test as one of the criterion to test for civil legal aid, the UK Supreme Court ruled in 2016 to do so was to introduce "a wholly different sort of criterion" and that it was unlawful.<sup>492</sup>

*With regard to an effective remedy:*

In the **United Kingdom**, a refusal of family reunion attracts a full right of appeal. Yet, a review of practice showed significant delays in obtaining a hearing, leading to a situation where it became simpler to reapply:

"Between 2014 and 2015 the number of appeals declined sharply. The likely reason is that reapplication, which is gratis, is much quicker (appeals were taking on average

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<sup>489</sup> *Gudanaiciene & Ors, R (on the application of) v The Director of Legal Aid Casework & Ors*, [2014] EWCA Civ 1622, UK: Court of Appeal (England and Wales), 15 December 2014, available at: <http://www.refworld.org/docid/54a127764.html>, para. 172. The judgment provides useful analysis of ECtHR and CJEU jurisprudence regarding access to legal aid.

<sup>490</sup> *I.S. (by the Official Solicitor as Litigation Friend) v. The Director of Legal Aid Casework & Another*, [2015] EWHC 1965 (Admin), UK: High Court, 15 July 2015, available at: [http://www.refworld.org/cases,GBR\\_HC\\_OB,58a705e94.html](http://www.refworld.org/cases,GBR_HC_OB,58a705e94.html), para. 107. See also, Just Rights, *Justice for the Young, A Snapshot*, February 2015, available at: <http://www.justrights.org.uk/sites/default/files/Justice%20for%20young%20a%20snapshot.pdf>.

<sup>491</sup> *The Director of Legal Casework and the Lord Chancellor v. I.S. (a protected party by his litigation friend the Official Solicitor)*, [2016] EWCA Civ 464, UK: Court of Appeal (England and Wales), 20 May 2016, available at: [http://www.refworld.org/cases,GBR\\_CA\\_CIV,58a70abf4.html](http://www.refworld.org/cases,GBR_CA_CIV,58a70abf4.html).

<sup>492</sup> *R (on the application of The Public Law Project) (Appellant) v. Lord Chancellor (Respondent)*, UK: Supreme Court, 13 July 2016, available at: [http://www.refworld.org/cases,UK\\_SC,58a700484.html](http://www.refworld.org/cases,UK_SC,58a700484.html), thus overturning the lower court judgment in *Public Law Project v. The Lord Chancellor*, [2015] EWCA Civ 1193, UK: Court of Appeal (England and Wales), 25 November 2015, available at: [http://www.refworld.org/cases,GBR\\_CA\\_CIV,58a7098a0.html](http://www.refworld.org/cases,GBR_CA_CIV,58a7098a0.html).

between nine and 11 months ... to be heard). Over the same period, there was a noticeable rise in allowed appeal and decision overturned rates.”<sup>493</sup>

#### 4.12 Status granted upon family reunification

Where family members joining beneficiaries of international protection are able to enjoy the same status, this allows them access to the same rights and support as their sponsor. In some States, however, reuniting family members do not have access to the same residency status and rights as their sponsors, while others have reduced the period for which a residence permit is granted. Where family members are only granted temporary residence permits, their access to integration support can be severely restricted.

Member States of UNHCR’s Executive Committee recommend:

“In order to promote the rapid integration of refugee families in the country of settlement, joining close family members should in principle be granted the same legal status and facilities as the ... family [member] who has been formally recognized as a refugee.”<sup>494</sup>

With regard to Council of Europe States, the Committee of Ministers has similarly recommended that “[a]fter admission for family reunification, the family member should be granted an establishment permit, a renewable residence permit of the same duration as that held by the principal or a renewable residence permit”.<sup>495</sup>

The Family Reunification Directive states in Article 13(1): “As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member or members. In that regard, the Member State concerned shall grant such persons every facility for obtaining the requisite visas.”

Where the status of family members is dependent on that of the sponsor or where the path to an independent status is a long one, this can result in situations of dependency between family members, which may create problems for the family in particular for victims of domestic violence or persons at risk of such violence. UNHCR therefore recommends that the residence of the family member should be independent of those of the sponsor.<sup>496</sup>

*In terms of State practice regarding the status granted to family members upon reunification:*

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<sup>493</sup> UK: Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, above fn. 440, para. 7.32.

<sup>494</sup> UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 24, para. 8.

<sup>495</sup> Committee of Ministers, *Recommendation on the legal status of persons admitted for family reunification*, Rec(2002)4, 26 March 2002, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e25d0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e25d0).

<sup>496</sup> UNHCR, *Refugee Family Reunification. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, p. 18. See also section 7.7 below on the status of family members in cases of divorce, separation or death.

In **Bulgaria**, once a visa has been issued and the family members arrive in Bulgaria, in the vast majority of cases family members apply for international protection and are granted the same status, as provided for in the Law on Asylum and Refugees, which stipulates that family members of the alien who has been granted refugee or humanitarian status shall also be considered refugees, insofar as this is compatible with their personal status and the exclusion clauses of the 1951 Convention do not apply.<sup>497</sup> Otherwise, the Law on Foreigners provides for family members to be granted long-term residence permit, valid for one year and renewable for the duration of the period for which the beneficiary of international protection is entitled to reside in Bulgaria.<sup>498</sup>

In **Denmark**, legislative changes have shortened residence permits from five years to two and restricted the conditions for obtaining the permanent right to stay.<sup>499</sup>

In **Luxembourg**, the family members admitted in the context of family reunification are only accorded international protection if they qualify for it in their own right and are otherwise granted legal stay, to which fewer rights are attached. A 2016 judgment of the Administrative Tribunal, for instance, upheld a decision to deny refugee status/subsidiary protection to a wife and adult son who had been admitted to and given legal residence in Luxembourg in the context of a family reunification with their husband/father, a recognized refugee. It ruled that the appellants had manifestly not raised issues qualifying them for international protection and that the fact that the husband/father had been granted international protection did not mean family members were automatically entitled to the same status.<sup>500</sup>

In **Poland**, family members joining beneficiaries of international protection under the family reunification procedure are only granted temporary residence permits and need to re-apply for a residence permit after two years. At this point, they are legally treated as ordinary third country nationals and must therefore fulfil all the criteria required for regular migrants. Within the scope of family unification procedures (not necessarily leading to protection), family members usually obtain a temporary residence permit. Reunited family members' only option for a permit that is independent of their sponsor is to apply for a permanent residence permit after five years of legal and continuous stay, for which they must fulfil general requirements regarding economic resources, command of Polish, and level of integration.<sup>501</sup>

**Slovakia** restricts the validity of the residence permit (and refugee status) granted to family members joining a refugee to three years, after which a new application is required. Only if the conditions for refugee status still exist is protection granted for an indefinite time and

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<sup>497</sup> Bulgaria: *Law on Asylum and Refugees*, 2002, above fn. 201, Articles 8(9) and 9(6).

<sup>498</sup> Bulgaria: *Foreigners in the Republic of Bulgaria Act*, 1998, above fn. 201, Article 25b(2).

<sup>499</sup> See e.g. L. Dearden, "Denmark refugee law: Concern over 'inhumane' family reunification delays that could cause more deaths", *The Independent*, 27 January 2016, available at: <http://www.independent.co.uk/news/world/europe/denmark-refugee-law-concern-over-inhumane-family-reunification-delays-that-could-cause-more-deaths-a6836511.html>.

<sup>500</sup> *Madame et consorts (Afghanistan) c. des décisions du ministre de l'Immigration et de l'Asile en matière de protection internationale*, N° 38015 du rôle, Luxembourg: Tribunal administratif, 9 June 2016, available at: [http://www.refworld.org/cases/LUX\\_TA\\_58b6e2704.html](http://www.refworld.org/cases/LUX_TA_58b6e2704.html).

<sup>501</sup> UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 77. This is still the case according to communication from the UNHCR office in Warsaw, October 2017.

independently of the sponsor. Family members of beneficiaries of subsidiary protection only receive a one-year residence permit and are not subsequently able to obtain an autonomous and indefinite permit.<sup>502</sup>

In the **United Kingdom**, joining family members do not receive the same status as their sponsor, but rather “leave in line”, that is, leave to remain to expire at the same time as their sponsor. If the sponsor has limited leave, the family members all apply for settlement at the same time. This creates difficulties for estranged partners.<sup>503</sup>

#### 4.13 Lack of implementing regulations

A lack of regulations or procedures regarding family reunification for beneficiaries of international protection also presents problems to the effective realization of the right to family life and family unity.

In **Spain**, for instance, legislation approved in 2009 provides that refugees and beneficiaries of subsidiary protection applying for family reunification (as opposed to those seeking to derive status by extension from the sponsor whether from within Spain or abroad) shall not be obliged to comply with the requirements established in the current regulations on immigration and immigration, but will rather be subject to specific rules defined through a Regulation.<sup>504</sup> Since, then, however, no Regulation has been issued with the result that applications for family reunification have been on hold since October 2009. While family members are generally able to derive refugee or subsidiary protection status by extension from the protection holder, this is not possible for couples whose marriage has been entered into after the sponsor entered the country of asylum or for family members who hold a different nationality to that of the beneficiary of international protection, as they are unable to derive status from him or her. These individuals are thus prevented from exercising their right to maintain their family unity.<sup>505</sup>

In the **Republic of Korea**, while legislation requires the Minister of Justice to permit the entry into the country of the spouse and minor children of a recognized refugee,<sup>506</sup> no implementing regulations or policies are actually in place to permit such reunification to take place. This means that, in the absence of procedures or regulations or instructions to Korean missions abroad on issuing visas to family members of recognized refugees, the latter do not issue such visas. Family members of refugees seeking to join their family in Korea are then only able to

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<sup>502</sup> Ibid., p. 77.

<sup>503</sup> Refugee Council, *Country Report: United Kingdom*, AIDA, 2016, available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_uk\\_2016update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_uk_2016update.pdf), p. 96.

<sup>504</sup> España: *Ley No. 12/2009 reguladora del derecho de asilo y de la protección subsidiaria*, 2009, above fn. 230, Articles 40 (concerning the extension of the right of asylum or subsidiary protection to family members) and 41 (concerning family reunification). The extension derivative status to family members is described in the text at fn. 230 above.

<sup>505</sup> ACCEM, *Country Report: Spain*, AIDA, February 2017, available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_es\\_2016update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_es_2016update.pdf), p. 63.

<sup>506</sup> Republic of Korea: *Law No. 11298 of 2012, Refugee Act*, 1 July 2013, available at: <http://www.refworld.org/docid/4fd5cd5a2.html>, Article 37.



do so if they manage to find some other way of reaching a Korean port of entry, thus exposing them to an uncertain and possibly irregular means of arrival.

In **Japan**, the Immigration Control and Refugee Recognition Act<sup>507</sup> does not provide for family reunification of refugees, although regulations implementing the Act permit refugees to apply for a Certificate of Eligibility of Residency Status on behalf of family members. Depending on their residency status, refugees may not be eligible to apply on behalf of their family, in which case the spouse and/or children may need to apply for mid- to long-term visa at a Japanese embassy.

## 5 PRACTICAL OBSTACLES TO FAMILY REUNIFICATION

Refugees and beneficiaries of complementary/subsidiary protection also face many practical obstacles when they seek to realize their right to family life and family unity.

As the European Commission has noted:

“Refugees encounter practical difficulties linked to their specific situation which are of a different nature than those faced by other third country nationals (e.g.: problems maintaining the contact with the family left in the country of origin). In addition, refugees may have spent lengthy periods in exile or on the territory of a Member State waiting for the outcome of the asylum procedure and may have founded a family during this time. Refugees may also be unaware of family members who are still alive or unable to produce information regarding their location or to provide the necessary documentation for an application for reunification within a short period after receiving a protection status. Their family members may have undergone similar situations of conflict, trauma and extreme hardship as the refugees have suffered themselves.”<sup>508</sup>

UNHCR has likewise observed that throughout Europe (and indeed elsewhere) there are “many practical obstacles in the family reunification process leading to prolonged separation, significant procedural costs and no realistic possibility of success”.<sup>509</sup> Others have cited difficulties tracing family members, prolonged delays in processing of applications, the limited availability of affordable migration advice, and long, costly and complicated procedures.<sup>510</sup> Tracing family members represents a key practical challenge that applies not only when it comes to family reunification but at all stages of displacement, as outlined in section 9 below.

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<sup>507</sup> *Japan: Immigration Control and Refugee Recognition Act of 1951 (2006)*, Cabinet Order No. 319 of 1951, 1951, available at: <http://www.refworld.org/docid/3ae6b5754.html>.

<sup>508</sup> European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, 2011, above fn. 107, p. 6.

<sup>509</sup> UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, pp. 3-4.

<sup>510</sup> For more on these obstacles, see ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171; RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, p. 1; D. Van Ossel, “Réfugiés: trop d’obstacles au regroupement familial”, RTBF, 13 March 2015, available at: [https://www.rtbef.be/info/societe/detail\\_refugies-trop-d-obstacles-au-regroupement-familial?id=8930456](https://www.rtbef.be/info/societe/detail_refugies-trop-d-obstacles-au-regroupement-familial?id=8930456).

The subsections below examine the following practical obstacles encountered:

- Lack of timely information on family reunification
- Difficulties accessing embassies, which may expose them to danger and result in long, difficult and expensive journeys including to other countries
- Difficulties obtaining visas and travel documentation
- Significant accumulated costs of procedures and travel
- Administrative delays and obstacles that mean the process can take years

For more on legal obstacles to family reunification see section 4 above and on the particular situation of persons with complementary/subsidiary protection see section 6 below.

### **5.1 Lack of timely information on family reunification**

As part of the State's positive obligations to enable respect for the right of beneficiaries of international protection to family life and family unity, the authorities in the country of asylum have a responsibility to ensure that beneficiaries are promptly informed as soon as they are granted protection in a language and manner that they can understand of the terms under which they may apply for family reunification, the procedures to be followed, and any deadlines that may apply. Articles 13 and 17 of the CRC also oblige States to respect the right of children to receive information from various national and international sources regardless of frontiers.

Nonetheless, ECRE and the Red Cross have identified "[t]he complexity of the procedure and the lack of clear, available information" as "key factors that can hinder beneficiaries of international protection from exercising their family reunion rights". In their 2014 report they found:

"Access to clear and reliable information throughout the procedure seems particularly problematic in several [EU] Member States. In some states, information is simply unavailable. In others, such information is provided in a language which the sponsor cannot understand. Some practitioners also report inconsistencies between the information provided in Europe and in embassies based in third countries. Furthermore, legislative changes have been introduced in most Member States over the past years and criteria for eligibility and favourable conditions are not clear to applicants nor to lawyers. As a consequence, it has become increasingly difficult to understand and interpret the rules governing family reunification."<sup>511</sup>

Other problems include the absence of information in writing, a lack of necessary detail or alternatively excessively complex presentation of information, or the fact that information is only given upon request and may not be specific to the situation of refugees.<sup>512</sup> This is of particular concern where deadlines are imposed within which beneficiaries must apply to

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<sup>511</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 13. See also FRA, *Thematic focus: Family tracing and family reunification*, 2016, above fn. 375, p. 14.

<sup>512</sup> UNHCR's *Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, p. 11.

benefit from more favourable conditions, since failure to obtain information promptly may deny them the possibility of reunification under those conditions.

*In terms of State practice regarding provision of clear, timely and accessible information on family reunification:*

Some national authorities provide information that has been adapted to protection holders regarding their rights to family reunification, as for instance in **France, Ireland or Sweden**,<sup>513</sup> although this is sometimes quite general. In **Belgium**, the Commissioner General for Refugees and Stateless Persons has systematically included a leaflet on family reunification in each positive decision since September 2017, while the federal reception agency Fedasil also provides information<sup>514</sup>. In **Germany**, the Federal Office for Migration and Refugees (BAMF) always attaches a letter with the most important rights, including on family reunification and relevant timeframes, when communicating decisions.

Information may, however, not be particularly well adapted to beneficiaries of international protection, as in **Finland**.<sup>515</sup> In **Luxembourg**, the authorities do not systematically inform beneficiaries of international protection about their right to family reunification when they are granted international protection, although all asylum-seekers receive a general information brochure when they seek asylum which includes information about family reunification. NGOs find that they therefore need to provide additional information, as that provided is not sufficient. In **Spain**, both the Interior Ministry and the Ministry of Employment and Social Security provide official information, but this is quite general, only available in Spanish and often uses complex language.<sup>516</sup>

The provision of information may also fall to supporting NGOs working to make such information accessible, as in **Belgium, Denmark, Germany, Hungary, Ireland, and Poland**.<sup>517</sup>

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<sup>513</sup> See respectively, OFPRA Family Reunification Leaflet, above fn. 182; Germany: Foreign Office, Information on family reunification for Syrian beneficiaries of international protection, available in German, English and Arabic at: [http://www.konsularinfo.diplo.de/Vertretung/konsularinfo/de/08\\_Informationen/Informationen.html](http://www.konsularinfo.diplo.de/Vertretung/konsularinfo/de/08_Informationen/Informationen.html); Irish Naturalisation and Immigration Service, *Family Reunification FAQ*, 30 December 2016, available at: [http://www.inis.gov.ie/en/INIS/Pages/Family\\_Reunification\\_Information\\_Leaflet](http://www.inis.gov.ie/en/INIS/Pages/Family_Reunification_Information_Leaflet); Swedish Migration Agency, *Residence permit to move to a spouse, registered partner or common law spouse in Sweden*, available in four languages at: <https://www.migrationsverket.se/English/Private-individuals/Moving-to-someone-in-Sweden/Spouse-registered-partner-or-common-law-spouse.html>.

<sup>514</sup> Belgium: Commissioner-General for Refugees and Stateless Persons, *You are Recognised as a Refugee in Belgium: Your Rights and Obligations*, November 2016, available in French, Dutch and English at: <http://www.cgra.be/fr/publications> with a section on family reunification. Communication from UNHCR Brussels, October 2017.

<sup>515</sup> The Finnish Immigration Service provides information in Finnish, Swedish and English at: <http://www.migri.fi/moving-to-finland-to-be-with-a-family-member/for-the-sponsor>.

<sup>516</sup> Communication from UNHCR office, Madrid, Spain, October 2017.

<sup>517</sup> See respectively, Belgian Refugee Council, *Family Reunification with Beneficiaries of International Protection in Belgium*, June 2014, available in three languages at: <http://www.cbar-bchv.be/LinkClick.aspx?fileticket=UqILgfySTO8%3d&tabid=106&mid=566&language=nl-NL>; Refugees Welcome, *Family Reunification for Refugees*, November 2016, available in five languages at: <http://refugeeswelcome.dk/advice/leaflets-and-guides/>; German Red Cross Tracing Service, information on family reunification for refugees, financed by the German government, see generally: <https://www.drk.de/hilfe-in-deutschland/suchdienst/> and also <https://familie.asyl.net/start/>; Hungarian Association for Migrants and

In **Switzerland** there is no clear pattern how information is provided, as sometimes it may be lacking and at others the information provided may be excessively complex.

UNHCR is also increasingly engaged in many countries in providing information and support, both directly and in partnership with others.<sup>518</sup>

Once an application for family reunification has been submitted, there may also be limited information on progress regarding the application.

In **Australia**, for instance, limited or lacking information communicated to applicants about the reasons for these delays or the progress of their applications has been reported.<sup>519</sup> The ECtHR has also found that factors including the lack of timely information provided to two appellants in **France** about the process of their application for family reunification had impaired their effective participation in the process.<sup>520</sup>

## 5.2 Difficulties accessing embassies

Family members of refugees often face challenges accessing embassies or consulates, representing another practical obstacle to family reunification. Where the family of a refugee is still in his or her country of origin, approaching a foreign embassy may sometimes pose a risk to their safety, in particular where the regime may be a possible source of persecution and/or the security situation is unstable. Family members may need to travel to a neighbouring country, sometimes by irregular means, to approach an embassy or consulate if there is no functioning embassy in country. The situation is exacerbated where States require family reunification applications to be submitted outside the country of asylum, as outlined in section 4.8 above.

In Syria, for instance, Syrians cannot submit an application at embassies in country due to the ongoing conflict and must travel to neighbouring countries. Generally, however, those countries implement a restrictive visa policy for Syrian nationals seeking to enter. In Turkey, visas are now required for Syrians seeking to enter to approach embassies and families may find themselves stuck at borders, unable to make long-awaited appointments. Lebanon does

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Hungarian Helsinki Committee, *Handbook on the Family Reunification Procedure*, 2014, available in several languages, including English, Arabic, Dari and Pashtu at: <http://menedek.hu/hirek/kezikonyv-menekultek-es-oltalmazottak-csaladegyesitesi-eljarasarol>; Irish Refugee Council at: <http://www.irishrefugeecouncil.ie/information-and-referral-service/family-reunification>; NASC, available at: <http://www.nascireland.org/campaigns-for-change/family-reunification/>; Immigrant Council, available at: <https://www.immigrantcouncil.ie/rights/family-reunification>; Citizens Information, available at: [http://www.citizensinformation.ie/en/moving\\_country/asylum\\_seekers\\_and\\_refugees/refugee\\_status\\_and\\_leave\\_to\\_remain/family\\_reunification\\_for\\_refugees\\_in\\_ireland.html](http://www.citizensinformation.ie/en/moving_country/asylum_seekers_and_refugees/refugee_status_and_leave_to_remain/family_reunification_for_refugees_in_ireland.html); Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187.

<sup>518</sup> See e.g. the information provided regarding Belgium at: <http://www.unhcr.be/fr/medias/communiqués-de-presse/artikel/afc40d3d925ea3b441cfff96d5bdf313/-9cb90c22b8.html>.

<sup>519</sup> RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, pp. 2 and 3.

<sup>520</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, para. 77, outlining the process that was involved including delays in providing information to the applicant; *Mugenzi c. France*, ECtHR, 2014, above fn. 85, para. 60, indicating the tardy provision of information prevented the applicant from effective participation in the process.

allow Syrians to enter if they have proof of an appointment with a foreign embassy for visa application purposes. Cross-border movements between Syria and Lebanon in relation to the processing of visa applications are therefore regular and quite common.

Family members of refugees are often themselves refugees outside their country of origin and travelling to an embassy may be difficult or impossible. Where refugee camps are remote and/or there are no embassies in the country of asylum, family members may have to travel long distances, sometimes to another country and sometimes by irregular means, to reach an embassy. Minors without legal guardians, persons with disabilities and older persons may not be able to travel at all, even though States have additional obligations towards them, for instance, under the CRC and Convention on the Rights of Persons with Disabilities.<sup>521</sup> As ECRE and the Red Cross have reported:

“Where there is no embassy in the family’s country of origin or of first asylum, the family will often have to first apply for a visitor visa to enter the country in which the closest embassy is located. Furthermore, even if the visa is issued, it may not be valid to cover the entire length of the process, which forces people to make several visa applications. The journey from their habitual place of residence is often long and expensive, and sometimes also dangerous.”<sup>522</sup>

One example of the difficulties that can be encountered concerns family members from Eritrea in Ethiopia who may be instructed to approach an Eritrean embassy to apply for a passport to prove their identity and/or enable travel, but this can put them at risk.<sup>523</sup> While UNHCR supports the issue of a pass to permit refugees registered with UNHCR to travel to the relevant embassy in Addis Ababa, this does not help Eritreans, since there is no Eritrean embassy in Ethiopia. Without travel documents they are unable to cross the border legally to Kenya or Sudan to approach the Eritrean embassies there and may as a result have no way of obtaining an Eritrean passport.

Moreover, many countries require applicants for family reunification to visit the embassy at least twice: first for the application/interview and second for receiving the visa in their passport/or collecting their passport. The lapse of time between visits may not be known and may therefore require more than one journey and stay, including in a foreign country. As ECRE and the Red Cross have observed:

“Most embassies require the physical presence of each family member at different stages of the submission, whether lodging the application, for the interview with the authorities, DNA testing, notification of the decision or visa application. This generates a range of obstacles for family members, as accessing the competent embassy can be a real uphill battle.”<sup>524</sup>

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<sup>521</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, available at: <http://www.refworld.org/docid/4680cd212.html>.

<sup>522</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 21

<sup>523</sup> See e.g. UN Human Rights Council, *Situation of Human Rights in Eritrea: Resolution adopted by the Human Rights Council*, A/HRC/RES/32/24, 15 July 2016, available at: <http://www.refworld.org/docid/57e3cc394.html>, p. 2, noting “with grave concern the continued use by the Government of Eritrea of arbitrary arrest and detention, ... of persons suspected of ... having a family member who has fled, inability to produce identity documents ...”.

<sup>524</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 21.

The situation can be particularly problematic in the case of States with limited diplomatic or consular representation. This can often be the case in countries in conflict, such as Syria or Yemen, from which many refugees come. The challenges are compounded where States require legal residence in the country where the application is submitted and/or where States require applications for family reunification to be submitted by the family member at an embassy in their country of origin or residence, as discussed in section 4.8 above.

There can also be problems where the territorial competency of a given consular service is disputed, requiring the applicants to travel back and forth among various locations multiple times with no consideration of the ordeal faced by family members and the financial burden experienced. For instance, the pregnant wife of one sponsor had to travel to the embassy in Tehran, Iran, and New Delhi, India, due to conflicting information being provided regarding the competencies of both embassies.<sup>525</sup>

Different approaches and practices among different embassies of the same country can also raise concerns regarding the fairness of the process. Consulates and embassies may impose certain requirements on family members that may not be compatible national or regional legislation. There can be a lack of transparency in how embassies and consulates interpret and apply family reunification rules, as well as misinformation and requests for documents, which are not in fact necessary.<sup>526</sup>

Where embassies receive many applications for family reunification and are only able to give appointments in several months' time, this can prevent refugee family members from being able to benefit from exemption from the obligation to meet income, accommodation, and health insurance requirements applied for a limited time in some States, thus effectively erecting additional hurdles for families.

One example of positive practice to assist individuals with a legal right to family reunification to overcome practical challenges of the visa procedure concerns the Family Assistance Programme (FAP). It is funded by the **German** Federal Foreign Office and operated by the International Organization for Migration (IOM) to facilitate the reunification of vulnerable families who have fled the conflicts in Syria and Iraq with family members who are recognized refugees in Germany. The programme operates at five locations in Turkey, Lebanon and Iraq and provides in-person and remote assistance to vulnerable families to inform them about visa requirements for family reunification and undertakes checks on their application to ensure they are complete. The programme provides German Consular offices with administrative support, appointment rescheduling and enhanced processing capacity, since IOM provides advice to applicants and collects visa applications and biometric enrollments on their behalf.<sup>527</sup> Since its inauguration in July 2016 the programme has assisted over 80,000 people in person and over 108,000 people remotely.

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<sup>525</sup> UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 18.

<sup>526</sup> *Ibid.*, p. 22.

<sup>527</sup> IOM, *IOM's Family Assistance Programme*, available at: [http://germany.iom.int/sites/default/files/FAP/FAP\\_Infosheet\\_ENGLISH\\_2017-04-04.pdf](http://germany.iom.int/sites/default/files/FAP/FAP_Infosheet_ENGLISH_2017-04-04.pdf).

Similar initiatives by other States to provide services to family-members of refugees of Syrians and for family members in other countries of first asylum in other regions, such as Ethiopia, Sudan or Kenya, would contribute to prompt and smoother processing of applications.

Other measures that might help alleviate these problems include:

- Permitting applications to be submitted by the sponsor in the country of asylum (as mentioned in section 4.8 above);
- Waiving a requirement for the family member to confirm the application at an embassy;
- Collaborating with other States in the same region to accept applications in other embassies, as for instance happens between **Belgium** and **Luxembourg**, or extending such collaboration;
- Showing flexibility regarding appointments at missions when individuals miss their appointment because of difficulties crossing borders or reaching the mission (as may be the case e.g. between Syria/Jordan and Syria/Turkey);
- Reducing the number of times family members are required to come to embassies; and
- Strengthening efforts to ensure appointments are made closer together so as to reduce the number of journeys required.<sup>528</sup>

Especially bearing in mind that women and children represent the majority of family members seeking reunification, such measures would be particularly important for more vulnerable groups, such as children, pregnant women, older people, people with disabilities or health conditions. They could reduce the number of journeys and the costs and dangers associated with them.

*As examples of State practice regarding difficulties approaching embassies:*

In **Belgium**, as one instance of the dangers to which some family members may be exposed, a Syrian woman and her children travelled to the Belgian embassy in Ankara, Turkey, to make a visa application for family reunification with her husband in Belgium. They were arrested at the border, and her brother and brother-in-law who had travelled with them were killed. The woman and children were detained for several days, were ransomed, and had to return to Syria.<sup>529</sup>

The closure of the embassy of **Finland** in Islamabad, Pakistan, in 2012 has meant that Afghan nationals residing in Pakistan have to apply for family reunification at the embassy of Finland in New Delhi, India.<sup>530</sup> Since Afghans living in Pakistan are generally undocumented, they first have to travel to Kabul to apply for a visa to India. India normally grants a visa for one month, but it can be extended to an additional month. After submitting the application,

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<sup>528</sup> Drawn in part from UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, pp. 11-12; UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 20; ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 21.

<sup>529</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 22.

<sup>530</sup> See <http://www.finlandpakistan.org/public/default.aspx?nodeid=41592&contentlan=2&culture=en-US>.

families must return to Afghanistan to wait for the invitation to an interview at the embassy, following which they may still be required to come back for DNA testing.<sup>531</sup>

With regard to **the Netherlands**, family members often have to travel long distances to reach a Dutch embassy for DNA testing or interviews and then have to stay there for a long time. They may incur additional costs if they themselves have had to flee the country or if they have stayed illegally in a neighbouring country and then try to leave by legal means. For example, some Somali family members had to pay up to US\$450 per family member as a penalty for staying illegally in Ethiopia.<sup>532</sup>

With regard to **Sweden** and Syrian nationals seeking family reunification, the embassies in the region that process family reunification cases are limited to embassies/consulates in Turkey, Jordan, United Arab Emirates, Egypt, Saudi Arabia or Sudan.<sup>533</sup> Yet Syrian nationals require a visa to enter these countries, unless they enter Turkey directly by land, making it extremely difficult if not impossible to approach any of the above embassies.

In the **United Kingdom**, an investigation by the Independent Chief Inspector of Borders and Immigration found that in 69 (36 per cent) of the 181 applications sampled, the applicant had had to cross an international border to travel to the Visa Application Centre (VAC). Of these 69 cases, 28 were reapplications. These were mostly Syrian and Iranian nationals applying in Amman and Istanbul, and one Somali applicant who had travelled to the VAC in Kampala in order to submit their family reunion application.<sup>534</sup> In addition, the British Red Cross has reported cases where applicants were refused access to embassies despite having pre-arranged appointment times.<sup>535</sup>

### 5.3 Difficulties obtaining visas and travel documentation

Once an application for family reunification has been accepted, obtaining travel documents for the actual journey may represent a further obstacle to family reunification. As UNHCR has reported:

“Obtaining travel documents and visas may be problematic both for family members who have stayed behind in the country of origin as well as for family members who may themselves be refugees. ... In practice the difficulty in obtaining visas is one of the main obstacles to family reunification for refugees, or at the least, this leads to significant delays in the family reunification process.”<sup>536</sup>

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<sup>531</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 21.

<sup>532</sup> *Ibid.*, p. 21.

<sup>533</sup> Swedish Migration Agency, *If you are a Syrian citizen, you can now apply for family reunification at the Swedish embassy in Khartoum*, 27 January 2017, and generally: <https://www.migrationsverket.se/English/Private-individuals/Moving-to-someone-in-Sweden.html>.

<sup>534</sup> UK: Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, above fn. 440, p. 51.

<sup>535</sup> British Red Cross, *Not So Straightforward: The need for qualified legal support in refugee family reunion*, 2015, above fn. 339, p. 56.

<sup>536</sup> UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, pp. 14-15.



This creates particular difficulties for refugees from conflict zones, such as Syria, and/or from countries without fully functioning administrations, such as Somalia and Afghanistan. Conflict may prevent family members from renewing travel documents, while identity and travel documents from Somalia and Afghanistan are not generally accepted by other States.

The HRC case of *El Dernawi v. Libya* illustrates the challenges that may be faced, as the wife and children of a Libyan refugee recognized in Switzerland had been unable to leave Libya as the authorities there had confiscated the passport of the mother on whose passport the children were travelling. The HRC found that this action “amounted to a definitive, and sole, barrier to the family being reunited in Switzerland” and therefore found violations of Articles 17, 23 and 24 of the ICCPR.<sup>537</sup>

In a statement that is also relevant for family members (whether themselves refugees or not) who are seeking to travel in order to reunite with a refugee family member, Member States of UNHCR’s Executive Committee have recognized:

“the importance of travel documents for refugees and stateless persons to facilitate their travel and the importance of granting visas to holders of these travel documents, where required for the implementation of durable solutions for refugees and complementary pathways to protection and solutions and other travel for refugees and stateless persons, thereby reducing the risk of irregular movement which may expose refugees and stateless persons to exploitation, abuse, violence and human trafficking.”<sup>538</sup>

Where family members seeking to join beneficiaries of international protection are unable to obtain the visas and travel documentation generally required, it is important that the legislation and practice of States receiving applications for family reunification allow refugee Convention Travel Documents (CTD) or emergency travel documents issued by the International Red Cross Committee (ICRC) to be accepted and/or that provision is made for the State itself to issue a one-way *laissez-passer* document.<sup>539</sup> Issuing humanitarian visas may also be a useful approach.<sup>540</sup>

For more on the CJEU’s recent judgment concerning the requirement for judicial review of a decision to deny a visa to someone seeking family reunification, who has been granted a temporary residence permit for family reunification, see section 4.11, text at fn. 478-480 above.

*Examples of State practice regarding difficulties obtaining visas and travel documents include:*

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<sup>537</sup> *Farag El Dernawi v. Libya*, 2007, above fn. 31, para. 6.3.

<sup>538</sup> UNHCR ExCom, *Conclusion on machine-readable travel documents for refugees and stateless persons*, No. 114 (LXVIII) 2017, 6 October 2017, available at: <http://www.refworld.org/docid/59df19bc4.html>.

<sup>539</sup> *Ibid.*, p. 15.

<sup>540</sup> See, for instance, in the Syrian context, UNHCR, *High-level meeting on global responsibility sharing through pathways for admission of Syrian refugees, Geneva, 30 March 2016 - Background Note*, 30 March 2016, available at: <http://www.refworld.org/docid/588b4e2d4.html>; UNHCR, *Resettlement and Other Admission Pathways for Syrian Refugees*, 2016, above fn. 196.

In **Bulgaria**, once family reunification is approved, a letter is prepared by the State Agency for Refugees (SAR) to the Consular Relations Directorate of the Ministry of Foreign Affairs requesting visas to be issued. If the family members of the beneficiary of international protection do not have travel documents, these can be issued by the Bulgarian diplomatic or consular missions abroad under the Law on Bulgarian Identity Documents.<sup>541</sup> In practice, the process is not entirely unproblematic, as the Ministry is often unwilling to authorize the issue of an entry permit where family members do not have national identity documents. While legislation provides for the Bulgarian authorities to issue a *laissez-passer*,<sup>542</sup> in practice UNHCR is aware of only one case where the Ministry has stated that at UNHCR's request it has facilitated the issuance of such documents to Syrian children who were in Turkey.<sup>543</sup> Bulgaria does not recognize ICRC travel documents.

In **Croatia**, problems faced by beneficiaries of international protection when seeking to reunify with family members include insufficient financial means to pay for travel and fees for visas (if they are required); problems obtaining visas to present themselves before diplomatic/consular offices if such do not exist in their countries; problems obtaining visas for transit country/ies (even if they already have a visa for Croatia); and problems obtaining valid travel documents.

In **Finland**, the Supreme Administrative Court ruled in 2015 that applications by family members cannot be rejected only on the grounds that they do not have a travel document if they cannot obtain a travel document accepted by Finland for reasons beyond their control.<sup>544</sup> This had previously been Finnish practice and the resulting change in regulations in practice applies only in exceptional cases, mainly to Somali citizens, because Finland does not accept Somali passports as official travel documents.<sup>545</sup> A *laissez-passer* can be issued for applicants who are granted a residence permit without possessing a valid passport/travel document.

In **Hungary**, certain travel documents, such as those issued by Somalia, are not accepted, neither does it accept alternative measures that would allow one-way travel, such as are accepted in many other EU Member States. This means certain refugee families are de facto excluded from reunifying based on their nationality or origin, contrary to the principle of non-discrimination.<sup>546</sup>

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<sup>541</sup> Bulgaria: *Law on Bulgarian Identification Documents*, 11 August 1998, available at: <http://www.refworld.org/docid/4c2cb8c92.html>.

<sup>542</sup> *Ibid.*, Article 59(6).

<sup>543</sup> Communication from UNHCR office in Sofia, Bulgaria, October 2017.

<sup>544</sup> *KHO:2015:107*, Finland: Supreme Administrative Court, 1 July 2015, available in Finnish at: <http://www.kho.fi/fi/index/paatoksia/vuosikirjapaatokset/vuosikirjapaatos/1435575319515.html>.

<sup>545</sup> Finnish Immigration Service, *Family members who do not have a travel document can get a residence permit in certain cases*, 21 July 2015, available at: [http://www.migri.fi/our\\_services/customer\\_bulletins/bulletins\\_family/1/0/family\\_members\\_who\\_do\\_not\\_have\\_a\\_travel\\_document\\_can\\_get\\_a\\_residence\\_permit\\_in\\_certain\\_cases\\_61302](http://www.migri.fi/our_services/customer_bulletins/bulletins_family/1/0/family_members_who_do_not_have_a_travel_document_can_get_a_residence_permit_in_certain_cases_61302).

<sup>546</sup> See Hungarian Helsinki Committee, *Country Report: Hungary, 2016 Update*, 27 April 2017, available at: <http://www.asylumineurope.org/reports/country/hungary>, p. 91.

In **Lithuania**, the authorities do not recognize ICRC travel documents, which may present an insurmountable hurdle if family members are unable to obtain a passport from their national authorities.<sup>547</sup>

In **Poland**, persons seeking to join family members must have either a passport or a refugee Convention Travel Document. Alternative travel documents appear not to be accepted.<sup>548</sup>

In **Slovakia**, NGOs assisting beneficiaries of international protection note that getting family members into the country is a key barrier to family reunification, with five out of the six applicants being unable to reunite because their families could not obtain a visa allowing them to travel to Slovakia.<sup>549</sup>

In **Slovenia**, legislation provides that a positive decision on family reunification is deemed a valid document for the entry into the territory of Slovenia. In addition, the law stipulates a travel document may be issued to foreigners for broadly indicated “justified reasons”. The situation of a person, whose family reunification into Slovenia was authorized but who lacks travel documents, can be deemed to fall under this category. UNHCR is aware of one case where the Slovenian authorities issued travel documents and shipped them through diplomatic channels to the country of origin to enable the family members to travel to Slovenia.<sup>550</sup>

In **Switzerland**, a national passport, CTD or ICRC *laissez-passer* is required for travel. If such documents are not available, the Swiss authorities can issue a one-way *laissez-passer*. Such a document will only be issued, however, once identity can be confirmed, which can present problems, for instance, for Eritrean sponsors with family members stuck in Sudan without identity papers who cannot clearly prove their identity. Visas for family reunification purposes are free of charge and delivered by the Swiss embassy responsible abroad.

It would seem reasonable, once States have approved the reunification of family members, for them also to facilitate travel to the State concerned, if family members do not have the requisite travel visas or documentation. States could achieve this *inter alia* by:

- Showing greater flexibility and acceptance of *laissez-passer* issued by relevant organizations such as ICRC (as e.g. in Austria and the United Kingdom);
- Issuing a specific temporary *laissez-passer* or other substitute travel document for foreigners (as e.g. in Sweden, Netherlands, France, Austria, Italy);
- Accepting CTDs issued by other States or UNHCR to refugees/beneficiaries of international protection;
- Using (for EU States) the cooperation provisions of the EU Visa Code to deal jointly with visa applications, or opening Common Application Centres to deal with visa

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<sup>547</sup> UNHCR staff at Regional Representation for Northern Europe, Stockholm, October 2016.

<sup>548</sup> Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187, p. 36; communication from UNHCR office, Warsaw, October 2017.

<sup>549</sup> UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, pp. 74-75.

<sup>550</sup> UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 10.

applications;<sup>551</sup>

- Providing supporting documentation to transit countries indicating that the person concerned has permission to enter the State where family reunification has been granted; and/or
- Issuing humanitarian visas to family members to enable reunification.<sup>552</sup>

#### 5.4 High costs of procedures and travel

Family reunification is often very costly for all family members. Expenses can include the costs of (a) procuring the documentation required; (b) providing biometric photographs, certified copies of passport/travel documentation; (c) translating official documents with an accepted notary; (d) lodging marriage or birth certificates with the authorities; (e) paying visa application and embassy fees; (f) applying for residence permits; (g) visits by family members to the embassy or consulate (travel including outside the country of origin, overnight accommodation, living expenses); (h) medical and/or DNA tests; (i) courier delivery; (j) appeals against negative decisions; (k) legal representation needed; and (l) finally the cost of travelling to the State to join the sponsor.<sup>553</sup>

These accumulated costs may mean family members have to spend thousands of euros/dollars, depending on the size of the family and the country of residence/destination. They are another obstacle that may prevent families from applying for reunification within the time limit imposed in some countries if refugees are to benefit from more preferential terms and/or forcing families to choose the family members who can reunify. Ultimately they may bar reunification.

Noting that “insufficient financial resources often hinder the exercise of the right to family reunification and that the lack of proof of adequate family income can constitute a barrier to reunion procedures”, the Committee on the Rights of All Migrant Workers and Members of their Families (CMW Committee) and CRC Committee have jointly encouraged States “to provide adequate financial support and other social services to those children and their parent(s), siblings and, where applicable, other relatives.”<sup>554</sup>

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<sup>551</sup> EU, *Visa Code*, above fn. 428, Articles 40 and 41.

<sup>552</sup> For more on the latter, see section 12 below.

<sup>553</sup> See generally, UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, pp. 15-16; ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 36; FRA, *Monthly data collection: Thematic focus: Family tracing and family reunification*, 2016, above fn. 375, p. 14; Proasyl, *Familiennachzug verhindert: Familien auf Jahre getrennt*, 8 April 2016, available at: <https://www.proasyl.de/news/familiennachzug-wird-systematisch-verhindert/>.

<sup>554</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW Committee) and CRC Committee, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <http://www.refworld.org/docid/5a2fa3e44.html>, para. 38.

The examples below show how high overall costs can be, while also providing examples of a few States where financial support is available, whether through State-funded or private loan or refunding schemes.

*As examples of the costs of procedures and travel in European States:*

**Austria** and **Switzerland** are among the States where applicants must cover all travel costs. In Austria, these can be up to € 8,000 depending on the size of the family and the country of origin.<sup>555</sup>

In **Belgium**, refugees have to pay for the travel costs, the visa fee (€180 per person), costs of documentation which include translation and legalization, medical examinations and DNA testing that is often required (€200 per person). On average, people spend €3,350 for a family reunification procedure.<sup>556</sup> Some organizations offer loans at low interest rates to finance the cost of airline tickets for family members for family reunification.<sup>557</sup>

In **Finland**, for Afghan refugees in Pakistan who are required to travel to India to pursue their application for family reunification, it has been reported that as a result of the various steps in the procedure, families may have to make three to four trips to India, which may result in an overall cost of about € 10,000 including translation, accommodation and administrative fees.<sup>558</sup> As an example of good practice, however, the Finnish Immigration Service will refund the travel expenses of family members of resettled refugees or if the family member's journey to Finland is arranged by the Finnish Red Cross and IOM.

In **Luxembourg**, while DNA tests are not required by the government (see section 4.4 above), this may be the only way to prove family links when documents are missing. DNA tests cost €500 per person, so where a child is involved, a family will have to pay at least €1000 to prove the existence of family links in the absence of other supporting evidence.<sup>559</sup>

In **Poland**, the law allows for a reduction or waiver of fees, while in **Romania**, a fee is not charged for processing a family reunification request. Additional costs for documentation and travel are nevertheless estimated to be high in Central European countries and vary significantly depending on the number of family members, the country of origin, the travel period and actual travel costs. One expert in Romania estimated the total average costs and fees per beneficiary at €900, while focus groups with Somalis in Poland mentioned €1,625. At the same time, neither country provides any funding related to family reunification procedures.<sup>560</sup>

In **Sweden**, while a refugee's family members are entitled to government-sponsored travel to Sweden, beneficiaries of subsidiary protection are excluded from this practice. Other costs

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<sup>555</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 36.

<sup>556</sup> *Ibid.*, p. 36.

<sup>557</sup> Belgian Refugee Council, *Family Reunification with Beneficiaries of International Protection in Belgium*, 2014, above fn. 517, p. 36.

<sup>558</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 21.

<sup>559</sup> *Ibid.*, p. 36.

<sup>560</sup> UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, 2013, above fn. 201, p. 75.

related to the application are imposed unless they are family members of sponsors holding refugee status, beneficiaries of subsidiary protection and sponsors granted residence permits on humanitarian grounds. By way of contrast, family members of unaccompanied minor children must cover all costs involved in the procedure regardless of status.<sup>561</sup>

*Outside Europe, contrasting examples of costs encountered by refugees include:*

In **Australia**, the overall cost of family reunion is very high, even though the Special Humanitarian Program (SHP), outlined in section 4.5 above, is the cheaper available option. One article refers to “a price tag of about A\$40,0000 to bring one family member to Australia”,<sup>562</sup> while the Refugee Council of Australia has reported:

“People proposing relatives under the SHP need to pay for airfares, migration agents, legal fees and costs of providing settlement support. It was reported that the cost of reunification, even with immediate family members such as partners and children, can amount to tens of thousands of dollars. This cost was seen as being very difficult (if not impossible) for many people from a refugee background to meet, particularly for those who have arrived in Australia relatively recently.”<sup>563</sup>

In **Canada**, Citizenship and Immigration Canada operates a transportation loan system to assist foreign nationals, Convention refugees and humanitarian-protected persons abroad to cover the costs of transportation for themselves and/or their family dependants to their place of final destination.<sup>564</sup>

## 5.5 Administrative delays and obstacles

The process involved in securing family reunification can mean that families spend years apart in sometimes precarious and even dangerous situations before they are able to reunite, if at all. Besides the length of asylum procedures that need to be completed before applications for family reunification can be submitted, it can take time before families are able to assemble the required official and other documents in the required format. Family members may face long waiting times before getting an appointment at embassies to be able to file an application, deliver documentation, and/or attend interview. It can take months or longer for the authorities to process the application and related visa and/or residence requests, with delays being compounded by increased numbers of applications. An initial negative decision may need to be appealed or additional information provided. If reunification is approved, visas and travel arrangements need to be made, sometimes within a very short time frame, if the visa granted is only valid for a short time.

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<sup>561</sup> ECRE and Red Cross, *Disrupted Flight*, 2014, above fn. 171, p. 36.

<sup>562</sup> Davidson, “Australia’s Immigration Measures are Keeping Families Apart, Study Says”, *The Guardian*, 2016, above fn. 2.

<sup>563</sup> RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, pp. 3-4. Costs under the family stream of the Migration Program can be even higher.

<sup>564</sup> For further details see <http://www.cic.gc.ca/english/resources/tools/service/loan/transport.asp>.

Procedures have often become increasingly complex with the requirements for, and process of, determining family links ever more complicated. Applicants may face legal and practical problems obtaining decisions on adoption, guardianship and custody for children. Pressures are further increased by the need to meet deadlines, notably in some countries to submit complete applications in time to be able to benefit from facilitated reunification, and/or to apply for family unification before a child reaches the age of majority.<sup>565</sup>

These obstacles and delays slow down the process of reunification, expose family members to hardship and danger, prolong separation and uncertainty, and can affect the benefits of family reunification as an important element in rebuilding a new life leading towards successful integration. Ultimately, in some instances, delays may push family members to seek to reunite by irregular means or even make reunification impossible, as outlined in section 11 below.

Where such delays and obstacles are encountered, this runs counter to the CRC's requirement that States deal with "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification ... in a positive, humane and expeditious manner".<sup>566</sup> Together with the CMW Committee, the CRC Committees further advise States in the case of undocumented children to "develop and implement guidelines, taking particular care that time limits, discretionary powers, and/or lack of transparency in administration procedures should not hinder the child's right to family reunification".<sup>567</sup>

UNHCR's Executive Committee also calls on "countries of asylum and countries of origin [to] support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay",<sup>568</sup>

The Summary Conclusions on family unity of 2001 state:

"Requests for family reunification should be dealt with in a positive, humane, and expeditious manner, with particular attention being paid to the best interests of the child. While it is not considered practical to adopt a formal rule about the duration of acceptable waiting periods, the effective implementation of obligations of States requires that all reasonable steps be taken in good faith at the national level. In this respect, States should seek to reunite refugee families as soon as possible, and in any event without unreasonable delay."<sup>569</sup>

They also recommend that "[p]reparation for possible family reunification in the event of recognition should, in any event, begin in the early stages of an asylum claim, for instance, by ensuring that all family members are listed on the interview form."<sup>570</sup> Such an approach not only helps reduce delay, but also operates as an important check (which is not always followed by States in practice) to reduce fraud.

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<sup>565</sup> FRA, *Thematic focus: Family tracing and family reunification*, 2016, above fn. 375, p. 14.

<sup>566</sup> CRC, Article 1(1). This language is reiterated in Council of Europe: Committee of Ministers, *Recommendation N° R (99) 23 on Family Reunion for Refugees and Other Persons in Need of International Protection*, 1999, 305, para. 4.

<sup>567</sup> CMW and CRC Committees, *Joint General Comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 2017, above fn. 554, para. 33.

<sup>568</sup> UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 24, para. 2.

<sup>569</sup> UNHCR, Summary Conclusions, Family Unity, above fn. 1, para. 11.

<sup>570</sup> *Ibid.*, para. 13.

With regard to regional jurisprudence in Europe, the ECtHR has addressed the question of the need for prompt and efficient handling of applications on a number of occasions.

In its judgment in *Saleck Bardi v. Spain*, for instance, the Court ruled that a parent's right to be reunited with his or her child creates a "positive obligation" for States to take measures to fulfil that objective and that to be effective measures to reunify a parent and child must be put in place promptly since the passage of time can cause irremediable damage to the parent-child relationship if they are separated.<sup>571</sup>

The three 2014 judgments in *Tanda-Muzinga, Mugenzi* and *Longue* are also relevant. In the former, the Court found that in view of the decisions to grant refugee status to the applicants, and the subsequent recognition of the principle of family reunification, it had been of overriding importance that their visa applications be examined rapidly, attentively and with particular diligence. To that end, it ruled that France had been under an obligation to institute a procedure that took into account the events which had disrupted and disturbed their family lives and had led to their being granted refugee status. Ultimately, the Court determined that the accumulation and prolongation of multiple difficulties and the authorities' failure to take account of the specific situation of the applicant meant that the decision making process had not shown the requisite guarantees of "flexibility, promptness and effectiveness" needed to respect the appellant's right to family life.<sup>572</sup>

In the EU context, the Family Reunification Directive stipulates:

"The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.

"In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

"Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State."<sup>573</sup>

In addition, the right to good administration, including the right to have one's "affairs handled impartially, fairly and within a reasonable time", as set out in Article 41 of the Charter of

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<sup>571</sup> *Saleck Bardi c. Espagne*, ECtHR, 2011, above fn. 83, paras. 50-53.

<sup>572</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, paras. 73, 81, and 82; *Mugenzi c. France*, ECtHR, 2014, above fn. 85; *Longue c. France*, ECtHR, 2014, above fn. 90, para. 75. These judgments are discussed further in section 3.2 above. See also *G.R. v. The Netherlands*, ECtHR, 2012, text above at fn. 467, where as outlined there, the Court found that "the extremely formalistic attitude of the Minister" and the courts was among the factors unjustifiably hindering his use of an otherwise effective remedy.

<sup>573</sup> EU Family Reunification Directive, above fn. 103, Article 5(3).



Fundamental Rights has been recognized by the CJEU as a general principle of EU law.<sup>574</sup> It requires that parties to proceedings should not be penalized by virtue of the fact that they did not comply with procedural rules “when this non-compliance arises from the behaviour of the administration itself”.<sup>575</sup>

In its judgment in the *Chakroun* case, the CJEU has also determined that Member States are required to avoid “undermining the objective of the [Family Reunification] Directive, which is to promote family reunification, and the effectiveness thereof” and to take “account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness”.<sup>576</sup>

In terms of national legislation, the **Bolivian** Constitution is notable in requiring the State to “attend in a positive, humanitarian and efficient manner to requests for family reunification presented by parents or children who have been given asylum or refuge”.<sup>577</sup>

*Examples of administrative delays and obstacles encountered in various European States include:*

In **France**, the ombudsperson has identified a series of practical problems encountered by beneficiaries of international protection seeking family reunification.<sup>578</sup> These include the use of 10 standardized template reasons for the rejection of visa requests, as well as problems faced by beneficiaries of international protection in obtaining information on how the verification of their application is progressing, in supporting their application notably through the provision of further documentation with a view to supporting the authenticity of documentation on civil status or filiation provided which is contested by the authorities, and finally in obtaining a precise and reasoned decision indicating the reasons why an application was rejected.

Concerns have also been expressed in France regarding the complexity of the procedure and the accumulation of delays, including in the time taken to verify documentation at consulates. The appeal process is also lengthy as an administrative commission must first be approached before an applicant can go before the Administrative Tribunal in Nantes (the tribunal competent to assess appeals).<sup>579</sup> In 2008, the Council of Europe’s Human Rights Commissioner

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<sup>574</sup> See also, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, CJEU, 2014, above fn. 146, para. 50.

<sup>575</sup> *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v. Hauptzollamt Hamburg-Jonas*, C-428/05, CJEU, 21 June 2007, available at: [http://www.refworld.org/cases/EU\\_CFI\\_58c161c64.html](http://www.refworld.org/cases/EU_CFI_58c161c64.html), para. 25. For more on the right to good administration see section 3.6 above.

<sup>576</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 117, paras. 47 and 64.

<sup>577</sup> Bolivia: *Constitución Política del Estado*, January 2009, available in Spanish at: <http://www.refworld.org/docid/4a1e6bc92.html>, Article 29(II).

<sup>578</sup> Le défenseur des droits, *Les droits fondamentaux des étrangers en France*, May 2016, available at: [http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/736160170\\_ddd\\_rapport\\_droits\\_etrangers.pdf](http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/736160170_ddd_rapport_droits_etrangers.pdf), pp. 21-23.

<sup>579</sup> ACAT France, G.A.S., *Ligue des droits de l’Homme, Pour une nécessaire réforme de la procédure de réunification familiale, facteur d’insertion des bénéficiaires d’une protection internationale*, 8 October 2013, available at: [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&cad=rja&uact=8&ved=0ahUKEwiW7Kf1n7LQAhWnIsAKHc5sAXw4ChAWCC0wAw&url=http%3A%2F%2Fwww.interieur.gouv.fr%2Fcontent%2Fdownload%2F66228%2F479303%2Ffile%2FNote-commune-Reunification-familiale-ACAT-GAS-LDH-8-octobre-2013.pdf&usq=AFOjCNGizt\\_jnEA\\_HkhDn1Teg1OIFH0IyA&bvm=bv.139250283,d.ZGg](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&cad=rja&uact=8&ved=0ahUKEwiW7Kf1n7LQAhWnIsAKHc5sAXw4ChAWCC0wAw&url=http%3A%2F%2Fwww.interieur.gouv.fr%2Fcontent%2Fdownload%2F66228%2F479303%2Ffile%2FNote-commune-Reunification-familiale-ACAT-GAS-LDH-8-octobre-2013.pdf&usq=AFOjCNGizt_jnEA_HkhDn1Teg1OIFH0IyA&bvm=bv.139250283,d.ZGg)

expressed his concerns regarding the “excessive length of time” the procedure takes “due to the involvement of numerous agencies in the processing of such applications”. “In some cases”, he warned, “the length of this procedure and the danger of staying in the country in question where they are beset by risks of persecution prompt the people concerned to join their family member in France by illegal means”.<sup>580</sup> He reiterated his concerns in a letter to the Minister of the Interior in 2010, where the average duration of the procedure was 24 months,<sup>581</sup> who in reply referred to planned reforms to the procedure and ascribed the delays to the diligence of the applicants in justifying family links and the reliability of civil status documents from the country of origin.<sup>582</sup> Since then, it appears there are still certain delays in complex cases, difficulties faced by family members in gathering evidence of family links, a lack of harmonized procedures and insufficient provision of information on the steps of the procedure.<sup>583</sup>

In **Germany**, there can be long waiting times before it is possible to get an appointment at embassies to file an application, in some cases several months or even a year, as in German embassies/consulates in Jordan, Lebanon (where the waiting time was at least 14 months in mid-2016) or Turkey.<sup>584</sup>

With regard to undue delay by consular offices, a 2011 judgment of the Curia (the highest court in **Hungary**) highlighted several substantial systemic and bureaucratic shortcomings of the application process and handling of family reunification applications made by refugees.<sup>585</sup> Hungarian legislation at the time required refugees to apply for family reunification within six months of their recognition in order to be able to benefit from facilitated reunification conditions. The court ruled that the denial of an application for family reunification made by

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<sup>580</sup> Council of Europe: Commissioner for Human Rights, *Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008. Issues reviewed: human rights protection arrangements, prisons, juvenile justice, immigration and asylum, and Travellers and Roma*, 20 November 2008, CommDH(2008)34, available at: <http://www.refworld.org/docid/492a6da72.html>, para. 114.

<sup>581</sup> *Lettre du Commissaire aux droits de l'Homme du Conseil de l'Europe à Eric Besson, Ministre français de l'Immigration, de l'Intégration, de l'Identité Nationale et du Développement Solidaire*, CommDH(2010)38, 3 August 2010, available to at: <http://www.refworld.org/docid/58c27ce14.html>.

<sup>582</sup> *Réponse du Ministre français de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire à la lettre du Commissaire aux droits de l'Homme du Conseil de l'Europe*, CommDH(2010)39, 16 September 2010, available at: <http://www.refworld.org/docid/58c27d664.html>.

<sup>583</sup> Ministère de l'intérieur, Direction générale des étrangers en France et Réseau européen des migrations, *Regroupement familial et reunification familiale des ressortissants de pays tiers en France, Point de contact français du Réseau européen des migrations, Troisième étude ciblée 2016*, janvier 2017, disponible sur: <https://www.immigration.interieur.gouv.fr/Info-ressources/Actualites/Focus/Regroupement-familial-et-reunification-familiale-des-ressortissants-de-pays-tiers-en-France>.

<sup>584</sup> *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Sevim Dağdelen, Jan Korte, weiterer Abgeordneter und der Fraktion Die Linke: Andauernde Probleme beim Familiennachzug zu anerkannten syrischen Flüchtlingen*, German Federal Government's response to a parliamentary question, 8 July 2016, at <http://dip21.bundestag.de/dip21/btd/18/091/1809133.pdf> cited in FRA, *Thematic focus: Family tracing and family reunification*, 2016, above fn. 375, p. 14.

<sup>585</sup> *Z.K. v. Office of Immigration and Nationality*, Ref. No. 21.K.20.059/2011/6, Kfv. II. 37.374/2011/8, 10 February 2011 (Hungary: Fejér County Court) and 9 May 2012 (Hungary: Curia), with summary at: <http://fra.europa.eu/en/caselaw-reference/hungary-kfv-ii-3737420118>. See also Hungary: *Act II of 2007 on the Entry and Stay of Third-Country Nationals*, 1 July 2007, available at: <http://www.refworld.org/docid/3ed4ba334.html>. The deadline by which applications must be made to benefit from preferential terms was reduced to three months from July 2016, as outlined above Section 4.6, text at fn. 375.

a refugee, who had been an unaccompanied minor, had been due to the failure of consular staff to properly register the application of the family members and subsequent unnecessary delays they introduced and therefore that the application should have been examined under the facilitated conditions foreseen for the family reunification of refugees initiated within the six-month deadline.

In **Ireland**, beneficiaries of international protection need to be able to negotiate a complex bureaucratic system, when seeking to bring family members to join them. There is a lot of paperwork and a general lack of clarity about timescales and other aspects of the process. Things are further complicated by the need to provide documentation, some of which requires contact with countries and regimes from which people have escaped because of risk to their lives.<sup>586</sup> In one case, for instance, the High Court ruled: “The requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled to a decision within a reasonable time” and that the delay of over four years in responding to the application was “unacceptable”. It also found that the possibility of making “a fresh application for family reunification does not provide an answer to the applicant’s difficulties”, since were he to do so “each of his children would have reached the age of majority by the time a decision was reached”. The Court therefore required the authorities to reconsider the case and “act urgently”.<sup>587</sup>

In **Italy**, a Turin Tribunal ruled that the failure of the authorities to issue a decision on a family reunification request by a recognized Somali refugee in Italy to be joined by his wife and children was unacceptable. The tribunal stated:

“The right to family reunification is, in fact, a fundamental human right which cannot be indefinitely postponed because of an omission of the Public Administration. The Public Administration has the legal duty ... to provide the appellant with a final decision within a reasonable time. In the present case, it failed to do so.”

The Tribunal further observed that “the only impediment to the granting of visas was due to a different transliteration of the Somali children’s surname between the authorization document and the visa request (as confirmed by the embassy itself)”. Given the preliminary authorization by the prefecture responsible, it therefore ordered to the Foreign Ministry (and the competent regional organs) to grant the requested visas to the appellant’s wife and children.<sup>588</sup>

In **the Netherlands**, the State Secretary for Security and Justice issued a letter in May 2016 to all asylum-seekers about the asylum situation in the Netherlands, where reception facilities were under pressure at the time. The letter cautioned them about various issues including the likelihood of being recognized and also referring to family reunification, in generally dissuasive terms, as follows:

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<sup>586</sup> Irish Refugee Council, *Transition from Direct Provision to Life in the Community*, June 2016, available at: <http://www.irishrefugeecouncil.ie/wp-content/uploads/2016/07/Transition-from-Direct-Provision-to-life-in-the-community-M-NiRaghallaigh-M-Foreman-et-al-2016.pdf>, pp. 56-58.

<sup>587</sup> *T. v. MJELR*, Ireland: High Court, 2008, above fn. 333, paras. 16 and 21.

<sup>588</sup> *Appeal no. 30590/2014*, Italy: Court of Turin, Civil Section I, 3 March 2015, available at: <http://www.quotidianoentlocali.ilssole24ore.com/pa24.php?idDoc=16818039&idDocType=3>.

“Many asylum seekers have left members of their family behind. It is only possible for you to submit an application for your family to come to the Netherlands if you have an asylum permit. There are no guarantees that you will be able to have your family come to the Netherlands. Owing to the large number of applications it may take a long while before the situation is clarified and your family will actually be able to come to the Netherlands. The statutory period in which the [Immigration and Naturalization Service] IND has to make a decision on an application for family reunification is currently six months. This means that all told it could take over two years before your family can come to the Netherlands, depending on your personal situation.”<sup>589</sup>

It has been suggested that “[i]n effect, this was understood to establish an equivalent practice to the newly introduced German two-year waiting period” before which subsidiary protection beneficiaries may not seek family reunification<sup>590</sup>.

In the **United Kingdom**, the House of Commons Home Affairs Committee reported in 2016 on the obstacles faced by refugees seeking to bring family members to join them as follows:

“The bureaucratic hurdles that are being put in front of refugees after a decision has been made allowing them to enter the UK to be reunited with family members are totally unacceptable, particularly as many of those affected are fleeing conflict and will have already undergone severe hardship. The UK Government should be doing all it can to help people in these circumstances rather than hindering their chance to reach safety. Where an individual receives notification of permission to enter the UK but it arrives too late for transport to be secured, it is ridiculous for that permission to be cancelled and for the process then to have to be restarted. The system must be more flexible.”<sup>591</sup>

Similarly, the Independent Chief Inspector of Borders and Immigration cautioned:

“Delays were potentially harmful, especially where families were in refugee camps, or had to apply or reapply in a country where they were not resident. One observed: ‘sometimes they can get stuck and cannot get back to their refugee camps... There are safeguarding issues related to ‘hanging’ around in a country you are not a national of or lawfully resident. It can be months before a decision is made.’”<sup>592</sup>

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<sup>589</sup> State Secretary for Security and Justice Dijkhoff, *Letter re asylum situation in the Netherlands*, 23 May 2016, available in numerous languages at: <https://www.government.nl/latest/news/2016/02/18/new-letter-issued-to-asylum-seekers>.

<sup>590</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, pp. 40-41. For the restrictions introduced for subsidiary protection beneficiaries in Germany, see section 6.1 below.

<sup>591</sup> House of Commons Home Affairs Committee (UK), *The Work of the Immigration Directorates (Q1 2016)*, Sixth Report of Session 2016-17, HC 151, 19 July 2016, available at: <http://www.refworld.org/docid/58ac4fd14.html>, para. 39.

<sup>592</sup> UK: Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, above fn. 440, p. 51.

The Chief Inspector also expressed concern that the asylum interview did not always capture details about an applicant's family members "as, according to staff at the visa sections visited, the staff conducting the asylum interviews were not aware of the potential importance of such information to other colleagues". This meant that "the absence of such details ... was not conclusive".<sup>593</sup>

Outside Europe, while **Canada** prioritizes family reunification, the process can nevertheless be lengthy. Applications for spousal sponsorship submitted before 7 December 2016 averaged between 9 to 21 months for assessment depending on the visa post. For applications submitted after 7 December 2016, Immigration, Refugees, Citizenship Canada has announced it plans to speed up processing for spousal sponsorship applicants so that 80 per cent of applications can be processed within a 12-month time frame.<sup>594</sup> As for the application processing times of dependent children, the average was 42 days for assessment of the sponsor and 14 months for assessment of the sponsored dependent child depending on the visa post.

In the **United States**, family reunification processing can take as long as three to five years.<sup>595</sup>

## 6 FAMILY REUNIFICATION FOR PERSONS WITH COMPLEMENTARY/SUBSIDIARY PROTECTION

In 2015, most European countries saw significant increases in the numbers of asylum-seekers arriving in Europe, with Germany experiencing continued increases into 2016, although other countries showed falling applications, notably in Scandinavia, Netherlands, Belgium and Austria.<sup>596</sup>

One anticipated consequence has been increased numbers of beneficiaries of international protection seeking reunification with their families.<sup>597</sup> This has in turn prompted some governments to seek to limit their obligations in particular towards beneficiaries of subsidiary protection. Courts have yet to determine whether such actions are compatible with States' obligations under international and regional human rights and refugee law, as discussed below.

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<sup>593</sup> Ibid., pp. 4, 19, 20.

<sup>594</sup> IRCC, "Notice: Faster processing times for spouses and partners", 15 December 2016, available at: <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-faster-processing-times-spouses-partners.html>.

<sup>595</sup> Communication from UNHCR office, Washington DC, November 2017.

<sup>596</sup> Eurostat News Release, *Asylum in the EU Member States: Number of first time asylum seekers slightly up to almost 306 000 in the second quarter of 2016*, 22 September 2016, available at: <http://ec.europa.eu/eurostat/documents/2995521/7662180/3-22092016-AP-EN.pdf/22f5de3b-b5a8-4195-82fe-3072a4a08146>; Eurostat News Release, *Asylum in the EU Member States: Record number of over 1.2 million first time asylum seekers registered in 2015*, 4/2016, 4 March 2016, available at: <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/>; UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, available at: <http://www.refworld.org/docid/57678f3d4.html>; UNHCR, *UNHCR Mid-Year Trends 2016*, 17 February 2017, available at: <http://www.refworld.org/docid/58b594cb4.html>, pp. 15-19.

<sup>597</sup> See generally, Y. Brenner, *A Family Reunification Dilemma for the EU*, Global Government Forum, 23 March 2016, available at: <http://www.globalgovernmentforum.com/family-reunification-dilemma-for-eu/>.

## 6.1 Legislative changes restricting access to family reunification for such persons

Following this influx of asylum-seekers into Europe, several EU Member States – though not all those States facing significant increases in arrivals – sought to restrict access to family reunification, in particular of persons with subsidiary protection.<sup>598</sup>

The justification for restricting access to family reunification has been presented by the States concerned in general terms as to make the country less attractive for new asylum-seekers so as to reduce the numbers arriving; the need not to overstrain reception facilities and integration processes; and to prevent negative social reactions. Sometimes, it has been argued that persons fleeing generalized violence are, generally speaking, in need of protection for a shorter period of time than those fleeing persecution for individual reasons with the result that subsidiary protection beneficiaries will soon return to their country of origin once the conflict has ended.

A paper published by the Council of Europe's Commissioner for Human Rights has nonetheless characterized many of the restrictions introduced as "knee-jerk reactions to the refugee arrivals of 2015, when European governments regrettably seemed to reach for any measure that would potentially be seen to deter or stem arrivals". The report states:

"While there is no question about the challenge some [European] states are facing to accommodate newly arrived refugees, 2016 and 2017 have seen a sharp drop in the numbers arriving. For those refugees who will make Europe their home for the foreseeable future, swift family reunification is imperative to enable their integration and the effective protection of their families."<sup>599</sup>

*The following European States have recently introduced restrictions on access to family reunification for beneficiaries of subsidiary protection:*

In **Austria**, under legislation effective since June 2016, beneficiaries of subsidiary protection now generally have to wait three years for family reunification and have to prove adequate accommodation, health insurance and sufficient income. For parents of unaccompanied children who are entitled to asylum or subsidiary protection, an exception applies: they do not have to prove these additional requirements if the sponsor is still a child at the time the application is filed.<sup>600</sup>

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<sup>598</sup> For overviews of changes introduced, see e.g. Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49; L. Halleskov Storgaard, "National Law Restrictions on Family Reunification Rights of International Protection Beneficiaries from a ECHR/EU law Perspective", Working Paper, 19 October 2016, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2853458](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2853458); EMN, *EMN Synthesis – Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, 2017, above fn. 40, pp. 20-21.

<sup>599</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 48.

<sup>600</sup> Austria: *Asylum Act*, 2005, above fn. 172, Art. 35(2a); Red Cross Austria, Tracing Service and Family Reunification (Österreichisches Rotes Kreuz, Suchdienst und Familienzusammenführung) cited in FRA, *Thematic focus: Family tracing and family reunification*, 2016, above fn. 375.

In **Denmark**, legislation in early 2015 introduced a new “temporary protection status” in addition to refugee status and subsidiary protection status. This status is intended for persons fleeing indiscriminate violence and since early 2016 such persons have been required to complete three years of residence before they can apply for family reunification, as opposed to one year as previously.<sup>601</sup> The sponsor must also prove he or she has sufficient living space, income and health insurance. (Refugees and beneficiaries of subsidiary protection are not required to complete a period of residence after being granted status before reunification can be sought.)

Considering these changes, the Human Rights Committee, while acknowledging the challenge of dealing with large numbers of asylum-seekers, expressed concern in August 2016 about the compatibility of this three-year waiting period for family reunification with the ICCPR.<sup>602</sup> By contrast, in November 2017 the Danish Supreme Court upheld a decision of the Immigration Appeals Board to deny the request of a Syrian with temporary protection to reunify with his wife who remained in Syria. The Court found that requiring him to wait three years to reunify with his wife did not violate either Article 8 or Article 14 ECHR, as the couple’s separation was only temporary and the husband could return to Syria when the general situation in the country improved, or if this did not happen, he would, as a general rule, be entitled to reunify with his wife after three years.<sup>603</sup>

In **Finland**, as of 1 July 2016, persons with subsidiary, humanitarian or temporary protection must meet the sufficient resources requirement when seeking to reunite with family members (unlike refugees, who do not if they apply for family reunification within three months of recognition). Exceptions can be made to the sufficient resources requirement in exceptional cases, where there is a pressing need or if the best interest of the child requires it.<sup>604</sup>

In **Germany**, amendments to the Residence Act in March 2016, suspended facilitated family reunification for two years for persons who received subsidiary protection after 17 March

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<sup>601</sup> UNHCR, *UNHCR Observations on the Proposed Amendments to the Danish Aliens Legislation*, L87, 6 January 2016, available at: <http://www.refworld.org/docid/5694ed3a4.html>, para. 7 outlining the changes, which were later approved, and UNHCR’s concerns; Danish Institute for Human Rights, *Three-year Waiting Period Violates Human Rights*, 6 January 2016, available at: <https://www.humanrights.dk/news/three-year-waiting-period-violates-human-rights>; Council of Europe, Commissioner for Human Rights, “Denmark: Amendments to the Aliens Act Risk Violating International Legal Standards”, 15 January 2016, with links to the Commissioner’s letter to the Danish Minister for Immigration and her reply, available at: <https://www.coe.int/en/web/commissioner/-/denmark-amendments-to-the-aliens-act-risk-violating-international-legal-standards?desktop=true>; M. Clante Bendixen, “The Asylum Restrictions in Brief Summary”, 31 January 2016, available at: <http://refugees.dk/en/news/2016/januar/the-asylum-restrictions-in-brief-summary/>; Bech et al., “A ‘Civic Turn’ in Scandinavian Family Migration Policies? Comparing Denmark, Norway and Sweden”, above fn. 424, pp. 5-10; M. Clante Bendixen, “More about Art. 7(3): Temporary Protection Status”, 28 February 2017, available at: <http://refugees.dk/en/facts/legislation-and-definitions/more-about-art-7-3-temporary-protection-status/>.

<sup>602</sup> HRC, *Concluding observations on the sixth periodic report of Denmark*, 15 August 2016, CCPR/C/DNK/CO/6, available at: <http://www.refworld.org/docid/58763dc64.html>, paras. 31-36.

<sup>603</sup> *A. v. Immigration Appeals Board*, Case no. 107/2017, Denmark: Supreme Court, 6 November 2017, English summary available at: <http://www.refworld.org/docid/5a0eb5174.html>.

<sup>604</sup> Finnish Immigration Service, “As of 1 July, the family member of a person who has been granted international protection must as a rule have secure means of support”, 2016, above fn. 406.

2016.<sup>605</sup> The significant numbers of asylum-seekers arriving in Germany in 2015, led in 2016 to a 50 per cent increase in the number of spouses and children joining refugees in Germany, around 105,000 visas being issued in 2016 as compared to 70,000 in 2015. This figure was much lower than anticipated in late 2015, given the major increase in the numbers of asylum applications, a fact attributed in part to the restrictions introduced, to the increase in the number of people granted subsidiary protection as opposed to refugee status (22 per cent of all asylum decisions resulted in subsidiary protection in 2016 as opposed to 0.6 per cent in 2015), who were then unable to apply for family reunification, as well as to the numbers of applications awaiting a decision.<sup>606</sup>

A February 2016 study for the German Bundestag concluded that the only way to ensure Germany's compliance with its obligations under the CRC was generally to allow family reunification with minor children and accept applications within the two-year period.<sup>607</sup> At the time the amendments were under consideration by parliament, a clarification was inserted into the regulations to the effect that reunification with family members on humanitarian grounds under Sections 22 and 23 of the Residence Act was not excluded, in particular in view of the reunification of parents with unaccompanied child beneficiaries of subsidiary protection. UNHCR observed in March 2017, however, that in practice almost no use had been made of Section 22 of the Residence Act. It therefore recommended that the use of this provision be routinely considered for subsidiary protection beneficiaries who would otherwise be excluded from family reunification and that the conditions for the grant of residence permits on humanitarian (hardship) grounds should be published.<sup>608</sup>

Subsequently, a written response to a parliamentary question in December 2017 indicated that 66 visas had been issued on urgent humanitarian ground as provided for under Section 22 of the Residence Act to subsidiary protection beneficiaries to date in 2017, while another 230 cases were under consideration.<sup>609</sup> While it appears that some use is now being made of this

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<sup>605</sup> That is, until 16 March 2018. See Germany: *Residence Act*, above fn. 415, Section 104(13); Germany: Federal Government, "Bundesrat Approves Second Asylum Package: Swifter procedures, fewer families to follow asylum-seekers", 26 February 2016, available at: [https://www.bundesregierung.de/Content/EN/Artikel/2016/02\\_en/2016-02-04-asylpaket2\\_en.html?nn=393830](https://www.bundesregierung.de/Content/EN/Artikel/2016/02_en/2016-02-04-asylpaket2_en.html?nn=393830). See also generally, H. Heuser, "Aussetzung des Familiennachzugs zu subsidiär Schutzberechtigten – ein Verstoß mit dem Grundrecht auf Familie?", *Asyl Magazin* 2017/4, pp. 125–131; UNHCR Deutschland, "Familienzusammenführung zu Personen mit internationalem Schutz: Rechtliche Probleme und deren praktische Auswirkungen", *Asyl Magazin* 2017/4, both available in German at: [https://familie.asyl.net/fileadmin/user\\_upload/pdf/AM17-4\\_thema\\_famzus.pdf](https://familie.asyl.net/fileadmin/user_upload/pdf/AM17-4_thema_famzus.pdf).

<sup>606</sup> "Familiennachzug hat stark zugenommen", *Tagesschau*, 19 January 2017, available at: <https://www.tagesschau.de/inland/fluechtlinge-familiennachzug-101.html>; "Familiennachzug nimmt stark zu", *Zeit Online*, 17 January 2017, available at: <http://www.zeit.de/politik/deutschland/2017-01/fluechtlinge-familiennachzug-syrien-irak-anstieg>.

<sup>607</sup> Deutscher Bundestag (lower house of German parliament), *Vereinbarkeit der Regelungen des Asylpakets II betreffend die Aussetzung des Familiennachzugs für unbegleitete minderjährige Flüchtlinge mit der VN-Kinderrechtskonvention (KRR)*, 16 February 2016, available at: <https://www.bundestag.de/blob/416608/6b721422cd6774314c8f8e11de359e32/wd-2-026-16-pdf-data.pdf>.

<sup>608</sup> UNHCR, "Familiennachzug zu Personen mit subsidiärem Schutz in Deutschland – Anhörung im Innenausschuss am 20. März 2017", available in German at: <https://www.bundestag.de/blob/498564/2e1985d931e244b34face6c2868f58c1/18-4-816-data.pdf>.

<sup>609</sup> Answer by State Secretary Walter J. Lindner to written parliamentary question by Ulla Jelpke (Die Linken), Verzeichnis der Fragen nach Geschäftsbereichen der Bundesregierung, Bundestag, 4 December 2017, available in German at: <http://dip21.bundestag.de/dip21/btd/19/001/1900189.pdf>, pp. 11-12.



possibility for subsidiary protection beneficiaries otherwise denied the possibility of prompt family reunification, the number able to benefit nevertheless appears low, given the approximately 200,000 subsidiary protection beneficiaries currently in Germany.<sup>610</sup>

In **Sweden**, under a temporary law approved in 2016 and valid until 2019, persons who sought asylum after 24 November 2015 and are granted subsidiary protection (and therefore only a temporary residence permit) only have the right to be reunited with their family in exceptional cases. Someone with a temporary residence permit may only seek to bring his or her spouse, registered or cohabiting partner and unmarried children under the age of 18 years to Sweden; both spouses/partners must have attained 21 years and must have lived together before moving to Sweden, although exemptions from the age requirement can be made if the couple has children together.<sup>611</sup>

*In addition, beneficiaries of subsidiary protection several other European States already had more limited rights to family reunification as compared to refugees.*

In Central Europe, beneficiaries of subsidiary protection in the **Czech Republic, Hungary and Slovakia** are not able to benefit from preferential treatment as regards income, accommodation and sickness insurance requirement if they apply within three months of being granted status, unlike refugees. In addition, in the Czech Republic, beneficiaries of subsidiary protection, like other immigrants, are required to have stayed lawfully in the country for at least 15 months before being able to apply.<sup>612</sup> In Hungary, the definition of who may be a family member is also more restricted than that for refugees, as outlined in section 4.1 above, while in Slovakia, beneficiaries of subsidiarity protection are nonetheless able to apply for a temporary residence permit for family members.<sup>613</sup>

In **Slovenia**, beneficiaries of subsidiary protection were already only entitled to seek family reunification one year after being granted protection under the 2011 Aliens Act, if the family existed before the beneficiary of subsidiary protection's entry into Slovenia. Subsequent amendments have changed the residence permit granted from a permanent to a temporary one, unlike family members joining a refugee who can still obtain a permanent residence permit.<sup>614</sup>

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<sup>610</sup> For further statistical information on subsidiary protection beneficiaries in Germany, see text as fn. 650 below.

<sup>611</sup> Swedish Migration Agency, *New law that affects asylum seekers and their families*, 2016, above fn. 378; Swedish Migration Agency, *Family Reunification*, above fn. 191. See also generally, Bech et al., "A 'Civic Turn' in Scandinavian Family Migration Policies? Comparing Denmark, Norway and Sweden", above fn. 424, pp. 13-17.

<sup>612</sup> EMN, *Ad-Hoc Query (1 of 2) family reunification of third country nationals receiving international protection*, 2016, requested by FI EMN NCP, 16 February 2016, available at: <http://www.refworld.org/docid/5a0d5af74.html>, p. 6.

<sup>613</sup> For Czech Republic, see text above at fn. 373; for Hungary, see FRA, *Monthly data collection: Thematic focus: Family tracing and family reunification*, 2016, above fn. 375, and generally, Hungarian Office of Immigration and Nationality at: [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=54&Itemid=808&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=54&Itemid=808&lang=en); for Slovakia, see Slovakia: *Act No. 404/2011 on Residence of Aliens*, 2011, above fn. 190, Articles 27 and 32(14) and Article 15 on visas.

<sup>614</sup> Slovenia: *Aliens Act*, 2011, above fn. 227, Article 47b(1) and 47b(3).

In **Latvia**, persons with alternative (subsidiary protection) status are only entitled to apply for family reunification after at least two years' legal residence and must provide documents certifying the expected place of residence and showing stable and regular income.<sup>615</sup>

In addition, in **Greece** beneficiaries of subsidiary protection are excluded from the preferential family reunification regime applying to refugees.<sup>616</sup> In **Cyprus**, beneficiaries of subsidiary protection have since April 2014 have not only been excluded from the preferential family reunification regime applying to refugees but also from applying for family reunification under the terms and conditions available to any other third country national under the Aliens and Immigration Law.<sup>617</sup> In 2015 the Government reported that in "special circumstances", the Ministry of the Interior may grant the right to family reunification to persons with subsidiary protection,<sup>618</sup> though this happens extremely rarely.<sup>619</sup> In **Malta**, beneficiaries of subsidiary protection are also excluded from applying for family reunification at all.<sup>620</sup>

In **Switzerland**, persons granted provisional admission with an "F-permit", who include, *inter alia*, refugees recognized on the basis of *sur place* activities, persons facing a real risk of a violation of Article 3 ECHR, and persons fleeing from conflict and generalized violence, have more limited rights to family than refugees with a B-permit. They may only apply for family reunification three years after being granted provisional admission, must be able to provide suitable housing and must not rely on social assistance.<sup>621</sup> Furthermore, in September 2016 attempts were made to remove these limited possibilities. While the National Council did not in the end approve this, income requirements were further heightened. In addition to the requirement of not depending on social benefits, provisionally admitted persons who are entitled to an old-age, disability or a widow's pension in Switzerland and who are entitled to

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<sup>615</sup> Latvia: *Asylum Law 2015*, above fn. 185, section 54(1).

<sup>616</sup> Greece: *Law No. 4251 Immigration and Social Integration Code and other provisions*, Government Gazette, No. 80, 1 April 2014, available at: <http://www.refworld.org/docid/54eb40114.html>, Article 69(2)(c); Greece: *Presidential Decree 131/2006* transposing the Family Reunification Directive, as supplemented by *Presidential Decree 167/2008* and amended by *Presidential Decree 113/2013* only concern refugees, leaving subsidiary protection beneficiaries excluded from their provisions. See also, Greek Council for Refugees, *Country Report: Greece, 2016 Update*, AIDA, March 2017, available at: <http://www.asylumineurope.org/reports/country/greece>, pp. 140-141.

<sup>617</sup> Cyprus: Aliens and Immigration Law, Section 18KI(2)(c).

<sup>618</sup> Council of Europe: Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Cyprus from 7 to 11 December 2015*, 31 March 2016, CommDH(2016)16, available at: <http://www.refworld.org/docid/572232044.html>, paras. 36-38; Council of Europe: Commissioner for Human Rights, *Final comments of the Government of the Republic of Cyprus on the final report drawn up by the Commissioner for Human Rights of the Council of Europe following his visit to Cyprus from 7 to 11 December 2015*, 31 March 2016, CommDH/GovRep(2016)12, available at: <http://www.refworld.org/docid/572379d64.html>, para. 1.2.2.

<sup>619</sup> IOM, "IOM Helps Syrian Girl Reunite with Family in Cyprus", 23 February 2016, available at: <https://www.iom.int/news/iom-helps-syrian-girl-reunite-family-cyprus> (96 per cent of Syrians granted protection in Cyprus being granted subsidiary protection).

<sup>620</sup> Malta: *Family Reunification Regulations*, 5 June 2007, S.L. 217.06, available at: <http://www.refworld.org/docid/55118b6a4.html>, Section 3(2)(c), this situation being perpetuated in by Legal Notice 148 of 2017, above fn. 186, Article 3(2)(c).

<sup>621</sup> Suisse: *Loi sur l'asile de 26 juin 1998*, 1998, above fn. 193, Article 51(2) (repealed), a wider family definition never applying to persons granted provisional admission as set out in Article 71. The situation of persons granted provisional admission on these grounds is thus different from that in the case of *Gül v. Switzerland*, ECtHR, 1996, above fn. 67, where the couple had been granted a residence permit on humanitarian grounds on account of the wife's state of health.

supplementary benefits are to be excluded from family reunification. This measure is expected to come into force in early 2018.

In addition, outside Europe, in the **United States**, persons granted Temporary Protection Status are not entitled to sponsor family members to join them.<sup>622</sup> Persons who have fled ongoing conflict in a number of Central American countries, such as El Salvador and Honduras, are granted this status rather than refugee status.

*By contrast, other EU States accord refugees and beneficiaries of complementary/ subsidiary protection access to family reunification on the same basis:*

This is so in **Belgium**,<sup>623</sup> in **Bulgaria**, where beneficiaries of humanitarian status (corresponding to subsidiary protection) and those with temporary protection enjoy access to family reunification on the same basis as refugees,<sup>624</sup> in **Croatia**,<sup>625</sup> in **Estonia**,<sup>626</sup> in **France**, where stateless persons have equal access as well,<sup>627</sup> in **Ireland** (since the entry into force of the International Protection Act in December 2016, although both refugees and beneficiaries of subsidiaries protection are required to wait 12 months from receiving protection before applying),<sup>628</sup> in **Italy** (since March 2014), in **Lithuania** (since March 2015),<sup>629</sup> in **Luxembourg**,<sup>630</sup> in **the Netherlands**, in **Poland**, where persons granted a residence permit for humanitarian reasons are in addition able to apply for family reunification on the same basis as refugees and beneficiaries of subsidiary protection,<sup>631</sup> in **Portugal**,<sup>632</sup> in **Spain**,<sup>633</sup> in **Romania**,<sup>634</sup> and in the **United Kingdom**, where persons with humanitarian protection (akin to subsidiary protection) can access family reunification on the same basis as refugees.

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<sup>622</sup> *United States: Immigration and Nationality Act (last amended February 2013)*, February 2013, available at: <http://www.refworld.org/docid/58a49c5f4.html>, section 244, and generally, M. Messick and C. Bergeron, "Temporary Protected Status in the United States: A Grant of Humanitarian Relief that is Less than Permanent", 2 July 2014, available at: <https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>; C. Menjivar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants*, Center for Migration Research, University of Kansas, May 2017, available at: [http://ipsr.ku.edu/migration/pdf/TPS\\_Report.pdf](http://ipsr.ku.edu/migration/pdf/TPS_Report.pdf).

<sup>623</sup> Belgium: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, above fn. 176, Article 10(2).

<sup>624</sup> Bulgaria: *Law on Asylum and Refugees*, 2002, above fn. 201, Article 34; Bulgaria: *Foreigners in the Republic of Bulgaria Act*, 1998, above fn. 201, Article 25b.

<sup>625</sup> Croatia: *Act on International and Temporary Protection 2015*, 2 July 2015, available at: <http://www.refworld.org/docid/4e8044fd2.html>, Articles 64(2)(2) and 66(1). For more details on who is considered a family member see text at fn. 178 above.

<sup>626</sup> UNHCR staff at Regional Representation for Northern Europe, Stockholm, October 2016.

<sup>627</sup> France: CESEDA, above fn. 21, Articles L314-11 8°, L313-13 and L752-1; OFPRA Family Reunification Leaflet, above fn. 182.

<sup>628</sup> Ireland: *International Protection Act*, 2015, above fn. 212, Section 2 defining qualified person and Section 56.

<sup>629</sup> See UNHCR, *Submission by UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Lithuania*, March 2016, available at: <http://www.refworld.org/docid/57fb8ed94.html>, p. 3. The relevant amendments to the Aliens Law were adopted on 9 December 2014.

<sup>630</sup> Luxembourg: *Loi portant sur la libre circulation des personnes et l'immigration*, 2008, above fn. 222, Articles 68-77.

<sup>631</sup> Poland: *Act of 2013 on Foreigners*, above fn. 187, Article 159.

<sup>632</sup> EMN, *Ad-Hoc Query on policies for family members of beneficiaries of international protection*, 2014, above fn. 319, pp. 31-32.

<sup>633</sup> España: *Ley No. 12/2009 reguladora del derecho de asilo y de la protección subsidiaria*, 2009, above fn. 230, Article 41.

<sup>634</sup> Romania: *Law No. 122/2006 on Asylum in Romania*, above fn. 188, Articles 71 and 72.

In addition, in **Norway**, persons granted international protection under the 1951 Convention or on Article 3 ECHR grounds have the same status and therefore enjoy family reunification rights on the same basis. Beneficiaries of subsidiary protection are recognized as refugees according to Norwegian law and may apply for family immigration according to the same rules as Convention refugees.<sup>635</sup>

Thus, **most EU Member States** accord the same rights as regards family reunification to beneficiaries of subsidiary/complementary protection as they do to refugees. Some of these changes have been introduced recently, perhaps in keeping with the trend to accord a uniform status to all beneficiaries of international protection, as outlined in the following subsection.

It should also be noted that in **Central and Latin America** refugees are recognized on the basis of the refugee definition under the Cartagena Declaration, which in addition to refugees under the 1951 Convention and the 1967 Protocol, “includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.<sup>636</sup> This definition thus includes persons who in other regions may be granted complementary/subsidiary protection. Persons fleeing armed conflict and violence in Central and Latin America thus benefit from family reunification on the same terms.

## **6.2 Are beneficiaries of subsidiary protection covered by the Family Reunification Directive?**

From a political point of view the restrictions have generally been introduced in States receiving particularly large increases in the numbers of arrivals, though not in all such States. Where restrictions have been introduced, the States concerned appear to have focussed on beneficiaries of subsidiary protection at least in part because Article 3(2)(c) of the Family Reunification Directive states that it does not apply to persons accorded “a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States”.

The recent report issued by the Council of Europe’s Commissioner for Human Rights argues in relation to the proper interpretation of Article 3(2)(c): “As regards subsidiary protection beneficiaries with a status granted under EU law, it is at least arguable that they are covered by the FRD, as they are not explicitly excluded.”<sup>637</sup> Should beneficiaries of subsidiary

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<sup>635</sup> A. Gustafsson Grønningsæter and J.-P. Brekke, *Family Reunification Regulation in Norway – A summary*, January 2017, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/29a\\_norway\\_family\\_reunification\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/29a_norway_family_reunification_final_en.pdf), p. 2.

<sup>636</sup> Cartagena Declaration, 1984, above fn. 42 para. 3.

<sup>637</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 28. It is worth noting that the Qualification Directive was not agreed until April 2004 and thus post-dates the 2003 Family Reunification Directive. See Council of the EU, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30

protection recognized under the recast Qualification Directive 2011/95 therefore be included? If they are, then the Family Reunification Directive would apply to them, although not automatically the preferential terms applying to refugees under Chapter V of the Directive.

Two sets of preliminary questions referred to the CJEU by the Dutch Council of State in June 2017 and by The Hague District Court in November 2017 concern applications for family reunification made by beneficiaries of subsidiary protection.<sup>638</sup> In each case, the first question posed is whether, in light of Article 3(2)(c) of the Family Reunification Directive, the CJEU is competent to answer the preliminary questions of a Dutch judge on the interpretation of provisions of the Directive in a dispute concerning the right of residence of a family member of a beneficiary of subsidiary protection, if this Directive is declared applicable directly and unconditionally in Dutch law. While beneficiaries of subsidiary protection enjoy the same rights as refugees in the Netherlands, the Court's answer to this first question may provide greater clarity on this issue, even though subsequent questions referred relate to different issues.<sup>639</sup>

### 6.3 Are the restrictions compatible with States' international and regional obligations?

Where more restrictive conditions such as waiting periods and income or other requirements are imposed on beneficiaries of subsidiary/complementary protection as compared with refugees, this creates major obstacles to the enjoyment of their right to family reunification. As the European Legal Network on Asylum has noted, applying more stringent conditions regarding family reunification to beneficiaries of subsidiary protection compared to refugees "ignores their particular circumstances relating to their forced displacement and the corresponding difficulties they are likely to face in meeting more onerous requirements for family reunification".<sup>640</sup>

It would seem that there are strong arguments to be made, based not least on States' obligations regarding the right to family unity under international and regional law more broadly, that beneficiaries of subsidiary protection should benefit from a right to family life and family unity on the same basis as refugees. These arguments are set out below and focus on the following issues:

- States' positive obligations where family reunification is not possible in another State

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September 2004, OJ L. 304/12-304/23, available at: <http://www.refworld.org/docid/4157e75e4.html>, while the current 2011 Qualification Directive (recast) accords equal rights to refugees and beneficiaries of subsidiary protection, except as regards the length of permit granted and social assistance (Articles 24 and 29).

<sup>638</sup> See, the joined cases of *Uitspraak no. 201505478/1/V1 en 201605532/1/V1*, Netherlands: Council of State, 2017, above fn. 377, now before the CJEU as *Staatssecretaris van Veiligheid en Justitie v. K. and B*, Netherlands: Council of State, Case C-380/17, CJEU, 2017, above fn. 371, and *AWB 16/26862*, Netherlands: Rechtbank Den Haag/The Hague District Court, 2017, above fn. 315,

<sup>639</sup> The Council of State's questions concern applications for family reunification made after the expiry of a three-month deadline, see text above at fn. 371, while the second case concerns the absence of official documentation, see text above fn. 315.

<sup>640</sup> ECRE/ELENA, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, 2016, above fn. 226, p. 13, para. 20. I am indebted to Prof. C. Groenendijk for several helpful comments on this section.

- The obligation of States, when balancing the interests at issue, to ensure the best interests of the child are a primary consideration and that they are placed sufficiently at the centre of this balancing exercise
- The obligation of States, when balancing the interests at issue, to ensure that the restrictions are necessary in a democratic society
- The trend in EU law towards establishing a uniform status for refugees and beneficiaries of subsidiary protection
- The obligation of States not to discriminate against similarly situated persons
- The requirement not to undermine the underlying purpose of the Family Reunification Directive

### 6.3.1 States' positive obligations where family reunification is not possible in another State

States have positive obligations towards individuals who are unable to enjoy the right to family life and family unity in another State. As the 2017 Joint General Comment by the CMW and CRC Committees states:

“Protection of the right to a family environment frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit, including the reunion of separated family members.”<sup>641</sup>

For its part, the ECtHR has ruled on numerous occasions that “there may ... be positive obligations inherent in effective ‘respect’ for family life”. While the Court has noted that “the boundaries between the State’s positive and negative obligations under [Article 8 ECHR] do not lend themselves to precise definition”, it has found:

“The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation”.<sup>642</sup>

These factors are outlined in the jurisprudence of the Court set out in section 3.2 above, but key among those requiring consideration are whether the family separation was voluntary or not, which the Court has recognized is not the case for refugees and persons fleeing armed conflict, and whether there are insurmountable obstacles to family life being enjoyed elsewhere – again recognized as not being the case in States’ own recognition that both groups are in need of international protection and cannot be returned to their country of origin.

The ECtHR has recognized that the situation of both refugees and persons who have fled conflict is different as regards family reunification from that of persons who have left their

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<sup>641</sup> CMW and CRC Committees, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, above fn. 554, para. 27. The language echoes that of UNHCR, Summary Conclusions, Family Unity, above fn. 1, para. 5.

<sup>642</sup> See e.g. *Jeunesse v. Netherlands*, ECtHR Grand Chamber, 2014, above fn. 50, para. 106.

country of origin for other reasons. While it emphasizes that Article 8 ECHR does not guarantee a right to choose the most suitable place to develop family life, the Court distinguishes “the interruption of family life [due to flight from] ... a genuine fear of persecution” or from a situation of indiscriminate violence meaning that the person could not “be said to have voluntarily left family members behind”<sup>643</sup> from other migration situations, where family life can be resumed in the country of origin. The discretion of Member States to deny family unity where there are major or insurmountable obstacles to developing family life elsewhere is thus significantly limited.

Where beneficiaries of subsidiary protection are barred from family reunification, there is no possibility to assess these factors and thus no way for the State concerned to determine whether it is respecting its obligations. Problems may also arise where there is insufficient flexibility for States to allow them to enable the family reunification of family members of beneficiaries of subsidiary protection, where this is not possible elsewhere.

### 6.3.2 States’ obligations regarding the best interests of the child

States’ capacity to ensure respect for the rights of the child and that their best interests are a primary consideration, as set out in Article 3 of the CRC, Article 24(2) of the EU Charter and elsewhere, may also be called into question on several counts.

The restrictions can be expected to have a particularly harmful effect on children with subsidiary protection and may not be in line with States’ obligations to ensure the child’s best interests are a primary consideration and those, for instance, under Article 10(1) of the CRC requiring States to deal with applications by a child or his or her parents for the purpose of family reunification “in a positive, humane and expeditious manner”.<sup>644</sup>

Where waiting periods are imposed before family reunification can be sought, older child beneficiaries of subsidiary protection may find that they are no longer entitled to reunify with their parents if they become adults before their parents are entitled to apply to join them, as they may then find that their parents are no longer viewed as part of the “nuclear” family. This may result in the family being definitively split, unless return to the country of origin eventually becomes possible for all family members.

Family members of adult beneficiaries of subsidiary protection who are minors are also affected. As the ECtHR has ruled, “[w]hen assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of *all members of the family, as this provision guarantees protection to the whole family*”.<sup>645</sup> Since a parent

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<sup>643</sup> See respectively, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, ECtHR, 12 October 2006, available at: <http://www.refworld.org/docid/45d5cef72.html>, para. 75, and *Tuquabo-Tekle and Others v. The Netherlands*, ECtHR, 2005, above fn. 74, para. 47.

<sup>644</sup> For instance, under Article 10(1) CRC. Recent ECtHR jurisprudence concerning the determination of the best interests of the child in family reunification cases is set out in section 3.2 above, while section 8.1 below concerns family reunification and the child’s best interests in the national context.

<sup>645</sup> *Jeunesse v. The Netherlands*, ECtHR, 2014, above fn. 50, para. 117 (emphasis added).

who is a beneficiary of subsidiary protection cannot enjoy his or her right to family unity in the country of origin, his or her children cannot enjoy their right to family unity there either.

As part of assessing whether restrictions introduced by States are in line with their international and regional obligations, it would be necessary to examine how they have taken into account the best interests of the children affected, both generally when the policy was introduced and in the individual case. As the CRC Committee has stated:

“Whenever a decision is to be made that will affect a specific child ... or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.”<sup>646</sup>

While the ECtHR has noted that “the best interests of the child cannot be a ‘trump card’ which requires the admission of all children who would be better off living in a Contracting State”, it has also affirmed that the domestic courts must place the best interest of the child “at the heart of their considerations and attach crucial weight to it”.<sup>647</sup> Where the domestic authorities fail to undertake a “thorough balancing of the interests in issue” that places the child’s best interests “sufficiently at the center of the balancing exercise and its reasoning”, this has led the ECtHR to conclude that there had been a violation of Article 8 ECHR.<sup>648</sup>

It is not clear to what extent and how States may have balanced these interests, when introducing restrictions on the right to family reunification of beneficiaries of subsidiary protection, but it is clear that they have a responsibility to do so, both regarding the policy in general and in the individual case.

### 6.3.3 *States’ obligation to ensure the restrictions are necessary in a democratic society*

In order to assess whether States that have introduced restrictions are upholding their obligations under international and regional law and it is necessary to examine the rationale and policy reasons behind their introduction in each country concerned. It would seem that reasons of immigration control have predominated, but the specific rationale will be different in different States.

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<sup>646</sup> UN Committee on the Rights of the Child (CRC Committee), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>, para. 6.

<sup>647</sup> *El Ghatet v. Switzerland*, ECtHR, 2016, above fn. 93, para. 46 (references removed).

<sup>648</sup> *Ibid.*, paras. 46-52.



A detailed examination of this process in each country is beyond the scope of this paper.<sup>649</sup> It may nonetheless be useful to consider some recent statistical reports on the numbers of family members likely to arrive and those actually arriving in a number of European countries, as they may provide an indicator of the necessity of introducing the restrictions in the first place and/or what should be done when suspensions expire. These reports adopt different research methodologies that nevertheless come to similar overall conclusions. They generally indicate a significantly lower rate of actual family reunification of refugees/beneficiaries of subsidiary protection than that initially estimated.

In **Germany**, a report issued in October 2017 found that by the end of 2017 approximately 600,000 adult refugees with an international protection status are expected to be living in Germany, of whom around 400,000 have asylum or refugee status under the 1951 Convention and the right to be joined by their spouses and minor children. The remaining 200,000 have subsidiary protection and if recognized as such after April 2016 are not currently entitled to reunification. The report estimated that by the end of 2017 there would be 100,000 to 120,000 spouses and minor children abroad who would be entitled to family reunification and that if persons with subsidiary protection were also included, the number of spouses and children entitled to family reunification would rise by 50,000 to 60,000 persons. This corresponds to 0.3 persons per refugee, rather than the 0.9–1.2 family members anticipated by BAMF at the time the restrictions were introduced. The report attributes this “comparatively low” number of potential family members entitled to reunite to the fact that many refugees are single and have no children and where they do have family the vast majority of spouses and underage children are already living in Germany. The report indicates that the potential number of family members joining is thus lower than often assumed. Moreover, it notes that this should not be understood as a forecast for actual immigration. Sometimes family members who are not technically entitled to reunification may come to Germany, while only some of those legally entitled to reunify are likely actually to come to Germany, for personal, administrative and economic reasons.<sup>650</sup>

In **The Netherlands**, a June 2017 report by the Central Bureau for Statistics examined the situation of a cohort of all 22,655 people who received protection status in 2014 and the net increase/decrease due to family reunification, birth, death and departure. The report found that there was a net increase in 2015 of 6,730 persons, representing 0.3 persons per refugee/beneficiary of subsidiary protection in contrast to an expected increase of one family member per refugee expected by the Central Bureau for Statistics. The report found there were significant differences among nationalities able to reunite: the increase among Syrian nationals was 0.9 per refugee, while for Iranian nationals there was a decrease of 0.25.<sup>651</sup> The report also

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<sup>649</sup> For an account of the rationale presented for the changes at the time the legislation was being considered in Germany and the actual situation thereafter, see for instance, UNHCR, “Familiennachzug zu Personen mit subsidiärem Schutz in Deutschland – Anhörung im Innenausschuss am 20. März 2017”, above fn. 608.

<sup>650</sup> H. Brücker, *Familiennachzug: 150.000 bis 180.000 Ehepartner und Kinder von Geflüchteten mit Schutzstatus leben im Ausland*, Institut für Arbeitsmarkt- und Berufsforschung (IAB), 19 Oktober 2017, available in German at: <https://www.iab-forum.de/familiennachzug-150-000-bis-180-000-ehepartner-und-kinder-von-gefluechteten-mit-schutzstatus-leben-im-ausland/?pdf=5323>. The report was based on a survey of a representative sample of 5,000 out of 400,000 refugees admitted in 2013-2016.

<sup>651</sup> Netherlands: Central Bureau for Statistics, *From reception to integration: Cohort study of recent asylum migrants*, 22 June 2017, available in Dutch at: <https://www.cbs.nl/nl-nl/publicatie/2017/25/van-opvang-naar-integratie-cohortstudie-asielmigranten>, pp. 14-15.

noted that family members usually arrive as migrants, rather than through regular family reunification. Very few Eritreans were able to reunite with family members in the Netherlands, a fact attributed to the lack of official documents demonstrating family ties, which meant that many Eritrean applications for family reunion were rejected.

In **Norway**, a January 2017 report on the numbers of family members joining refugees in Norway found that it was too early to comment on family immigration among refugees who arrived in 2015. It nevertheless found that for immigrants who came to Norway in the period 1990–2015 as the family member of a refugee who arrived during the same period, an average of 0.32 family members per refugee arrived during the period. This rate did not take into account how long it takes for a refugee to bring a family member to Norway or subsequent migration of those family members who arrive. Nevertheless, it showed that 17 per cent (23,500) of refugees had been able to bring family members to Norway; 83 per cent had never acted as a sponsor; 60 per cent of the refugees registered as sponsors were only associated with one family member, while 15 per cent had two family members in Norway. In total, 8 per cent had managed to get five or more family members into Norway.<sup>652</sup>

It is striking that these three reports, each of which used different research techniques, conclude that a relatively low figure of around 0.3 family members per refugee were able to come to the refugee's country of asylum.

#### 6.3.4 *The trend in EU law towards a uniform status for all beneficiaries of international protection*

The difference in treatment as regards family reunification between refugees and beneficiaries of subsidiary protection under the Family Reunification Directive needs also to be viewed in the light of developments in EU law towards establishing a uniform status for refugees and beneficiaries of subsidiary protection.

Since the adoption of the Directive in 2003, the trend in EU legislation has been towards a uniform status for all beneficiaries of international protection. This was envisaged in the Stockholm Programme adopted by the European Council in 2009, while the 2012 Treaty on the Functioning of the EU requires the European Parliament and the Council to “adopt measures for a common European asylum system” including a uniform status for refugees and beneficiaries of subsidiary protection.<sup>653</sup>

The inclusion of all beneficiaries of international protection within the scope of the Long-Term Residents Directive from 2011 is part of this trend. It is also evident in both the recast Asylum Procedures and Qualification Directives which each refer to the Stockholm Programme. For instance, the recast Qualification Directives states that the content of international protection

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<sup>652</sup> Statistics Norway, “Family Immigration Among Refugees: How Many Refugees’ Families Come to Norway?”, 19 January 2017, available in English at: <https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/how-many-refugees-families-come-to-norway>.

<sup>653</sup> Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Council document 17024/09, 2 December 2009, available at: <http://www.refworld.org/docid/58c162cb4.html>, at 6.2, adopted by the European Council, 10/11 December 2009 and TFEU, 2012, above fn. 139, Articles 78(2)(a) and 78(2)(b).

granted must apply “both to refugees and persons eligible for subsidiary protection unless otherwise indicated” and that Member States shall “ensure that family unity can be maintained”.<sup>654</sup>

Indeed, the European Commission has noted: “[T]he humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees.”<sup>655</sup> It therefore encourages Member States “to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection”.<sup>656</sup> The European Commission has in addition stated:

“When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. ... However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified. Such an approximation of rights is necessary to ensure full respect of the principle of non-discrimination, as interpreted in recent case law of the ECtHR, and of the UN Convention on the Rights of the Child. It responds moreover to the call of the Hague Programme for the creation of a uniform status of protection.”<sup>657</sup>

Furthermore, as ELENA has argued: “[T]here are divergences between Member States as to which form of protection status is granted to those in similar circumstances from the same nationality, which includes countries where there are protracted conflicts, indicating the likelihood of long-term displacement.”<sup>658</sup>

The Council of Europe’s Commissioner for Human Rights has further noted that, while formally the two categories of refugee and beneficiary of subsidiary protection are distinct, since the latter are by definition not a 1951 Convention refugee, “in practice, whether any given applicant is granted one status or another depends on a variety of institutional and political factors”. The resulting “diverse patterns in recognition rates of the same nationalities ... mean that similarly situated individuals may be recognised as 1951 Convention refugees or

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<sup>654</sup> Council of the EU, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>, (Recast Qualification Directive), Articles 20(2) and 23(1). Recital 39 also states: “[W]ith the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility.”

<sup>655</sup> European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 169, section 6.2.

<sup>656</sup> European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 169, section 6.2.

<sup>657</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, COM(2009) 551 final, 2009/0164 (COD), available at: <http://www.refworld.org/docid/4ae95f222.html>, p. 8.

<sup>658</sup> ECRE/ELENA, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, 2016, above fn. 226, para. 29.

subsidiary protection beneficiaries (or granted some residual domestic status) depending on where and when they claim asylum, and whether they have the inclination or resources to appeal the granting of subsidiary protection". The report argues that "[i]n light of those institutional practices, as a matter of human rights law, all beneficiaries of international protection ought to be regarded as similarly situated and generally entitled to equal treatment".<sup>659</sup>

It may even be that there is an element of arbitrariness in the different statuses granted to similarly situated persons in different European jurisdictions, which tends to argue against the attachment of different rights to the two statuses. Ultimately, for both categories, the key factor is the ongoing need for international protection.

As for the CJEU, its analysis in *European Parliament v. Council of the EU*<sup>660</sup> of the provision in Article 8 of the Family Reunification Directive permitting States to require third country nationals to wait for a period of two or three years before being able to apply for family reunification under certain circumstances may be relevant, although it applies to third country nationals generally. In its judgment, the Court stressed that such "a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors" and that the same is true regarding the Member State's reception capacity, which the Court finds, "may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases". Rather, the Court ruled that "when carrying out that analysis, the Member States must ... also have due regard to the best interests of minor children".<sup>661</sup>

Considering the vulnerable position of beneficiaries of subsidiary protection and their family members, it would seem difficult to justify treatment of beneficiaries of subsidiary protection with regard to family unification that is worse than that of third country nationals generally, irrespective of the length of their lawful residence in a Member State.

It should be noted with regard to refugees that Article 12(2) of the Directive specifies: "Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her." Since the situation of beneficiaries of subsidiary protection has been shown not to be temporary in nature and they are equally unable to enjoy their right to family life elsewhere, the reasons for which States agreed to the insertion of this provision can be seen to apply equally to beneficiaries of subsidiary protection. Where States nevertheless impose a waiting period, this at least needs to be sufficiently flexible both to take into account "the particular circumstances of specific cases" and to have due regard to the best interests of minor children.

In addition, the CJEU in its 2016 judgment in the joined cases of *Alo* and *Oso*, concerning two Syrian beneficiaries of subsidiary protection and their right to establish themselves in a different part of a Member State, reiterated that

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<sup>659</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 14.

<sup>660</sup> *European Parliament v. Council*, CJEU, 2006, above fn. 103 and section 3.4 above.

<sup>661</sup> *Ibid.*, paras. 99-101. *European Parliament v. Council*, CJEU, 2006, above fn. 103, paras. 99-101.

“the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees”.

The Court ruled that to restrict, in this case the right of freedom of movement to beneficiaries of subsidiary protection when that of refugees was not restricted, “would create ... a distinction ... between the content of the protection afforded in this respect to, on the one hand, refugees and, on the other, beneficiaries of subsidiary protection status”. It also ruled that national rules that differentiate between subsidiary protection holders and refugees, amongst others, would only be legitimate if these groups were not in an objectively comparable situation as regards the objective pursued by those rules.<sup>662</sup>

More generally, it should be noted that the Family Reunification Directive was adopted in 2003 at a time when the ECtHR’s jurisprudence relevant to family reunification was relatively undeveloped and that since then it has evolved significantly, as set out in section 3.2 above. Given that the fundamental rights guaranteed by the ECHR constitute general principles of Union law,<sup>663</sup> the interpretation of EU law must undertaken in conformity with the ECtHR’s jurisprudence.

### 6.3.5 States’ obligations not to discriminate against similarly situated persons

The principle of non-discrimination requires States not to treat two groups of similarly situated persons differently. This principle underpins international human rights law and in Europe is set out in Article 14 ECHR and in Article 21 of the Charter of Fundamental Rights.

According to ECtHR caselaw, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.<sup>664</sup>

The Commissioner for Human Rights has affirmed:

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<sup>662</sup> *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, C-443/14 and C-444/14, CJEU, 1 March 2016, available at: <http://www.refworld.org/cases,ECI,56e67d9f4.html>, paras. 31-37, 54 and 61.

<sup>663</sup> EU, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b179f222.html>, Article 6(3).

<sup>664</sup> See e.g. *Niedzwiecki v. Germany*, Application No. 58453/00, ECtHR, 25 October 2005, available at: <http://www.refworld.org/cases,ECHR,4406d6cc4.html>, para. 32, a case concerning access to child benefit for someone with unlimited residence. In that case, the ECtHR did not “discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other” and so found a violation of Article 14 in conjunction with Article 8 ECHR (para. 33). See also, Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, pp. 24-25.

“Article 14 of the Convention is an open-ended non-discrimination guarantee, so it is possible to challenge discrimination on suspect grounds, such as sex, race and sexual orientation, as well as differences in treatment between similarly situated individuals and groups where the discrimination is on grounds of ‘other status’. There are different standards of justification for these different types of discrimination. In the former case, particularly strong justifications must be offered, while in the latter case, states may justify differences in treatment if they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Notably, the Court has explained that the margin of appreciation is restricted when discrimination is based on an immutable characteristic, and has suggested that the margin is similarly restricted where the difference of treatment is grounded on refugee status since it does not entail an ‘element of choice’”<sup>665</sup>

Like refugees, beneficiaries of complementary/subsidiary protection cannot be expected to return to their country of origin to enjoy family life. Like refugees, they have not left their country of origin voluntarily and have been recognized as being in need of international protection. As UNHCR has stated, “[s]ituations of armed conflict and violence frequently involve exposure to serious human rights violations or other serious harm amounting to persecution” and

“may be rooted in, motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides, or may impact people based on these factors. In fact, what may appear to be indiscriminate conduct (i.e. conduct whereby the persecutor is not seeking to target particular individuals) may in reality be aimed at whole communities or areas whose inhabitants are actual or perceived supporters of one of the sides in the situation of armed conflict and violence.”<sup>666</sup>

The situation of people to whom some States have granted only subsidiary protection is thus not significantly different from that of refugees. Experience has shown that they are not able to return home more quickly given the continuing conflict and/or instability in key countries origin such as Syria, Afghanistan or Iraq. If this is accepted, it falls to the State to prove the difference in treatment pursues a legitimate aim, is necessary and proportionate.

Czech has noted that whether the unequal treatment of different groups of people similarly situated in the context of family reunification is compatible with the prohibition of

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<sup>665</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 23. See by contrast the judgment in *Bah* concerning a Sierra Leonean woman with indefinite leave to remain, who had been able to reunite with her son on condition that she did not have recourse to public funds. They were then threatened with homelessness and not prioritized by the local authority for housing on grounds that the son was subject to immigration control, although they were not made homeless at any point. This difference in treatment was found not to violate Article 14 ECHR in conjunction with Article 8. See *Bah v. United Kingdom*, Application no. 56328/07, ECtHR, 27 September 2011, available at: <http://www.refworld.org/cases,ECHR,4ee0fad32.html>.

<sup>666</sup> UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, available at: <http://www.refworld.org/docid/583595ff4.html>, paras. 11 and 33.

discrimination or not depends primarily on what weight is accorded to the public interest and whether this unequal treatment is found to be sufficiently legitimate, proportionate and necessary as to require the restriction or denial of the right to family unity and family reunification to one group of persons that is similarly situated to another group.<sup>667</sup>

As the case law of the ECtHR set out below indicates, the margin of discretion available to States is nevertheless more limited in relation to particularly vulnerable groups including in the immigration context.

Several ECtHR judgments where the Court has found violations of Article 14 in conjunction with Article 8 ECHR are relevant.<sup>668</sup> An early example is that of *Abdulaziz, Cabales and Balkandali*, where the Court determined there was discrimination against each of the applicants on the ground of their (female) sex.<sup>669</sup>

In *Hode and Abdi* the ECtHR determined that a difference of treatment in “analogous, or relevantly similar, situations” is discriminatory if it has no objective and reasonable justification, “in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”. The Court found that the protection conferred by Article 14 ECHR, which prohibits discrimination in the enjoyment of the rights in the Convention “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”, is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent, but also relates to the individual’s immigration status. It ruled that “the requirement to demonstrate an ‘analogous situation’ does not require that the comparator groups be identical. Rather, the applicants must demonstrate that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently” and that it was necessary to determine “whether or not the difference in treatment was objectively and reasonably justified”.<sup>670</sup> In this case, the ECtHR concluded that preventing a temporary residence permit holder of five years from being able to apply for family reunification was in breach of Articles 8 and 14 of the ECHR.

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<sup>667</sup> P. Czech, “Die Neuerungen des Asylrechtspakets 2016 – Einschränkungen des Familiennachzugs”, *Fremden- und Asylrechtlichen Blätter*, 1 / 2016-I, pp. 15-22, at p. 19. See also P. Czech, “A right to family reunification for persons granted international protection? The Strasbourg case-law, state sovereignty and EU harmonization”, 17 June 2016, available at: <http://eumigrationlawblog.eu/a-right-to-family-reunification-for-persons-under-international-protection-the-strasbourg-case-law-state-sovereignty-and-eu-harmonisation-2/>.

<sup>668</sup> It is also worth noting that the Committee of Ministers has adopted a Recommendation on family reunion, which applies equally to refugees and “other persons in need of international protection”. See Council of Europe: Committee of Ministers, *Recommendation N° R (99) 23 on Family Reunion for Refugees and Other Persons in Need of International Protection*, 1999, above fn. 305.

<sup>669</sup> *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, 1985, above fn. 64, para. 62. For more see UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, sections 3.3.1 and 3.3.2. See also, for instance, *Şerife Yiğit v. Turkey*, Application No. 3976/05, ECtHR, Grand Chamber, 2 November 2010, available at: <http://www.refworld.org/cases,ECHR,58a731f14.html>, paras. 67-71, which set out the Court’s settled case-law on the issue in 2010.

<sup>670</sup> *Hode and Abdi v. UK*, ECtHR, 2012, above fn. 277, paras. 45-51.

Four 2016 judgments of the ECtHR show how the Court's jurisprudence regarding the protection from discrimination afforded under Article 14 in conjunction with the right to family life under Article 8 ECHR is evolving.

First, the case of *Novruk and Others v. Russia*, concerning the failure to grant a residence permit to HIV-positive non-nationals in Russia, whom the Court considered "a particularly vulnerable group", may also be relevant more generally in this context, in particular as regards the substantially narrower margin of appreciation accorded to States in such cases. In its judgment the ECtHR ruled:

*"If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered significant discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for imposing the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice, with lasting consequences resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs."*<sup>671</sup>

Second, in *Biao v. Denmark*,<sup>672</sup> as discussed in section 3.2 above, the Grand Chamber confirmed that a "very narrow margin of appreciation" applied in the case and determined that the impact of the "28-year-rule" introduced in Denmark constituted indirect discrimination on grounds of ethnic origin. It ruled:

*"[T]he Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish."*<sup>673</sup>

Such reasoning may be seen also to apply to refugees and beneficiaries of complementary/subsidiary protection. Given their particular vulnerability, States also have a narrower margin of appreciation vis-à-vis both categories of persons. In situations where the family reunification terms applied *directly* discriminate against beneficiaries of complementary/subsidiary protection by treating them differently to refugees, despite their similar situation, it may be that this constitutes discrimination if sufficient legitimacy, proportionality and necessity cannot be shown.

This reasoning may also be seen to apply in cases where requirements for family reunification have the effect of *indirectly* discriminating against refugees and beneficiaries of complementary/subsidiary protection vis-à-vis other migrants. This could be so, for instance, where these requirements place disproportionate burdens on refugees and beneficiaries of complementary/subsidiary protection that they are not able to meet, for instance if this means

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<sup>671</sup> *Novruk and Others v. Russia*, Applications nos. 31039/11, 48511/1, 76810/12, 14618/13 and 13817/14, ECtHR, 15 March 2016, available at: <http://www.refworld.org/docid/5852ab944.html>, para. 100 (emphasis added).

<sup>672</sup> *Biao v. Denmark*, ECtHR Grand Chamber, 2016, above fn. 51.

<sup>673</sup> *Ibid.*, para. 138.



they are required to contact the embassy of their country of origin when it has already been recognized that they have a well-founded fear of persecution/serious harm in that country. Applying the same terms to these categories of persons may thus constitute indirect discrimination, again if sufficient legitimacy, proportionality and necessity cannot be shown.

Third and fourth, in the cases of *Pajić v. Croatia*<sup>674</sup> and in *Taddeucci et McCall c. Italie*,<sup>675</sup> as discussed at 7.6 below, the ECtHR found violations of Article 14 in conjunction with Article 8 in relation to the treatment accorded to a lesbian and a gay couple respectively. As the Court ruled in *Pajić v. Croatia*:

In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was *necessary*, in order to achieve that aim, to exclude certain categories of people – in this instance persons in a same-sex relationship – from the scope of application of the relevant domestic provisions at issue. *This equality requirement holds true in the immigration cases as well where States are otherwise allowed a wide margin of appreciation.*<sup>676</sup>

Considering this recent ECtHR case law on Articles 8 and 14 ECHR, which has developed more than a decade after the adoption of the Directive, a complete exclusion of beneficiaries of subsidiary protection from the personal scope of the Directive would appear difficult to justify.

Indeed, in Czech's view, the difference in treatment as regards family reunification for refugees and beneficiaries of subsidiary protection is in violation of Article 8 ECHR in conjunction with Article 14 ECHR and in violation of the prohibition of differential treatment among foreigners.<sup>677</sup> These measures may similarly violate the corresponding provisions in Articles 7 and 21 of the EU Charter. For its part, ECRE has argued:

“[G]iven that subsidiary protection holders have been brought within the scope of the Qualification Directive, measures that differentiate between categories of international protection holders are discriminatory, with more favourable treatment for refugees an insufficient defence. Member States must provide an objective and reasonable justification which should be subject to a high level of scrutiny, especially given the absence of free personal choice for beneficiaries of international protection as compared to [persons with] other types of immigration status.”<sup>678</sup>

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<sup>674</sup> *Pajić v. Croatia*, Application no. 68453/13, ECtHR, 23 February 2016, available at: <http://www.refworld.org/docid/5852b8534.html>.

<sup>675</sup> *Taddeucci et McCall c. Italie*, Requête no. 51362/09, ECtHR, 30 June 2016, available at: <http://www.refworld.org/docid/5852ba884.html>.

<sup>676</sup> *Pajić v. Croatia*, ECtHR, 2016, above fn. 674, para. 82 (emphasis added).

<sup>677</sup> P. Czech, “Die Neuerungen des Asylrechtspakets 2016 – Einschränkungen des Familiennachzugs”, above fn. 667, at p. 21.

<sup>678</sup> ECRE/ELENA, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, 2016, above fn. 226, para. 28.

The 2017 Council of Europe report on family reunification in Europe likewise finds the difference in treatment difficult to justify. While it might be argued that 1951 Convention refugees have a privileged position in international law, it notes that refugees and complementary/subsidiary protection holders are both protected from return under international human rights law and cannot enjoy their right to family unity in their country of origin. It could be argued that the stay of subsidiary/complementary protection beneficiaries is likely to be limited, given that their stay permit is of shorter duration than that of refugees, but their prospects for return are primarily linked to the situation in their country of origin and they remain protected by the principle of *non-refoulement*. Refugees are similarly subject to the cessation clauses of the 1951 Convention if circumstances change sustainably in the country of origin. The report finds that “[b]oth 1951 Convention refugees and beneficiaries of subsidiary protection have a reasonable prospect of remaining in the country of refuge in the longer term or permanently” and argues that the differences in treatment “should be reconsidered promptly.”<sup>679</sup>

The report concludes:

“Of course, each restriction will have to be examined on its own merits. This should take into account any particular reasons offered by the respondent state in question to legitimise such a restriction. However, in general, there are strong reasons to conclude that many of the current restrictions violate Article 8 of the Convention. Under the UN Convention on the Rights of the Child, states are obliged to treat applications ‘in a positive, humane and expeditious manner’. The principles underlying these international instruments also support a strong right to family reunification for refugees. Moreover, drawing arbitrary distinctions between different categories of refugees and other international protection beneficiaries will often violate Article 14 of the Convention (read together with Article 8 of the Convention). The inequality of status between 1951 Convention refugees and subsidiary (and other protection) beneficiaries as regards the apparent coverage of EU family reunification law does not justify that difference in treatment.”<sup>680</sup>

#### 6.3.6 *The requirement not to undermine the underlying purpose of the Family Reunification Directive*

Finally, it could be possible to argue that EU Member States are required not to undermine the underlying purpose of the Family Reunification Directive, which is defined in Article 1 as being “to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States”.

Even though Article 3(2)(c) appears to exclude beneficiaries of subsidiary protection from the scope of the Directive, Member States are required to ensure that measures concerning family reunification are “adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law”. They are also required to ensure that the right to family reunification is “exercised in proper compliance with the values

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<sup>679</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, pp. 24-26.

<sup>680</sup> *Ibid.*, p. 47.

and principles recognised by the Member States, in particular with respect to the rights of women and of children” and to promote the integration of family members (recitals 2, 4, 11 and 15).

As the CJEU has ruled: “It is apparent ... from recital 4 in the preamble to Directive 2003/86, that that directive has the general objective of facilitating the integration of third country nationals in Member States by making *family life* possible through *reunification*.”<sup>681</sup> The CJEU’s judgment in *Chakroun* further affirms that States’ “margin for manoeuvre ... must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof” and that “authorisation of family reunification is the general rule”.<sup>682</sup> Two other CJEU judgments likewise confirm that the aim of the Directive is to “promote family reunification”.<sup>683</sup>

This question may become particularly relevant depending on the outcome of the questions referred to the CJEU by Dutch courts regarding its competence to rule on the situation of beneficiaries of subsidiary protection in the context of the Family Reunification Directive, as outlined in section 6.2 above.

If beneficiaries of subsidiary protection are determined to fall within the scope of the Directive and their situation is found to be similar to that of refugees, then imposing a waiting period before which reunification may be sought, as otherwise permitted under Article 8 but precluded in the case of refugees under Article 12(2) of the Directive, would appear to run counter to the terms of the Directive.

One Article of the Directive may provide a mechanism whereby those EU Member States that discriminate between refugees and beneficiaries of subsidiary protection, when both are particularly vulnerable and are unable to enjoy their right to family unity elsewhere, can treat refugees and beneficiaries of subsidiary protection on an equal basis in line with their wider human rights obligations. Article 3(5) of the Directive states that it “shall not affect the possibility for the Member States to adopt or maintain more favourable provisions”.

## 7 FAMILY REUNIFICATION AND DIFFERENT TYPES OF MARRIAGE AND PARTNERSHIP

In the context of family reunification, regional courts and national practice accept various types of marriage and partnership as able to constitute family life.<sup>684</sup>

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<sup>681</sup> *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, CJEU, above fn. 103, para. 26. See also ECRE/ELENA, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, 2016, above fn. 226, para. 31.

<sup>682</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 117, para. 43.

<sup>683</sup> *O. and S.*, CJEU, 2012, above fn. 119, para. 69 and *Minister van Buitenlandse Zaken v. K. and A.*, CJEU, 2015, above fn. 131, para. 50.

<sup>684</sup> See UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, section 3.3, for more on international and regional jurisprudence on the different types of relationships that have been accepted by international bodies and regional court as able to constitute family life.

The subsections below look at issues and practice arising in the context of family reunification involving:

- Common law, traditional and religious marriages;
- Marriages between persons of different nationalities;
- Proxy marriages;
- Polygamous marriages;
- Marriages deemed invalid (including child and forced marriages); and
- Same-sex relationships/partnerships;
- The status of family members and divorce, separation or death

### 7.1 Common law, traditional and religious marriages

In the context of EU law, Choudry writes that marriage is still accorded a privileged status by the EU, although the Family Reunification Directive permits States to authorize the entry of “unmarried partners ... with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership”.<sup>685</sup>

Legislation in quite a number of countries requires common law partners to have lived in a stable relationship within the same household for a certain number of years (usually one or two years), this being not required if the couple have a child together. In practice it can be very difficult for unmarried couples or couples who are unable to provide a marriage certificate to prove their cohabitation, as can be the case for Syrian or Eritrean refugees among others. This is less of a problem where there are children.

*Examples of State practice regarding common law, traditional and religious marriages include:*

A number of countries are quite strict in requiring couples to be formally married. They include **Austria, Estonia, Italy, Romania, and Slovakia**. In **Poland**, it is only couples who are in a marriage recognized under Polish law who are accepted, with the result that no exclusively religious marriages (i.e. marriages not registered with the civil authorities), same-sex, or polygamous unions are recognized.<sup>686</sup>

Otherwise, examples of countries that are more flexible include **Belgium**, where civil and religious or customary marriages are recognized, although in the case of religious and customary marriages, the spouse only obtains a humanitarian visa and is subject to more conditions when it comes to the renewal of their residence permit.<sup>687</sup>

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<sup>685</sup> C. Choudhry, “A Commentary on Article 7 of the Charter of Fundamental Rights and Freedoms” in *The EU Charter of Fundamental Rights: A Commentary*, eds S. Peers et al, Hart, 2014, pp. 209-210; Family Reunification Directive, above fn. 103, Article 4(3).

<sup>686</sup> Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187, p. 9.

<sup>687</sup> Belgian Refugee Council, *Guide pratique demandes de visa humanitaire pour membres de la famille des bénéficiaires de protection internationale en Belgique*, 2016, above fn. 177.

In **Finland**, persons regardless of their sex who have been living continuously in a marriage-like relationship in the same household for at least two years or who have joint custody with the cohabiting partner of a child are considered family members.<sup>688</sup>

In **France**, cohabiting partners are accepted, but must be over the age of 18 and the applicant must be able to demonstrate a sufficiently stable and continuous cohabiting relationship.<sup>689</sup>

In **Ireland**, the High Court ruled that the existence of a valid common law marriage is determined by the nature of the ceremony undergone and by the parties' intention to be bound by it. In the circumstances of the case, which concerned the validity of a religious marriage ceremony held in Mogadishu, Somalia, the Court added: "Where a refugee is in a position to prove ... that, since the date of the claimed marriage ceremony, a real marital relationship based on cohabitation and exclusivity in the relationship has subsisted between the two parties in question over a substantial period", the applicant for family reunification could be considered a "spouse in a subsisting marriage" as defined in Irish legislation.<sup>690</sup> The Supreme Court dismissed the Minister's appeal in this case on the grounds that he "was not entitled to rely on the fact of the marriage as being religious as a ground for refusal" and he "did not take sufficient account of the explanation given for the inability to produce a marriage certificate from Somalia in the circumstances of that country at the relevant time".<sup>691</sup>

In **the Netherlands**, the District Court of The Hague in July 2017 overturned a decision to deny a provisional stay residence permit to an Eritrean national who was married in a traditional ceremony in Eritrea to another Eritrean national, who is currently a refugee in the Netherlands. The request had been denied on the grounds that the relevant authorities did not recognize a traditional marriage as a lawful marriage under international private law, particularly due to the lack of official, sworn documents confirming the marriage. Relying on expert opinion, the court confirmed that, in Eritrea, all marriages (civil, traditional and religious) are legally valid. Since the fact that there was a traditional marriage between the applicants had not been called into question, the Court quashed the administrative decision and ordered the authorities to take a new decision, this time considering the applicant's marriage as legally valid.<sup>692</sup>

In **Slovenia**, registered partners and long-term unofficial partners qualify for family reunification. In principle, partners in proven and stable relationships in **Bulgaria** also qualify.<sup>693</sup>

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<sup>688</sup> Finland: *Aliens Act*, 2004, above fn. 205, section 37.

<sup>689</sup> France: CESEDA, above fn. 21, Articles L314-11 8° et L313-13; OFPRA Family Reunification Leaflet, above fn. 182.

<sup>690</sup> *Hassan and Another v. Minister for Justice, Equality and Law Reform*, [2010] IEHC 426, Ireland: High Court, 25 November 2010, available at: [http://www.refworld.org/cases,IRL\\_HC,58a6e7d04.html](http://www.refworld.org/cases,IRL_HC,58a6e7d04.html), paras. 16 and 20.

<sup>691</sup> *Hassan & Another v. Minister for Justice, Equality & Law Reform*, [2013] IESC 8, Ireland: Supreme Court, 20 February 2013, available at: [http://www.refworld.org/cases,IRL\\_SC,512ddd612.html](http://www.refworld.org/cases,IRL_SC,512ddd612.html), para. 54.

<sup>692</sup> *Case No. 16/26926*, Netherlands: Rechtbank Den Haag/District Court of The Hague, ECLI:NL:RBDHA:2017:7423, 5 July 2017, available in Dutch at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2017:7423>.

<sup>693</sup> Communication from UNHCR, Sofia, Bulgaria, October 2017.

Outside Europe, in **Canada**, for the purposes of the Immigration and Refugee Protection Act and its related Regulations, a common-law partner is considered to be “an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to persecution or any form of penal control”.<sup>694</sup>

## 7.2 Married couples of different nationalities

With regard to marriages between couples of different nationalities, Edwards observes:

“Where the foreign spouse is a resident or citizen of a country other than the refugee’s country of origin, ... [i]t would first be necessary to determine if they could live in the country of residence or citizenship of the intended spouse. It is not always the case that the country of refuge is the most desirable location, although it would be important that wherever the couple are granted the right to reside, the refugee is able to maintain the level of protection required of his or her status as a refugee. Considerations of the general situation in the country of destination, including any hostility to refugees generally and/or persons of their ethnic, religious, or cultural origin, would be relevant.”<sup>695</sup>

In the jurisprudence of the ECtHR, the Court ruled in *Abdulaziz, Cabales and Balkandali*, a case involving mixed nationality couples, that “[t]he duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country”.<sup>696</sup> Since then, the Court has gone on to set out the various factors that need to be taken into account when judging the proportionality of any interference with the right to respect for family life, not least those relating to the best interest of the child.<sup>697</sup>

In **Spain**, a spouse with a different nationality to that of the sponsor is not entitled to derive status by extension from the sponsor. They may, however, apply for family reunification, although implementing regulations setting out how this may be done have yet to be issued.<sup>698</sup>

In **Switzerland**, as noted above, for refugees with a B-permit both married couples and registered or cohabiting partners may qualify for family reunification, but this is only if *particular circumstances* do not preclude this (and if they were separated by flight).<sup>699</sup> The position of couples of different nationalities may be found to be a “particular circumstance” barring family reunification. If it is determined that the couple can live in the country of origin

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<sup>694</sup> Canada: *Immigration and Refugee Protection Regulations (IRPR)*, above fn. 244, section 1(2).

<sup>695</sup> Edwards “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, above fn. 276, p. 317.

<sup>696</sup> *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, 1985, above fn. 64, para. 68.

<sup>697</sup> See generally section 3.2 above, including for instance the cases of *Rodrigues da Silva, Hoogkamer v. Netherlands* at para. 39, *Nunez v. Norway*, *Butt v. Norway*, *Kaplan v. Norway*, and *Jeunesse v. The Netherlands* discussed in section 3.2 above.

<sup>698</sup> España: *Ley No. 12/2009 reguladora del derecho de asilo y de la protección subsidiaria*, 2009, above fn. 230, Article 41(1). See section 4.13 above for more on family reunification under Article 41 of the Act, for which implementing regulations are not yet in place.

<sup>699</sup> Suisse: *Loi sur l’asile de 26 juin 1998*, état le 1er octobre 2016, above fn. 193, Art. 51(1).

of one of the couple (with no risk of persecution as defined by the 1951 Convention, no risk of human rights violations, and no situation of generalized violence or conflict) and that in practical terms it is possible to settle there, family reunification can be denied.

### 7.3 Proxy marriages

Marriages concluded by proxy, where one party is not present at the ceremony, are common traditions in some countries and are not as such doubted as invalid, at least in the practice of some countries. Cultural sensitivity and accurate country of origin information are therefore important when evaluating family reunification applications in such cases. If doubts arise or other concerns such as the risk of forced marriage appear, it is important that careful and detailed examination of the individual case is provided for in legislation and implementing regulations.

*Examples of State practice regarding recognition of proxy marriages include:*

In **Ireland**, a 2010 High Court judgment addressed the issue of proxy marriages in a case involving a family reunification application by a refugee from Sudan. It determined that

“a proxy marriage lawfully concluded, according to the law of the locality in which it takes place, will be recognised as valid provided the parties had the capacity to contract it at the time and unless some factor of public policy applies to prevent or to relieve the State from recognising it. This is particularly so where both of the parties concerned were domiciled in the jurisdiction in which the marriage was solemnised so that no issue arises as to the absent party represented by the proxy having been domiciled in Ireland at the time.”<sup>700</sup>

The Supreme Court subsequently upheld this position in 2013.<sup>701</sup>

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<sup>700</sup> *Hamza and Another v. Minister for Justice, Equality and Law Reform*, [2010] IEHC 427, Ireland: High Court, 25 November 2010, available at: [http://www.refworld.org/cases,IRL\\_HC,58a6e9155.html](http://www.refworld.org/cases,IRL_HC,58a6e9155.html), para. 23.

<sup>701</sup> *Hamza and Another v. Minister for Justice, Equality and Law Reform*, [2013] IESC 9, Ireland: Supreme Court, 27 February 2013, available at: [http://www.refworld.org/cases,IRL\\_SC,512e0a242.html](http://www.refworld.org/cases,IRL_SC,512e0a242.html).

Similarly, courts in both **the Netherlands** and the **United Kingdom** courts have accepted that proxy marriages may result in family life.<sup>702</sup> In **Finland** and **Hungary**, proxy marriages may also be recognised if they were legal marriages registered in the country of origin.<sup>703</sup>

#### 7.4 Polygamous marriages

In terms of international standards in the case of polygamous marriages, the Human Rights Committee has affirmed:

“[E]quality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”<sup>704</sup>

Similarly, the Committee on the Elimination of Discrimination against Women has determined that polygamy is a violation of Article 5 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>705</sup> and has serious implications for the emotional and financial well-being of a woman and her dependants.<sup>706</sup>

At regional level, the Family Reunification Directive provides: “In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.”<sup>707</sup>

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<sup>702</sup> See *Uitspraak 201601089/1/V1*, Netherlands: Council of State, 2017, above fn. 294, in which the Secretary of State did not dispute that the applicant and sponsor were married before they entered the Netherlands and thus that there was a legal family relationship; *QJ (Algeria) v. Secretary of State for the Home Department*, [2010] EWCA Civ 1478, UK: Court of Appeal (England and Wales), 21 December 2010, available at: [http://www.refworld.org/cases,GBR\\_CA\\_CIV\\_4d2b1ee72.html](http://www.refworld.org/cases,GBR_CA_CIV_4d2b1ee72.html); *T. v. Secretary of State for the Home Department*, SC/31/2005, UK: Special Immigration Appeals Commission (SIAC), 22 March 2010, available at: [http://www.refworld.org/cases,UK\\_SIAC\\_4bab727e2.html](http://www.refworld.org/cases,UK_SIAC_4bab727e2.html). Both the UK cases concerned deportation and in both the couple had children. See also *MM & Ors, R (On the Application Of) v. Secretary of State for the Home Department*, [2014] EWCA Civ 985, UK: Court of Appeal (England and Wales), 11 July 2014, available at: [http://www.refworld.org/cases,GBR\\_CA\\_CIV\\_53d8da9f4.html](http://www.refworld.org/cases,GBR_CA_CIV_53d8da9f4.html), where one of the three appellants was a recognized refugee from Lebanon seeking to bring his Lebanese wife whom he had married by proxy to the UK.

<sup>703</sup> EMN, *EMN Synthesis Report for the EMN Focussed Study 2016 – Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, 2017, above fn. 40, p. 22.

<sup>704</sup> HRC, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, available at: <http://www.refworld.org/docid/45139c9b4.html>, para. 24.

<sup>705</sup> UNGA, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, UNTS, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html>.

<sup>706</sup> UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, available at: <http://www.unhcr.org/refworld/docid/48abd52c0.html>, para. 14.

<sup>707</sup> EU Family Reunification Directive, above fn. 103, Article 4(4), which also permits Member States to limit the family reunification of minor children of a further spouse and the sponsor, even though Article 4(1)(c) otherwise includes as family members, the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her.



In countries where polygamy is prohibited, legislation and/or practice will generally permit only one spouse to reunify with the beneficiary of international protection. This is the case, for instance, in Europe, the Americas, Australia, and New Zealand.<sup>708</sup>

As regards which spouse is entitled to be reunified, in some States the sponsor is allowed to decide which spouse is to be reunited, in others the first application submitted is given priority, and in others where one spouse is already present, others are not permitted to join.<sup>709</sup>

More specifically, in **Australia**, in keeping with the broader provisions of the Marriage Act, which does not cater for polygamous marriages, “[i]n order for migration requirements to be met, there can be only one ongoing married or de facto relationship. If either party to a married or de facto relationship is involved in another married or de facto relationship, neither party can satisfy the migration definition of spouse or de facto partner.” This is because the Migration Act requires the parties to spouse and de facto relationships to “have a mutual commitment to a shared life to the exclusion of all others”.<sup>710</sup>

In **Belgium**, while a beneficiary of international protection who has more than one wife may only bring one of them to join him, he may bring the children from more than one marriage to join him, following a Constitutional Court ruling of 2008 finding that the different treatment of such children violated the equality and non-discrimination provisions of Articles 10 and 11 of the Belgian Constitution read in conjunction or not with the CRC.<sup>711</sup>

In **Germany**, while a husband who is already living with one wife in Germany cannot obtain a residence permit for another wife, in exceptional cases a second wife is to be granted a residence permit if she has been living with several consecutive “tolerated stay” statuses in the shared home for a longer time.<sup>712</sup>

In **Ireland**, a 2010 High Court judgment ruled in a case concerning an application for family reunification that polygamous marriages are not recognized in Ireland, even if they are legal in the State in which they were solemnized.<sup>713</sup> Shortly afterwards, the High Court further clarified that a marriage contracted under laws which allow for polygamy may be recognized

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<sup>708</sup> See e.g. EU Family Reunification Directive, *ibid.*, above fn. 103, Article 4(4); Turkey: *Law on Foreigners and International Protection*, 2013, above fn. 431, Article 34(2). New Zealand Immigration’s definition of partnership can be found at: <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/tools-and-information/support-family/partnership>.

<sup>709</sup> For further details regarding practice, see European Migration Network (EMN), *EMN Ad-Hoc Query on Polygamous Marriage, responses to question submitted on 23 February 2016*, available at: <http://www.refworld.org/docid/58ac4d2fd.html>.

<sup>710</sup> Australia: *Act No. 62 of 1958, Migration Act 1958 - Volume 1*, 8 October 1958, available at: <http://www.refworld.org/docid/4e23f3962.html>, Section 5CB; Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian Offshore humanitarian program Visa application and related procedures*, p. 31.

<sup>711</sup> *Arrêt n° 95/2008 du 26 juin 2008*, Belgium: Cour constitutionnelle, 26 June 2008, available at: <http://www.refworld.org/docid/48b518c42.html>, para. B.24.

<sup>712</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 30(4); EMN, *EMN Ad-Hoc Query on Polygamous Marriage*, 2016, above fn. 709, p. 5.

<sup>713</sup> *H.A.H. and S.A.A. v. The Attorney General and by Order of the Court S.A.H.*, [2010] IEHC 497, Ireland: High Court, 4 November 2010, available at: [http://www.refworld.org/cases,IRL\\_HC,58a6e8584.html](http://www.refworld.org/cases,IRL_HC,58a6e8584.html). N.B. Ireland has not opted into the Family Reunification Directive.

“provided neither party was domiciled in Ireland at the time and neither has also been married to a second spouse, either then or since”.<sup>714</sup>

The issues considered in the first of these two judgments went on to the Supreme Court, which ruled on the matter in June 2017.<sup>715</sup> The case concerned a Lebanese man with two wives whom he had married legally under the law of that country and with each of whom he had a subsisting relationship and children. He sought and obtained asylum in Ireland and was subsequently naturalized as an Irish citizen. He was first reunified with *S.A.H.* (“his second wife”) and a number of minor children, expressly on the basis that she was his wife. Subsequently, she also became an Irish citizen. When the husband applied for *S.A.A.* (“his first wife”) to be admitted this was denied. She subsequently arrived in Ireland independently and sought asylum unsuccessfully, although it was unlikely that any step would be taken to remove her regardless of the outcome of the proceedings.

In her judgment, Justice O’Malley supported unanimously by the six other judges stated that “in the area of immigration, to refuse admission to a spouse simply because the marriage was potentially polygamous would damage the policy of family reunification with the aim of successful integration into the State.” She determined “that a marriage that is potentially polygamous only is capable of being recognised as legally valid in this State”; that “for the same policy reasons, that it should be recognised as of the date of inception”; that recognition of that marriage should not “be withdrawn if the husband contracts a further marriage”; and that “any second or subsequent marriage entered into while the marriage to a first wife is in being cannot be recognised as valid in Irish law”.<sup>716</sup>

She ruled further:

“In the area of immigration, which is where this litigation has its roots, it may well be desirable to have some regard to the reality of familial bonds. I note that it is the policy of the Department of Justice, when considering an application for family reunification in respect of the children of a refugee, to disregard the marital status of a child’s parents. That is in my view entirely correct. I would simply add that there is probably scope, having regard to the powers of the Minister, for a discretionary approach to the question whether the mother of a child should be admitted even where she is not recognised as a wife of the applicant. However, I stress again that these are policy matters which are, primarily, for the Oireachtas to consider. ...

“The rules of private international law require the State to recognise a marriage validly contracted under a foreign system of law unless such recognition is prohibited by our public policy. In my view, for the reasons set out in this judgment, the Constitution and Irish public policy clearly envisage a marriage as being a union between two people, based on the principles of equality and mutual commitment. There is therefore no bar to the recognition of a marriage that is in fact monogamous, where the only objection is that the system of law under which the couple married would permit more

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<sup>714</sup> *Hamza and Another v. MJELR*, [2010] IEHC 427, Ireland: High Court, 25 November 2010, above fn. 700, para. 42.

<sup>715</sup> *H.A.H. v. S.A.A. and Others*, Ireland: Supreme Court, [2017] IESC 40, 15 June 2017, available at: <http://www.refworld.org/docid/5a2fb7814.html>.

<sup>716</sup> *Ibid.*, paras. 107-116.

than one marriage. Recognition should be afforded as of the date of inception of the marriage, and should not be withdrawn in the event of a second or subsequent marriage by the husband. I would therefore allow this appeal and grant the declaration sought – that is, that the marriage of the husband with the first wife was valid as of the date of its inception.

“In this judgment I have also expressed the view that Irish law does not recognise the validity of a second or subsequent marriage while the first marriage is in being. However, this does not necessarily mean that such a marriage can never have legal consequences.”<sup>717</sup>

The court thus found that a marriage that is capable of being potentially polygamous has legal recognition in Ireland and that this legal validity will not be lost retrospectively if the husband contracts another marriage, as was so in this case. Any marriages subsequent to the first in a polygamous relationship would not be held valid, since to do so would contravene the Irish constitution and public policy, as outlined above.

In the absence of legislation by the Oireachtas (parliament) on this issue, the overall situation in Ireland remains unclear. In effect, the judgment holds that while a polygamous marriage (i.e. a second or subsequent marriage while the first is in being) will not be recognized under Irish law, there is still some scope for a second/subsequent wife to be granted permission to enter and reside in Ireland by virtue of being the mother of a child granted permission to come to Ireland to reunify with his or her father, having regard to the powers of the Minister to permit family reunification on a discretionary basis. UNHCR is not, however, aware of any cases where an application of this nature has been granted.<sup>718</sup>

In the **United Kingdom**, only one spouse in a polygamous marriage is permitted to join the sponsor; it is not the order in which polygamous spouses marry which is crucial but the order in which they go to the UK.<sup>719</sup>

## 7.5 Marriages deemed invalid, including child and forced marriages

Generally, a marriage concluded abroad is recognized even if the foreign legal norms, for instance those regarding age or legal capacity, have not been appropriately followed, on the condition that the marriage in question is considered valid in the State where it was solemnized. The only exception is the *ordre public* reservation, according to which the marriage may not be recognized if such recognition would be against public policy.<sup>720</sup>

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<sup>717</sup> Ibid., paras. 118, 120-121.

<sup>718</sup> Communication from UNHCR Dublin office, 27 November 2017.

<sup>719</sup> UK Home Office, *Immigration Rules part 11: Asylum*, Asylum (paragraphs 326A to 352H), above fn. 198, paras. 277-281; UK Visas and Immigration, *Guidance Polygamous / potential polygamous marriages: SET14*, 13 November 2013, available at: <https://www.gov.uk/government/publications/polygamous-potential-polygamous-marriage-set14/polygamous-potential-polygamous-marriages-set14>.

<sup>720</sup> See generally, S. Mustasaari, “The married child belongs to no one? Legal recognition of forced marriages and child marriages in the reuniting of families [2014] CFLQ 261, *Child and Family Law Quarterly*, Vol. 26, No. 3, 2014, pp. 261-282.

Circumstances under which a marriage may be deemed invalid include cases of child or early marriage – defined by the Council of Europe Parliamentary Assembly as “the union of two persons at least one of whom is under 18 years of age” – and/or forced marriage – “the union of two persons at least one of whom has not given their full and free consent to the marriage”.<sup>721</sup> Child marriage and forced marriage are prohibited under international law and the marriage of a child shall have no legal effect.<sup>722</sup> Child marriage is in effect forced marriage, “[s]ince children are, by definition, incapable of consent or of exercising the right of refusal”; forced marriage should also be distinguished from arranged marriage.<sup>723</sup>

The issues arising in cases of child and/or forced marriage in the context of family reunification are complex, as they stand at the intersection between different legal and cultural systems. They raise questions regarding *ordre public*, where State responsibility lies, what protection obligations may arise, and how to ensure the best interests of any child who may be involved are a primary consideration.

The Parliamentary Assembly urges parliaments to “refrain from recognising forced marriages and child marriages contracted abroad except where recognition would be in the victims’ best interests with regard to the effects of the marriage, particularly for the purpose of securing rights which they could not claim otherwise”.<sup>724</sup>

With regard to **child marriage**, where several competing interests are at stake, ensuring the child’s best interests are a primary consideration requires States in their decision-making to “show that the right has been explicitly taken into account, ... how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations”.<sup>725</sup> It is also important to ensure the right of the child(ren) concerned to be heard, commensurate to their age and maturity.

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<sup>721</sup> Council of Europe: Parliamentary Assembly, *Resolution 1468 (2005) on Forced Marriages and Child Marriages*, 5 October 2005, 1468 (2005), available at: <http://www.refworld.org/docid/43f5d5184.html>.

<sup>722</sup> CEDAW, Article 16(2); CRC, Article 24(3); UNGA, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962, available at: <http://www.refworld.org/docid/456d89064.html>; UN Economic and Social Council, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, available at: <http://www.refworld.org/docid/58c156dc4.html>, Article 1; UN Human Rights Council, *Preventing and eliminating child, early and forced marriage: Report of the Office of the United Nations High Commissioner for Human Rights*, 2 April 2014, A/HRC/26/22, available at: <http://www.refworld.org/docid/53999c1b4.html>, including information on definitions and international legal framework.

<sup>723</sup> UN Human Rights Council, *UN Human Rights Council: Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, 24 January 2007, A/HRC/4/23, available at: <http://www.refworld.org/docid/461e3cc22.html>, paras. 21 (child marriage as forced marriage), 25 and 26 (distinction between forced and arranged marriage), and 28 (different forms of forced marriage).

<sup>724</sup> Council of Europe: Parliamentary Assembly, *Resolution 1468 (2005) on Forced Marriages and Child Marriages*, 2005, above fn. 721, para. 14.2.4.

<sup>725</sup> CRC Committee, *General Comment No. 14*, 2013, above fn. 646, para. 6. See also recent ECtHR jurisprudence concerning the determination of the best interests of the child in family reunification cases discussed in section 3.2 above, as well as section 6.3, the paragraphs summarizing best interests considerations in relation to other restrictions on family reunification rights.

One judgment of the ECtHR concerns an Afghan couple who sought asylum in Switzerland and who had been married at the age of 14 and 18 years. In *Z.H. and R.H. v. Switzerland*<sup>726</sup> the Court and the Swiss authorities did not initially recognize the marriage, although the Swiss authorities did recognize their family life once the girl reached the age of 17 years, after which their marriage was judicially recognized under Swiss law. It should be noted, however, that this case concerns two people already within Swiss jurisdiction as opposed to individuals seeking reunification.<sup>727</sup>

In terms of State practice, in **Denmark**, all marriages concluded abroad where both spouses were aged over 15 years used to be recognized, but in January 2017 legislation was approved prohibiting people under the age of 18 from getting married, with exceptions only to be granted for compelling reasons.

In **Germany**, the number of children who are married among those seeking and granted asylum has been a particular concern. In July 2016, nearly 1,500 children were registered as married in the foreigners' register, of whom more than 900 came from Syria, Afghanistan and Iraq. Most were aged over 16, but 361 of them were aged under 14. These developments led to the approval in July 2017 of legislation stating that, if the requirements for entering into a marriage are subject to foreign law, any marriage concluded with a person under the age of 16 is void under German law and that, if one of the partners has reached 16 but not yet 18 years of age, the marriage can be annulled.<sup>728</sup> This provision includes asylum-seekers and refugees, who were already married in their country of origin. The debate on the issues indicated their complexity. Some cautioned that declaring a marriage invalid may lead to social isolation, particularly if the two people involved are separated, to any offspring being declared illegitimate (with potential resulting problems at the stage of return), and/or to reduced entitlement to allowances.<sup>729</sup>

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<sup>726</sup> *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, ECtHR, 8 December 2015, available at: <http://www.refworld.org/docid/566843824.html>.

<sup>727</sup> Ibid. A year after their marriage they applied for asylum in Switzerland, where Italy was determined to be responsible for assessing the claim under the (then applicable) Dublin II Regulation. R.H. was expelled to Italy, but returned to Switzerland, was *de facto* allowed to remain there despite his illegal presence and was able to request a re-examination of his asylum application. The ECtHR agreed with the Swiss Federal Administrative Court's view that "the applicants' religious marriage was invalid under Afghan law and in any case was incompatible with Swiss *ordre public* due to the first applicant's young age". Once Z.H. turned 17, however, the authorities recognized that family life subsisted between the applicants and decided they should benefit from a joint asylum procedure. Subsequently, their religious marriage was judicially recognized by a Swiss court and they were both granted asylum. The ECtHR considered that overall a fair balance had been struck between the personal interests of the applicants in remaining together pending the outcome of Z.H.'s asylum application and the public order interests of the State in controlling immigration.

<sup>728</sup> See Bundesministerium der Justiz und für Verbraucherschutz, *Gesetz zur Bekämpfung von Kinderehen*, 21 July 2017, available at:

[https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bekaempfung\\_Kinderehe.html;jsessionid=225329C569B0B9FF5ABEBC1EECB8E6C4.2\\_cid297?nn=6704238](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bekaempfung_Kinderehe.html;jsessionid=225329C569B0B9FF5ABEBC1EECB8E6C4.2_cid297?nn=6704238), amending inter alia the Introductory Act to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch) to introduce a new Article 13(3).

<sup>729</sup> A. Reimann, "Der Streit über Kinderehen - darum geht es", *Spiegel Online*, 3 November 2016, available at: <http://www.spiegel.de/politik/deutschland/kinderehen-worum-es-bei-dem-streit-geht-a-1119511.html>; "Koalition einigt sich auf Verbot von Kinderehen", *Zeit Online*, 14 February 2017, available at: <http://www.zeit.de/politik/deutschland/2017-02/gesetzentwurf-verbot-kinderehen-heiko-maas-koalition-einigung>; "Regelfall „Ehe-Alptraum“", *Tageszeitung* 24 February 2017, available at: <http://www.taz.de/!5387146/>; and various position papers submitted at the link in fn. 728 above.

In **Sweden**, a case-by-case approach is adopted whereby local authorities primarily take into account the wishes of the minor child, who is treated as an unaccompanied child and assigned a guardian.<sup>730</sup>

Determining the best interests of a child bride (it being primarily girls rather than boys who are affected) in the context of the right to family unity and family reunification is a complex matter. Whether it is in the child's best interests to reunite or remain with her spouse, her parents, another family member, or to deny any family reunification will depend on individual circumstances. One, though not necessarily both, of her parents may well be a source of risk, though it should be remembered that while parents may be responsible for marrying their child before the age of 18, this is not necessarily illegal e.g. for those aged 17 or 16 or younger depending on the national laws in place. If both parents are deemed to constitute a risk to the child, then it would seem all the more important for a married child to have the possibility of reunifying with other family members, if this is in her best interests, not just with her parents. The language of Article 10(3) of the Family Reunification Directive, allowing for an unaccompanied child's reunification not only with the parent, but also with "his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced", could perhaps also be applied to married child beneficiaries of international protection, also in contexts where reunification with a parent is deemed not to be in the child's best interests and not only when the parents cannot be traced. A child bride may or may not be accompanied by her spouse, who may also pose a risk to the child or be a source of support, even if the marriage is not deemed valid. If States are to be able to ensure that the child's rights and best interests are respected, they need the flexibility in legislation and regulations to be able to do so.

With regard to **forced marriage**, in the EU context, Article 4(5) of the Family Reunification Directive provides that "in order to ensure better integration and to prevent forced marriages Member States *may* require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her".

As already discussed in section 3.4 above, the CJEU has ruled on the interpretation of this provision in the case of *Noorzia*.<sup>731</sup> For its part, the European Commission has advised, that if the individual assessment of an application shows that

"the justification for Article 4(5), i.e. ensuring better integration and preventing forced marriages, is not applicable, then [Member States] should consider making an exception thus allowing for family reunification in cases in which the minimum age requirement is not fulfilled. For instance, when it is clear from the individual assessment that there is no abuse, e.g. in the case of a common child".

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<sup>730</sup> U. Scheffer, C. Eubel, J. Müller-Neuhof, "Wie soll Deutschland mit Kinderehen umgehen?", *Tagespiegel*, 26 August 2016, available at: <http://www.tagesspiegel.de/politik/minderjaehrige-fluechtlinge-wie-soll-deutschland-mit-kinderehen-umgehen/14462318.html>; "Denmark bans marriage for under-18s", *The Local*, 19 January 2017, available at: <https://www.thelocal.dk/20170119/denmark-bans-marriage-for-under-18s>.

<sup>731</sup> See also *Noorzia v. Bundesministerin für Inneres*, CJEU, above fn. 126.

In its view, “the minimum age requirement needs to be fulfilled at the moment of the effective family reunion and not when the application is submitted”. As a result, the Commission argues that it should “be possible to submit applications and to examine these before the minimum age requirement is fulfilled”, with the date of effective family reunification postponed until the minimum age is reached.<sup>732</sup> It appears questionable as to whether the existence of a common child is necessarily evidence that the marriage is not forced – it may be evidence of marital rape – meaning that a careful evaluation of the individual circumstances is essential, including consideration of the best interest of any child (whether spouse or offspring) involved as a primary consideration.

For its part, PACE’s Committee on Migration, Refugees and Displaced Persons recommends that “possible derogations, including a minimum age for the spouse which differs from the age of legal majority (cf. Article 4(5)) and the two stand-still clause derogations (Articles 4(1) last indent and 4(6)) should be withdrawn and harmonised in compliance with fundamental rights.”<sup>733</sup>

In the national context, legislation in many European States requires that spouses be aged 18 or older (not 21 or older), as for instance in **France, Germany, Italy, Luxembourg, Slovakia, Switzerland, Turkey**, and the **United Kingdom**, as well as in **Canada and New Zealand**.<sup>734</sup> In Central Europe the minimum age for marriage is also relevant as regards validity of the marriage in the country of asylum. The minimum age is 18 years, though in exceptional cases, upon the court’s consent, it is 16 years.<sup>735</sup>

By contrast, legislation in **Austria, Cyprus**,<sup>736</sup> **Lithuania, Malta**,<sup>737</sup> and **the Netherlands** require spouses to be at least 21 years of age. In **Belgium**, both spouses (or registered partners) must be aged at least 21 years of age, this being reduced to 18 years if the marriage (or registered partnership) preexisted arrival in Belgium.<sup>738</sup>

**Denmark** and **Norway**, neither of which is bound by the Family Reunification Directive, set an even higher limit: couples wishing to reunify must be aged 24 years or over before permission will be granted. In Denmark this has been the case for some time.<sup>739</sup> In Norway,

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<sup>732</sup> European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 169, p. 8.

<sup>733</sup> PACE, Committee on Migration, Refugees and Displaced Persons, *Position paper on family reunification*, 2012, above fn. 163, para. 12.

<sup>734</sup> New Zealand Immigration’s definition of partnership can be found at: <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/tools-and-information/support-family/partnership>. The sponsor must be aged 18 or over, or if they’re aged 16 or 17 years, have the consent of their parents or guardians.

<sup>735</sup> UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 6.

<sup>736</sup> Cyprus: Refugee Law, Section 25(5)(a)(i).

<sup>737</sup> Malta: *Family Reunification Regulations*, as amended by Legal Notice 148 of 2017, above fn. 186, Article 4(1)(a).

<sup>738</sup> Belgium: *Loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers*, 15 December 1980, available at: <http://www.refworld.org/docid/4e803ea82.html>, Article 10(4).

<sup>739</sup> Danish Immigration Service, *The 24-year Rule, New to Denmark*, available at: <https://www.nyidanmark.dk/en-us/coming-to-dk/familyreunification/spouses/the-24-year-rule.htm>; Danish Immigration Service, *Refugees or Persons with Protected Status*, available at: <https://www.nyidanmark.dk/en-us/coming-to-dk/familyreunification/spouses/refugees/flygtning.htm>.

under legislation in force since January 2017, both parties must be at least 24 years old before an application for a residence permit as the sponsor's spouse or cohabitant may be granted. The requirement does not apply if the marriage was contracted or the cohabitation established before the sponsor entered Norway and exemption is reportedly possible if it is evident that the marriage or cohabitation is voluntary. While the stated aim of this requirement is to prevent and counter forced marriages, for younger adult refugees unable to establish family life elsewhere the provision has the effect of discriminating against them.<sup>740</sup>

It is questionable whether introducing an age requirement of 21 or 24 is an effective tool for tackling forced marriage, as the UK Supreme Court found in its judgment in *Quila and Bibi*, referred to in the jurisprudence below. As the Council of Europe Commissioner for Human Rights' report notes: "This suggests that such age limits must be justified and, in refugee cases, where they could amount to a long waiting time in dangerous circumstances, their justification is likely to be more difficult."<sup>741</sup>

See section 7.4 above for more on the situation regarding polygamous marriages, which are also not regarded as valid in many countries, and section 8.5 below on family reunification in the case of married unaccompanied child beneficiaries of international protection.

*Examples of national jurisprudence and practice regarding invalid marriages include:*

In a 2015 the Constitutional Court of **Austria** issued a judgment relevant to cases where a marriage is deemed invalid but there are nevertheless children.<sup>742</sup> The case concerned a request for an entry visa made by a recognized Afghan refugee to enable his wife and minor son to join him in Austria, which had been denied on the grounds that the marriage had been contracted when the woman was 16 years old contrary to Afghan law and was therefore invalid. The Constitutional Court found that the lower court's decision was arbitrary, since an invalid marriage had no effect on the child's family relationship with his father, and therefore violated the right to non-discrimination among foreigners. The Court ruled that it was necessary to assess whether there was a risk of violating Article 8 ECHR vis-à-vis the son and whether it was therefore necessary to issue a visa to avoid such a violation. The Constitutional Court ordered the decision regarding the mother to be withdrawn as it was also necessary to assess whether the wife/mother should be issued with an entry visa in order to ensure family life.

In **Sweden**, the Swedish Migration Court of Appeal ruled in a case concerning a 16-year-old Iraqi citizen, A., who had applied for a permit to reside in Sweden for herself and her one-year-old daughter on the grounds of a family bond to Sweden, where A.'s father resided.<sup>743</sup> A.

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<sup>740</sup> UNHCR, *UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation*, 2016, above fn. 425, paras. 76-94, setting out the proposed changes and UNHCR's views; Gustafsson Grønningsæter and Brekke, *Family Reunification Regulation in Norway*, 2017, above fn. 635, p. 4.

<sup>741</sup> Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, p. 38.

<sup>742</sup> *E1510/2015 ua*, Austria: Verfassungsgerichtshof, 2015, above fn. 289. There is no specific minimum age that has to be reached by the spouse unless there is an obvious conflict with *ordre public*, but the minimum age required by law in the country of origin must have been reached.

<sup>743</sup> MIG 2012:4, Sweden: Migration Court of Appeal, 5 March 2012, mil nr UM 6327-11, Migrationsverkets 6rende nr 11-742377.



was married and her marriage was valid according to Iraqi law, but she argued that the marriage should not be recognized on the grounds that it should be considered a forced marriage, as her consent to the marriage, for which she had never been asked, was not *de facto* needed to make her marriage valid according to Iraqi law and that her marriage should be considered a child marriage, as she was only 15 years old at the time of entering into the marriage. The Migration Court of Appeal rejected these arguments, finding that the lack of consent alone did not create an assumption of duress or make it plausible, and decided that her marriage was valid. As a result, she was not considered an unmarried minor and was therefore not entitled to join her father in Sweden. In her commentary on the judgment, Mustasaari questioned the Court's sole focus on A.'s age, "thereby completely ignoring the lack of her consent".<sup>744</sup>

In the **United Kingdom**, the Supreme Court in its judgment in the case of *Quila and Bibi*<sup>745</sup> ruled on the legality of a change in the Immigration Rules introduced in November 2008 which raised the minimum age for a person either to be granted a visa for the purposes of settling in the UK as a spouse or to sponsor another for the purposes of obtaining such a visa from 18 to 21. In its 2011 judgment, the Supreme Court dismissed the Secretary of State's appeal on the grounds that the refusal to grant marriage visas to the respondents was an infringement of their rights under Article 8 ECHR.

The case concerned a Chilean-British and a Pakistani-British couple who as a result of the Rule had been unable to live together in the UK. There was no question of either marriage being a forced marriage. In its judgment the court found that the Secretary of State had failed to establish that the interference with the respondents' rights to a family life was justified under Article 8(2) ECHR. It ruled that, while the Rule had a legitimate aim, namely the protection of the rights and freedoms of those who might be forced into marriage and was rationally connected to that objective, its efficacy was highly debatable. Rather, the amendment would keep a very substantial number of bona fide young couples apart or forced to live outside the UK, vastly exceeding the number of forced marriages that would be deterred. The restriction was automatic and indiscriminate, failed to detect forced marriages and imposed a delay on cohabitation in the country of choice, which was a deterrent that could impair the essence of the right to marry under Article 12 ECHR. While the case concerned marriages involving one British spouse, it has relevance for beneficiaries of international protection in that they are unable to enjoy family life in their country of origin.

In 2016, the UK Independent Chief Inspector of Borders and Immigration expressed concern regarding the treatment of applications for family reunification by married women under the age of 18. His inspection found: "The process for considering family reunion applications recognised that there might be 'exceptional circumstances' or 'compassionate factors' that called for an application to be considered outside the Immigration Rules." He reported: "In

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<sup>744</sup> S. Mustasaari, "The married child belongs to no one?", 2014, above fn. 720, p. 265.

<sup>745</sup> *R (on the application of Quila and another) (FC) & R (on the application of Bibi and another) (FC) v. Secretary of State for the Home Department*, [2011] UKSC 45, UK: Supreme Court, 12 October 2011, available at: [http://www.refworld.org/cases/UK\\_SC\\_58ac58494.html](http://www.refworld.org/cases/UK_SC_58ac58494.html). The Immigration Rules now require spouses or partners to be aged 18 or over. See UK Home Office, *Immigration Rules part 8: family members (paragraphs A277 to 319Y)*, 3 January 2017, available at: <http://www.refworld.org/docid/58c26d1a4.html>, rule 277.

particular, the treatment of married women under the age of 18 appeared to take no account of relevant ‘compassionate factors’”, citing “a particularly egregious case where the wife, aged 16, with two children, aged 18 and eight months ... was about to be left in Syria without family support. She was refused twice, ... as the immigration rules require both the spouse applicant and UK sponsor to be aged 18 at the time of the application.”<sup>746</sup>

These examples illustrate the necessity of States considering not only the situation of the beneficiary of international protection in the country of asylum but also that of family members from whom he or she may be separated. They also show the importance of ensuring that legislation and regulations allow for exceptional circumstances to be taken into account and for practice to be able to identify and show flexibility in such circumstances.

## 7.6 Same-sex relationships/partnerships

Both the ECtHR and the IACtHR accept that same-sex couples in a relationship can constitute family life, including if they do not cohabit, and a family unit.

In 2010, the ECtHR ruled that a homosexual couple living in a stable relationship falls within the notion of “family life”, in the same way as the relationship of a heterosexual couple (rather than as private life as previously).<sup>747</sup> It determined in *Schalk and Kopf v. Austria* that “a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would”. It also found “no basis for drawing the distinction ... between those applicants who live together and those who – for professional and social reasons – do not, ... since ... the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8”.<sup>748</sup>

For its part, the IACtHR, has since its 2012 judgment in the case of *Atala Riffo* accepted that same-sex couples and their children can create “a family unit” protected as such under Articles 11(2) and 17(1) of the American Convention on Human Rights.<sup>749</sup>

Two ECtHR judgments are specifically relevant in the family reunification context. In the 2016 case of *Pajić v. Croatia* the ECtHR found a violation of Article 14 taken in conjunction with Article 8 ECHR in the case of a lesbian couple from Croatia and Bosnia and Herzegovina,

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<sup>746</sup> UK: Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, above fn. 440, pp. 6 and 40.

<sup>747</sup> *Schalk and Kopf v. Austria*, Application no. 30141/04, ECtHR, 24 June 2010, available at: <http://www.refworld.org/docid/4c29fa712.html>, paras. 92-94; *P.B. and J.S. v. Austria*, Application no. 18984/02, ECtHR, 22 July 2010, available at: <http://www.refworld.org/docid/5852b79e4.html>, para. 30; *X. and Others v. Austria*, Application no. 19010/07, ECtHR, Grand Chamber, 19 February 2013, available at: <http://www.refworld.org/docid/5852c33f4.html>, para. 95.

<sup>748</sup> *Schalk and Kopf v. Austria*, *ibid.*, para. 94.

<sup>749</sup> *Caso Atala Riffo y Niñas v. Chile*, IACtHR, 24 February 2012, available in English and Spanish at: <http://www.refworld.org/docid/4f840a122.html>, para. 177. For further details regarding both courts’ jurisprudence, see UNHCR, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”, above fn. 4, section 3.3.4.

whose request for a residence permit for family reunification in Croatia had been denied, since the Aliens Act excluded persons living in a same-sex relationship from the possibility of obtaining family reunification.<sup>750</sup>

Later the same year, in *Taddeucci et McCall c. Italie*,<sup>751</sup> the ECtHR likewise found a violation of Article 14 in conjunction with Article 8 ECHR on the grounds that the couple was treated on the same (less favourable) basis as unmarried heterosexual couples, when it was impossible for them (at the relevant time) to get married in Italy. The case concerned a gay couple seeking a residence permit in Italy on family grounds for McCall, who unlike his partner was not an EU citizen.

In addition, the Family Reunification Directive requires States to “give effect to the provisions of this Directive without discrimination on the basis of ... sexual orientation”.<sup>752</sup>

In the Americas, the IACtHR similarly found in 2012 in the case of *Atala Riffo*, which concerned a lesbian couple with children:

“[I]t is clear that they had created a family unit which, as such, was protected under Articles 11(2) and 17(1) of the American Convention [on Human Rights], since they shared their lives, with frequent contact and a personal and emotional closeness between Ms. Atala, her partner, her eldest son and the three girls. The aforementioned, without prejudice to the fact that the girls shared another family environment with their father.”<sup>753</sup>

*Examples of State practice regarding same-sex relationships/partnerships include:*

States that do not recognize same-sex relationships in the context of family reunification include **Estonia, Latvia, Lithuania, Malta, Poland, and Romania**.

By contrast, many other States recognize registered same-sex couples or partnerships for family reunification purposes, including:

In **Australia**, the Migration Act specifically states that partners in a de facto relationship with each other can be “of the same sex or a different sex”. It defines such a de facto relationship as existing if the two persons are not married but they have a mutual commitment to a shared life to the exclusion of all others; the relationship between them is genuine and continuing; and they live together (or do not live separately and apart on a permanent basis) and they are not related by family.<sup>754</sup>

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<sup>750</sup> *Pajić v. Croatia*, ECtHR, 2016, above fn. 674, para. 85.

<sup>751</sup> *Taddeucci et McCall c. Italie*, ECtHR, 2016, above fn. 675.

<sup>752</sup> EU Family Reunification Directive, above fn. 103, Recital 5.

<sup>753</sup> *Caso Atala Riffo y Niñas v. Chile*, IACtHR, 2012, above fn. 749, para. 177.

<sup>754</sup> Australia: *Act No. 62 of 1958, Migration Act 1958 - Volume 1*, 8 October 1958, available at: <http://www.refworld.org/docid/4e23f3962.html>, Sections 5F and 5CB; Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian Offshore humanitarian program Visa application and related procedures*, p. 31.

In **Austria**, same-sex partners may seek family reunification if the relationship is registered and the registered partnership existed before entry to Austria.

In **Belgium**, a registered partner (including a same-sex partnership) may seek family reunification, if there is legal recognition or proof that the relationship is durable and stable.

In **Finland**, same-sex couples in a nationally registered partnership are considered family members, as are persons regardless of their sex who have been living continuously in a marriage-like relationship in the same household for at least two years or who have joint custody with the cohabiting partner of a child.<sup>755</sup>

In **France**, legislation recognizes same-sex marriage. Although the legal framework for family reunification does not specifically mention same-sex couples,<sup>756</sup> they are entitled to family reunification under the same conditions as the others.

In **Germany**, couples in a “registered partnership” are entitled to family reunification.<sup>757</sup>

In **Ireland**, the 2015 International Protection Act refers specifically to civil partners as being family members for the purposes of family reunification, as long as the partnership existed before the refugee sought asylum in Ireland.<sup>758</sup>

In **Italy**, same-sex migrant and refugee couples are covered in the context of family reunification under a 2016 amendment to Italian legal provisions on same-sex unions and rules on partnerships.<sup>759</sup>

In **Slovenia**, the Constitutional Court ruled in 2015 that the Law on International Protection Act, by not determining same-sex partners as family members, was in violation of the right to family life and the right to equal rights.<sup>760</sup>

In **Switzerland**, couples in a registered partnership, including persons of the same sex, are entitled to family reunification whether they have been recognized as refugees with asylum or granted provisional admission.<sup>761</sup>

It is not clear how a requirement for partnership to be registered applies in practice to the situation of beneficiaries of international protection, as such a requirement does not appear to

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<sup>755</sup> Finland: *Aliens Act*, 2004, above fn. 205, Section 37.

<sup>756</sup> France: CESEDA, above fn. 21, [Article L752-1](#).

<sup>757</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 27(2).

<sup>758</sup> Ireland: *International Protection Act*, 2015, above fn. 212, Section 56(9)(b).

<sup>759</sup> Italy: Legge 20 maggio 2016, no. 76, *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*, available at: [www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg](http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg), which states “all the laws/regulations that refer to marriage, the provisions containing the words ‘spouse’, ‘husband and wife’ or similar expression, also apply to each of the civil parties union between persons of the same sex”.

<sup>760</sup> *Up-213/15-13*, Slovenia: Constitutional Court, 5 May 2015, available in Slovenian at: <http://odlocitve.us-rs.si/si/odlocitev/US30980?q=U-I-68%2F16-8>. See Slovenia: *Law of 2008 on International Protection*, 4 January 2008, available at: <http://www.refworld.org/docid/47f1fdfc2.html>, Articles 2(1) and 17, which have since been amended.

<sup>761</sup> Suisse: *Loi fédérale sur les étrangers*, état le 1er janvier 2017, above fn. 193, Articles 52 and 88a and Article 1a(e) *Ordonnance 1 sur l’asile relative à la procédure du 11 août 1999*, état le 1er mars 2017, available at: <https://www.admin.ch/opc/fr/classified-compilation/19994776/index.html>.

take into account the fact that for many lesbian and gay couples, particularly those who have suffered persecution on the basis of their sexual orientation, it is not possible to register their partnership or live together in their country of origin. In effect they have to establish their sexuality first, which heterosexual couples do not have to do, and then to find other means of evidencing their relationship.

While not a family reunification case as such, the case in **Canada** of a lesbian from Cameroon, who had sought asylum, but whose refugee status had been revoked on the basis of a misrepresentation, shows the challenges that may arise when lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals seek residence, just as they can arise when they seek asylum. She had applied for continued residence in Canada on humanitarian and compassionate grounds on the strength of her Canadian establishment and because she had given birth to a daughter and on the hardship she would face because of her sexual orientation as a lesbian if she were returned to Cameroon. Her application was first rejected on grounds including that she had provided limited information that she had openly disclosed or displayed her sexual orientation in Canada or that she would do so upon returning to Cameroon. The Federal Court overturned the decision in 2015, arguing that given the situation for LGBT individuals in Cameroon and the “consequences of discovery, it is quite plain that the Applicant would take steps in Cameroon to conceal her sexual identity” and that she “would be foolhardy to act otherwise”. The Court found that “[c]ontrary to the Officer's views, the Applicant's ability to hide her sexual identity in Cameroon is not the end-point to the necessary inquiry into hardship” and that

“the Officer erred by assuming that the hardship (i.e. risk) confronting the Applicant could be easily managed by the suppression of her sexual identity. That view is, quite simply, insensitive and wrong. The imposition on LGBT individuals of a legal requirement for discretion is a hold-over from a time when, unlike heterosexual couples, LGBT couples were expected to conceal their affection. This type of anachronistic thinking has no place in a humanitarian assessment.”<sup>762</sup>

National authorities therefore need to take a flexible approach to the evaluation of the situation of same-sex couples, where one of them has been recognized as being in need of international protection, who are seeking to reunify. They also need to take into account the realities of life in countries from which LGBT couples have fled, which means that it will not be possible for them to provide official documentary evidence of a partnership.

## **7.7 The status of family members in cases of divorce, separation or death**

Legislation in many States requires couples to be committed to living together as a family unit once reunified. At the same time, once families have been reunified, it is important that the residency and status of family members is not automatically cancelled or called into question in cases of divorce, separation or death. This is particularly so where domestic violence is an

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<sup>762</sup> *V.S. v. Canada (Citizenship and Immigration)*, 2015 FC 1150, docket: IMM-7865-14, Canada: Federal Court, 7 October 2015, available at: [http://www.refworld.org/cases,CAN\\_FC,5a31228c4.html](http://www.refworld.org/cases,CAN_FC,5a31228c4.html), paras. 10-12.

issue, as otherwise reunited family members may feel obliged to remain in abusive relationships.<sup>763</sup>

In the EU, the Family Reunification Directive requires Member States to promote the integration of family members including by granting “a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships” (recital 15) and provides in Article 15(3):

“In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit *may* be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States *shall* lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.” (emphasis added)

For its part, PACE’s Committee on Migration, Refugees and Displaced Persons recommends more proactively:

“Cases of abusive relationships within reunited families should be detected and dealt with in a fair and humane manner and it must be ensured that victims of domestic violence or forced marriage are not sent back to their countries of origin against their will. Spouses should be entitled to an autonomous residence permit as soon as possible ... This is particularly important for those who may be victims of domestic violence or other problems.”<sup>764</sup>

In addition the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence requires States Parties to

“take the necessary legislative or other measures to ensure that victims [of violence against women or domestic violence] whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship”.<sup>765</sup>

*Examples of State practice regarding family members’ status in cases of divorce, separation or death include:*

In **Belgium**, legislation which otherwise permits the withdrawal of a residence permit granted in the context of family reunification if family members no longer maintain effective family life together requires the minister or his or her delegate to pay particular attention to the

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<sup>763</sup> See also section 4.12 above, on the status granted upon family reunification.

<sup>764</sup> Council of Europe, Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons, *Position paper on family reunification*, 2012, above fn. 163, para. 12.

<sup>765</sup> Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, available at: <http://www.refworld.org/docid/4ddb74f72.html>, Article 59(1).

situation of victims of domestic violence who no longer form part of the family unit and require protection [from the family member] and to inform the person concerned that his or her residency will not be terminated.<sup>766</sup>

In **Germany**, a spouse's residence permit may be extended for a year as an independent right of residence, if the couple ceases "marital cohabitation" after cohabiting for three years in Germany or if the spouse dies. This three-year cohabitation requirement does not apply *inter alia* in situations of domestic violence or where the wellbeing of a child living with the spouse living with the spouse requires it.<sup>767</sup>

In **Greece**, a decree provides for family members admitted on family reunification grounds to be granted an autonomous residence permit if they have been resident for five years and are adult and in the event of the death of the sponsor if the family members have been residing in the country for at least one year before the date of the death; in cases of divorce, annulment of marriage or confirmed interruption of the marital relationship if the marriage lasted at least three years, of which one was in Greece, before the start of divorce proceedings, the annulment of the marriage or the confirmation of the interruption of the marital relationship and in particularly difficult circumstances, domestic violence.<sup>768</sup>

In **Ireland**, the 2015 International Protection Act provides that permission to a spouse or civil partner of a sponsor to enter and reside in Ireland shall cease to be in force where the marriage or the civil partnership concerned ceases to subsist.<sup>769</sup> This provision applies both before and after entry to the State. For example, if permission is granted to enter and reside in the State and the marriage/civil partnership breaks down before the couple actually enters the State then the permission will cease to be in force. Similarly, if a marriage/civil partnership ends after entry to the State the permission will cease to be in force. The Irish Naturalisation and Immigration Service (INIS) has stated that, in practice, they have not been notified of any such cases since the entry into force of the 2015 Act on 31 December 2016.<sup>770</sup>

In **Poland**, legislation provides for a foreigner with a temporary residence permit granted for the purposes of family reunification (including as a beneficiary of international protection) to be granted a temporary residence permit if this is in his or her vital interest, in the event of divorce, legal separation or becoming widowed.<sup>771</sup>

In **Switzerland**, the Aliens Act provides that if the family unit is dissolved the spouse and children are entitled to a residence permit and to its renewal if the marriage has existed for three years and integration has been successful or if there are major personal reasons for

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<sup>766</sup> Belgique: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, above fn. 176, Article 11 4°.

<sup>767</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 31.

<sup>768</sup> Greece: *Presidential Decree No. 167 of 2008*, above fn. 209, Article 11.

<sup>769</sup> Ireland: *International Protection Act*, 2015, above fn. 212, Section 56(6).

<sup>770</sup> Email response to UNHCR from the family reunification section, INIS (a section of the Department of Justice and Equality), 13 October 2017.

<sup>771</sup> Poland: *Act of 2013 on Foreigners*, above fn. 187, Article 161(2). The same applies in the case of a child in the event of the death of his or her parent with international protection and in the case of a parent the death of his or her minor child granted international protection.

continued stay in Switzerland. The latter include notably where domestic violence is involved, the marriage was concluded without free consent of one spouse or social reintegration in the country of origin appears seriously compromised, although the threshold for proving such violence is high.<sup>772</sup>

In **Turkey**, legislation provides that in case of divorce, a short-term residence permit may be granted to a foreign spouse without him or her needing to have cohabited for at least three years (as otherwise applies to Turkish spouses) if the spouse is able to present a court decision stating that he or she is a victim of domestic violence. In case of the sponsor's death, a family residence permit obtained depending on the sponsor shall be used until the end of family residence permit. A short-term residence permit may be granted without seeking a condition of duration. At the end of this period, the foreigner's residence permit request shall be evaluated pursuant to general provisions.<sup>773</sup>

In the **United Kingdom**, the Scottish Court of Session upheld the appeal of a Ugandan wife who had joined her refugee husband under the refugee family reunion provisions, whose application for indefinite leave to remain on the basis of having been a victim of domestic violence had been rejected.<sup>774</sup> While the Immigration Rules provide for victims of domestic violence who are the spouse of a British citizen or an individual settled in the UK to be granted leave to remain, she had been deemed not to fall into this category as refugees recognized in the UK have since 2005 only been given limited leave to remain of five years rather than an immediate grant of indefinite leave as previously. The Court ruled that the government had been wrong to assimilate the position of refugees with that of students/workers and that there was no evidence that the government had considered the effect the 2005 changes would have on refugee spouses who would no longer be able to apply for indefinite leave to remain as the victim of domestic violence. The Court ruled:

“The effect on them is not an informed choice made by government upon due consideration, but appears to be an unintended by product of the changes introduced in 2005. .... [E]ven allowing full weight to the element of discretion to be accorded to the executive, we consider that this is a case in which the line has been drawn effectively by oversight, and where the justification advanced is weak to the extent of being unjustifiable.”<sup>775</sup>

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<sup>772</sup> Suisse: *Loi fédérale sur les étrangers*, 2005, above fn. 193, Article 50. For further information including related jurisprudence of the Federal Administrative Tribunal, see Suisse: Département fédéral de justice et police (DFJP), Office fédéral des migrations (ODM), *Circulaire: Violence conjugale*, 12 April 2013, available at: <https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/auslaender/familie/20130413-rs-ehengewalt-f.pdf>. See also CEDAW Committee, *Concluding observations on the combined fourth and fifth periodic reports of Switzerland*, 18 November 2016, CEDAW/C/CHE/CO/4-5, available at: <http://www.refworld.org/docid/583872184.html>, para. 46.

<sup>773</sup> Turkey: *Implementing Regulation on the Law on Foreigners and International Protection*, No. 29656, 17 March, 2016, Articles 97(3) and 98(3), Articles 30(8) and 30(9).

<sup>774</sup> *A. v. Secretary of State for the Home Department*, [2016] CSIH 38, UK: Court of Session (Scotland), Inner House, 27 May 2016, available at: [http://www.refworld.org/cases,GBR\\_CS\\_58a7039f4.html](http://www.refworld.org/cases,GBR_CS_58a7039f4.html).

<sup>775</sup> *Ibid.*, paras. 80, 82.



## 8 FAMILY REUNIFICATION AND CHILDREN

Ensuring that children are reunified with their parents and other family members enables States to ensure they fulfil their responsibilities under the CRC, including States Parties' obligations to "respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family ... to provide appropriate direction and guidance" (Article 5); "to respect the right of the child to preserve his or her identity, including [his or her] family relations" (Article 9); to "ensure that a child shall not be separated from his or her parents against their will", except where this is in his or her best interests (Article 9); to deal with applications for family reunification "in a positive, humane and expeditious manner" (Article 10);<sup>776</sup> to ensure that no child is "subjected to arbitrary or unlawful interference" with his or her private and/or family life (Article 16); to respect the "common responsibilities [of both parents] for the upbringing and development of the child" (Article 18); and in the case of an unaccompanied asylum-seeking or refugee child to cooperate in family tracing initiatives "to obtain information necessary for reunification with his or her family" (Article 22).<sup>777</sup>

This section looks at some of the challenges faced both where adult beneficiaries of international protection seek to reunify with their children and where child beneficiaries of international protection seek to reunify with their parents and other family members. The rights under the CRC and international law more generally apply in both contexts. This section examines:

- Family reunification and the child's best interests
- The situation of unaccompanied child beneficiaries of international protection who are denied access to family reunification
- The situation of unaccompanied child beneficiaries of international protection who are able to reunify with their parents and/or other family members
- The situation of adopted children, foster children, children of earlier marriages/relationships, children where custody has not been formally granted, and guardianship under the *kafalah* system
- The situation of child beneficiaries of international protection who reach the age of majority
- Other issues, including the situation of married unaccompanied child beneficiaries of international protection and the requirement to show evidence of accommodation, sickness insurance, and stable and regular resources

### 8.1 Family reunification and the child's best interest

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<sup>776</sup> See also UNHCR, Summary Conclusions, Family Unity, above fn. 1, para. 11, stating: "Requests for family reunification should be dealt with in a positive, humane, and expeditious manner, with particular attention being paid to the best interests of the child."

<sup>777</sup> See also UNHCR, "The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied", above fn. 4, Section 2.1.1, and in more detail, Werner and Goeman, "Families Constrained: An analysis of the best interests of the child in family migration policies", 2015, above fn. 63, pp. 5-9.

In most cases involving unaccompanied children the interests of the child will best be served by their reunification with their parents or other family, unless for instance there is “abuse or neglect of the child by the parents” (Article 9(1) CRC). As the CRC Committee notes:

“[T]he child who is separated from one or both parents is entitled ‘to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests’ (art. 9, para. 3). This also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship”.<sup>778</sup>

In the case of unaccompanied and separated children outside their country of origin, however, the CRC Committee states:

“Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a ‘reasonable risk’ that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations. ... Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.”<sup>779</sup>

The CRC and CMW Committees have further jointly advised:

“When the child’s relations with his or her parents and/or sibling(s) are interrupted by migration (in both the cases of the parents without the child, or of the child without his or her parents and/or sibling(s)), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification. ...

“Countries should facilitate family reunification procedures in order to complete them in an expeditious manner, in line with the best interests of the child. It is recommended

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<sup>778</sup> CRC Committee, *General Comment No. 14*, 2013, above fn. 646, para. 60.

<sup>779</sup> CRC Committee, *General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>, paras. 81-83; CMW and CRC Committees, *Joint General Comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 2017, above fn. 554, para. 35. See generally also UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.refworld.org/docid/48480c342.html>.

that States apply best interest determination procedures in finalizing family reunification”<sup>780</sup>

Assessment of the best interests of the child in family reunification cases needs to take into account elements including the child’s views, the preservation of the family unit, the care protection and safety of the child, their situation of vulnerability, and their right to health and to education.<sup>781</sup> The CRC Committee explains that the relevance and weight to be accorded to each element “will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances”.<sup>782</sup> As Pobjoy has noted: “A child’s best interests are rarely determined by a single overriding factor. The best interests assessment can thus not be approached as a binary or overly formulaic exercise, but must entail consideration of a range of factors.”<sup>783</sup>

The ECtHR in its jurisprudence has provided increasingly detailed guidance on how the best interests of the child are to be determined and taken into account in the family reunification context, as is outlined in Section 3.2 above. As Werner and Goeman have observed:

“Based on case law of recent years of the ECtHR it appears that there is an enormous increase in cases in which the ‘best interests of the child’ play a defining part. The influence of the CRC within the sphere of Article 8 ECHR is therefore a fact and this naturally means an improvement of the legal position of children when it comes to their private and family life. At the same time, however, case law shows many fluctuations and is therefore somewhat unpredictable. ...

“It appears that the Court pays attention in an increasing number of cases to the ‘best interests of the child’ and from the terminology used by the Court it can be derived that the Court views the ‘best interests of the child’ principle as an important aspect in the broader balance of interests. However, the ECtHR still does not apply the term ‘best interests of the child’ in all cases and when it does apply this term, it is not used in a consequent manner.”<sup>784</sup>

In the EU context, the Family Reunification Directive requires Member States examining an application to “have due regard to the best interests of minor children” (Article 5).

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<sup>780</sup> CMW and CRC Committees, *Joint General Comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 2017, above fn. 554, paras. 32 and 35. For more on the best interest principle, see also CMW and CRC Committees, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, available at: <http://www.refworld.org/docid/5a2f9fc34.html>.

<sup>781</sup> CRC Committee, *General Comment No. 14*, 2013, above fn. 646, paras. 52-79.

<sup>782</sup> *Ibid.*, para. 80.

<sup>783</sup> J. Pobjoy, *The Child in International Refugee Law*, CUP, 2017, p. 233.

<sup>784</sup> Werner and Goeman, “Families Constrained: An analysis of the best interests of the child in family migration policies”, 2015, *ibid.*, pp. 13, 16.

*Examples of national practice and jurisprudence on the best interests of the child in the context of family reunification include:*

In **Australia**, the case of *Minister of State for Immigration and Ethnic Affairs v. Teoh*<sup>785</sup> concerned a decision by the Minister to refuse to grant the applicant resident status in Australia and to order his deportation, despite the fact that the applicant's wife and young children were Australian citizens. Though not directly related to family unity for refugees, *Teoh* has been interpreted as authority for the proposition that ratification of the United Nations Convention on the Rights of the Child gives rise to a legitimate expectation that the Minister, when making administrative decisions in actions concerning children, will treat their best interests as a primary consideration.<sup>786</sup>

In **Finland**, a 2016 ruling of the Supreme Administrative Court determined that the two-year-old daughter of a Somali refugee should be considered a family member and thus entitled to family reunification, even though her mother had left her behind in her own mother's care when she fled Mogadishu and had been granted residence permit in Finland on the basis of family ties using false personal data.<sup>787</sup> Once in Finland, the mother had sought asylum and explained that she had used false personal data. She was later recognized as a refugee. The Court considered that mother and daughter had been separated for compelling reasons, that it was not decisive that the former had originally arrived in Finland using false personal data, and that it could not be assumed that the mother, who fled because of persecution, voluntarily gave up custody of her young daughter merely because she had left her with her own mother when she fled. It found that the mother had applied for a residence permit for her child expeditiously, that her actions demonstrated her intention not to give up custody of her child permanently, that she had kept in touch with her relatives in Somalia and supported them financially. The decision referred to Finland's obligations under both the CRC and ECHR.

In **France**, among the problems faced by beneficiaries of international protection seeking to bring a child to join them that have been identified by the ombudsperson is the use of a standardized reason for the rejection of a visa request presuming that, where a beneficiary of international protection has established filiation of a child who has a second parent in the country of origin who is not dead and not formally deprived of any parental or custodial rights, that it is in the child's best interests for him or her to remain with the parent in the country of origin. The ombudsperson finds the use of such a reason appears to be illegal, since it is not up to consular authorities to determine which parent a child should live with under such circumstances.<sup>788</sup> Where standardized reasons are given, this can in addition hardly constitute an individualized assessment of the child's situation.

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<sup>785</sup> *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, Australia: High Court, 7 April 1995, available at: <http://www.refworld.org/docid/3ae6b70c8.html>.

<sup>786</sup> The decision in *Teoh* has been subsequently distinguished, see notably *Minister for Immigration and Ethnic Affairs; Ex parte Lam*, Australia: High Court, [2003] HCA 6, 12 February 2003, available at: [http://www.refworld.org/cases,AUS\\_HC\\_58b04b984.html](http://www.refworld.org/cases,AUS_HC_58b04b984.html).

<sup>787</sup> *KHO:2016:204*, Finland: Supreme Administrative Court, Decision of 20 December 2016.

<sup>788</sup> France: Le défenseur des droits, *Les droits fondamentaux des étrangers en France*, 2016, above fn. 578, p. 22.

In **Sweden**, when a child will be affected by a decision on an application for a permit under the Aliens Act, the child must be heard, unless this is inappropriate. Account must be taken of what the child has said to the extent warranted by the age and maturity of the child.

In the **United Kingdom**, legislation requires the Home Secretary to safeguard and promote the welfare of children in the UK. Although this statutory duty does not apply to children outside the UK, Home Office policy guidance states that staff working overseas “must adhere to the spirit of the duty”.<sup>789</sup>

## 8.2 Unaccompanied child beneficiaries of international protection and family reunification

The Summary Conclusions on family unity of 2001 state:

“Expedited procedures should be adopted in cases involving separated and unaccompanied children, and the applicable age of children for family reunification purposes would need to be determined at the date the sponsoring family member obtains status, not the date of the approval of the reunification application.”<sup>790</sup>

Article 10(3) of the Family Reunification Directive *requires* States to authorize the entry and residence of the parents of unaccompanied refugee children and *permits* States to do the same for the child’s “legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced”. In addition, Article 5(5) of the Directive *obliges* Member States to take into account the best interest of the child.

With regard to the jurisprudence of the ECtHR, it ruled in 2006 in the case of a five-year old Congolese girl intercepted in Belgium who was seeking to join her mother in Canada, but who was returned to the Democratic Republic of Congo, that the “State was under an obligation to facilitate the family’s reunification”.<sup>791</sup>

As for the CJEU, it is interesting to note that in its judgment in *O. and S.*, the Court identifies the question of dependency, including that between a minor resident in the EU and his or her parent seeking to join him or her, as being one which may require States to permit admission and residency.<sup>792</sup>

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<sup>789</sup> UK: *Borders, Citizenship and Immigration Act 2009*, Section 55; UK Home Office/Department for Children and Families, *Every Child Matters: Statutory Guidance*, November 2009, available at: <http://www.refworld.org/docid/58b014424.html>, as also confirmed by the Upper Tribunal in *AT and another (Article 8 ECHR - Child Refugee - Family Reunification) Eritrea*, UKUT, 2016, above fn. 200, para. 31.

<sup>790</sup> UNHCR, Summary Conclusions, Family Unity, above fn. 1, para. 11.

<sup>791</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 2006, above fn. 643, para. 85, reiterated in Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, IACtHR, 2014, above fn. 46, para. 167.

<sup>792</sup> *O. and S.*, CJEU, 2012, above fn. 119, although this case concerned an EU citizen.

### 8.2.1 Unaccompanied child beneficiaries of international protection denied access to family reunification

Of the countries examined for this study, only **Switzerland**, the **United Kingdom**, **Canada**, and the **United States** do not permit unaccompanied child refugees/beneficiaries of complementary protection to reunite with their parents. While reunification in such cases is sometimes possible in these countries, the circumstances under which exceptions can be made are generally heavily circumscribed and rarely applied.

In **Switzerland**, the parents and minor siblings of an unaccompanied minor refugee have since February 2014 no longer been eligible for family reunification. This followed the repeal of a provision permitting other near relatives of refugees living in Switzerland to be included in family asylum if there were special grounds in favour of family reunion.<sup>793</sup>

In the **United Kingdom**, the Immigration Rules provide: “The parents and siblings of a child who have been recognised as refugees are not entitled to family reunion under the Immigration Rules.”<sup>794</sup> The government asserts that this policy is “a considered position designed to avoid perverse incentives for children to be encouraged or even forced to leave their country and undertake a hazardous journey to the UK” and maintains that “[a]llowing children to sponsor their parents would play right into the hands of traffickers and criminal gangs and go against our safeguarding responsibilities”.<sup>795</sup>

Cases may exceptionally be considered outside the Immigration Rules. “Exceptional circumstances” are defined as those circumstances that would “make refusal of entry clearance a breach of ECHR Article 8 (the right to respect for family life) because refusal would result in unjustifiably harsh consequences for the applicant or their family”. “Compassionate factors” are defined as “circumstances, which might mean that a refusal of leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but not constitute a breach of Article 8”. The applicant must demonstrate “what the exceptional circumstances or compassionate factors are in their case” and “[e]ach case must be decided on its individual merits”.<sup>796</sup> The Home Office considers that applications which do meet the criteria under the Rules are likely to be granted “only rarely”.<sup>797</sup>

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<sup>793</sup> Suisse: *Loi sur l’asile de 26 juin 1998*, état le 1er octobre 2016, above fn. 193, Article 51(2) (repealed). See also *E-2413/2014*, Suisse: Tribunal administratif fédéral (TAF), 13 July 2015, refusing entry to the mother and sisters of a son/brother from Syria who had been recognized as a refugee and granted asylum while still a minor.

<sup>794</sup> UK Home Office, *Family reunion: for refugees and those with humanitarian protection*, 2016, above fn. 487, p. 18. The UK has opted out of the Family Reunification Directive.

<sup>795</sup> UK: House of Lords debate, 3 February 2016, column 1881, available at: <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160203-0003.htm#16020380000085>. This view was restated in 2017 in response to a written question: UK: House of Lords, *Asylum: Children: Written question - HL6683*, 20 April 2017, available at: <http://www.parliament.uk/written-questions-answers-statements/written-question/lords/2017-04-05/HL6683>.

<sup>796</sup> UK Home Office, *Family reunion: for refugees and those with humanitarian protection*, 2016, above fn. 487, p. 19.

<sup>797</sup> *Ibid.*

Indeed, such cases seldom succeed and can be very lengthy on appeal.<sup>798</sup> There have been only 175 cases where visas were granted on the basis of exceptional circumstances, although it is not known how many of these concerned applicants under the age of 18.<sup>799</sup> One case considered by the Upper Tribunal involved an Eritrean unaccompanied minor granted asylum, who sought family reunification with his mother and younger brother, who had fled to Sudan. The Tribunal ruled in 2016 that refusing to permit them to enter and remain in the UK constituted a disproportionate breach of the right to respect for family life enjoyed by all family members under Article 8 ECHR. The judge ruled that the family's separation "does not further any identifiable public interest", that "[o]n the contrary it is antithetical to strong and stable societies", and that "reunification will promote, rather than undermine, the public interest ... [and] will be manifestly better for society than maintenance of the status quo".<sup>800</sup>

In **Canada**, unaccompanied child refugees are unable to reunite with either parents or siblings. To sponsor family members to come to Canada under the family class programme, the prospective sponsor must be 18 years of age or older, thus excluding unaccompanied child refugees from being able to sponsor family members for reunification. Under the expedited "one-year window of opportunity programme", parents are not included among family members able to reunite with refugees.<sup>801</sup> As the Canadian Council for Refugees has noted:

"Under the Immigration and Refugee Protection Regulations, children who are granted 'protected person' status in Canada are not permitted to include their parents and siblings, either abroad or in Canada, in their applications for permanent residence. They cannot sponsor them through the family class after landing either."<sup>802</sup>

The result is that unaccompanied child refugees who wish to bring their parents or siblings must first reach the age of 18 and meet income requirements that are out of reach for most minors, in order to sponsor family members. It appears that, as in the UK and other States, this policy is related to concerns regarding the possibility of families sending "anchor children" to Canada in the hopes that other family members will be able to follow.

This does not mean that there are no avenues for family reunification, but such avenues as do exist offer inadequate solutions, since they often rely on discretionary humanitarian and

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<sup>798</sup> UNHCR, *Family Reunion in the United Kingdom (UK) - Briefing Paper*, March 2016, available at: <http://www.refworld.org/docid/588b4ead4.html>, p. 6; Chief Inspector, UK: Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, above fn. 440, pp. 38-41, which reviewed 181 cases assessed in British embassies/consulates in Amman, Istanbul and Pretoria and found that none had identified exceptional circumstances or compassionate factors, though the Chief Inspector identified nine cases that might reasonably have been considered to involve such circumstances.

<sup>799</sup> UK, Gower and McGuinness, *The UK's Refugee Family Reunion Rules: Striking the Right Balance?*, above fn. 199, p. 18.

<sup>800</sup> *AT and another (Article 8 ECHR - Child Refugee - Family Reunification) Eritrea*, UKUT, 2016, above fn. 200, paras. 35 and 36.

<sup>801</sup> For more on these two means of family reunification, see text at fn. 242 et seq. and fn. 388 et seq. above.

<sup>802</sup> Canadian Council for Refugees, *Family Reunification: Submission to the Standing Committee on Citizenship and Immigration*, November 2016, available at: <http://ccrweb.ca/en/family-reunification>, p. 2.

compassionate considerations (H&C)<sup>803</sup> or some kind of judicial review of the rejection of their application. H&C discretion exists to relieve hardship, including the hardship of family separation, but it is a discretionary remedy. Some counsel in Canada have included parents on a minor refugee child's permanent residence application and then begun a constitutional challenge of the refusal to process the parent, but these cases have always been settled with the parent obtaining status in Canada. There have also been cases where refugee children in Canada have been reunited with their refugee parents through resettlement of the parent, but this option does not work for parents who remain in the country of origin.<sup>804</sup>

In the **United States**, there is no established path for child refugees or asylees to petition for a parent to derive status through the child. Child refugees and asylees can only petition for a parent to reunite once the child naturalizes as a US citizen. In general, the earliest a refugee/asylee can seek to naturalize is five years after being granted refugee/asylee status.<sup>805</sup>

Other countries examined permit at least the parents of unaccompanied child refugees to reunite, as outlined in section 8.2.2 which follows.

National authorities sometimes justify restricting the access of unaccompanied child beneficiaries of international protection to family reunification as designed to counter a perceived practice of families sending "**anchor children**" on dangerous journeys, so that they can later be joined by other family members.

Yet unaccompanied child beneficiaries of international protection have a right to family life and family unity just like adults. Indeed, their right to family reunification is perhaps even more clearly established in international law, in particular under the CRC, while States also have greater obligations to assure the protection of children.<sup>806</sup> Denying unaccompanied child beneficiaries of international protection the possibility of reunifying with their parents and family does not respect their right to family life and family unity, since their recognition as facing persecution or serious harm means that family life in their country of origin is not possible.

As Jastram and Newland have noted:

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<sup>803</sup> Government of Canada, "Guide 5291: Humanitarian and Compassionate Considerations", 2017, available at: <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5291-humanitarian-compassionate-considerations.html>

<sup>804</sup> Communication from UNHCR office Ottawa, December 2017. See also, Justice for Children and Youth, "Submission for the CMW-CRC Joint General Comment on the Human Rights of Children in the Context of International Migration", 29 February 2016, available at: <http://jfcy.org/wp-content/uploads/2013/10/Submission-for-CMW-CRC-Joint-General-Comment-on-Children-in-Context-of-Migration-JFCY.pdf>, paras. 25-30.

<sup>805</sup> Once refugee or asylee children turn 18 and if they are one of the designated nationalities and if their family members are otherwise eligible, they may be able to petition for their parents in the Priority 3 program, for more on which see text above at fn. 253-259.

<sup>806</sup> While the United States is not a party to the CRC, it should be noted that the best interest principle originally derived from US family law. See generally, S. Starr and L. Brilmayer, "Family Separation as a Violation of International Law", *Berkeley Journal of International Law*, 21(2), 2003, available at: <http://scholarship.law.berkeley.edu/bjil/vol21/iss2/3/>, pp. 213-287, at pp. 225, 268-269.



“A State’s fear of ‘anchor children’ being used to open a path for the immigration of a family does not justify denial of family reunification to a child who has been found to have a legitimate claim to refugee status, nor does it comport with international obligations relating to family reunification and the best interests of the child.”<sup>807</sup>

States also have an obligation to ensure that the child’s best interests are a primary consideration in such matters. Where States do not have a regulatory framework to permit the family reunification of child beneficiaries of international protection at least with parents, when this is assessed to be in their best interests, they lack the necessary framework to ensure they uphold their international obligations.

For its part, the ECtHR has ruled that the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of “family life” within the meaning of Article 8 of the Convention.<sup>808</sup>

At national level, two UK parliamentary committee reports issued in 2016 have examined this issue and concluded that denial of family reunification for child refugees is perverse and have recommended that the policy be changed. In its report, the House of Commons Home Affairs Committee observed:

“It seems to us perverse that children who have been granted refugee status in the UK are not then allowed to bring their close family to join them in the same way as an adult would be able to do. The right to live safely with family should apply to child refugees just as it does to adults. The Government should amend the immigration rules to allow refugee children to act as sponsors for their close family.”<sup>809</sup>

Meanwhile, the UK House of Lords’ EU Committee found that there was

“no evidence to support the Government’s argument that the prospect of family reunification could encourage families to send children into Europe unaccompanied in order to act as an ‘anchor’ for other family members. If this were so, we would expect to see evidence of this happening in Member States that participate in the Family Reunification Directive. Instead, the evidence shows that some children are reluctant to seek family reunification, for fear that it may place family members in danger.”<sup>810</sup>

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<sup>807</sup> Jastram and Newland, “Family Unity and Refugee Protection”, 2003, above fn. 72, p. 560,

<sup>808</sup> See, among many authorities, *Kutzner v. Germany*, Application no. 46544/99, ECtHR, 26 February 2002, available at: <http://www.refworld.org/cases,ECHR,58c166454.html>, para. 58; *Monory v. Romania and Hungary*, Application no. 71099/01, ECtHR, 5 July 2005, available at: <http://www.refworld.org/cases,ECHR,5a4ca8d54.html>, para. 70.

<sup>809</sup> UK: House of Commons Home Affairs Committee, *The Work of the Immigration Directorates (Q1 2016)*, above fn. 591, para. 41.

<sup>810</sup> UK: House of Lords, EU Committee, “Children in Crisis: Unaccompanied Migrant Children in the EU”, HL Paper 34, 26 July 2016, available at: <http://www.refworld.org/docid/5a4ce35d4.html>, para. 62.

Indeed, it may well be that denying or restricting the right of family members to reunite actually pushes family members into the hands of smugglers, as they seek to reunite by irregular means in the absence of legal avenues.<sup>811</sup>

One study of the experience in Norway reported that “family immigration via unaccompanied refugee minors is a limited phenomenon”. It found that “[f]ew of those who arrived in Norway in the period 1996–2015 have acted as a reference person for one or more family members”.<sup>812</sup>

Indeed, mothers and fathers do not lightly send their children into exile alone. Rather, if they see their children are at risk of persecution, including child-related forms of persecution such as forced recruitment as a child soldier or in an armed gang, or that their children risk being caught up in conflict, flight may seem the only means of survival. As Gulwali Passarlay wrote of his mother in his account of his flight as a 12-year-old child from Afghanistan which eventually took him to the United Kingdom: “By sending me away, she definitely saved her son, but she also lost him. She, of everyone, paid the highest price.”<sup>813</sup>

In terms of national jurisprudence, the UK House of Lords ruled in a 2008 case concerning removal that may also be seen as relevant in the family reunification context, that both the Secretary of State and the immigration appellate authorities were required to consider the right to respect for the family life of all the family members who might be affected by the removal decision, not just those of the claimant or appellant in question:

“Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.”<sup>814</sup>

The House of Lords ruled further that to

“consider only the effect upon other family members as it affects the appellant ... is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.”<sup>815</sup>

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<sup>811</sup> See e.g. Refugee Children’s Consortium, “Refugee Family Reunion: briefing for Westminster Hall debate”, 2016, above fn. 487 and also more generally, the report of the Dutch Central Bureau for Statistics, *From reception to integration: Cohort study of recent asylum migrants*, 2017, text above at fn. 651, finding that many family members arriving in the Netherlands were arriving by irregular means.

<sup>812</sup> Statistics Norway, “Family Immigration Among Refugees: How Many Refugees’ Families Come to Norway?”, 2017, above fn. 652.

<sup>813</sup> G. Passarlay, *The Lightless Sky: My journey as a child refugee*, Atlantic Books, 2015, p. 354.

<sup>814</sup> *Beoku-Betts (FC) v. Secretary of State for the Home Department*, [2008] UKHL 39, UK: House of Lords, 25 June 2008, available at: <http://www.refworld.org/docid/48623f3d2.html>, para. 20.

<sup>815</sup> *Ibid.*, para. 4.

If the few States that refuse child beneficiaries of international protection the right to family reunification allowed them at least to reunite with their parents, this would bring practice more into line with States' obligations under the CRC and under international and regional human rights law more generally. It would also allow these States to join the vast majority of States that have accepted and permit this. As outlined in the following section, reunification also with minor siblings would take account of the situation and rights not only of the child beneficiary of international protection, but also those of his or her siblings.

### 8.2.2 *Unaccompanied child beneficiaries of international protection able to reunify with family members*

The vast majority of States reviewed for this paper permit unaccompanied child beneficiaries of international protection to reunify at least with their parents.

For instance, all EU Member States bound by the Family Reunification Directive permit unaccompanied child beneficiaries of international protection to be joined by their **parents**, as is required under Article 10(3) of the Directive cited in the preceding section (the United Kingdom having opted out of the Directive).

With regard to permission for **other family members** in addition to parents to reunify with unaccompanied child beneficiaries of international protection, UNHCR has noted:

“Where a child has lost his/her parents during conflict or due to persecution by the government, it may be impossible to formalize legally the fact that s/he has since been taken care of by an uncle or a grandparent. UNHCR would recommend to all Member States, as part of the examination of the best interest of minor children, to consider and provide the possibility for refugee children to be reunited with other family members or guardians where their parents in direct ascending line cannot be traced.”<sup>816</sup>

In addition, where only the parents are permitted to reunite and they have other minor children, they are faced with a decision either of remaining separated from the child beneficiary of international protection or of leaving behind their other child(ren), including in what may be a precarious and/or dangerous situation. Such a policy thus serves to perpetuate separation not to reunite family members. It should rather be recalled that minor children are part of the nuclear or close family and that refugee families have an essential right to family unity, which would speak for the whole family being permitted to reunite together, also bearing in mind the best interests of all the children involved.

*Examples of the many European States that permit the grandparents and/or guardians of unaccompanied child refugees (and sometimes those with subsidiary protection) if there are no parents or they cannot be traced include:*

**Austria** (grandparents or other family members, if they were the legal guardians in the country of origin and if parents cannot be traced); **Bulgaria** (another adult member of their family or a

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<sup>816</sup> UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 3, pp. 9-10.

person responsible for the child by law or custom if the parents are deceased or missing); **Finland** (parent or guardian); **France** (“direct ascendants”, that is, his or her parents, or if he or she does not have parents or they cannot be traced, his or her grandparents); **Hungary** (legal guardian, in the absence of the parents); **Italy** (direct first-degree ascendants or any other adult responsible by law); **the Netherlands** (foster parents, in the absence of biological parents, if the foster parents and the minor formed a household in the country of origin, if the parents are subsequently granted international protection, it is possible to seek to reunify with the minor siblings of the unaccompanied child in a separate procedure, but this is not always granted); **Poland** (first-degree relative in the direct ascending line, i.e. a parent, grandmother or grandfather, or another adult who is responsible for the child according to the Polish law, i.e. has lawful custody over the child); and **Slovenia** (parents or guardians).<sup>817</sup>

It should nonetheless be noted that, where evidence of formal guardianship is required, few countries from which refugees originate have legal adoption procedures recognized in European States. In the above scenarios, siblings would only be entitled to reunify if they were the child’s guardian.<sup>818</sup>

*Examples of European States permitting not only the parents but also **siblings and other family members** to reunite with unaccompanied child refugees and sometimes with beneficiaries of subsidiary protection include:*

**Belgium** (although the law provides only for parents to be able to join unaccompanied child beneficiaries of international protection, it is recognized that the best interest principle means that persons other than those authorized by law may exceptionally be allowed to come to Belgium with a humanitarian visa and a temporary residence permit, as might be the case, for instance, for the child’s brothers and sisters, legal guardian or other members of his or her family);<sup>819</sup> **Czech Republic** (parents and in their absence any relative in ascending line or a guardian and with unmarried minor siblings); **Finland** (parent, guardian and minor siblings);<sup>820</sup> **Greece** (legal guardian or any other member of the family, where the minor refugee has no relatives in the direct ascending line or such relatives cannot be traced);<sup>821</sup> **Iceland** (parents and siblings below 18 years of age);<sup>822</sup> **Ireland** (“parents and their children who... are under the age of 18 years and are not married”, but not with grandparents, legal guardians or other family members, even when parents cannot be traced);<sup>823</sup> **Luxembourg** (legal guardians or any other family member, if an unaccompanied child beneficiary of

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<sup>817</sup> See e.g. Finland: *Aliens Act*, 2004, above fn. 205, Section 37(1); France: CESEDA, above fn. 21, Article L752-1.I; Italy: *Legislative Decree no. 286/1998*, above fn. 220, Article 29bis(3), this provision applying to beneficiaries of subsidiary protection as well as refugees even though they are not mentioned; Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland*, 2016, above fn. 187, p. 10; Slovenia: *Aliens Act*, 2011, above fn. 227, Article 47a(2).

<sup>818</sup> See also section 8.3 below for more on questions of guardianship.

<sup>819</sup> Belgian Refugee Council, *Family Reunification with Beneficiaries of International Protection in Belgium*, 2014, above fn. 517, p. 9.

<sup>820</sup> Finland: *Aliens Act*, 2004, above fn. 205, Sections 37(1) and 53(4).

<sup>821</sup> Greece: *Presidential Decree No. 167 of 2008*, above fn. 209, Article 13(2)(b).

<sup>822</sup> Iceland: *Act on Foreigners No. 80/2016*, 2016, above fn. 211; UNHCR, *UNHCR Observations on the proposed amendments to the Icelandic Act on Foreigners*, above fn. 211, para. 19 (this proposal having since been approved in law).

<sup>823</sup> Ireland: *International Protection Act*, 2015, above fn. 212, Section 56(9)(c).

international protection has no parent or they cannot be traced); and **Romania** (parents or legal guardian or, where they do not exist or cannot be identified, any other relative).<sup>824</sup>

In **Denmark**, unaccompanied minor refugees may apply immediately for their parents and minor siblings to join them.<sup>825</sup> In addition, unlike adults with temporary protection status who must wait three years, children with this status may also apply to reunite with their parents and minor siblings immediately upon being granted status. Applications may be rejected, however, if the child is 15 years or older at the time he or she applied, or if he or she already has a family member in Denmark able to take care of the child.<sup>826</sup>

In **Germany**, it is legally (and therefore in practice) extremely difficult for other family members such as siblings (in addition to parents) to reunite with an unaccompanied child refugee. Parents and siblings fall under different provisions of the Residence Act, with children granted protection in Germany only being permitted to reunify with their siblings, if this is deemed “necessary to avoid exceptional hardship”, which was previously handled very restrictively.<sup>827</sup> While the assessment of such applications in practice no longer requires review of “exceptional hardship” criteria applied to other family members, other requirements are usually applied. These include the requirement to apply within three months and to assess whether family reunification is possible in a third country with which the family has special links (including legal residence).<sup>828</sup> Applications may as a result not be approved, in particular since there is no dispensation from the requirement to provide accommodation and living space for siblings seeking to reunify. In practice, this requirement usually prevents the family reunification of the siblings at the same time as that of the parents with the minor in Germany. Rather, any siblings are generally only entitled to reunify as children of the parents once the latter have come to Germany.<sup>829</sup> In one case, for instance, only the parents of a child refugee in Germany were granted visas to join their 16-year-old son, but they could not come as they could not leave the refugee’s four minor siblings, one of whom was a baby, alone in Lebanon.<sup>830</sup>

In December 2015, the Higher Administrative Court in Berlin-Brandenburg nevertheless showed flexibility towards the parents and sister of an unaccompanied minor Yezidi Kurdish

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<sup>824</sup> Romania: *Emergency Ordinance No. 194/2002*, 2002, above fn. 189, Article 46(3).

<sup>825</sup> Refugees Welcome Denmark, *I would like to get family reunification for someone in Denmark*, available at: <http://refugeeswelcome.dk/en/asylum/family-reunification/>; M. Clante Bendixen, *Family Reunification for Refugees*, 16 May 2017, available at: <http://refugees.dk/en/facts/legislation-and-definitions/family-reunification-for-refugees/>. (Adults with temporary protected status must complete three years of residence before being able to apply for family reunification, as outlined in section 6.1, text at fn. 601. above.)

<sup>826</sup> Refugees Welcome Denmark, Q and A, available at: <http://refugeeswelcome.dk/advice/q-a/>, click on “I want my family to come to Denmark”.

<sup>827</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 36(2), reunification with the parents being regulated under Section 36(1). See also, UNHCR Deutschland, “Familienzusammenführung zu Personen mit internationalem Schutz: Rechtliche Probleme und deren praktischen Auswirkungen”, *Asyl Magazin* 2017/4, available at: [https://familie.asyl.net/fileadmin/user\\_upload/pdf/AM17-4\\_thema\\_famzus.pdf](https://familie.asyl.net/fileadmin/user_upload/pdf/AM17-4_thema_famzus.pdf), pp. 132-137, at pp. 134-136; and Dr D. Rabenschlag und M. Rau, “Rechtsprechungsbericht Das »Ankerkind« im Visumrecht” (Teil 1) und (Teil 2), *Verwaltungsgerichtsbarkeit, BDVR-Rundschreiben 2 | 2017 und 3 | 2017*, available in German at: <http://www.bdvr.de/index.php/id-20162017.html>. I am indebted to Dr Rabenschlag for his comments on an earlier draft of this paper and for alerting me to his detailed analysis of the many legal issues arising in this context.

<sup>828</sup> See text at fn. 183, above and Germany: *Residence Act*, 2004, above fn. 183, Section 36.

<sup>829</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 29.

<sup>830</sup> Proasyl, *Familiennachzug verhindert*, 2016, above fn. 553.

refugee from Iraq. The parents had been faced with the possibility of having to leave their minor daughter alone in Iraq if they joined their son, but the court ruled that exceptionally the daughter should be granted an entry visa under Section 32(1) of the Residence Act permitting the issuance of a residence permit to unmarried minor children, even though the parents did not yet have the long-term residence permit and were unable to meet the income requirements normally imposed. The Court found that the daughter could not be expected to remain alone in the tented refugee camp where she had been living with her father (the mother having already joined her son in Germany), nor could the father be expected not to take up the visa he had been granted to come to Germany.<sup>831</sup>

This case appears, however, the exception rather than the rule. Rather, a December 2016 decision by the same court is the one that has since been followed. In this judgment, the Higher Administrative Court in Berlin-Brandenburg refused to uphold an appeal against a decision denying an entry visa to the child of an Iraqi mother, who herself had a visa to join her unaccompanied minor refugee son in Germany on the grounds that her son turned 18 in January 2017 and her right of residence therefore ceased as he was no longer a minor.<sup>832</sup>

By contrast, one recent judgment of the Berlin Administrative Court also ruled in favour of the parents/siblings of a minor child who had subsidiary protection in Germany and had been diagnosed with post-traumatic stress disorder due to trauma experienced in the civil war in his home country and during flight, as well as depression and feelings of guilt due to his separation from his family.<sup>833</sup> In its judgment, the Court argued that the constitutionality of the temporary suspension of family reunification for beneficiaries of subsidiary protection would be questionable if there were no possibility for exceptions, as provided for under Section 22 of the Residence Act, to issue visas on humanitarian grounds.<sup>834</sup> The Court interpreted this exception clause in the light of fundamental rights under Article 6 of the Basic Law, Article 8 ECHR and the best interest of the child, ruling that in the specific circumstances of the case, visas should be issued under Section 22 of the Residence Act to enable them to reunite with their son/brother.

In **Norway**, an unmarried beneficiary of international protection under the age of 18 years can be reunited with his/her parents or guardian(s). If direct parents cannot be traced, grandparents, legal guardians or other family members can apply for family reunification with the child in Norway if custody can be proven. In such cases the guardianship must be demonstrated by a court decision or by other reliable official documentation. In practice, however, residence permits for family reunification with an unaccompanied child are rarely granted.<sup>835</sup>

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<sup>831</sup> OVG 3 S 95.15, Germany: Oberverwaltungsgericht (Higher Administrative Court), Berlin-Brandenburg, 21 December 2015, available at: [http://www.refworld.org/cases,DEU\\_THUER\\_OBER,58c299ce4.html](http://www.refworld.org/cases,DEU_THUER_OBER,58c299ce4.html).

<sup>832</sup> OVG 3 S 106.16, Germany: Oberverwaltungsgericht, Berlin-Brandenburg, 22 December 2016, available at: [http://www.refworld.org/cases,DEU\\_THUER\\_OBER,58c2996a4.html](http://www.refworld.org/cases,DEU_THUER_OBER,58c2996a4.html). The Verwaltungsgericht Berlin (first instance appeal body for all visa claims against Germany) follows this new jurisprudence with one exception (VG 10 K 438.16 V, Germany: Administrative Court, judgment of 10 November 2017) against which the Ministry of Foreign Affairs has applied for leave to appeal.

<sup>833</sup> VG 36 K 92.17 V, Germany: Administrative Court, 7 November 2017 (as yet unpublished).

<sup>834</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 22.

<sup>835</sup> Information from UNHCR Regional Representation for Northern Europe, Stockholm, 19 October 2017.

Outside Europe, the possibilities for minor beneficiaries of international protection to reunite with their parents or other family members can be very limited.

In **Australia**, family reunion applications proposed by minors who hold offshore humanitarian visas have from March 2014 received the highest processing priority by the department and their immediate family members' application receive a concession against "compelling reasons factors".<sup>836</sup> By contrast, applications proposed by minors who hold a protection visa or Resolution of Status visa have received the lowest processing priority by the department and their family's application is assessed against the four compelling reasons factors. The possibility for minors to propose their family for a permanent visa under the Special Humanitarian Programme (SHP) was also removed in March 2014.<sup>837</sup>

In conclusion, examples such as the two German cases mentioned above and the Eritrean case in the UK referred to in section 8.2 above reflect a positive practice of showing readiness to consider "exceptional" circumstances as part of a humane family reunification policy, where the vulnerability of family members is recognized as limiting States' margin of appreciation. Such examples are, however, the exception rather than the rule.

Flexibility is therefore required in regard to the reunification of child beneficiaries of international protection with family members both in relation to acceptance of less formal guardianship and fostering practices that may apply in countries of origin and in terms of other family members in addition to parents, such as siblings, who may be allowed to reunify. Otherwise, where only the parents of an unaccompanied child beneficiary of international protection are permitted to reunify with their child, this can prevent the family from being reunited and oblige parents to decide whether to leave other children behind and join the child with international protection or to remain with their other children. Otherwise, family reunification becomes the perpetuation of family separation.

### **8.3 Adopted and foster children, including questions of guardianship and custody**

Regional courts have confirmed various situations where different children should be considered family members.<sup>838</sup> Yet adopted children, foster children, children born out of wedlock, children of earlier marriages/relationships, children where custody has not been formally granted, and children where parents have joint custody and permission is required to have been granted by the other parent all face additional hurdles when seeking

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<sup>836</sup> These concern the degree of persecution or discrimination to which the applicant is subject in their home country; the extent of his or her connection with Australia; whether or not there is another suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution or discrimination; and the capacity of the Australian community to provide for the permanent settlement of the applicant in Australia.

<sup>837</sup> Australia: Department of Immigration and Border Protection, "What are the changes to Refugee and Humanitarian programme?", March 2014, available at: <https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-are-the-changes-to-refugee-and-humanitarian-programme>.

<sup>838</sup> See UNHCR, "The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied", above fn. 4, sections 3.3.4 to 3.3.8. See also Section 4.1 above on the family definition applied provides examples of State practice as regards children.

reunification. The preliminary question referred to the CJEU in November 2017 regarding the situation of a foster mother seeking reunification with her son who was unable to provide official documents may also provide relevant guidance on issues surrounding documentation in such cases.<sup>839</sup>

With regard to the situation of children taken in under the Arabic scheme of *kafalah*, a process of legal guardianship akin to adoption, a case currently before the CRC Committee that may provide useful guidance. The case concerns the Belgian authorities' denial of a humanitarian visa to an abandoned Moroccan child who had been taken in by a Belgian-Moroccan couple.<sup>840</sup>

Many States impose strict limitations, requiring for instance that sole custody be formally proven, that legal guardianship be recognized, and/or that proof be provided of the death of one parent. With regard to foster children (whether of the sponsor or of his or her spouse), some national laws in EU Member States treat them in the same way as children born to the parents for the purposes of family reunification. Often, though, they must often provide reliable information showing that the sponsor was the *de facto* guardian before the sponsor entered the Member State. In **Belgium** and **Sweden**, foster children are reported not to have the same right as adoptive and native children to be granted a residence permit.<sup>841</sup> In other Member States, foster children can be issued a residence permit under certain conditions.

Additional documentation required may not be available depending on national systems and practice in place in the country of origin and/or situations of conflict and instability that prevent such documentation being issued or result in it being destroyed. Where children have been born in exile this can also be problematic, notably if the child's birth has not been formally registered and/or the child is stateless.

States may indeed understandably be concerned to avoid dubious situations of purported informal "adoption" that may actually mask a situation where trafficking or exploitation may be involved. At the same time, their policy and practice need to take into account the particular situation and vulnerability of child beneficiaries of international protection and to strike a fair balance between State interests in immigration control and the right of such beneficiaries to family unity.

One example of the difficulties faced securing family reunification, where couples are divorced concerns the application of a divorced refugee from Eritrea with asylum in **Denmark** to reunify with his 12-year-old son, which was rejected by the Danish Immigration Service. The boy's mother had fled Eritrea but her asylum application had been rejected in another country and the boy was living with his elderly, sick grandmother in Eritrea. Even though both father and son had passports and there was a birth certificate with the name of the father on it, they were both required to take a DNA test because the parents were divorced. Since the nearest Danish embassy was in Ethiopia and legal departure from Eritrea is not permitted, the father

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<sup>839</sup> See text above at fn. 315.

<sup>840</sup> For brief information about the case, see CRC Committee, Communication No. 12/2017, available at: <http://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>.

<sup>841</sup> EMN, *EMN Synthesis Report for the EMN Focussed Study 2016 – Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, 2017, above fn. 40, p. 22.



needed to organize for his son to be smuggled illegally (and dangerously) across the border and for him to be able to stay in Ethiopia during the months required for the application (which might still be declined) to be processed.<sup>842</sup>

*Examples of State practice regarding de facto adopted children, foster children, and children for whom responsibility has been assumed under the Arabic scheme of kafalah, include:*

In **Belgium**, if a child is “de facto” adopted, procedures are difficult and long; foster children cannot in principle benefit from family reunification, though they could be granted a residence permit on humanitarian grounds on a case-by-case basis.<sup>843</sup>

In **Germany**, where care or custody of an unmarried, minor child is shared by the parents, a residence permit to join just one parent can only be granted if the other parent has given his or her consent or if a relevant binding decision has been supplied by a competent authority. An exception can only be made if this is necessary “to prevent undue hardship”.<sup>844</sup> Adopted children may be denied family reunification if there is no legally valid adoption and/or the adoption was only undertaken in order to be eligible for family reunification.

In **the Netherlands**, the children’s ombudsperson found in 2013:

“since 2008, the rights of children to be reunited with a (foster) parent who is a refugee in the Netherlands have been seriously violated by the Dutch government. An increasingly stringent policy, in which many unjustifiable demands are placed on families in order to be eligible for reunification, coupled with careless working methods of the [Immigration and Naturalization Service] IND, has meant that the rights of children to be reunited with their parents have been infringed.”<sup>845</sup>

Courts in Italy and the United Kingdom have also addressed the question of family reunification of children for whom others have assumed responsibility under the Arabic scheme of *kafalah*.

In **Italy**, the Supreme Court considered a case where the Italian Immigration Authority had refused to grant an entry visa to a minor who was entrusted to an Italian couple under the *kafalah* system. Referring to the principle of the best interest of the child as set out in the CRC and the Charter of Fundamental Rights, the Court acknowledged the need to provide a broad interpretation of “family member” in the national provision, which includes relations like the *kafalah*, provided that certain conditions were fulfilled.<sup>846</sup> In this case, however, the sponsors

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<sup>842</sup> M. Clante Bendixen, *Refugee Children Not Able to Meet Demand for DNA Test*, 26 June 2016, available at: <http://refugees.dk/en/news/2016/june/refugee-children-not-able-to-meet-demand-for-dna-test/>.

<sup>843</sup> EMN, *Ad-Hoc Query on policies for family members of beneficiaries of international protection*, 2014, above fn. 319, pp. 3-4.

<sup>844</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 32(4), where further details regarding this provision are provided.

<sup>845</sup> Netherlands: Children’s Ombudsperson, *Family Reunification: Policy and implementation 2008-2013*, 6 June 2013, available at: <https://www.dekinderombudsman.nl/ul/cms/fck-uploaded/Engelstalige%20rapporten/2013FAMILYREUNIFICATION.pdf>, p. 1.

<sup>846</sup> *Case 11404*, Italy: Supreme Court (Cassazione, I sez. Civ.), 22 May 2014, referred to in EU: European Commission,

were Italian and the applicable law, which refers to “any other family members” who are dependent, would not be applicable for beneficiaries of international protection.<sup>847</sup>

In the **United Kingdom**, the courts have considered the status of “a child for whom a family member has taken parental responsibility under the Islamic procedure known as ‘*Kafala[h]*’”. The Home Office has written that

“given the nature of the Somali family we are prepared to be flexible and if a refugee is able to show that a person not covered by the policy was a dependent member of the refugee’s immediate family unit before the refugee came to the United Kingdom, then we would be prepared to consider exceptionally extending the refugee family reunion provision to cover that person”.<sup>848</sup>

One case concerned AA, an orphan separated from the rest of her family during the fighting, whose brother-in-law took her in under the *kalafah* procedure. He later fled to the UK where he was granted asylum and applied for his family and the girl to join him in the UK. The application was approved as regards his wife and two other daughters, but AA’s application was refused. The Court of Appeal later overturned this decision on Article 8 ECHR grounds and she was able to join him.<sup>849</sup>

#### 8.4 Children who reach the age of majority

With regard to the situation of child beneficiaries of international protection who reach the age of majority, if a child reaches the age of 18 years, they will lose the right for their parents (and in some countries siblings or other family members) to join them. This is particularly problematic where children have to wait a long time for a decision on their asylum claim and/or where family tracing takes time and they turn 18 in the meantime.

The assessment of a young asylum-seeker’s age thus becomes key in the family reunification context, just as it is in terms of reception and the asylum procedure before that. On this issue, the CMW and CRC Committees have jointly recommended:

“To make an informed estimate of age, States should undertake a comprehensive assessment of the child’s physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different

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2014 *Report on the Application of the EU Charter of Fundamental Rights*, 8 May 2015, available at: <http://www.refworld.org/docid/55af67dc4.html>, p. 96.

<sup>847</sup> Legislative Decree 30/2007 transposing EU Free Movement Directive 2004/38/EC, above fn. 138, Art. 3(2)(a).

<sup>848</sup> *Secretary of State for the Home Department v. Dhudi Saleban Abdi*, UK: Court of Appeal (England and Wales), 30 October 1995, available at: <http://www.refworld.org/docid/3ae6b62414.html>.

<sup>849</sup> *AA (Somalia) v. Entry Clearance Officer - Addis Ababa*, [2012] EWCA Civ 563, UK: Court of Appeal (England and Wales), 1 May 2012, available at: <http://www.refworld.org/docid/4fedc28a2.html>. The case was appealed to the Supreme Court on the question of the interpretation of the Immigration Rules, for which see *AA (Somalia) (FC) v. Entry Clearance Officer (Addis Ababa)*, [2013] UKSC 81, UKSC, 18 December 2013, available at: <http://www.refworld.org/docid/52b1ce114.html>. For the situation of de facto adopted children more generally, see UK Home Office, *Family reunion: for refugees and those with humanitarian protection*, 2016, above fn. 487, p. 19.

aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children ... in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes. States should ensure that their determinations can be reviewed or appealed to a suitable independent body.”<sup>850</sup>

Several cases that are currently before the CRC Committee may provide useful guidance on the appropriateness of various age assessment techniques.<sup>851</sup>

In the specific context of family reunification, the Opinion of the Advocate General in a case before the CJEU is also relevant. The case concerns the interpretation of Article 2(f) of the Family Reunification Directive and in particular the situation of a refugee who entered the Netherlands as an unaccompanied child, but who had turned 18 by the time asylum was granted with effect from the date of his asylum application. When he requested family reunification with his parents, this was rejected on the grounds he was no longer a minor.

In his October 2017 Opinion, the Advocate General argued that it was “necessary to afford the most extensive protection in order to respond, in so far as possible, to the particular vulnerability of unaccompanied minors arriving on the territory of the Member States, and of young adults who have refugee status ... and that this would be unlikely to jeopardise the objectives set by the Union legislature with regard to stemming migratory flows”.<sup>852</sup> He did not accept that “the relationship of dependency between parents and children ceases immediately upon the date on which the child attains the age of majority” and found that ignoring the vulnerability of an unaccompanied child who arrived in Europe and reached the age of majority prior to the granting of international protection would run counter to the objectives of the Family Reunification Directive.<sup>853</sup> He therefore concluded that an unaccompanied child asylum-seeker who attains the age of majority before being granted asylum, with retroactive effect to the date of the application, and who subsequently applies for family reunification as granted to unaccompanied minor refugees may be considered to be an unaccompanied minor.<sup>854</sup> It remains to be seen what position the Court will take.

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<sup>850</sup> CMW and CRC Committees, *Joint General Comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 2017, above fn. 554, para. 4. See also Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, pp. 35-36.

<sup>851</sup> Cases before the CRC Committee concerning unaccompanied and undocumented children subjected to medical testing to determine their age are listed at: <http://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>.

<sup>852</sup> *A.S. v. Staatssecretaris van Veiligheid en Justitie*, C-550/16, CJEU, Opinion of Advocate General Bot, 16 November 2017, available at: <http://www.refworld.org/cases/ECJ/5a0dad064.html>, para. 54. The case was referred by the District Court of The Hague, see *Applicant v. State Secretary for Security and Justice*, AWB 16/8200, Netherlands: The Hague District Court, 16 August 2016, available at: <http://www.refworld.org/docid/57c585bd4.html>.

<sup>853</sup> *Ibid.*, paras. 56 and 57.

<sup>854</sup> *Ibid.*, para. 67.

State practice varies as to whether the point at which majority is calculated is defined as being the date of applying for family reunification or the date on which the family reunification decision is made.

*Examples of States where the date of majority is calculated as being the date on which the application was lodged include:*

In **Belgium**, a 2010 ruling by the Council for Aliens Law Litigation (CALL)<sup>855</sup> ruled that an unaccompanied child beneficiary of international protection must be less than 18 years of age at the time the visa request is submitted by his or her parents and not at the time of the decision on the granting of a visa made by the Immigration Office.

In **Switzerland**, as noted by the ECtHR, “[t]he case-law of the Federal Supreme Court provided that the decisive date for determining whether child was under 18 years of age was the date on which the application was lodged”.<sup>856</sup>

*By contrast, examples of States where the date of majority is defined as being that on which the decision on the application is made or even later include:*

In **Austria**, the Supreme Administrative Court addressed the question of the point at which the age of majority of an unaccompanied child beneficiary of international protection should be calculated in family reunification cases. The Court found that the applicable date was that on which the decision on the mother’s application for an entry visa was made and therefore upheld the authorities’ rejection of the application.<sup>857</sup> This line of jurisprudence was confirmed by two further judgements of January and February 2017<sup>858</sup> and has since been followed by numerous decisions of the Federal Administrative Court.

In **Finland**, the position of unaccompanied minor sponsors became more difficult when the law was changed in 2010 to require a minor to be under 18 when the decision on the application for family reunification was made. This process being very lengthy, many young sponsors reach the age of 18 before such a decision is taken. Even though the maximum time allowed under the Aliens Act for the decision-making process in family reunification cases is nine months, in 2014 the average processing time for minor beneficiaries of international protection seeking reunification with their parent(s) was 414 days, although the situation has since improved. If the nine-month time limit is exceeded and the delay is not caused by the applicant, the decision can still be positive even if the sponsor has reached the age of majority. A 2016 judgment of the Supreme Court ruled, for instance, that where a minor applicant (or

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<sup>855</sup> *Judgment no. 39.369, Belgium: CALL, 25 February 2010, available at: <http://www.refworld.org/docid/5859451c4.html>.*

<sup>856</sup> *El Ghatet v. Switzerland*, ECtHR, 2016, above fn. 93, paras. 31 and 33 referring to relevant Swiss Federal Supreme Court judgments.

<sup>857</sup> *Ra 2015/21/0230 bis 02313*, Austria: Administrative Court (VwGH), 28 January 2016, available at: [http://www.refworld.org/cases,AUT\\_FCCA,58c280294.html](http://www.refworld.org/cases,AUT_FCCA,58c280294.html).

<sup>858</sup> *Ra 2016/20/0231-0234*, Austria: Administrative Court (VwGH), 26 January 2017, available in German at: [http://www.refworld.org/cases,AUT\\_AHAC,5a0db5df4.html](http://www.refworld.org/cases,AUT_AHAC,5a0db5df4.html); *Ra 2016/18/0253-0254*, Austria: Administrative Court (VwGH), 21 February 2017, available in German at: [http://www.refworld.org/cases,AUT\\_AHAC,5a0dbf3f4.html](http://www.refworld.org/cases,AUT_AHAC,5a0dbf3f4.html).

minor sponsor) reaches the age of majority during the family reunification process, due account must be taken of whether the processing of the application has been delayed significantly due to a reason beyond the applicant's or sponsor's control.<sup>859</sup>

In **Germany**, many unaccompanied child refugees are 16 or 17 years old when they arrive in Germany. The entry of core family to Germany for family reunification with a child is only possible until the child turns 18. The relevant date applied is not the date of application for the visa, but the date of issuance of the visa (or the last oral hearing before court – if there is a court procedure).<sup>860</sup>

A recent judgment by the German Federal Constitutional Court addresses these issues, as well as the suspension of family reunification of beneficiaries of subsidiary protection more broadly. The case concerned a Syrian child, who came to Germany in September 2015 and was granted subsidiary protection in August 2016, and his parents and three siblings, who remained in Damascus, but were seeking to join him in Germany.<sup>861</sup> They sought the issue of provisional visas to reunite with their minor child/sibling or alternatively the issue of humanitarian visas. They asserted that the two-year suspension of family reunification for beneficiaries of subsidiary protection under section 104(13) of the Residence Act was contrary to the guarantees under the Basic Law (constitution) of equality before the law and the special protection of the family by the State,<sup>862</sup> the Family Reunification Directive, and the CRC. They argued inter alia that the restrictions on family reunification constituted a disproportionate infringement of a fundamental right and that they had a disproportionate impact on minors who would reach majority before 16 March 2018, when the suspension is scheduled to end, since they would be permanently excluded from family reunification.

The Constitutional Court rejected the appeal, ruling that its power to issue interim measures suspending the enforcement of a law had to be used with utmost restraint, since it would in this case have the effect of suspending the stay of family reunification of all subsidiary protection beneficiaries and thereby thwart the intention of the legislator, which had introduced the measures in the interests of the integration systems in state and society. With regard to the issue of humanitarian residence permits under section 22(1) of the Residence Act, the Court found there was insufficient justification in this particular case and that the appellants' situation did not differ significantly from that of other families separated by the departure of a (still) underage child. It also ruled that the weighing of the infringement of the right to family life was in this case a priori short-term, that children who are almost adults are generally less dependent on their parents than younger children and therefore that the special protection by the state required in this case was not sufficiently justified. The judgment was delivered two days before the son's 18th birthday.

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<sup>859</sup> KHO:2016:79, Finland: Supreme Administrative Court, Decision of 24 May 2016, and generally Council of Europe: Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, above fn. 49, pp. 36-37.

<sup>860</sup> Communication from UNHCR office, Berlin, December 2017.

<sup>861</sup> 2 BvR 1758/17, Germany: Federal Constitutional Court, judgment of the First Chamber of the Second Senate, 11 October 2017, available in German at: [http://www.refworld.org/cases,DEU\\_BUNDESVERFASS,5a4cd1134.html](http://www.refworld.org/cases,DEU_BUNDESVERFASS,5a4cd1134.html). The judgment referred inter alia to *X. et X. c. État belge*, C-638/16 PPU, CJEU, 2017, above fn. 177.

<sup>862</sup> *Basic Law for the Federal Republic of Germany (as amended July 2002)* [Germany], 23 May 1949, available at: <http://www.refworld.org/docid/3ae6b5a90.html>, Articles 3(1) and 6(1) respectively.

More generally, it should also be noted that children seeking to join family members who are beneficiaries of international protection also face serious challenges. Lengthy asylum procedures, time taken to gather documentation, to meet income, accommodation or other requirements, or the obligation to fulfil a period of residence before the beneficiary is able/entitled to seek reunification, delays in family reunification procedures, or other factors may easily slow the process. As a result, children reach the age of majority and thereby lose the right to reunite with their parents or other family members to which they would otherwise have been entitled.

## 8.5 Married unaccompanied child beneficiaries of international protection and other issues

Two further issues also arise concerning unaccompanied child beneficiaries of international protection wishing to reunite with family members. Some may be anomalies. They are:

- The situation of married unaccompanied child beneficiaries of international protection
- The requirement (or not) to show evidence of accommodation, sickness insurance, and stable and regular resources

With regard to the situation of **married unaccompanied child beneficiaries of international protection**, some States appear effectively to deny them the right to family reunification when legislation specifies that it is only where such children are unmarried that they may reunify with their parents. This appears to be the case, for instance, in **Austria, Bulgaria, France, Germany, Greece, Ireland, and Sweden**.<sup>863</sup> (By contrast, States that do *not* refer to minor beneficiaries of international protection as having to be unmarried to be able to reunite with family members include **Belgium, Croatia, Czech Republic, Finland, Germany, Italy, and Romania**.)<sup>864</sup>

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<sup>863</sup> See Austria: *Asylum Act*, 2005, above fn. 172, Article 2(1)(22); Bulgaria: *Law on Asylum and Refugees*, 2002, above fn. 201, Additional Provisions §1(3)(b); France: CESEDA, above fn. 21, Article L.752-1 and L.812-5, stating that minors who are granted refugee status or subsidiary protection or who are stateless may, if they are not married, apply for family reunification with their first degree relatives in the direct ascending line with no conditions as to time limits, health insurance, accommodation or resources; Germany: *Asylum Act 2008*, 2 September 2008, available at: <http://www.refworld.org/docid/48e4e9e82.html>, Section 26; Greece: *Presidential Decree No. 141, G.G. A' 226, of 2013, on the transposition into the Greek legislation of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (L 337) on minimum standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (recast)*, 21 October 2013, available at: <http://www.refworld.org/docid/54eb4e774.html>, Article 2(i); Ireland: *International Protection Act*, 2015, above fn. 212, Section 56(9)(c); Swedish Migration Agency, *Residence Permit for a Parent of an Unaccompanied Child in Sweden*, available at: <https://www.migrationsverket.se/English/Private-individuals/Moving-to-someone-in-Sweden/Parent-with-a-unaccompanied-child-in-Sweden.html>.

<sup>864</sup> See Belgique: *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, above fn. 176, Section 10(7); Croatia: *Act on International and Temporary Protection 2015*, 2015, above fn. 178, Article 4(18); Czech Republic: *Act No. 325/1999 Coll. on Asylum*, 1999, above fn. 203, Section 13; Finland: *Aliens Act*, 2004, above fn. 205, sections 37, 114 and 115; Germany: *Residence Act*, 2004, above fn. 183, Section 36, Italy: *Legislative Decree no. 286/1998*, above fn. 220, Article 29bis(3); Romania: *Emergency Ordinance No. 194/2002*, 2002, above fn. 189, Article 46(3).

This situation may be an anomaly – a failure in drafting to take sufficient account of the situation of married child beneficiaries of protection or an incorrect reading of the text. It does not appear to be a big political or legal issue, but if married unaccompanied child beneficiaries of international protection are not entitled to family reunification, this appears to leave a particularly vulnerable group of children without potentially vital support, if this is assessed to be in their best interests. There is no requirement that a refugee be unmarried in Article 10(3) of the Family Reunification Directive. While parents may be responsible for marrying their child before the age of 18, this is not necessarily illegal e.g. for those aged 17 or 16 or younger depending on the national laws in place. In addition, it may be that one only parent is responsible for the early marriage or that reunification with other family members might be in the child's best interests.

In such situations, rather than precluding the possibility of family reunification for the child, it would seem more appropriate for legislation to specify that, where an unaccompanied child beneficiary of international protection is married, an individual assessment of the child's protection needs and his or (more likely) her best interests that takes account of the child's views is required, so as to determine whether reunification with one parent (where they do not pose a protection risk) or with a guardian, sibling(s), or other family members is in the child's best interests. A married unaccompanied child still has a right to family unity and it may well be that one parent, a sibling, or someone else who has cared for him or her in the country of origin or first asylum would provide important support and protection. To rule out that possibility would not seem to be in the best interests of the child and to leave the State without the flexibility to address the child's specific needs, which is likely to operate to the detriment of the child's wellbeing.

With regard to **the requirement that beneficiaries of international protection show they have sickness insurance, accommodation and sufficient and sustainable resources** before they can reunify with family members, practice in some EU States regarding unaccompanied child beneficiaries of international protection appears problematic.<sup>865</sup> It seems that these States require the *parents* to meet these requirements if the application for reunification is submitted more than three months after the child has been granted protection, even though under Article 7(1) the Family Reunification Directive states that these requirements are to be met by the sponsor not the family members.

The situation appears not to take into account that children cannot be expected to meet such requirements nor does it provide an appropriate framework for the child's best interest to be considered. Parents who are outside the country cannot be expected to meet these requirements either. It can only be hoped that actual practice follows that of the majority of EU States and/or that courts remedy this situation. States are after all obliged to examine

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<sup>865</sup> EMN, *EMN Ad-Hoc Query on Rules on family reunification of unaccompanied minors granted refugee status or subsidiary protection*, requested by Benedikt Vulsteke on 27th May 2016, available at: <http://www.refworld.org/docid/58a468be4.html>. The responses indicate that **Cyprus, the Czech Republic, Finland, Hungary, Lithuania, Slovakia** and **Slovenia** require parents of unaccompanied child beneficiaries of international protection to meet these requirements if the application is submitted more than three months after the child has been granted protection.

family reunification applications “in the interests of the child and with a view to promoting family life”.<sup>866</sup>

## 9 FAMILY TRACING

Tracing family members separated by conflict and flight is an essential element in being able to secure the right to family life and family unity. It is relevant throughout the displacement cycle, including in the context of family reunification. The focus is often on unaccompanied and separated children, where it is particularly important, but it is relevant for all family members.

States are obliged under Article 212(2) of the CRC to provide, as they consider appropriate, cooperation in efforts by the UN or NGOs cooperating with the UN “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”. As the CRC Committee states:

“Tracing is an essential component of any search for a durable solution and should be prioritized except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardize fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee. Subject to all of these conditions, such tracing efforts should also be continued during the asylum procedure. For all children who remain in the territory of the host State, whether on the basis of asylum, complementary forms of protection or due to other legal or factual obstacles to removal, a durable solution must be sought.”<sup>867</sup>

For UNHCR, “efforts need to be made as soon as possible to initiate tracing and family reunification [of unaccompanied and separated child applicants] with parents or other family members” except “where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution.”<sup>868</sup>

Family tracing is a fundamental element of the reunification of families of beneficiaries of international protection, but it is a complex, uncertain, and sometimes lengthy process. The circumstances of family separation may mean family members are displaced within the country of origin due to insecurity once some family members have left. Different family members may be on the move at the same time and become separated. The length of time family members may be separated can lead to lengthy tracing procedures.

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<sup>866</sup> *European Parliament v. Council of the EU*, C-540/03, CJEU, above fn. 103, para. 88.

<sup>867</sup> CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, above fn. 38, para. 80.

<sup>868</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>, para. 68. See also UNHCR, *Resettlement Handbook*, 2011, above fn. 9, p. 192.



Delays in promptly starting and difficulties pursuing family tracing may mean beneficiaries of international protection are unable to meet sometimes tight deadlines imposed by some States within which applications for family reunification must be submitted in order to benefit from preferential terms vis-à-vis other migrants.

Mechanisms for family tracing in many States rely on the well-established regular family tracing system of the International Committee of the Red Cross (ICRC) as a key actor. The main task of the Red Cross Tracing Service is to help re-establish contacts between close relatives separated as a result of wars, armed conflicts, natural disasters, and social or political circumstances. The Tracing Services of the different national Red Cross societies are guided by the Central Tracing Agency, which is a part of the ICRC.<sup>869</sup>

Besides using the ICRC tracing system, refugees also often turn to NGOs for help. When high numbers of refugees were arriving in Europe in 2015, private initiatives also offered tracing services – particularly in big train stations in Austria, Germany and Hungary – using photos without considering data protection risks, although such private initiatives were only temporary.

Challenges identified in tracing family members include the fact that many asylum-seekers and refugees move very quickly between countries, so by the time a national Red Cross office has a reply to search requests, the individuals may have already left for another country. Names are often noted down in different spellings by different offices involved in one or more countries, making it difficult to match names in databases, while smugglers and other asylum-seekers often advise asylum-seekers not to provide their real names. Since many asylum-seekers arrive in Europe without documents, this can make it difficult or even impossible to verify whether or not individuals are truly related to each other. Refugees may not know where they are or where they were separated from family members, as they have no geographical knowledge of places they have been through, and may, for instance, come to tracing services looking for relatives “in Europe”. The Red Cross then also searches in the country of origin, as refugees who do not manage to reach Europe often go back and may be found there. Tracing and meeting with the asylum-seekers in question is particularly difficult when they are in an immigration detention centre, as their ability to communicate is more limited. Family members who may have died, for instance, trying to cross the Mediterranean Sea are identified only slowly, if at all.

In Europe, the ICRC has developed a web-based family tracing tool, “Trace the Face”,<sup>870</sup> which is available in six languages, is used in most EU Member States, and complies with EU data protection standards. Individuals looking for family members can upload their own photo (but not photos of family members) into the system. Children aged 15 and above can upload

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<sup>869</sup> See generally FRA, *Thematic focus: Family tracing and family reunification*, 2016, above fn. 375, pp. 10-12. European Asylum Support Office (EASO), *EASO Practical Guide on Family Tracing*, March 2016, available at: <http://www.refworld.org/docid/58ac464b4.html>, also provides useful information and examples of State practice on family tracing.

<sup>870</sup> See [www.tracetheface.org](http://www.tracetheface.org). For more information in six languages see <http://familylinks.icrc.org/europe/en/Pages/search-persons.aspx>, which states that about 150 new photos are published every month. Tracing services generally do not share with the authorities data on persons who search for their family members or who are sought.

their photo with the consent of their legal representative. Only the photo is placed online, without any indication of the name, the place or the family member the person is looking for. The ICRC has also established an additional, internal tool with photos of children under the age of 15, which can only be accessed by Red Cross offices.

For tracing purposes, refugees and migrants mainly use social media networks (e.g. Viber, Whatsapp, and Facebook) and databases available on the internet, such as <https://refunite.org> or [www.familylinks.icrc.org](http://www.familylinks.icrc.org). Smartphones are particularly important for accessing such social networks, making the availability of an internet connection particularly important. While Syrian refugees and their family members usually have smartphones, this may not be so for other refugees.

*Examples of State practice in Europe regarding family tracing include:*

Family tracing services may be undertaken by national authorities, national Red Cross or NGOs. In **Bulgaria, Poland, Romania, and Slovakia**, tracing services are only provided by NGOs, mostly the Red Cross, at times partially financed by the State concerned.<sup>871</sup>

In **Finland**, the authorities have a formal agreement with the General Secretariat of the NGO International Social Services (ISS) to carry out tracing of families or legal guardians of unaccompanied or separated children. Under the agreement, tracing is not pursued if it becomes apparent that the child or the family may be exposed to danger. The decision to discontinue tracing is taken under guidance from ISS, but also from the child and his or her legal representative and/or guardian.<sup>872</sup>

In **Italy**, family tracing and family assessments are carried out by the International Organization for Migration (IOM) based on an agreement with the Ministry of Labour and Social Policy upon the child's request and with the child's informed consent and that of the family. Assessing whether the child can be reunited and reintegrated with his/her family members in the country of origin is designed in close collaboration with the child, his or her family, IOM and social services and is approved by the Ministry of Labour.<sup>873</sup>

In **Romania**, the General Inspectorate for Immigration is required to begin family tracing of unaccompanied minor asylum-seekers as soon as possible and to take into account the best interests of the child, as well as his or her opinion on the issue, bearing in mind the child's age and maturity. Confidentiality must be respected, especially when the life or physical integrity of a minor or his or her close family who remain in the country of origin may be endangered.<sup>874</sup> The General Inspectorate for Immigration has an agreement in principle with the Red Cross to conduct such family tracing.

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<sup>871</sup> UNHCR indicators report, p. 74.

<sup>872</sup> UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, available at: <http://www.refworld.org/docid/5523e8d94.html>, p. 8.

<sup>873</sup> *Ibid.*, p. 8.

<sup>874</sup> Romania: *Law No. 122/2006 on Asylum in Romania*, above fn. 188, Article 73.

## 10 RESTRICTIONS AS A MEANS TO COMBAT FRAUD AND MISUSE?

The introduction of restrictive measures is sometimes justified as being in the interests of combatting perceived fraud and misuse of family reunification processes. In the EU, Article 16(2) of the Family Reunification Directive states:

“Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that:

“(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;

“(b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State.

“When making an assessment with respect to this point, Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his/her residence permit.”

A preliminary question referred by the Netherlands Council of State to the CJEU in September 2017 may shed further light on aspects of the interpretation of this Article. The Council of State asked whether Article 16(2)(a)

“must ... be interpreted as precluding the withdrawal of a residence permit granted for the purpose of family reunification in the case where the acquisition of that residence permit was based on fraudulent information but the family member was unaware of the fraudulent nature of that information”.<sup>875</sup>

Statistics indicating the extent of the problem are limited and in any case any information available relates to immigration generally rather than specifically to the situation of beneficiaries of international protection seeking family reunification. A 2012 report on the situation in EU countries finds a “wide variation in the perceptions of [the] extent [of misuse]”, ranging “from it being unclear, to a minimal or marginal issue, to increased observations, to being a policy priority”.<sup>876</sup>

*Examples of reports on the issue of fraud include:*

With regard to **France**, the Council of Europe's Commissioner for Human Rights found that the authorities had an extremely negative attitude to applications for family reunification made from outside the country. He reported that French consulates continued to regard families with a suspicion often impossible to overcome, as if those applying were seeking to

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<sup>875</sup> Request for a preliminary ruling from the Raad van State (Netherlands), *Y.Z. and Others v. Staatssecretaris van Veiligheid en Justitie*, Case C-557/17, 22 September 2017, available at: [http://curia.europa.eu/juris/document/document.jsf?text=&docid=197124&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=292080&utm\\_source=ECRE+Newsletters&utm\\_campaign=8c97f2d551-EMAIL\\_CAMPAIGN\\_2017\\_12\\_15&utm\\_medium=email&utm\\_term=0\\_3ec9497afd-8c97f2d551-422299085](http://curia.europa.eu/juris/document/document.jsf?text=&docid=197124&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=292080&utm_source=ECRE+Newsletters&utm_campaign=8c97f2d551-EMAIL_CAMPAIGN_2017_12_15&utm_medium=email&utm_term=0_3ec9497afd-8c97f2d551-422299085).

<sup>876</sup> See generally EMN, *Misuse of the Right to Family Reunification: Marriages of convenience and false declarations of parenthood*, June 2012, available at: <http://www.refworld.org/docid/51b895af4.html>. Examining both marriages of convenience and false declarations of parenthood, the report identifies the former as the most prominent concern.

deceive them to obtain favours they did not deserve. He stated that it naturally happens that some people give false information to gain entry to a country, but found that to allow these examples to make policy generally inflexible was a serious error.<sup>877</sup>

With regard to **the Netherlands**, a 2014 study carried out by the Advisory Committee on Migration Affairs (ACVZ), a quasi-governmental body, came to the conclusion that there was

“no concrete evidence of fraud or abuse of the procedure. The Committee cannot therefore confirm that the measures tightening up policy were necessary to combat such fraud, especially since the term ‘fraud’ was used in connection with cases in which the IND [Immigration and Naturalization Service] doubted whether there were de facto family ties, yet two-thirds of the applications in which this was initially the suspicion were nevertheless ultimately granted.”<sup>878</sup>

In **Central Europe**, no State reviewed in a UNHCR report indicated a problem with abuse of the right to family reunification with regard to beneficiaries of international protection. It found there were “[c]ertain issues involving fake applications being made ... with regard to other categories of migrants or with regard to marriages being concluded between citizens of the given country and foreigners”. Taken “together with the fact the both refugees and beneficiaries of subsidiary protection have been subjected to fairly detailed procedures in order to verify the circumstances of their cases before protection was granted to them” the report found that this “should inspire trust”, although this was not always the case.<sup>879</sup>

The documentation that needs to be provided to secure reunification, the collection of facts, checks on family ties, country information on national and religious traditions, and interviews with both sponsors and applicants are all among measures intended to prevent misuse of the process. In the case of beneficiaries of international protection seeking family reunification, unlike other immigrants, the possibility of comparing declarations regarding family composition made at the time asylum was sought with those made when seeking family reunification represents an additional verification tool available to the authorities.

With regard specifically to the question of **marriages of convenience**, that is, marriages contracted for the sole purpose of enabling the person concerned to enter or reside in a State, these can raise concerns, both among policymakers and in the media, that the right to family reunification may be misused as a route to settlement.

Where false declarations have been made or a marriage is found to be one of convenience, penalties imposed by States include imprisonment, fines, or both for the sponsor, while

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<sup>877</sup> Council of Europe: Commissioner for Human Rights, *Memorandum by Thomas Hammarberg following his visit to France in 2008*, 20 November 2008, above fn. 580, quoted in *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, para. 49

<sup>878</sup> ACVZ, *Na de vlucht herenigd: advies over de uitvoering van het beleid voor nareizende gezinsleden van vreemdelingen met een verblijfsvergunning asiel*, 2014, above fn. 293, p. 135. The English summary “Reunited after Flight” at pp. 133-137 provides a useful overview of the numerous changes as regards family reunification in the Netherlands to late 2014.

<sup>879</sup> UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, above fn. 157, p. 18.

additional penalties for the applicant include the refusal of a residence permit or, if already granted, its revocation or invalidation.<sup>880</sup>

## 11 CONSEQUENCES OF DELAYS OR IMPOSSIBILITY OF SECURING FAMILY REUNIFICATION

As preceding sections indicate, beneficiaries of international protection often face a serious accumulation of obstacles in their search for a way to be able to enjoy their right to family life and family unity. From the family definition applied and the documentation required through to the accumulated costs of preparing the required information and travelling to embassies to submit and substantiate applications, these hurdles too often combine to make family reunification either a long and tortuous process or an impossible dream.<sup>881</sup>

Delays and obstruction of family reunification leave family members in precarious and often dangerous situations and exerts a heavy psychological and financial toll on them. It tends to slow integration in the new host country, ultimately affecting wider social cohesion. It also leads to increased pressure on family members to make irregular onward journeys to attempt to reunify, in turn feeding the growth in smuggling and trafficking. The following paragraphs set out some of these issues in greater detail.

Long delays increase risks to family members abroad if they are living in conflict zones or refugee camps. Families are often subject to the same risk of persecution that caused the sponsor to be granted protection. Living conditions may endanger the health of family members and affect children's education, leading to increased social costs when they finally arrive in the country of asylum. Long separations bring a heavy psychological toll. Prolonged family separation has its most dramatic impacts on children towards whom States have particular obligations.<sup>882</sup>

One Red Cross survey, for instance, showed that refugee family reunion has protection implications for the families of refugees who remain in insecure or armed conflict environments. These protection concerns reflected the fact that the majority of sponsors in the survey were men and the majority of applicants were women and children, whose vulnerability in insecure environments is universally recognized. The survey found that 30 per cent of family members were living in a third country, of whom 30 per cent did not have legal status, thus exposing them to protection risks. Of the applicants, 47 per cent referred to insecurity concerns in the country where they were, including as a result of conflict, armed violence, risk of abduction, arrest, domestic violence, and forced recruitment.<sup>883</sup>

One example of the dangers to which family members can be exposed concerns the lengthy case of a Somali refugee seeking to bring his family to join him in **Ireland**. The family included the sponsor's seven-year-old daughter and 15-year-old brother who were killed in an

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<sup>880</sup> See in relation to EU States, EMN, *Misuse of the Right to Family Reunification*, 2012, above fn. 876, pp. 39-41.

<sup>881</sup> For more on administrative delays and obstacles, see section 5.5.

<sup>882</sup> See <http://ccrweb.ca/en/family-reunification>.

<sup>883</sup> British Red Cross, *Not So Straightforward: The need for qualified legal support in refugee family reunion*, 2015, above fn. 339, pp. 15, 27-30.

explosion as they attempted to escape Mogadishu and get to Ethiopia, six months after he had applied for his family to join him. As the Irish High Court recalled in its judgment issued more than five years after the application for family reunification was first submitted, “the facts of this case illustrate that there are circumstances where the need for family reunification is extremely urgent”.<sup>884</sup>

Another example involves a refugee in the **United Kingdom** whose spouse and children had travelled from their home in North Africa to submit an application in Tunisia. The family reunion application was unsuccessful because the children’s documents were rejected and the family was then unable to travel home again without their passports. They were forced to use any funds they had to continue to stay in Tunisia, and were struggling to meet their living expenses, as the spouse was unable to work.<sup>885</sup>

Further examples concern a former refugee living in **Australia** who reported that her brother had been kidnapped and killed in Iraq after having twice had a visa application refused by Australia, while a former refugee from Pakistan reported that his wife and children (including his severely disabled daughter) were only finally able to join him in Australia seven years after he had originally applied for reunification.<sup>886</sup>

Where reunification is not possible or not possible without significant delays, the loss may be immeasurable. One Vietnamese refugee, who fled by boat, was rescued at sea, taken to a refugee camp in Singapore, and then sponsored for resettlement to the United States where he arrived as a 16-year-old in 1980, stated: “The pain of being split up without knowing whether we would ever be together again was immense. My family was separated for 17 years, and I don’t think we ever healed from that split.”<sup>887</sup>

Others have identified psychological, financial, and social cohesion costs to delays and the inability of refugees to reunify with their families.<sup>888</sup> As has been noted:

“Family separation affects the ability to engage in many aspects of the integration process: education, employment, putting down roots and generally moving on, while its absence impacts negatively and for a long time on physical and emotional health. Mostly, family reunification is the first intention refugees have upon receiving status.”<sup>889</sup>

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<sup>884</sup> *A.M.S. v. The Minister for Justice and Equality*, above fn. 217, para. 42.

<sup>885</sup> UK Refugee Children’s Consortium, “Briefing for debate on Refugee Family Reunion”, 2016, above fn. 487.

<sup>886</sup> RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, pp. 2 and 3.

<sup>887</sup> Diep N Yuong, “My family fled Vietnam for America. It took 17 years for us to be reunited”, *The Guardian*, 25 October 2016, available at: <https://www.theguardian.com/commentisfree/2016/oct/25/vietnam-boat-people-refugees-america-reunited>. Diep N Yuong fled Vietnam by boat, was rescued at sea, taken to a refugee camp in Singapore, and then sponsored for resettlement to the United States where he arrived as a 16-year-old. The international and regional standards and jurisprudence provide the framework against which the obstacles to family reunification faced by many refugees and persons with complementary/subsidiary protection introduced in many States in recent years need to be assessed so as to ensure that the States concerned are upholding their international obligations.

<sup>888</sup> RCOA, *Addressing the Pain of Separation for Refugee Families*, 2016, above fn. 340, p. 2.

<sup>889</sup> UNHCR, *A New Beginning: Refugee Integration in Europe*, September 2013, available at: <http://www.refworld.org/docid/522980604.html>, p. 70, citing relevant literature on the issue.

Likewise, in the view of CJEU Advocate General Mengozzi: “[P]rolonged separation of family members is likely in reality to have negative effects on integration since such separation is likely to weaken family ties.”<sup>890</sup> The European Parliament has also stated: “Keeping families and relatives together may spur integration, as the focus can be directed towards the establishment of a new life instead of concerns towards family members that are still in insecure situations.”<sup>891</sup>

Where family members are unable to reunite by regular means, this may in addition add to pressure for them to make onward, irregular and often highly dangerous journeys in an attempt to reunify.<sup>892</sup> Ensuring that family reunification procedures are accessible, efficient and take account of the particular situation of beneficiaries of international protection is thus one way of reducing onward movement. This may in turn help reduce demand for the services of smugglers and associated risks of trafficking.<sup>893</sup> As the CMW and CRC Committees have jointly noted in relation to children:

“Children that remain in their countries of origin may end up migrating irregularly and unsafely, seeking to be reunited with their parents and/or older siblings in destination countries. States should develop effective and accessible family reunification procedures that allow children to migrate in a regular manner, including children remaining in countries of origin who may migrate irregularly. States are encouraged to develop policies that enable migrants to regularly be accompanied by their families in order to avoid separation. Procedures should seek to facilitate family life and ensure that any restrictions are legitimate, necessary and proportionate. While this duty is primarily for receiving and transit countries, States of origin should also take measures to facilitate family reunification.”<sup>894</sup>

## 12 HUMANITARIAN VISAS AND OTHER PATHWAYS TO FAMILY UNITY

Several States permit humanitarian or other visas to be issued in exceptional circumstances to particularly vulnerable individuals. Such schemes may offer alternative pathways to safety for family members who would not otherwise be able to reunify. The following subsections set out some of these possibilities, though they remain discretionary and generally only offer a solution in exceptional circumstances.

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<sup>890</sup> *Noorzia v. Bundesministerin für Inneres*, Opinion of Advocate General, above fn. 130, para. 50.

<sup>891</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Working Document on Developing safe and lawful routes for asylum seekers and refugees into the EU, including the Union resettlement policy and corresponding integration policies (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration)*, 15 July 2015, available at: <http://www.refworld.org/docid/58ab0d1c4.html>.

<sup>892</sup> See for instance, the accounts of the family members of beneficiaries of international protection who have felt obliged to use irregular means to reunite in UNHCR, *Desperate Journeys; Refugees and migrants entering and crossing Europe via the Mediterranean and Western Balkans routes*, August 2017, available at: <http://www.refworld.org/docid/59ad23046.html>.

<sup>893</sup> See generally, UNHCR, *Onward Movement of Asylum-seekers and Refugees: Discussion paper prepared for the Expert Roundtable on Onward Movement*, 25 September 2015, available at: <http://www.refworld.org/docid/563080eb4.html>.

<sup>894</sup> CMW and CRC Committees, *Joint General Comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 2017, above fn. 554, para. 37.

## 12.1 Humanitarian visas

Humanitarian visas issued at the discretion of individual States are one way for family members who would not otherwise qualify for family reunification and for other vulnerable refugees to be able travel and secure admission to another State. As UNHCR has noted:

“Humanitarian visa programmes, such as those introduced by Argentina, Brazil, France, Italy, Sweden, and Switzerland, provide Syrian refugees [and others] with access to a third country and/or the opportunity to apply for asylum. Those who travel to a third country on a humanitarian visa may be granted asylum-seeker or refugee status upon arrival. They may also be provided with access to expedited asylum procedures.”<sup>895</sup>

With regard to people who have fled the conflict in Syria, for instance, in **Brazil** a 2013 Resolution enables Brazilian consulates in the Middle East to issue visas “on humanitarian grounds ... to individuals affected by the armed conflict in the Syrian Arab Republic who wish to seek refuge in Brazil”.<sup>896</sup> Special humanitarian visas are issued under simplified procedures to allow survivors of the war to travel to Brazil, where they can then submit an asylum claim. The programme was extended for two further years in 2015. As of 30 April 2017, UNHCR reported that Brazil had issued 8,450 humanitarian visas to Syrian refugees. In addition, **France** has issued 4,600 humanitarian visas to Syrian refugees, and 4,700 such visas have been issued in **Switzerland**.<sup>897</sup>

Humanitarian visas also offer an important protection tool for family members of beneficiaries of international protection for other nationalities, who may likewise be in very precarious situations. National authorities could usefully use them more frequently, especially where the best interests of the child as well as the unity of the family are at stake.

One good practice example concerns **Switzerland**, where the authorities may issue visa on humanitarian grounds on a discretionary basis. In one case, for instance, an Eritrean woman with provisional admission was barred from applying for family reunification with her three young children because of her status. She had had to leave them in Eritrea with their grandmother, but the family started receiving threats after the mother fled, so the children

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<sup>895</sup> UNHCR, *High-level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees: Background note*, 30 March 2016, available at: <http://www.refworld.org/docid/588b4e2d4.html>, p. 3; and generally, UNHCR, *Legal avenues to safety and protection through other forms of admission*, 18 November 2014, <http://www.refworld.org/docid/5594e5924.html>.

<sup>896</sup> *Resolução Normativa Nº 17 de 20 de Setembro de 2013*, Brazil, 20 September 2013, available at: [www.jusbrasil.com.br/diarios/59458269/dou-secao-1-24-09-2013-pg-29](http://www.jusbrasil.com.br/diarios/59458269/dou-secao-1-24-09-2013-pg-29). See also, UNHCR, *The Syrians starting over in Brazil*, 24 March 2016, available at: <http://www.unhcr.org/uk/news/stories/2016/3/573c364f4/the-syrians-starting-over-in-brazil.html>; M. Calegari and R. Baeninger, “From Syria to Brazil”, *FMR*, January 2016, available at: <http://www.fmreview.org/destination-europe/calegari-baeninger.html>; UNHCR compilation of State practice regarding humanitarian visas in Central and Latin America, available at: [http://www.acnur.org/fileadmin/scripts/doc.php?file=fileadmin/Documentos/Proteccion/Buenas\\_Practicas/9234](http://www.acnur.org/fileadmin/scripts/doc.php?file=fileadmin/Documentos/Proteccion/Buenas_Practicas/9234).

<sup>897</sup> UNHCR, *Resettlement and Other Admission Pathways for Syrian Refugees*, 30 April 2017, available at: <http://www.refworld.org/docid/59786cf14.html>; UNHCR, *Summary of key outcomes - 30 March 2016 High Level Meeting on global responsibility sharing through pathways for admission of Syrian refugees*, 14 April 2016, available at: <http://www.refworld.org/docid/588b4b404.html>.



moved to Sudan with a cousin. This cousin later departed with a visa for Sweden, leaving the children with their father, who subsequently disappeared. This left the children with a distant relative who also received a visa for Sweden, leaving the three children essentially alone although occasionally visited by a neighbour, who himself was expected to reunify with his wife in Sweden. With one of the children in addition suffering from serious health problems, a best interests determination by UNHCR and interventions by the Swiss Red Cross, resulted in the Swiss authorities exceptionally granting the three children humanitarian visas, in view of their extreme vulnerability. So they were finally able to join their mother in Switzerland several years after she had fled.<sup>898</sup> While the use of humanitarian visas in this case provided a solution for these children, its use is very rare and does not offer a solution more generally.

Other examples discussed earlier include: the possibility of issuing a visa on humanitarian grounds in **Belgium**,<sup>899</sup> on humanitarian and compassionate grounds in **Canada**,<sup>900</sup> to avoid undue hardship in **Germany**,<sup>901</sup> the recently announced Humanitarian Admission Programme for Refugee Families in **Ireland**,<sup>902</sup> and the possibility of allowing entry to the **United Kingdom** on the basis of exceptional circumstances or compassionate factors.<sup>903</sup>

In the EU context, Article 25(1) of the **EU Visa Code**<sup>904</sup> *obliges* Member States exceptionally to issue Schengen visas with limited territorial validity (LTV) “on humanitarian grounds, for reasons of national interest or because of international obligations”. At the same time, Article 19(4) of the Visa Code *allows* States to derogate from the admissibility requirements for visa applications “on humanitarian grounds or for reasons of national interest”.

While there is a certain tension between these two provisions (including their obligatory and permissive aspects), they could offer a useful tool to enable the entry of family members, notably beyond the nuclear/close family of beneficiaries of international protection or persons not qualifying for regular family reunification. Indeed, research published in 2014 suggested:

“[M]ore than half of the EU Member States, including one non-Schengen EU Member State, have or have had some form of scheme for issuing humanitarian visas – be they national, uniform Schengen and/or LTV Schengen ... [visas]. Accordingly, 16 EU Member States acknowledge the practical need for some form of humanitarian visa scheme, although most deploy their schemes primarily on an exceptional basis.”<sup>905</sup>

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<sup>898</sup> UNHCR-Centre suisse pour la défense des droits des migrants (CSDM), *The Principle of Family Unity for Refugees in Switzerland – Are International Human Rights Standards Applied?*, conference Bern, 21 November 2017, presentation by Swiss Red Cross.

<sup>899</sup> See above, text at fn. 177.

<sup>900</sup> Government of Canada, “Guide 5291: Humanitarian and Compassionate Considerations”, 2017, above fn. 803-804, as well as text at fn. 251-252.

<sup>901</sup> Germany: *Residence Act*, 2004, above fn. 183, Section 22, and text at fn. 183, 607-610, 827-828.

<sup>902</sup> See above, text at fn. 214.

<sup>903</sup> UK Home Office, *Family reunion: for refugees and those with humanitarian protection*, 2016, above fn. 487, p. 19 and text above at fn. 796-800.

<sup>904</sup> EU: European Parliament, *Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, 15 July 2009, available at: <http://www.refworld.org/docid/588b51a04.html>, Article 25(1).

<sup>905</sup> U. Iben Jensen, *Humanitarian Visas: Option or Obligation?*, European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Justice, Freedom and Security, PE

States may thus use these provisions of the Visa Code to enable admission including for family members, although the CJEU's March 2017 judgment in the case of *X. et X. c. État belge* means that this provision is not as such a route to being able to seek international protection. In this judgment, the Court determined that since the family in that case had indicated their intention to seek asylum if granted a visa to come to Belgium, "the purpose of the application differs from that of a short-term visa", since "the Visa Code is intended for the issuing of visas for stays on the territories of Member States not exceeding 90 days in any 180-day period". It found that to conclude otherwise "would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the [Dublin] system". It concluded:

"Article 1 of the Visa Code must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law."<sup>906</sup>

## 12.2 Residence permit for a relative for serious reasons related to a child's development

One possibility that exists in **Italy** in addition to the family reunion procedure, that could be replicated elsewhere, is set out in a legislative decree. This permits the Juvenile Court to authorize the entry or stay of a family relative, for a specified period of time if there are "serious reasons" related to the child's physical and psychological development, taking account of the age and health of the child on Italian territory.<sup>907</sup> Using this possibility provides an additional way to ensure the best interests of the child are respected and to uphold the principle of family unity. The practice does not seem to be replicated elsewhere but could represent a useful mechanism to ensure the best interests of the child are respected in other countries as well.

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509.986, September 2014, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU\(2014\)509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf), p. 48; European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *Towards an EU Humanitarian Visa Scheme?*, Briefing, PE 556 950, 2016, available at: <http://www.refworld.org/docid/58ab0f634.html>. See also European Parliament, *Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration*, (2015/2095(INI)), 12 April 2016, available at: <http://www.refworld.org/docid/58c1631f4.html>.

<sup>906</sup> *X. et X. c. État belge*, C-638/16 PPU, CJEU, 2017, above fn. 177, paras. 47-51. See by contrast, the Advocate General's Opinion in *X. et X. c. État belge*, Conclusions de l'avocat Général Mengozzi, C-638/16, CJEU, 7 February 2017, available in French at: <http://www.refworld.org/cases,ECI,58a16b4e4.html>.

<sup>907</sup> Italy: *Legislative Decree no. 286/1998*, above fn. 220, Article 31(3).

A 2010 judgment of the Supreme Court of Cassation in Italy considerably expanded the scope of what may constitute “serious reasons” under Article 31 of Legislative Decree no. 286/98.<sup>908</sup> In view of the special protection enjoyed by the family and the interests of the child in the Constitution,<sup>909</sup> in European and international law, the Court found that it was not necessary to prove the existence of exceptional or urgent circumstances. According to the Court, the interpretation of the “serious reasons” concept includes “any real damage, concrete, perceptible and objectively serious that in consideration of the age or the conditions linked to the overall psycho-physical balance is derived or *is highly probable* will result in the minor, by the removal of the family member or by his own definitive eradication from the environment in which it grew”. Since then the Court has ordered a permit to be issued to the family member whenever it found that the removal of that family member would seriously impair the physical or mental integrity of the child.

In a 2012 judgment, for instance, the Supreme Court of Cassation referred to this provision and stressed the need to tangibly and effectively assess the possible harm to a minor if a family member living in Italy as an irregular migrant were to be removed. The judgment required the Juvenile Court to assess the effective exercise of the family member’s parental responsibility and authorize his or her entry or residence if his or her removal would seriously affect the child’s mental and physical development.<sup>910</sup> Similarly, the Juvenile Court of L’Aquila used this same provision in a 2013 judgment to order a residence permit to be issued on the basis of this provision to the foreign grandmother of a minor child whose father was dead. The grandmother of the child had come to Italy since the son-in-law, who subsequently died, was abusing his wife and child. The Court found that the presence of the six-year-old child’s maternal grandmother contributed to his emotional stability and that his separation from her would cause serious harm jeopardizing his mental and physical development.<sup>911</sup>

### 12.3 Other pathways

Member States of UNHCR’s Executive Committee have called on

“States to consider creating, expanding or facilitating access to complementary and sustainable pathways to protection and solutions for refugees, in cooperation with relevant partners, including the private sector, where appropriate, including through humanitarian admission or transfer, family reunification ...”<sup>912</sup>

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<sup>908</sup> *Ordinanza n. 21799*, Italy: Supreme Court (Corte Suprema di Cassazione), 25 October 2010, available at: <http://www.stranieriitalia.it/briguglio/immigrazione-e-asilo/2010/ottobre/sent-cass-21799-2010.pdf>.

<sup>909</sup> Italy: *Constitution*, 22 December 1947, available at: <http://www.refworld.org/docid/3ae6b59cc.html>, Article 31.

<sup>910</sup> *Ordinanza n. 9535/2012*, Italy: Supreme Court of Cassation (Corte di Cassazione), 2012, referred to in EMN, *Italy Annual Policy Report on Asylum and Immigration 2012*, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/annual-policy/2012/14a.italy\\_annual\\_policy\\_report\\_2012\\_en\\_version\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/annual-policy/2012/14a.italy_annual_policy_report_2012_en_version_final_en.pdf).

<sup>911</sup> RG. n. 265/13 VG, Italy: Juvenile Court of L’Aquila, 25 November 2013.

<sup>912</sup> UNHCR, *Conclusion of the Executive Committee on international cooperation from a protection and solutions perspective*, 6 October 2016, No. 112 (LXVII) 2016, available at: <http://www.refworld.org/docid/57f7b5f74.html>, para. 11.

Another way of ensuring vulnerable family members and hardship cases can secure quicker access to safety and family unity can be through programmes akin to the **humanitarian admission** programmes developed as part of the response to the Syrian crisis. They resemble resettlement and can give access to residence in a third country on a permanent or temporary basis to especially vulnerable categories of refugees with urgent needs, such as medical needs. A residence permit can be given on either permanent or temporary basis, depending on the legislation of the State concerned. Humanitarian admission can thus complement resettlement and give urgent protection to the most vulnerable.<sup>913</sup>

Another example that may permit family members who would otherwise not qualify for reunification to do so is the **humanitarian corridor** scheme established in **Italy** in 2015 by the Federation of Protestant Churches in Italy, the Sant'Egidio Community, the Waldenstein and Methodist churches on the basis of an agreement with the Italian Ministries of the Interior and Foreign Affairs.<sup>914</sup> The scheme grants safe and legal entry to Italy to vulnerable people “in evident need of protection”. It has generally been used for Syrians fleeing the conflict there and has enabled about 1,000 people to come to Italy between February 2016 and August 2017.

**Resettlement** may also offer a route for families to be reunited when family reunification routes are not available. UNHCR’s Executive Committee has recommended, for instance, that States, UNHCR and other relevant agencies and partners:

“Enhance the use of resettlement as a protection and durable solutions tool for children at risk; where appropriate, take a flexible approach to family unity, including through consideration of concurrent processing of family members in different locations, as well as to the definition of family members in recognition of the preference to protect children within a family environment with both parents; and recognize UNHCR’s role in the determination of the best interests of the child which should inform resettlement decisions including in situations where only one parent is being resettled and custody disputes remain unresolved due to the unavailability or inaccessibility of competent authorities, or due to the inability to obtain official documents from the country of origin as this could jeopardize the safety of the refugee or his/her relatives.”<sup>915</sup>

**Private sponsorship** programmes tap into private resources to enable beneficiaries of international protection to move to another country with the support of private citizens, NGOs, or faith-based groups. Private sponsorship programmes, such as those in **Canada**<sup>916</sup>

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<sup>913</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Developing safe and lawful routes for asylum seekers and refugees into the EU*, 2015, above fn. 891, p. 3. See also more generally the family reunification humanitarian admission programme (FRHAP) announced in Ireland in November 2017, outlined in text above at fn. 213.

<sup>914</sup> Community of Sant'Egidi, *Humanitarian Corridors for Refugees*, available at: <http://www.santegidio.org/pageID/11676/langID/en/Humanitarian-Corridors-for-refugees.html>.

<sup>915</sup> UNHCR ExCom, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, available at: <http://www.refworld.org/docid/471897232.html>, para. (h)(xviii).

<sup>916</sup> Immigration, Refugees and Citizenship Canada, *Guide to the Private Sponsorship of Refugees Program*, available at: <http://www.cic.gc.ca/english/resources/publications/ref-sponsor/>.

and, on a pilot basis, in **Australia**,<sup>917</sup> can create bonds between refugees, community-based organizations, and receiving communities. They can take place alongside or in conjunction with government resettlement programmes and can enable refugees to reunite with extended family members who may not otherwise qualify under family reunification criteria.<sup>918</sup>

### 13 CONCLUSION

State practice generally situates the reunification of the families of beneficiaries of international protection within the framework of immigration control. Yet the situation of beneficiaries of international protection is fundamentally different from that of other migrants, since they are unable to enjoy family life in their country of origin. As the ECtHR has affirmed, family reunification in the country of asylum is for refugees the only means by which family life can be resumed.<sup>919</sup> Ensuring their reunification in the country of asylum is therefore also a question of protection and humanitarian values, of respecting the right to family life and family unity, ensuring the best interest of the child are a primary consideration, and supporting families' integration into their new societies.

International and regional law and the jurisprudence of the Human Rights Committee and of regional courts, notably the ECtHR, CJEU and IACtHR, provide important guidance and clarification for States on practice regarding family reunification. State practice ranges from inclusive to restrictive in its interpretation of State obligations where the right to family life and family unity may be engaged. It nevertheless indicates that governments recognize that the public interest in immigration control must be shown to be – in the language of the HRC – necessary and proportionate to a legitimate aim, or – in that of the ECtHR – in accordance with the law and necessary in a democratic society. States also recognize, and the courts have provided increasingly detailed guidance on, how the requirement to ensure the best interests of the child is to be incorporated into the resulting balancing exercise.

Bearing international and regional standards and related jurisprudence in mind, States' policy and practice regarding the reunification of family members of beneficiaries of international protection needs to

- Take into account the particular situation of beneficiaries of international protection – Since they are unable to exercise their right to family unity in their country of origin this means that, unlike other migrants, States have strong positive obligations to permit and facilitate their reunification with other family members, whether they be in the country of origin (and often exposed to risk there) or a country of first asylum.

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<sup>917</sup> Australia: Department of Immigration, Protection and Border Protection, *Community Proposal Pilot*, available at: <http://www.border.gov.au/Trav/Refu/Ofs/Community-proposal-pilot>; <http://www.border.gov.au/ReportsandPublications/Documents/discussion-papers/cps-consultation.pdf>.

<sup>918</sup> UNHCR, *Legal avenues to safety and protection through other forms of admission*, 2014, above fn. 895; J. Kumin, *Welcoming Engagement: How Private Sponsorship can Strengthen Refugee Resettlement in the European Union*, December 2015, <http://www.migrationpolicy.org/research/welcoming-engagement-how-private-sponsorship-can-strengthen-refugee-resettlement-european>.

<sup>919</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 20, para. 74; *Mugenzi c. France*, ECtHR, 2014, above fn. 85, para. 53.

- Adopt a flexible family definition – This involves acknowledging the many shapes and sizes in which families come, the different cultural practices and understandings of family, the impact of displacement on family composition and recognizing the concept of dependency that applies not only in the financial and economic context but also in emotional and psychological terms.
- Ensure legal requirements do not present insurmountable obstacles – This involves many issues, including recognizing that documentation, income, accommodation and health insurance requirements that may be imposed and other restrictions including as regards the time frame within which applications may be submitted or limitations imposed as a result of the manner of arrival, fees imposed or status granted need to take account of the particular situation of people who have had to flee their homes leaving their belongings and livelihoods behind and who may come from States that do not necessarily have functioning legal systems and/or may be at war.
- Adopt procedures that are expeditious, flexible, transparent, and efficient – This involves tackling practical obstacles, including by ensuring information is promptly provided to people newly recognized as being in need of international protection; facilitating access to embassies; strengthening collaboration with the embassies of other countries to enhance access; reducing the number of times refugee family members have to approach embassies at sometimes great personal cost and risk; ensuring prompt communication with applicants about the processing of their application; facilitating the issuance of visas and admission; instituting streamlined processing for vulnerable, hardship cases so that any eventual approval does not come too late; and considering ways to contain costs by ensuring fees are moderate, permitting their payment in stages, or supporting a travel fund to assist with the travel costs for the admission of relatives.
- Acknowledge that refugees and beneficiaries of complementary/subsidiary protection have comparable protection needs and hence require equal treatment as regards family reunification, in line with States’ non-discrimination and other obligations, meaning that the latter should not be required to meet more onerous conditions.
- Ensure the best interests of the child are a primary consideration – as has been highlighted in international, regional and national jurisprudence with increasingly clear instructions to relevant authorities as to what this involves – and that child beneficiaries of international protection are not disadvantaged as regards family reunification but are rather able to reunite promptly with their parents and other family members, where this is in their best interests.

For many families, the numerous legal and practical obstacles to family reunification combine to put reunification out of reach. The case of three Syrian women (one of them seven months pregnant) and their six children who fled their war-torn country in 2016 in search of safety highlights the perils to which they were exposed when they tried to join their husbands in Germany and illustrates the challenges families may face. After their house was bombed and afraid of losing someone if they stayed, they managed to make the journey. As one mother said: “I’m so happy that we made it. I feel so much better knowing that the whole family is

here and safe." With fears about family members stranded or trapped in conflict zones lifted, this can be expected to help the families establish a new life.<sup>920</sup>

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<sup>920</sup> UNHCR, *Syrian family reunited in Germany after nightmare flight*, 26 October 2016, available at: <http://www.unhcr.org/news/stories/2016/10/580f72b34/syrian-family-reunited-germany-nightmare-flight.html>.

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