Realising the right to family reunification of refugees in Europe

Issue paper

COMMISSIONER FOR HUMAN RIGHTS
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Realising the right to family reunification of refugees in Europe

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This issue paper examines family reunification for refugees as a pressing human rights issue. Without it, refugees are denied their right to respect for family life, have vastly diminished integration prospects and endure great additional unnecessary suffering, as do their family members. The Commissioner for Human Rights calls on all Council of Europe member states to uphold their human rights obligations and ensure the practical effectiveness of the right to family reunification for refugees and other international protection beneficiaries. To do so, states should (re-)examine their laws, policies and practices relating to family reunification for refugees. This issue paper contains 36 recommendations to that end.

Chapter 1 introduces the importance of this issue from a human rights and refugee integration perspective, noting that for refugees in particular, the right to family life normally requires swift reunification of families. Otherwise family members may be left in peril and the refugee's capacity to integrate is completely undermined. This chapter also explains the meaning of key terms – "refugee", "family" and "family reunification". "Refugee" in the issue paper is understood broadly, encompassing refugees under the 1951 Convention relating to the Status of Refugees ("1951 Convention refugees") and other beneficiaries of international protection, who are not returnable due to conflict or other serious human rights risks (who are often "subsidiary protection beneficiaries" in EU and some national laws). The term also encompasses asylum seekers, who, until their claims are processed, are presumptive refugees. The concept of "family" in this context is of necessity a broad one, and includes both the "immediate family" (spouse or partner, with minor children and other dependent children) and the "extended family", which includes other dependent family members. "Family reunification" refers broadly to processes whereby refugees are enabled to have their family members join them in the country of asylum.

Chapter 2 sets out the pertinent international human rights standards applicable in Europe under various global instruments, examining in turn the International Covenant on Civil and Political Rights (ICCPR), the UN Convention on the Rights of the Child (CRC), international refugee law and the revised European Social Charter (the Charter). The CRC provisions in particular create a strong entitlement to family reunification for children, with states being 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.

Chapter 3 contains an overview of the major case law of the European Court of Human Rights (the Court) on this topic. The Court has an extensive case law under Article 8 of the European Convention on Human Rights (the Convention) where it seeks to strike a fair balance between states' migration control prerogatives and the right to respect for family life of migrants. It is demonstrated that in the case of refugees, vindicating the right to respect for family life means affording swift family reunification. This chapter also clarifies the implications of the "best interests of the child principle" as incorporated into the Court's analysis. It also demonstrates that Article 14 of the Convention (non-discrimination) prohibits status discrimination, requiring strong justification for differences in treatment between 1951 Convention refugees, subsidiary and other protection beneficiaries as regards family reunification. This chapter finds that justification to be lacking.

Chapter 4 provides a brief account of the key issues pertaining to EU law on family reunification for refugees, in order to rectify some common misperceptions that seem to inform the restrictive practices of EU member states. The main EU legislative measure, the Family Reunification Directive (FRD), requires member states to apply some favourable rules to 1951 Convention refugees, when compared to other third-country national migrants. However, its application to subsidiary protection beneficiaries is contested. This chapter assesses the legal framework and notes the legal requirement to justify any exclusions or restrictions of family reunification, also as a matter of EU law. It is also noted that family unity is privileged under the Dublin Regulation. However, in practice that instrument is not effective in guaranteeing family unity and often leads to protracted and unjustified family separation.

Chapter 5 examines the restrictive practice in some Council of Europe states, which puts the human rights of refugees and their children at risk. Partly in response to the rapid increase in the number of asylum seekers arriving in Europe in 2015, several European states restricted family reunification. Common restrictions include limitations on who may apply for family reunification, in particular limitations on the rights of subsidiary protection beneficiaries. There are also significant limitations on the recognised conception of "family", which does not reflect the actual experience of refugees. Even when refugees formally enjoy a right to seek family reunification, a range of legal and practical barriers often render that right ineffective in practice. These barriers include waiting times, short deadlines, strict evidential requirements, financial cost barriers and barriers in the region of origin. Some human rights concerns when dependent legal status is accorded to family members are also identified here.

The concluding observations summarise the Commissioner's recommendations to Council of Europe member states, placing particular emphasis on those concerning the practical effectiveness of the right to family reunification for refugees. It highlights the restrictions that were introduced as knee-jerk reactions to the refugee arrivals of 2015, and the importance of abolishing them in order to ensure refugees' integration and the effective protection of their families.

The Commissioner's recommendations

Ensure that family reunification procedures for all refugees (broadly understood) are flexible, prompt and effective

1. Give effect to the Court's case law and ensure that all refugee family reunification procedures are flexible, prompt and effective, in order to ensure protection for the right to respect for their family life.

2. Urgently review and revise relevant state policies if they discriminate between 1951 Convention refugees, subsidiary and other protection beneficiaries.

Ensure that the definition of family members eligible for reunification is appropriately broad

3. Accord family reunification rights to all spouses, where the term spouse is understood broadly to encompass not only legally recognised spouses and civil partners (including same-sex spouses and civil partners), but also individuals who are engaged to be married, who have entered a customary marriage (also known as "common-law" marriage) or who have established long-term partnerships (including same-sex partners).

4. Abolish age limits for spousal family reunification that are higher than the age of majority of 18 years.

Strengthen the position of children in the family reunification process

5. Ensure that the best interests of the child is a primary consideration in all family reunification decisions and that refugee children's requests for family reunification are dealt with in a positive, humane and expeditious manner.

6. Avoid family separation and allow both parents and siblings to reunite when an unaccompanied minor is the sponsor, that is, the first family member arriving in a host state.

7. Ensure that, for the purposes of applying for family reunification, a child is regarded as such as long as the application is submitted before he or she turns 18. Applications brought by children should not be terminated when the child turns 18 and should recognise the particular protection needs of young adults who have fled as unaccompanied minors.

Establish clear limits on age assessment processes

8. Carry out age assessments only if there are reasonable doubts about a person being a minor. If doubts remain that the person may be underage, he or she should be granted the benefit of the doubt. Assessment decisions should be subject to administrative or judicial appeal.

9. Age assessments based on medical evidence alone have proven to be ethically dubious and inadequate for determining a person's actual age. Age assessments should rather involve a multidisciplinary evaluation by an independent authority over a period of time and not be based exclusively on medical assessment.

10. Where there is a medical component to a multidisciplinary age assessment, examinations should only be carried out with the consent of the child or his or her guardian. Examinations should not be intrusive and should comply with medical and other pertinent ethical standards. The margin of error of medical and other examinations should be clearly indicated and taken into account.

Ensure that family reunification is granted to extended family members, at least when they are dependent on the refugee sponsor

11. Ensure that extended family members are also eligible for family reunification when they are dependent on the sponsor.

12. Ensure that the concept of dependency allows for a flexible assessment of the emotional, social, financial, and other ties and support between refugees and family members. If those ties have been disrupted due to factors related to flight, they should not be taken to signal that dependency has ceased.

13. The criteria used to assess dependency should be in keeping with the legal concept developed in the Court's case law and other legal guidance. They should be explained in clear and public guidelines or legal instruments, in order to enable refugees to tailor their applications accordingly.

Avoid discrimination between families formed before flight and after (pre- and post-flight families)

14. Respect the duty of non-discrimination between family members, in particular pre- and post-flight family members. Refugees must be allowed to demonstrate their family links formed in exile or in flight. Any interference with refugees' post-flight family relationships must be demonstrated to be necessary in a democratic society and proportionate to the aim pursued.

Ensure that family reunification processes are not unduly delayed

15. Waiting periods for refugee family reunification should not interfere with the right to family life. Waiting periods of over one year are inappropriate for refugees and for their family members.

16. Waiting periods must be justified in the individual case and must be in accordance with law, pursue a legitimate aim and be necessary and proportionate in the circumstances.

Allow refugees sufficient time to apply for family reunification

17. Abolish short time limits for family reunification applications, unless they are adapted to permit a first provisional application to be made by the refugee him- or herself in the country of asylum, allowing documentation and details to be submitted later.

Take measures to account for the particular (practical) problems refugees and their families face in reunification procedures

18. Examine asylum claims and family reunification matters simultaneously, in particular for asylum seekers with manifestly strong protection claims.

19. Refugees may face particular problems in gathering evidence to support their family reunification claims. As such, when assessing family relations, states should consider a range of evidence to demonstrate family ties, not only documentary proof. Flexible approaches should be adapted to the particular situations of different refugee populations.

20. Develop guidelines to make clear which sorts of other evidence may be offered to demonstrate family links, if formal documentation is not acceptable or is unavailable.

21. Ensure that documentation requirements do not put refugees' at further risk from their countries of origin or imperil their family members. Where possible, adapt procedures to ensure that refugees and their family members are not required to engage with the authorities of the country of origin.

22. Ensure that alternative travel documents are provided when national travel documents are not accepted or not available. This may include the use of "1954 Convention travel documents"[2] or emergency International Committee of the Red Cross (ICRC) travel documents. Issue laissez-passers to family members who do not have the possibility to obtain national travel documents.

23. Avoid imposing onerous integration conditions, such as the passing of excessively difficult integration tests in the country of origin as a condition of reunification.

Avoid routine use of DNA and other biometric assessments

24. Avoid the routine use of DNA and other biometric assessments to establish family relationships. Establish standards to set relevant limits and safeguards in this regard.

25. Resort to DNA testing to verify family relationships 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 the only reliable recourse to prove or disprove fraud.

26. Regulate the maximum cost of DNA tests for family reunification and make provisions for the covering of cost by the state, in particular when the family relationship is subsequently confirmed.

Ensure effective access to places where family reunification procedures can be initiated

27. Enable family reunification applications to be presented in the country of asylum, avoiding the need for families to make dangerous and costly journeys to embassies.

28. If states insist that family members should attend embassies and consulates in order to make applications, every effort should be made to ensure that these are practically accessible.

29. Conduct a thorough review of embassy procedures and develop a clear set of protocols to facilitate family reunification, including by enabling online applications and appointments.

30. For EU member states, if the sponsor's state of residence has no embassy in his/her family's country of asylum, make use of the EU system that allows another member state to handle the issuing of visas.

Reduce practical barriers to family reunification

31. Make information on the rules, procedures and documentary requirements for family reunification available in various pertinent languages online and via those actors who support refugees in regions of origin.

32. Reduce or waive administrative and visa fees for refugees (broadly understood), where such costs may otherwise prevent family reunification.

33. Establish financial support schemes for family reunification of those refugees who do not have sufficient resources to cover the costs.

Ensure that residence permits for family members enable legal protection and autonomy

34. Grant spouses and family members who arrive on the basis of family reunification a legal status that enables them to enjoy full legal protection and independence. In particular, grant autonomous residence permits to spouses in accordance with the best practices and legal measures relating to violence against women and children.

For states bound by the Dublin Regulation: make full and flexible use of the family unity criteria

35. Ensure wide interpretation and effective application of the Dublin family unity criteria.

36. If the Dublin family unity provisions are ineffective, acknowledge and act on the positive duties under Article 8 of the Convention to bring family members together.

Chapter 1

Introduction

1.1. The urgency and importance of family reunification for refugees

Council of Europe member states currently play host to many asylum seekers and refugees who have arrived in the past three years. While many have fled conflicts that will ultimately come to an end, they inevitably make their homes in European states for now. The increase in asylum seekers arriving in Europe in 2015 led to an understandable focus on their immediate reception and the processing of their asylum claims. In this context, the longer-term challenge of promoting successful integration into new host societies has often been ignored or sidelined.

Integration of migrants and refugees is a complex policy challenge that has implications for many human rights, such as the right to equality and non-discrimination, and access to social and economic rights, particularly employment, education, health care and housing. This issue paper is a concrete follow up to the Commissioner's calls to European states to act decisively on integration, which were echoed in his 2016 issue paper *Time for Europe to get migrant integration right*. In this context, family reunification is an urgent human rights issue and plays a vital stabilising role. As the Commissioner has put it:

> How can one integrate fully into one's new host country without knowing that one's spouse or children are safe? The first member of a family to have settled in the host country will assist and guide subsequent arriving members of the family in the integration process, thereby facilitating the government's work.[3]

The Commissioner's Human Rights Comment "Restrictive laws prevent families from reuniting" concluded that:

> immigrants and refugees, who are lawfully residing in a state, should be able to reunite with their family members as soon as possible, without going through laborious procedures. Being denied the human right to be with one's family makes life more burdensome – and integration much more difficult.[4]

The need to adapt family reunification rules to the particular situation of refugees was acknowledged in the Council of Europe Parliamentary Assembly's Recommendation 1686 (2004) on human mobility and the right to family reunion. It recommended imposing less strict conditions for migrant applicants with respect to financial guarantees, health insurance and housing and, in particular, avoiding discrimination against women migrants and refugees which could result from the imposition of such measures.

For refugees in particular, family reunification is imperative to integration.[5] Article 34 of the 1951 Refugee Convention obliges states to facilitate the integration of refugees. Over the years the United Nations High Commissioner for Refugees (UNHCR) has repeatedly stated that: "the possibility of being reunited with one's family is of vital importance to the integration process. Family members can reinforce the social support system of refugees and, in so doing, promote integration".[6] It is widely documented that being united with family members is a key priority for refugees upon arrival in a host country.[7] The realities of refugee flight to Europe are such that only a tiny proportion of refugees are able to use safe and legal mechanisms to access asylum. Due to well understood access barriers, refugees generally make dangerous, irregular journeys in search of asylum.[8]

> " Refugees who are reunited with their family benefit from a reinforced social support system which promotes their integration.

While some families do travel together to seek asylum, this is often not the case. Instead, conflict often separates families. The urgency of family reunification lies also in the fact that families left behind are often at great risk – in particular if they remain in conflict zones or are living precariously in countries in the region of conflict, where the protection available often falls well below international legal standards. In that context, swift family reunification is not only a matter of good policy, but may be equated with humanitarian evacuation. The Commissioner has stressed that for refugees, "delaying the enjoyment of their right to family reunion also denies effective protection to family members in camps and conflict zones".[9]

Given that there are often few safe and legal routes to claim asylum in Europe, it is not unusual for one parent to travel ahead, leaving family behind in the hope that later, the family will be permitted to join him or her. In Germany, for example, it is estimated that the profile of Syrian refugees was such that between 0.9 and 1.2 family members could ask for reunification.[10] In the Netherlands, the estimate was 1.2 family members.[11] Notably, this contrasts sharply with the repeated suggestion in the media debate that three or four family members would join each refugee.[12]

> " For families unable to reunite, the separation causes severe stress, social isolation and economic difficulties that prevent a normal life.

The negative effects of postponing family reunification on sponsors (the first family members arriving in a host state) and families are generally well documented.[13] Family separation is a significant cause of anxiety, with often debilitating psychological impact. Moreover, it is suggested that, "the longer the period of separation, the poorer the outcomes when the family reunites and the harder it is to regain its balance".[14] The Commissioner has emphasised that for families who are willing but

unable to reunite, the separation causes severe stress, social isolation and economic difficulties that prevent a normal life.[15] Reports of the European Union Agency for Fundamental Rights (FRA) have outlined that restricting family reunification leads to people migrating irregularly, risking other human rights violations.[16]

These negative impacts are all the more evident in the case of refugees, since their lives will often be dominated by a constant fear about the situation of the family members left behind.[17] Separation of family members during flight:

> can have devastating consequences on people's well-being, as well as on their ability to rehabilitate from traumatic experiences of persecution and war and inhibit their ability to learn a new language, search for a job and adapt to their country of asylum.[18]

Notably, in two judgments rendered by the European Court of Human Rights in 2014, *Mugenzi v. France* and *Tanda-Muzinga v. France*, relating to Article 8 of the Convention and the family reunification process of refugee sponsors, the Court underlined that family unity is an essential right for refugees and that family reunification is a fundamental precondition for allowing persons who have fled persecution to re-establish a normal life.[19] In addition, the Court usefully underlined that, especially in refugee cases, family reunification procedures should be flexible, prompt and effective.

1.2. Key terms explained

1.2.1. Refugees – subsidiary protection beneficiaries – asylum seekers

This issue paper deals with family reunification of refugees. The term "refugee" may be understood narrowly or broadly. Narrowly construed, it refers to refugees within the meaning of the 1951 Convention relating to the Status of Refugees (the Refugee Convention) – "1951 Convention refugees" in the terminology used in this issue paper. In EU law, 1951 Convention refugees (provided they are not EU nationals) are simply called "refugees".[20] In international law and practice, refugee status is declaratory, so "refugees" are refugees "as soon as they fulfil the criteria in the definition".[21] Accordingly, as a matter of international law, asylum seekers are presumptive refugees, and have a provisional right to remain until their status is determined.

States have a broader duty to protect persons from return than just 1951 Convention refugees. Article 3 of the European Convention on Human Rights prohibits the return of persons to face torture, or inhuman or degrading treatment, even if they do not meet the conditions set out in the 1951 Refugee Convention.[22] In EU law, as in many states, the category of "subsidiary protection beneficiary" is recognised. A subsidiary protection beneficiary in EU law is someone who may not be returned to their country as he or she faces "serious harm" if returned, namely the death penalty or execution; torture, inhuman or degrading treatment; and some individual risks from indiscriminate violence in conflict.[23]

Often, people fleeing war are seen by states as being eligible for subsidiary protection rather than refugee status. However, those fleeing war are often in fact 1951 Convention refugees as they have a well-founded fear of persecution on one of the grounds listed in the Refugee Convention, such as religion or political opinion. On this basis, for example, UNHCR:

> considers that most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the [Refugee Convention], since they will have a well-founded fear of persecution linked to one of the Convention grounds. For many civilians who have fled Syria the nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict.[24]

UNHCR's recently issued guidelines on those fleeing conflict support this interpretation of the 1951 Convention refugee definition.[25]

Formally, the legal categories are mutually exclusive – by definition, a subsidiary protection beneficiary is someone who is not a 1951 Convention refugee. However, in practice, whether any given applicant is granted one status or another depends on a variety of institutional and political factors. Looking across Europe, we see diverse patterns in recognition rates of the same nationalities. For instance, looking at applicants from Syria, while in 2015 in Germany, Greece, the United Kingdom, Norway and Belgium most Syrian nationals granted protection were recognised as 1951 Convention refugees, in Sweden, Cyprus, Spain, Malta and Hungary they tended to be granted subsidiary protection.[26] This pattern is not new, and large-scale studies indicate that the interpretation and application of both the refugee and subsidiary protection definition varies significantly across Europe.[27] While, as a matter of positive law, the categories are distinct, as regards individuals' likelihood of recognition in one category or the other, there is considerable fluidity. Moreover, if those granted subsidiary protection appeal in order to establish their entitlement to recognition as a 1951 Convention refugee, they are often successful. So recognition as a 1951 Convention refugee also often depends on individuals' resources to bring appeals.

The diverse institutional practices mean that similarly situated individuals may be recognised as 1951 Convention refugees or 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. There is a long-standing practice of siphoning asylum seekers into non-convention status, in particular in order to avoid the rights attached to the status of a 1951 Convention refugee. This is illustrated in recent German practice, where grants of subsidiary protection have increased markedly as the family reunification rights attaching to that status have diminished. In 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.

In this paper, "asylum seeker" is used to connote individuals who have applied for international protection, whereas "refugee" is used in the broad sense, to encompass all international protection beneficiaries. Where the context demands differentiation, we use the terms "1951 Convention refugees", "subsidiary protection beneficiaries", and "other protection beneficiaries" to distinguish between different types of refugees. In EU law, both "1951 Convention refugees" and "subsidiary protection beneficiaries" together are "international protection beneficiaries". It should also be noted that some national systems use different national legal terminology for these different categories. Where necessary, this terminology is explained in the pertinent description of national law and practice.

1.2.2. Family members

The protection of the family in human rights law tends to take a broad conception of "family", informed by the principle of non-discrimination.[28] The European Court of Human Rights emphasises that family life is rooted in real connections, not only formal legal relationships. It is well established that "family life" within the meaning of Article 8 of the European Convention on Human Rights exists in the case of relationships between married couples and non-married (stable) partners.[29] The Court has long recognised that informal and religious marriages also fall under Article 8 of the Convention.[30] More recently, the Court has acknowledged that same-sex couples in stable relationships enjoy family life together, even if they are not cohabiting.[31] As regards parents and their children, family ties are created from the moment of a child's birth and only cease to exist under "exceptional circumstances".[32] As regards relationships between extended family members, such as those of parents and adult children, the Court accepts that they fall within the concept of "family life" provided that additional factors of dependence, other than normal emotional ties, are shown to exist.[33] In contrast, national immigration and asylum laws often take an unduly restrictive approach to defining family members, excluding adult children or family members who are not spouses.

> " The right to family life also applies to informal or religious marriages, non-married partners, and between parents and dependent adult children.

For purposes of exposition, this issue paper uses the term "immediate family" and "extended family". "Immediate family" entails a spouse or life-partner, minor children and other dependent children. "Extended family" includes other family members, in particular (but not only) dependents. According to UNHCR, "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".[34] As will be seen below, there are considerable tensions between tight formal national definitions, in particular when combined with demands for documentary proof of family links, and refugee realities. Together, they often render refugees' family reunification rights ineffective in practice.

As regards refugees, one notable policy trend is to take a narrow conception of family reunification and to restrict the conception further to family units formed pre-flight. The notion of the pre-flight family is narrowly defined; for instance a family based on a marriage contracted in the refugee's country of origin. Such definitions fail to appreciate the reality of refugees' lives. Many refugees spend protracted periods in exile and in flight, and form families in transit, or while residing precariously in their regions of origin before they arrive in Europe. If the law requires families to be formed in the country of origin specifically, those pre-existing families may not fall under domestic family reunification provisions. In some circumstances, differentiating between pre- and post-flight families will violate Article 14 of the Convention,[35] and in all likelihood other equality guarantees, including those under EU law.

1.2.3. Family reunification and related terms

Family reunification refers to a range of legal processes.[36] In the narrow sense of family reunification used throughout this paper, it means the re-forming in the host state of a family previously existing elsewhere. In some states, procedures to reunite refugees and their families may take various forms. For instance, in Spain there is both a procedure to extend refugee status, and a formal process called "family reunification". "Family formation" migration refers to migration in order to form a new family unit. Also pertinent may be "family retention", protecting members of an existing family unit from expulsion, and "family regularisation", offering family members a pathway to regular status once they arrive in the sponsor's country of residence. However, the bulk of this issue paper focuses on family reunification.

Chapter 2

Family reunification in international and European human rights standards

2.1. The International Covenant on Civil and Political Rights

The Universal Declaration of Human Rights (UDHR, Article 16, paragraph 3) provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. The ICCPR, which binds all Council of Europe member states, protects family life under Articles 17 and 23. Article 17 of the ICCPR states that, " [n]o one shall be subjected to arbitrary or unlawful interference with his … family", and the second paragraph specifies that, "[e]veryone has the right to the protection of the law against such interference or attacks". Article 23 of the ICCPR provides that the family, "is the natural and fundamental group unit of society and is entitled to protection by society and the State".[37]

The Human Rights Committee (HRC) has affirmed that:

> the term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated ... by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect.[38]

In its General Comment No. 15 on the position of aliens, while the HRC acknowledges that states may control entry of aliens to their territory, it notes 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".[39] The HRC has examined some individual complaints concerning family reunification,[40] requiring that interferences with family life be provided for by law, in accordance

with the provisions, aims and objectives of the ICCPR and reasonable in the particular circumstances.[41] The HRC interprets the requirement of reasonableness as implying that any interference "must be proportional to the end sought and be necessary in the circumstances of any given case".[42] Considerations relating to the best interests of the child (Article 24 of the ICCPR) are attributed significant weight by the HRC.[43]

On refugees, *El Dernawi v. Libya* concerned a Libyan man who was granted asylum in Switzerland. His wife and children, who were still in Libya, were granted family reunification but they were unable to leave Libya as the authorities had confiscated their passports.[44] The HRC noted that the actions of the Libyan authorities constituted a "definitive, and sole, barrier to the family being reunited in Switzerland". As it was evident that, "a person granted refugee status under the 1951 Convention on the Status of Refugees, [could not] reasonably be expected to return to his country of origin",[45] the HRC concluded that the rights of the author and his family under Articles 17, 23 and 24 of the ICCPR had been violated.[46] In *Gonzalez v. Guyana* 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, paragraph 1, of the ICCPR.[47] The HRC emphasised that it was evident that the couple could not live together in Cuba, and the state party had not indicated where else they might live as a couple.[48]

> " No one shall be subjected to arbitrary or unlawful interference with his family.

In the ICCPR periodic reports, family reunification has also been considered. In its 1996 Concluding Observations on Switzerland, the HRC observed that, "family reunification is not authorized immediately for foreign workers who settle in Switzerland, but only after 18 months, which, in the Committee's view, is too long a period for the foreign worker to be separated from his family".[49] In its 2007 Concluding Observations on France, the HRC expressed concern about the length of family reunification procedures for recognised refugees.[50] In its 2016 Concluding Observations on Denmark, while the HRC acknowledged the challenge of dealing with large numbers of asylum seekers, it expressed concern about the compatibility of the newly introduced three-year waiting period for family reunification of temporary protection beneficiaries with the ICCPR.[51]

2.2. The Convention on the Rights of the Child

The right to family reunification is protected under Articles 9 and 10 of the CRC. Article 9 of the CRC obliges states to ensure that, "a child shall not be separated from his or her parents against their will, except when … such separation is necessary for the best interests of the child". The first paragraph of Article 10 of the CRC refers directly to this provision and provides 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".[52] Furthermore,

Articles 16 and 22, paragraph 2, of the CRC relate to the right to family life, and are generally based on the logic of family unity.[53] Article 16 of the CRC echoes Article 17 of the ICCPR and prohibits arbitrary or unlawful interference with the child's family life, while lastly, states are required 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" (Article 22, paragraph 2, of the CRC).

> States should deal with children's family reunification in a positive, humane and expeditious manner.

In its General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, the Committee on the Rights of the Child (UNCRC) confirms that only the child's best interests could impede family reunification of an unaccompanied or separated child in the situation of separation in different countries.[54] The UNCRC further elaborates that family reunification of a child in the country of origin is not in his or her best interests if "there is a 'reasonable risk' that such a return would lead to the violation of fundamental human rights of the child".[55] In a number of concluding observations, the UNCRC recognises that the practice in some countries of failing to ensure family reunification or permitting it with unnecessarily restrictive conditions constitutes a serious "protection gap" faced by children.[56] In its Concluding Observations on Poland, the UNCRC criticises the procedures on family reunification for imposing excessively demanding requirements for documentation and physical verification of applications and recommends Poland to "[t]ake all necessary measures to safeguard the principle of family unity for refugees and their children, including by making administrative requirements for family unification more flexible and affordable".[57]

Notably, a legal analysis conducted for the German Lower House of Parliament concluded that the only way to ensure Germany's compliance with its obligations under the CRC was to generally allow family reunification with minor children and accept applications within the two-year waiting period.[58]

2.3. International refugee law on family reunification

The 1951 Refugee Convention itself is silent on the issue of family reunification. However, the Final Act of the UN Conference of Plenipotentiaries states that, "the unity of the family … is an essential right of the refugee".[59] It emphasised that the family is threatened in refugee situations, and urged governments to:

> take the necessary measures for the protection of the refugee's family, especially with a view to … [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.

At the same time, it also stressed the special needs of children, particularly unaccompanied minors who have been separated from their parents. In the chapter on the principle of family unity in its handbook, UNHCR notes that this recommendation

in the Final Act is observed by the majority of states, whether or not they are parties to the 1951 Convention or the 1967 Protocol.[60]

Over the years UNHCR has issued a number of notes and guidelines on family reunification.[61] Importantly, its Executive Committee (ExCom, comprised of state representatives) has repeatedly stressed the importance of family reunification for refugees.[62] While these conclusions are not legally binding, they are generally accepted as constituting "soft law", which aids in the interpretation and application of refugee law instruments. In its 2001 background note on family reunification in the context of resettlement and integration, UNHCR identifies five guiding principles which promote and facilitate family reunification.[63]

a. The family is the natural and fundamental group unit of society and is entitled to protection by states.

b. The refugee family is essential to ensure the protection and well-being of its individual members.

c. The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific.

d. Humanitarian considerations support family reunification efforts.

e. The refugee family is essential to the successful integration of resettled refugees.

2.4. European Social Charter

Article 19, paragraph 6, of the European Social Charter requires member states to facilitate as far as possible the reunion of family members with foreign workers, who reside legally in the country. Recital 16 of the revised European Social Charter underlines that the family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.[64] The European Committee of Social Rights (ECSR) in its 2015 conclusions observed that the rights of the Charter are to be enjoyed to the fullest extent possible by refugees, and that the obligations undertaken by states under the European Social Charter "require a response to the specific needs of refugees and asylum seekers, such as … the liberal administration of the right to family reunion".[65]

The ECSR has examined many restrictions by contracting states on family reunification and found them incompatible with Article 19 of the Charter. For example, where requirements for language or integration tests, or courses and added fees were liable to impede rather than facilitate family reunion, they are contrary to Article 19, paragraph 6, of the Charter.[66] The ECSR has underlined that restrictions on family reunion in the form of requirements for sufficient or suitable accommodation should not be so restrictive as to prevent any family reunion.[67] The 2015 conclusions of the ECSR found that most countries investigated did not meet the requirements in Article 19 of the Charter.[68] For example, the ECSR found that the requirement in Section 32 of the German Residence Act, according to which children over the age of 16 wishing to move to Germany to live with one parent must prove that they speak German, is not in conformity with the Charter, because it presents an obstacle to family reunion.

Chapter 3

Family reunification in the European Court of Human Rights' case law

3.1. Family reunification for refugees

The Court has developed its case law on family reunification over decades and has sought to reconcile states' migration control prerogatives with the right to respect for family life.[69] In general, migrants must demonstrate that family life cannot be enjoyed "elsewhere" in order to show that the refusal of family reunification will violate Article 8 of the Convention. The case law has developed over time to become more protective of human rights, in particular when the rights of children are at issue.[70] While earlier judgments set an extremely high standard for family reunification, requiring applicants to demonstrate that reunification was the only way to (re-) establish family life,[71] the standard now is that applicants must show that reunion is the "most adequate" way to family life.[72]

In the case of refugees (broadly understood), the Court has been sensitive to their particular situation and has strengthened the protection of their right to family reunification. In two respects, family reunification of refugees differs from that of non-refugees. Firstly, the "elsewhere" approach cannot be applied given the predicament of refugees. There can be no question of refugees being subject to an obligation to re-establish family life in their country of origin. In the case of refugees (and others who are non-returnable for practical reasons)[73] there are *ipso facto* "insurmountable obstacles" to establishing family life in the country of origin. Moreover, it is also inappropriate to assume that refugees can be required to move to third states. As the Court's extensive case law on the transfer of asylum seekers has shown, any transfer of a refugee or potential refugee requires a careful individual analysis of the human rights implications of the transfer.[74] Secondly, the Court tends to take into account whether parents had voluntarily left children in their country of origin as a factor potentially weighing against family reunification. In the case of refugees, who are by definition forced to flee, the Court acknowledges that they are often also compelled by circumstances to leave family members behind.

The distinctive approach to family reunification for refugees emerges when contrasting two important cases, *Tuquabo-Tekle v. the Netherlands*[75] and the earlier case of *Gül v. Switzerland*.[76] In the former case, a mother left her daughter behind when she fled Eritrea to seek asylum, following the death of her husband. Her protection needs were recognised not as a 1951 Convention refugee, but rather with another form of (less secure) humanitarian protection. Nonetheless, the Court remarked that it was questionable whether the mother left her daughter behind of "her own free will". Accordingly, it was held that the Netherlands was obliged under Article 8 of the Convention to admit her daughter to the territory, so that they could enjoy family life together there. In contrast, in *Gül v. Switzerland,* the Court found no violation in Switzerland's refusal to grant admission to a son to rejoin his father in Switzerland. In that case, the father had sought asylum in Switzerland, but was merely granted a residence permit on humanitarian grounds. Considerable time had passed since then, and the father recently had made several visits to his son in Turkey. The Court held that there were no longer "strong humanitarian grounds" for the father to remain in Switzerland, so re-establishing family life in Turkey would be practicable.

This analysis reveals that family reunification is generally the only way to protect the right to respect of family life of refugees' with current protection needs. This view is confirmed by two notable 2014 judgments of the Court in *Tanda-Muzinga v. France*[77] and *Mugenzi v. France*.[78] Both applicants were recognised refugees in France, who submitted family reunion applications in 2003 and 2007 respectively. In both cases, the children were in third countries. They both confronted insurmountable difficulties in the procedure. In the Mugenzi case, a cursory dental examination was used to cast doubt on the child's age as disclosed on his birth certificate. As a result, reunion was refused. All domestic appeals against this finding were refused and the children became adults with the passage of time. In the Tanda-Muzinga case, the authorities also questioned the authenticity of the identity documents. After several years of appeals and challenges, they were finally granted reunification.

Importantly, the Court emphasised that the applicants' status as refugees meant that their application for family reunion should be dealt with "speedily, attentively and with especial care, considering that the acquisition of an international protection status is proof that the person concerned is in a vulnerable position".[79] The Court noted that the need for a special procedure for family reunification of refugees was recognised in international and European law. It found that the French procedure had failed to guarantee "the flexibility, speed and efficiency" to respect the right to family life.[80]

In 2016 in *I.A.A. and Others v. the United Kingdom*[81] the Court examined a case concerning the admission of five children of a Somali woman resident in the UK. The children were living in Ethiopia, having been previously in the care of an aunt. The mother had moved to the UK in 2003 to join her second husband, a refugee. The Court held that on the facts, the mother could relocate to Ethiopia, as there were no "insurmountable obstacles" or "major impediments" to her doing so.[82] Concerning the possibility of returning to Somalia, the Court emphasised that although she was married to a refugee, "neither she nor any of her children (including the applicants) [had] been granted refugee status and the applicants [had] not sought to argue that they would be at risk of ill-treatment were they to return to Somalia".[83] Clearly, had she demonstrated that she was in need of international protection, the case would have been dealt with differently.

3.2. "Best interests of the child" in the case law of the European Court of Human Rights

A notable trend in the Court's case law is the increased prominence and weight attached to the "best interests of the child" principle, as evidenced in *Mugenzi v. France*[84] and *Tanda-Muzinga v. France*.[85] In these cases, the Court emphasised that where family reunification involves children, the national authorities must give precedence to the best interests of the child in the review of proportionality of the interference with family life.[86] Similarly, *Jeunesse v. the Netherlands*[87] and *Neulinger and Shuruk v. Switzerland*[88] (although not dealing with refugees) are also illustrative of the Court's great emphasis on "best interest" considerations in recent years. In *Jeunesse v. the Netherlands* this is in fact one of the main reasons why the Court for the first time held that Article 8 of the Convention had been violated in a case concerning family reunification of a spouse. In these cases, the Court referred specifically to the CRC and the UNCRC general comments.

3.3. Equal treatment and family reunification

A key policy trend is differences in treatment between 1951 Convention refugees and subsidiary protection and/or other protection beneficiaries. The non-discrimination guarantee under Article 14 of the European Convention on Human Rights renders these distinctions legally suspect. Article 14 of the Convention must be invoked in conjunction with another Convention right, but in family reunification cases, Article 8 of the Convention is invariably engaged, so that poses no obstacle. 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.[89]

> " Refugees' family reunification requires adequate and swift attention.

The Court has in recent years rendered several judgments on discrimination as regards family reunification. In *Biao v. Denmark*, the Grand Chamber found a violation of Article 14 of the Convention in the difference in treatment between certain categories of Danish nationals regarding family reunification, allowing only those who had been Danish nationals for 28 years to enjoy the right.[90] The workings of the

Danish rules were found to amount to indirect discrimination on grounds of ethnicity. Since it follows from case law that, "[n]o difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society",[91] the Court went on to examine whether this indirect discrimination could be justified by "compelling or very weighty reasons unrelated to ethnic origin" and answered in the negative.[92] It found that the 28-year rule was based on undocumented, partly biased, general assumptions and "rather speculative arguments" about when Danish nationals had created strong ties with Denmark and that this rule, when applied to the applicant, did not allow for his strong ties to Denmark to be taken into account.

> " Differences in family reunification rights granted to persons with subsidiary protection and 1951 Convention refugees should be avoided.

In *Pajić v. Croatia*, the Court found a violation of Article 14 (in connection with Article 8 of the Convention) in the fact that Croatian family reunification rules permitted no applications from same-sex couples.[93] As stable relationships between (even non-cohabiting) same-sex couples attract legal protection as family life under Article 8 of the Convention, the difference in treatment fell to be considered under Article 14 (read together with Article 8). The difference in treatment on grounds of sexual orientation was in need of strong justification, but none was offered by the respondent state. *Hode and Abdi v. the United Kingdom*[94] concerned the difference in treatment between refugees' spouses who married post-flight and other migrants entitled to family reunification. The Court held that refugees with post-flight spouses were similarly situated to migrant students and workers, who were entitled to family reunification irrespective of when the marriage was contracted. The similarity was rooted in the fact that "as students and workers, whose spouses were entitled to join them, were usually granted a limited period of leave to remain in the United Kingdom, the Court considers that they too were in an analogous position to the applicants for the purpose of Article 14 of the Convention".[95] The UK failed to demonstrate that this difference in treatment pursued a legitimate aim sufficient for such difference to be justified.

The UK had attempted to argue that it treated migrant workers and students better as it was attempting to attract them to the UK, while it was accepting refugees as a matter of international obligation, but not seeking to compete with other states to attract them.[96] While the Court held that offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Article 14 of the Convention, it noted that this justification had not previously been offered by the UK for this policy.[97] In *Niedzwiecki v. Germany* the Court, echoing the German Federal Constitutional Court, held that it could not discern sufficient reasons justifying a difference of treatment between non-nationals as regards access to child benefits which was based on the type of residence permit.[98] In its reasoning, which was upheld by the Court, the German Federal Constitutional Court pointed out that insofar as the distinction was aimed at limiting the grant of child benefits to aliens who were likely

to stay permanently in Germany, the criteria applied were inappropriate to achieve that aim since the fact that a person held a limited residence title did not constitute a sufficient basis for predicting the duration of his or her stay in Germany.[99]

Concerning the inequality of treatment between 1951 Convention refugees and subsidiary protection beneficiaries, it appears that this status inequality is difficult to reconcile with Article 14 of the Convention, read in conjunction with Article 8 of the Convention. Following the case law outlined above, the reasoning implies that subsidiary protection status is also an "other status" under Article 14. With respect to their right to family life, refugees and beneficiaries of subsidiary protection are in "analogous, or relevantly similar, situations". The Court has already examined other status distinctions between refugees and other migrants, and between different categories of migrants, and indeed between different categories of citizens. In *Hode and Abdi v. the United Kingdom*, refugees were treated as being in a relevantly similar situation to student and labour migrants. In all respects, their situation is even closer to subsidiary protection beneficiaries. Once this is accepted, it falls to the state to prove the objective and reasonable justification for the difference in treatment.

While the Court has not dealt directly with the issue, the principles in its case law cast doubt on the potential justifications offered by states. There appear to be two possible lines of justification for the difference in treatment. The first seeks to justify the difference in the privileged position of 1951 Convention refugees in international law. The second relates to the time-bound nature of the protection need of subsidiary protection beneficiaries. This first justification has little merit; 1951 Convention refugees and subsidiary protection beneficiaries are often similarly situated in that they are protected from return under international law. Many subsidiary protection beneficiaries are protected against return under international human rights law, for instance.

Nor is the second justification convincing, either legally or empirically. Legally, 1951 Convention refugee status is also temporary. It is subject to cessation on various grounds, including if there is a sustainable change in circumstances in the refugees' country of origin.[100] Both 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. This is acknowledged notably in EU law, as both categories of international protection beneficiaries potentially come under the EU Long-Term Residents Directive.[101]

Empirically, the profiles of subsidiary protection beneficiaries and 1951 Convention refugees are often very similar. The length of their stay will be determined primarily by the continuation of the reasons for fleeing their country of origin, not by the duration of the residence permit they were granted. If the protection need is still present, a permit granted for one or two years only must (and indeed in all likelihood will in practice) be extended. If it were not, and there was still a real risk on return, the law would require extension of protection from *refoulement*. In *Niedzwiecki v. Germany*, the Court held that it did not discern sufficient reasons to justify the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit and those who held a limited residence permit that was renewed every two years. Hence, the different treatment violated Article 14 taken in conjunction with

Article 8 of the Convention.[102] A fortiori, in the case of 1951 Convention refugees and other international protection beneficiaries, although they may be granted residence permits of different durations, this does not provide a basis from which to infer that they warrant different treatment.

To conclude, differences in treatment between 1951 Convention refugees and subsidiary protection beneficiaries are difficult to square with Article 14 of the European Convention on Human Rights (and indeed with the analogous EU general principle of equality and non-discrimination) and so should be reconsidered promptly.

Chapter 4

EU law on family reunification

Over half of the Council of Europe's member states' laws on family reunification are directly affected by rules of European Union law. For a proper understanding of the regulation of family reunification in many states, then, a discussion of EU law is necessary. Below, both EU primary law (in particular fundamental rights guarantees) and secondary law setting out precise rules for family reunification to be applied in EU member states are discussed.

4.1. Primary EU law

The Charter of Fundamental Rights of the European Union (EUCFR) contains several provisions relevant to refugee family reunification rights. Article 7 of the EUCFR guarantees everyone's right to respect for his or her family life. The non-discrimination clause in Article 21 prohibits discrimination on an open-ended list of grounds (in that respect like Article 14 of the European Convention on Human Rights), reflecting the general principle of equality in EU law. This principle means that, insofar as they are similarly situated, treating refugees and subsidiary protection beneficiaries differently requires justification. Article 51, paragraph 1, of the EUCFR states that the EUCFR applies to the member states only "when they are implementing Union law", a phrase that is interpreted broadly.

EU law on asylum and immigration measures must be interpreted in a manner consistent with the charter.[103] Its influence is seen in many domains. In *MA and Others v. Secretary of State for the Home Department* for example, the Dublin Regulation was interpreted in the light of Article 24, paragraph 2, of the EUCFR so as to vindicate the "best interests" of the child principle.[104] Similarly, EU fundamental rights principles have had some significant impact on asylum procedures, notably the *A and Others v. Staatssecretaris van Veiligheid en Justitie* case, in rooting out some evidential practices that were deemed to violate human dignity and privacy.[105] The right to effective judicial protection (Article 47 of the EUCFR), together with the right to good administration (Article 41 of the EUCFR), has been applied to subsidiary protection processes, even when the relevant EU procedural directive did not then explicitly govern the procedures.[106] Concerning time limits, while short time limits are sometimes acceptable, if there is evidence that they impede the effective enforcement of rights, their legality is in doubt.[107] This holds even if those time limits are ostensibly permitted in EU legislation, as is the case with the three-month limit for family reunification of refugees under the FRD. Any rigid application of that limit will be of dubious legality in the light of the principle of effectiveness.

4.2. Secondary EU law

4.2.1. The Family Reunification Directive

The main secondary EU law measure dealing with family reunification rights of third-country nationals (that is, those who do not hold the nationality of an EU member state) is the FRD of 2003.[108] The UK, Ireland and Denmark are not bound by the FRD. In general, it creates an individual right to family reunification and must be interpreted in light of EU fundamental rights and the Convention as well as the principles set out in Articles 5(5) and 17 of the FRD.[109] The Court of Justice of the European Union (CJEU) has tended to interpret family reunification as the rule, such that any discretion to limit the right must be construed narrowly.[110]

Explicitly, the FRD applies to sponsors (of third-country nationality), who hold a residence permit valid for one year or more and who have reasonable prospects of obtaining the right of permanent residence.[111] It applies to 1951 Convention refugees, and indeed establishes important preferential rules for their family reunification, when compared with other migrants (Chapter V). However, it explicitly does not apply to i) asylum seekers; ii) applicants for or beneficiaries of temporary protection; and iii) applicants for or beneficiaries of "a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States" (Article 3(2) of the FRD). 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. Admittedly, some member states seem to assume that they are not obligated by the FRD to apply its provisions to this category. It is also important to recall that the EU general principle of equality prohibits distinctions between similarly situated persons, as does Article 14 of the Convention. On this basis, the lawfulness of affording the privileges of Chapter V of the FRD only to 1951 Convention refugees is in doubt.

In 2008, the Commission noted that at least nine member states in their national legislation apply the FRD to subsidiary protection beneficiaries despite them being excluded from its scope.[112] In 2014, the Commission stated that, "the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages [the member states] to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection".[113] It also praised a number of member states for not applying the restrictions at all to refugees, "in recognition of the particular plight of refugees and the difficulties they often face in applying for family reunification".[114]

The meaning of "dependent" is not defined in the FRD, but as mentioned previously, the Commission uses guidance from the jurisprudence on family members of EU citizens to inform the concept, which takes a broad view of "dependency".[115] Dependency, in this context, is the result of a factual situation characterised 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.[116] There is no need to inquire into the reasons for that support, or whether the family member could find some other means of support.[117]

4.2.2. The Qualification Directive – original and recast

The Qualification Directive (QD)[118] purports to harmonise the qualification of third-country nationals as 1951 Convention refugees or subsidiary protection beneficiaries. The recast QD does not apply to the UK, Ireland and Denmark, although the UK and Ireland opted into the original version of that measure.[119] The definition of family member in Article 2(j) of the QD refers to "members of the family of the beneficiary of international protection who are present in the same Member State in relation to the applicant for international protection". The aim of that definition is to exclude "from family unification, under this Directive, family members that are in the host country for different reasons (e.g. work) or that are in another Member State or in a third country".[120]

Article 23, paragraph 1, of the QD states that "Member States shall ensure that family unity can be maintained". It has been argued that it may have a function to protect family unity in case of expulsion.[121] Its general wording also suggests that it applies to admission decisions.[122] The definition of family member refers to relationships that "already existed in the country of origin". Peers et al. suggest that this limitation:

> disregards the fact that refugees may form genuine and lasting family relationships during or after flight, ties which are also protected by Article 8 [of the] ECHR ... Whether this complies with the principle of non-discrimination in relation to the right to respect for family life remains open to question.[123]

Notably, it is also narrower than the FRD, which refers to the refugee's family where the relationships "predate their entry" (Article 9, paragraph 2, of the FRD).

> " Authorities must ensure that family unity can be maintained.

In 2016, the Commission adopted a proposal to recast the directive once more.[124] The proposal also includes an extended definition of family members, taking into account the different circumstances of dependency, and covering post-flight family members.[125] UNHCR welcomed the extension of the scope of family members, "reflecting the reality of often prolonged periods of transit", and advising member states to turn this optional clause into a mandatory one.[126]

4.2.3. Family reunification issues under the Dublin Regulation

Certain provisions in the Dublin Regulation (604/2013), if properly applied, may contribute to the maintenance of family unity and even result in bringing about family reunification for asylum seekers.[127] According to Recital 15, for example:

> The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated.

The regulation deals with family members already in the EU but living separated in different member states. In order of priority, the state responsible is the one where:

- a family member of an unaccompanied minor is legally present,[128] or if there is no such state, where the unaccompanied minor makes his/her most recent application;[129]
- a family member has been recognised as a refugee or has an outstanding asylum application (note the narrow definition of family under the Dublin II Regulation has been broadened by the Dublin III Regulation).[130]

However, the application of these provisions has been widely criticised as insufficient in practice.[131] A UNHCR study conducted between October 2015 and February 2016 in nine countries, including France and the United Kingdom, examined the application of the Dublin Regulation in those countries. UNHCR concluded that the procedure for assigning member state responsibility was protracted and that family applications were not prioritised in practice. The reasons given for the delays included lengthy family tracing procedures, delays in conducting age assessments, and different documentary and evidential requirements for establishing family links among member states (including as regards DNA tests). Given these serious practical difficulties, family members often remain separated although they have a legal right in EU law to have their asylum claim determined together.

> ” Correctly implementing family reunification rules within the Dublin System would considerably reduce human suffering.

In January 2016, the UK courts considered the position of unaccompanied minors living in the informal camp in Calais, France, who had close family members in the UK, including recognised 1951 Convention refugees.[132] Normally, they would be required to claim asylum in France and then request the French authorities to request the UK authorities to take charge of their claims on the basis of the family unity criteria in the Dublin Regulation. The applicants argued that this process would not vindicate their right to respect for their family life under Article 8 of the Convention. The tribunal held that the Dublin Regulation has the status of "a material consideration of undeniable potency in the proportionality balancing exercise" and that any "vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not lightly find that, in a given context, Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part".[133] However, on the particular facts, the tribunal held that Article 8 entitled the applicants to swift admission to the UK, once they claimed asylum in France. On appeal,[134] the court of appeal held that greater evidence ought to be required to bypass the Dublin mechanisms than had been required by the lower court but that, nonetheless, it should be done if there was an "especially compelling case" that otherwise the right to family life would be violated.[135]

The Dublin system, were it made to operate correctly, offers family members of asylum seekers the opportunity to have their claims examined in the same state.

This would considerably reduce human suffering. As well as being beneficial to the asylum seekers themselves, this mode of protection for family unity could also offer significant efficiency gains for states, as they would not face irregular movement or later family reunification applications.

4.2.4. Temporary Protection Directive

The first instrument of EU law granting the right to family reunification to persons in need of protection is the Temporary Protection Directive 2001/55 (TPD).[136] It has been noted that there is a consensus on the need for prompt reunification during temporary protection, especially where the protection results in extended periods of residence in the country of asylum.[137] So far, the TPD has not been applied in practice, since the Council of Ministers has not adopted a decision establishing the existence of a mass influx of displaced persons, required by Article 5 of the TPD. Nonetheless it is noteworthy that the TPD sets out rules on family reunification: Article 15 sets three conditions, namely that the family ties existed already in the country of origin, that the ties were disrupted due to circumstances surrounding the mass influx, and that the family members must be either beneficiaries of temporary protection themselves (but present in another member state) or in need of protection.

Chapter 5

Restrictive trends affecting family reunification for refugees

5.1. Limitations on beneficiaries of family reunification

5.1.1. 1951 Convention refugees v. subsidiary protection beneficiaries

Most states in Europe have greatly restricted family reunification rights over the past years. Typical restrictions include high income, integration and accommodation requirements.

Integration tests and requirements have attracted particular criticism for their counterproductive nature, a matter on which the Commissioner has previously commented.[138] Overall, a 2013 comparative study on family reunification and integration requirements concludes that:

> The restrictive measures on the admission and residence of family members have not furthered integration and in many cases may have actually impeded it. Being excluded means, in any case, that integration is not promoted. Delay in the process means that the family members live separately, and thus, focus on the process and not on the host society. Children are badly affected by the delay, because they miss at least one parent and their language learning and integration process are delayed.[139]

These requirements are generally viewed as posing a particular, often insurmountable, barrier for refugee sponsors. In that context, EU law (discussed above) and national law and practice generally create some formal preferential treatment for the family reunification of refugees. However, in 2012, UNHCR reported that despite the more favourable provisions for refugee family reunification set out in EU legislation, "throughout Europe, many practical obstacles in the family reunification process lead to prolonged separation, significant procedural costs and no realistic possibility of success".[140] This means that refugees' apparently privileged access to family reunification is often ineffective.

In its Recommendation 1686 (2004) on human mobility and the right to family reunion, the Council of Europe Parliamentary Assembly (PACE), while welcoming the preferential treatment granted to refugees in the FRD, expressed its regret that it does not recognise the right to family reunion for persons granted subsidiary protection. PACE urged European states to "grant the right to family reunion to persons benefiting from subsidiary protection".[141]

While some states continue to treat 1951 Convention refugees and subsidiary protection beneficiaries in the same manner as regards family reunification, there is a strong trend to differentiate. In this section, we highlight those significant refugee-hosting states that do formally distinguish between these different categories.

This trend is evident in Germany, which, given its prominence as a refugee-hosting state, warrants particular attention. It is estimated that in 2015 approximately 800 000 persons arrived in Germany seeking international protection. Many were unable to formally apply for asylum until 2016. One policy response was to postpone family reunification for persons granted subsidiary protection for two years.[142] At the time the measure was adopted, most applicants from key refugee producing states (notably Syria) were being recognised as 1951 Convention refugees. After the new restriction on family reunification entered into force in March 2016, there was a sharp rise in subsidiary protection grants. These subsidiary protection beneficiaries would not be entitled to file an application for family reunification until after March 2018. Notably too, of those granted subsidiary protection, almost 26 000 persons (29%) filed an appeal against this decision, creating a large additional burden for the administration and the courts. Of the 2 365 appeals decided by the end of October 2016, three quarters resulted in the appellant being recognised as a 1951 Convention refugee.[143] Among appellants from Syria, the rate of success on appeal (that is, when the outcome was that the appellant ought to have been recognised as a 1951 Convention refugee) was 81%.[144]

> ” Throughout Europe, many practical obstacles lead to prolonged separation, significant procedural costs and no realistic possibility of success for refugees seeking to reunite with their family.

In Hungary since 2011, subsidiary protection beneficiaries have been excluded from the more favourable rules for refugees.[145] Subsidiary protection beneficiaries must meet the stringent rules that apply to other migrants, as must 1951 Convention refugees that apply outside the three-month time limit. In Cyprus, a law introduced in 2014 removed the preferential right to family reunification from 1951 Convention refugees and excluded beneficiaries of subsidiary protection from the right to family reunification altogether.[146] In Greece, only 1951 Convention refugees, and not subsidiary protection beneficiaries, are covered by the family reunification legislation implementing the FRD.[147] UNHCR has criticised this facet of Greek law.[148] In order to benefit from the preferential rules, refugees must apply within three months of recognition. Otherwise, they must meet requirements as to employment and permanent accommodation. Procedures are known to be cumbersome and protracted, although there is little data from which to assess their workings overall.[149]

In Sweden, for example, a new temporary law entered into force in July 2016, which removed the right to family reunification for subsidiary protection beneficiaries altogether.[150] It applies to those who applied for asylum after 24 November 2015.[151]

The law will remain in force until July 2019. It was introduced as part of a package of measures to reduce the numbers of people seeking refuge in Sweden.[152] As the numbers of people seeking asylum there subsequently have fallen dramatically (apparently for reasons unrelated to the Swedish policy changes), it remains to be seen if the political promise to revisit the restrictions will be implemented. The only saving provision in the measure provides that family reunification should be granted even to subsidiary protection beneficiaries if it would otherwise violate Swedish obligations under international law.[153]

> In Europe, there is a strong trend to differentiate between the family reunification rights of 1951 Convention refugees and those granted subsidiary protection. This should be avoided.

In Finland, the main difference in treatment between 1951 Convention refugees and subsidiary protection beneficiaries is that the requirement to demonstrate means of support applies invariably to the latter category as of 1 July 2016. The income levels set as means of support criteria are very high,[154] and often create a barrier for subsidiary protection beneficiaries.

5.1.2. Child refugees

Most states permit unaccompanied minors to apply for family reunification with their parents. This entitlement often contributes to disputes about age, in particular for child refugees from countries with poor recording of births, such as Afghanistan. Human rights concerns about the reliability and appropriateness of age assessment processes are now well established.[155] In particular, the lack of probity of medical methods of age assessment has been established.[156] The Commissioner has reiterated that age determination of unaccompanied minor migrants is a complex process involving physical, social and cultural factors and that incorrect age assessment may result in detrimental consequences for the child concerned, including wrongful detention. Therefore, age assessment should not depend only on a medical examination.[157] PACE has resolved as follows on this matter:

> age assessment should only be carried out if there are reasonable doubts about a person being underage. The assessment should be based on the presumption of minority, involve a multidisciplinary evaluation by an independent authority over a period of time and not be based exclusively on medical assessment. Examinations should only be carried out with the consent of the child or his or her guardian. They should not be intrusive and should comply with medical ethical standards. The margin of error of medical and other examinations should be clearly indicated and taken into account. If doubts remain that the person may be underage, he or she should be granted the benefit of the doubt. Assessment decisions should be subject to administrative or judicial appeal.[158]

In most states, the right to family reunification of unaccompanied minor refugees only extends to their parents. Where it does not extend to other family members, this often leads to great hardship and family separation, as parents must choose to leave behind other children if they wish to avail themselves of the right to reunification with an unaccompanied minor.

> Human rights concerns about the reliability and appropriateness of age assessment processes are well established.

In contrast, in the UK, there is no provision in statute to allow child refugees to apply to have their parents come to join them in the UK. However, an Upper Tribunal (Immigration and Asylum Chamber) decision in 2016 held that refusal to grant admission would violate Article 8 of the Convention.[159] The decision took account of the human rights standards (Convention and CRC) and also noted the constrained (if fairly typical) circumstances of the young refugee. The judge accepted that if family reunification in the UK was not enabled, the child refugee would be:

> driven to consider alternatives, some of them manifestly dangerous given his youth and unaccompanied and unsupported status. These include the precarious journey involved in attempting to reunite with the [parents] wherever they may be at present. The evidence points to the probability that they are either in Khartoum or the UNHCR refugee camp several hundred kilometres away. The situations in both locations are fraught with danger and imbued with deprivation. Reunification of this family in their country of origin, Eritrea, is not a feasible possibility.[160]

Both the waiting times and protracted procedures have a particularly adverse impact on unaccompanied minors. They mean that often applicants will "age out" of the protective provisions for unaccompanied minors before they have the legal or practical opportunity to apply for family reunification.[161] If that occurs, the legal implications are severe. Normally, adult refugees can only exceptionally reunify with their parents, if they can prove the dependency of the parent on the child. This is unlikely to be established where a refugee flees in childhood, and has had a protracted flight or period waiting as an asylum seeker.

> Unaccompanied minors are adversely affected by waiting times and protracted procedures.

In the Netherlands, the law requires that a minor be under 18, not when the application for family reunification is made, but rather when the decision on that application is given. The compatibility of this requirement with EU law is currently before the CJEU.[162] In Finland, the position of unaccompanied minor sponsors became more difficult in 2010, when the law was changed to this effect also, so that a minor had to be under 18 when the decision was given. Family reunification proceedings being very long, many young sponsors reach the age of 18 years during the proceedings.

The maximum allowed length established by the Aliens Act for the decision-making process in family reunification cases is nine months. If this is exceeded and the delay is not caused by the applicant, the decision can still be positive even if the sponsor has reached 18 years of age. In 2014, the average processing time was 414 days in cases where the sponsor was a minor beneficiary of international protection and the applicant was his or her parent. At the moment the decision can usually be made in the required nine months.

5.2. Family members eligible for reunification

The realities of life in many refugees' regions of origin mean that family units may not be nuclear families based on a formal marriage. Flight and protracted exile also impact on family units and structures. UNHCR's ExCom Conclusion No. 24 notes in this respect that: "It is hoped 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".[163] It is also noted that PACE, through Recommendation 1686 (2004) on human mobility and the right to family reunion, has urged European states:

> to apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents.[164]

5.2.1. Spouses and partners

Some states have provisions for family reunification for stable partners, even if not married. However, the types of evidence needed to demonstrate the stability of a partnership vary greatly, and some states only accept formalised civil partnerships. In Ireland, new legislation[165] defines immediate family members as the spouse, civil partner, minor children, or parents and siblings if the sponsor is an unmarried minor. The inclusion of civil partners is noteworthy, but unlikely to enable reunion of same-sex couples, given that most refugees flee states where this status is not legally available, although domestic case law recognises common-law marriages.[166] In *Pajić v. Croatia*, the Court found a violation of Article 14 in connection with Article 8 of the Convention in the fact that family reunification rules in Croatia permitted no applications from same-sex couples.[167] By the time the case came to Court, the domestic law had been reformed.

> ❞ Raising age requirements is another obstacle to family reunification.

Some states have introduced age requirements to raise the age at which migrants in general may benefit from family reunification, with the age of 21 being set as the maximum in the FRD.[168] Five EU member states (Austria, Belgium, Cyprus, Lithuania and the Netherlands) have set the age limit at 21. Denmark is not bound by the FRD

and has set an even higher age limit of 24 for some time. In contrast, the UK Supreme Court held that a similar requirement imposed in the UK breached Article 8 of the Convention, as it was found disproportionate to the stated aim of combating forced marriage.[169] 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.

5.2.2. Children

Most states permit reunification with minor children, including adopted children. However, some states require formal proof of adoption, which may be difficult to procure. Another legal difficulty concerns children of one spouse or partner. Member states may demand proof that the other spouse or partner agrees to the reunification. This proof may also be difficult for refugees to procure. Further evidential barriers to proving parent-child relationships are considered in section 5.3.3. below. In general, family reunification of adult children is not permitted, unless there is some particular need. To illustrate, Article 4, paragraph 2.b, of the FRD refers to discretion to admit "the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health".

In the UK, the definition of "child" adds additional criteria beyond minority – in addition the child must be "not leading an independent life" and must have been "part of the family unit of the refugee or person with humanitarian protection (i.e. a subsidiary protection beneficiary) at the time when the refugee fled".[170] At one point, this latter requirement was interpreted to mean that children born post-flight (even if conceived pre-flight) were not eligible for reunion, but the practice on this matter has changed.

5.2.3. Extended family members and the question of their dependency

Most national legislation only includes immediate family members in the entitlement to family reunion. Some European states have discretionary processes for extended family members, provided they are dependent on the sponsor, following the structure of the FRD. A recent report concluded that "[c]riteria for determining dependence vary widely across Europe, creating a lottery for applicants who seek to be reunified with their family (beyond the nuclear family)".[171]

Until recently, Spain did not require dependency to be proven for relatives in the ascending line, but that requirement has been recently introduced. In practice it appears that dependency is construed as financial dependency as demonstrated through regular financial contributions. It appears that this requirement is difficult to prove for those whose relatives still live in conflict zones where access to financial services may be impeded. In Hungary, dependency is 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 during the preferential period for refugee family reunification of three months after the recognition.

In Ireland, new legislation in force since December 2016 appears to end the discretion to admit extended family members.[172] The previous legislation required

demonstration of dependency or demonstration that the family member was "suffering from a mental or physical disability to such an extent that it is not reasonable for him or her to maintain himself or herself fully".[173] It is anticipated that this change is likely to split up families – for example by requiring parents reuniting with minors to leave adult children or elderly relatives behind. One NGO with long experience in assisting refugee family reunification predicts "the new family reunification provisions will devastate families".[174]

> " Adult children, siblings and elderly relatives often cannot benefit from family reunification.

As is discussed below, there is good practice and persuasive guidance on the interpretation of "dependency", from both UNHCR[175] and the European Commission as regards the FRD.[176] In EU law, the Commission notes that the CJEU has held that the status of "dependent" family member is the result of a factual situation characterised by the sponsor's provision of legal, financial, emotional or material support for that family member, or by the sponsor's spouse/partner.[177]

This guidance should be used to promulgate formal guidelines on the concept of dependency. The concept should allow for a flexible assessment of the emotional, social, financial and other ties and supports between refugees and family members. If those ties have been disrupted due to factors related to flight, this should not be taken to signal that dependency has ceased.

5.2.4. Distinctions between pre- and post-flight families

Many European states limit refugees' privileged access to family reunification to the so-called "pre-flight family", relying on Article 9, paragraph 2, of the FRD. However, distinctions between pre- and post-flight families warrant scrutiny from a human rights perspective, and may breach Article 14 taken together with Article 8 of the Convention.[178] Some states use this exception in a rigid manner, requiring families to be formed in the country of origin of the refugee. However, this ignores the reality that many refugees may have spent long periods in exile or in flight, and have formed families outside the country of origin. Moreover, a family formed in the country of asylum is still a family under human rights law. While this does not mean that all families formed there must be permitted to stay together, in the case of relationships where the couple has no other way to enjoy family life, that is nevertheless the implication of the human right to respect for family life.[179]

> " A family formed after fleeing the country of origin is still a family under human rights law.

The UK rules on family reunification contain a similar distinction between pre- and post-flight families. The definitions of both categories are complex. Their effect is that many refugee families are excluded from the more favourable conditions applicable

to pre-flight families. Post-flight families are subject to all the normal immigration rules on family reunion, including high financial thresholds and language tests. Similarly in Norway, all refugees are currently entitled to family reunification under the same conditions.[180] However, Norwegian law contains the pre- and post-flight distinction, thus subjecting post-flight couples to the ordinary family reunification rules, which are extremely demanding.[181]

5.3. Legal and practical barriers to refugee family reunification

5.3.1. Long waiting times

As mentioned above, when Germany limited the rights of subsidiary protection beneficiaries to family reunification, it chose to use a two-year waiting period. As regards 1951 Convention refugees, the FRD generally only allows a two-year waiting period for migrants, but explicitly envisages that 1951 Convention refugees who apply for family reunification should be exempted from it.

Significant waiting periods apply to subsidiary protection beneficiaries in Austria (3 years), the Czech Republic (15 months), Denmark (3 years), and Switzerland (3 years).

Austria's long waiting period of three years for subsidiary protection beneficiaries was introduced in June 2016.[182] In Denmark in early 2015, the national legislation was amended to introduce a new category of "temporary protection status", along with 1951 Convention refugee and subsidiary protection status.[183] The new status is designed for those who, due to a situation of generalised violence, are at risk of ill-treatment contrary to the Convention, the ICCPR and/or the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It is assumed that such persons' protection need is of a more temporary nature than that of 1951 Convention refugees and subsidiary protection beneficiaries. As of February 2016, only 1951 Convention refugees and subsidiary protection beneficiaries are entitled to apply for family reunification when they are granted protection in Denmark. Sponsors holding temporary protection status are subjected to a three-year waiting period.

> " Long processing and waiting times hinder the effective realisation of the right of refugees to family reunification.

As well as these formal waiting periods, some states generate waiting times informally, with similar restrictive effects. New legislation in force since December 2016 in Ireland introduces a one-year waiting period after status has been recognised before family reunification may be sought.[184] This is particularly worrying since status determination is often protracted in Ireland, and sometimes takes years. The Netherlands does not differentiate between 1951 Convention refugees and subsidiary protection beneficiaries. It maintains a single asylum status. In February and May 2016, the government informed asylum seekers that family reunification could take as long as two years, since the asylum procedure could last 18 months,

the maximum allowed by the EU Asylum Procedure Directive,[185] and the application for family reunification would take yet another six months. Both letters were widely publicised and posted on social media by the government.[186] In effect, this was understood to establish an equivalent practice to the newly introduced German two-year waiting period.

In Switzerland similarly, those refugees with so-called "Status F", a form of temporary status for those who are not 1951 Convention refugees, are subjected to a waiting period of three years from recognition to reunification. Family reunification of such sponsors depends on the availability of suitable housing and proof that the family is not dependent on social assistance. Many applicants in Switzerland are granted this temporary status (in 2016, more people were granted this status than recognised as 1951 Convention refugees).[187] In practice, being granted this status makes finding employment more difficult, thereby making it more difficult to meet the material conditions for reunification as regards financial independence and suitable accommodation. The accommodation requirement is interpreted strictly, such that one bedroom is required for each child, and the accommodation must be secured at the time the application is made.

5.3.2. Short deadlines

Many states impose tight deadlines for family reunification applications, requiring applicants to submit applications within three months of being recognised if they wish to benefit from the more liberal rules for refugees. For many refugees, meeting this deadline is impossible. There may be difficulty tracing family members, gathering the requisite documentation and arranging for family members to travel to the relevant consulates or embassies.

> " For many refugees, meeting tight deadlines to apply for family reunification is impossible.

In 2012, UNHCR noted that most states did not make use of the facility in the FRD to limit refugees' preferential access to family reunification using this three-month time limit.[188] This facility was included in the FRD at the behest of the Netherlands, which had such a provision in its domestic law. Notably, at present a proposal is under discussion there to extend the time limit for the application for family reunification from three to six months.[189] At the time, UNHCR welcomed this approach:

> in recognition of the specific circumstances of refugees, and call[ed] on all Member States not to apply such time limits to the more favourable conditions granted to refugees. As a minimum, time limits should only apply for the introduction of an application for family reunification and should not require that the applicant and family member provide all the documents needed within the three month period.[190]

Since 2012, an increasing number of states apply the short time limit of three months. This is the case in Germany, for example. However, some practical measures have been adopted to enable sponsors to apply within the three-month period. In order to ensure that the three-month requirement is formally kept to, applicants

are encouraged to register on a specified webpage within the three-month period, while waiting for their embassy appointment.[191]

In Luxembourg, refugees are entitled to family reunification on the more favourable conditions only if an application is filed within three months of recognition (even if they cannot locate their family members). After this point in time, they must fulfil the demanding conditions relating to health insurance, housing and stable resources.[192] In Sweden too, 1951 Convention refugees must apply within three months if they wish to avoid onerous maintenance requirements (which entail strict income and accommodation requirements). Hungary is also an example of this approach. It has a preferential system for family reunification for 1951 Convention refugees, but it is often practically impossible for them to access it.[193] The preferential rules only apply to 1951 Convention refugees who apply within three months of being informed of recognition (this is the case since 1 July 2016 – previously it was six months), and do not apply to subsidiary protection beneficiaries. Outside the preferential system, the requirements relate to financial resources, accommodation, health insurance and funds for family members' return travel.

In Norway, families must apply for family reunification within one year after the sponsor was granted a residence permit. If they fail to do so, they become subject to the stringent general immigration requirements.

5.3.3. Onerous evidential requirements

Refugees often face particular difficulties in providing official documentation to substantiate their family relationships. Article 11, paragraph 2, of the FRD obliges member states to take into account other evidence when the refugee cannot provide official documentary evidence, and provides that, "[a] decision rejecting an application may not be based solely on the fact that documentary evidence is lacking". UNHCR's ExCom Conclusion No. 24 calls for facilitated entry on the basis of liberal criteria of family members of persons recognised to be in need of international protection, and in particular underlines that, "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". The same position is contained in paragraph 4 of the Council of Europe Committee of Ministers Recommendation No. R (99) 23 on family reunion for refugees and other persons in need of international protection.

> " Providing official documentation to show family relations is often particularly problematic for refugees.

However, empirical studies demonstrate that, all too often, applications are refused for lack of documentation, without providing the opportunity to submit alternative evidence. In the UK, studies demonstrate that significant practical barriers to family reunification emerge due to the high standards of proof required by the UK authorities to demonstrate family links. In 2015, the British Red Cross published a report based on 91 family reunion cases, which found that family reunion applications are not

straightforward and that vulnerable family members are left in danger as a result of difficulties accessing family reunification.[194] A recent official inquiry substantiated complaints that procedures were too onerous and rejections too frequent.[195] The report found that the Home Office was too ready to refuse applications on the basis of failure to provide sufficient evidence, and failed to defer decisions to allow applicants to produce the "missing" evidence. A particular problem was noted in relation to the provision of DNA evidence. In 2014, the Home Office withdrew funding support for DNA testing, leading to a significant increase in refusals.

Moreover, for single-parent families, some states demand proof of parental authority or the death of the other parent. Both can be impossible to provide if one parent remains in a conflict zone. For non-biological children, there are particular challenges because in many refugees' states of origin, adoption is not a formal process.

States increasingly demand DNA proof of parent-child relationships for refugees. The costs of DNA tests are often prohibitively high. As mentioned above, when the UK withdrew financial support for DNA tests, many applicants were unable to provide this evidence themselves and the rate of rejected applications increased.

DNA testing raises a number of ethical and human rights issues. As a recent scholarly study noted:

> It reduces the socio-biological complexity of the family to a solely biological entity and has the potential to exclude family members that are only related socially and not genetically. Subsequently, it establishes a double standard for family recognition between EU citizens and immigrants. Parental testing may also show that family members are not biologically related and therefore pose ethical questions. Additionally, it can be used as another means of reducing legal immigration.[196]

UNHCR urges that:

> 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.[197]

In terms of good practice, problems with documentary proof can be reduced by accepting standard documents issued by official authorities rather than copies of the original birth or marriage certificates. For example, the German government in May 2015 decided that credible evidence (*qualifizierte Glaubhaftmachung*) of a family relationship was sufficient rather than full documentary proof and dropped the requirement of original civil registration documents and legalisation of these documents where an excerpt from the official Syrian family register is presented.[198]

5.3.4. Financial cost barriers

Family reunification also emerges as a financially costly process, in particular when formal visa and embassy fees, translation costs, verification of documents, travel costs to distant embassies and DNA tests are taken into account.[199] For this reason, UNHCR urges fee waivers and financial support to enable refugee family reunification.[200]

As regards formal fees, for instance, in Norway, adult applicants must all pay a 500 euros application fee. More generally, the accumulated costs of fees, travel, translation of

documents and other formalities are several thousand euros for a family. Similar costs are estimated in Belgium.[201]

The cost of documentation accompanying the application for family reunification can be reduced by reducing the number of documents required to the essential ones, by waiving legalisation of documents and accepting English translations of standard documents (marriage books and birth certificates). If official travel documents are not available, other documents should be accepted.

As to the costs for the family members to travel to the sponsor's country of refuge, different solutions are possible. The Danish government used to fund transport of family members being reunited with refugees living in Denmark. However, that funding was abolished as one of a series of recent restrictive measures.[202] In the Netherlands, an NGO (VluchtelingenWerk Nederland) pays travel costs of families unable to pay for the tickets themselves from a special fund fed by private donations and a national lottery. In Belgium, an NGO, Un Visa, Une Vie (One Visa, One Life) crowdfunds visa applications to enable Syrian refugees' families to join them in Belgium.

5.3.5. Challenges in refugees' country or region of origin hindering family reunification

The country of origin of refugees is usually mired in conflict, instability and/or has a repressive government. This fact inevitably poses challenges for family reunification, in particular if new or reissued documentation is required from the state of origin. Demanding such documentation can also pose risks for refugees, by making their governments aware of their activities and place of residence, or their families' plans to flee. Some European states do not accept identity and marriage documentation from refugees' countries of origin, particularly if they are viewed as weak states such as Somalia or Afghanistan, considering the documentation to be unreliable. In these cases, the fairness of procedures depends on the authority's flexibility in accepting alternative forms of proof of the family relationship.

> " Obtaining travel documents is often a challenge for family members, even once the family reunification is granted.

A second set of practical barriers emerge because of family members' limited access to embassies and consulates. Previous studies have documented practices that physically preclude access to embassies to pick up visas, and long delays that effectively bar refugees' families from benefiting from the preferential treatment to which they would otherwise be entitled.[203] When embassies in countries of origin are closed (as is often the case), European states nowadays tend to require family members to travel to embassies elsewhere in person. Often the embassies that accept applications are not the most obvious ones. For example, Norway requires family members to travel to the following consulates – Khartoum for Eritreans, Addis Ababa for Somalis, Islamabad for Afghans.

As regards the UK, while applications from family members outside the UK are generally made online, fingerprints and a photograph (known as "biometric information") must be submitted at a visa application centre. Difficulties arise because refugees' family members are often in countries without such a visa facility, in which case the applicant needs to visit the relevant visa application centre in another country. Applicants from Syria must go to Lebanon or Jordan, but are not directed to Turkey, for example. In contrast, Germany introduced the possibility to make online appointments for visa applications in many of its consulates in the Middle East in 2015. The main interviews are still in person, but at least the booking system means that multiple trips do not have to be made.

Many of these barriers could be reduced with greater co-operation between European states. In particular, EU member states could consider using forms of co-operation provided for in Articles 40 and 41 of the EU Visa Code to deal jointly with visa applications where a member state still has consular services, or opening a new common visa office in or near to the countries of origin of many refugees.

Beyond the state of origin, the realities of flight mean that refugee families are often separated, and refugees typically flee in the first instance to neighbouring countries, where their status is usually precarious. Hungary also imposes one particularly restrictive and anomalous rule. It is required that the family member submitting an application for family reunification must be "lawfully resident" in the country from which he or she applies.[204] For family members who are themselves fleeing (as is often the case), this requirement may be impossible to fulfil. Furthermore, combined with the requirement that an application must be submitted through a Hungarian consulate, the "lawfully resident" rule may constitute an insurmountable obstacle. In some regions there are no consulates in every country and it is normally not feasible for family members to be "lawfully resident" in a country they are only temporarily visiting with a view to submitting their application.[205] Hungarian practice is also rigid and restrictive in its approach to travel documents, proof of marriage and translation requirements.[206]

Even once family reunification applications have been granted, family members often face additional practical barriers as they still require a visa to travel. However, a regular visa requires a valid passport. There are well-established alternative forms of documentation (1954 Convention travel documents, emergency ICRC travel documents, national laissez-passers) that may be issued to facilitate travel, but it appears that many states do not make them available.[207]

The asylum system in Turkey is somewhat different, in that it distinguishes sharply depending on the nationality of the refugees in question. Most Syrian refugees as a group enjoy a particular form of the "temporary protection". In law, those with this status are entitled to apply for family reunification with family members outside Turkey. The regulation's language suggests that there is no right to family reunification, but merely a right to request it.[208] Family members are defined as spouse, minor children and dependent adult children.[209] The regulation also provides that in the case of unaccompanied children, "family unification steps shall be initiated without delay without the need for the child to make a request".[210] A recent report suggests that this provision is not implemented in practice.[211] Many non-Syrian refugees in

Turkey live in limbo and asylum procedures are difficult to access. For most, routes to regular status and the attendant family reunification they may seek, remain difficult or impossible to access.

5.4. Status of beneficiaries of family reunification

Once admitted to the country of asylum, UNHCR's ExCom Conclusion No. 24 notes in this respect that: "[i]n 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 head of the family who has been formally recognized as a refugee". Similarly the Council of Europe Committee of Ministers advises member states to grant the family member a residence permit of the same duration as that held by the principal.[212]

> " Family reunification processes should ensure gender equality and child protection.

Under many systems, spousal residence rights may lapse if the authorities discover that a married couple is no longer together. This practice raises particular concerns from gender equality and child protection perspectives, as it can create a risk factor for those experiencing or at risk of domestic violence. Some states mitigate that risk by providing autonomous migration statuses or allowing those who experience domestic violence to apply for independent status. Article 59 of the Istanbul Convention urges states to ensure that victims of domestic violence whose residence status depends on that of the spouse or partner, in the event of the dissolution of the marriage or the relationship, are granted (in the event of "particularly difficult circumstances") an autonomous residence permit irrespective of the duration of the marriage or the relationship.[213] Similarly, the Council of Europe Committee of Ministers recommends that family members should be granted an autonomous residence permit independent of the principal after four years of legal residence. In the case of divorce, separation or death, member states should allow applications for an autonomous residence permit when the family member has been residing legally in the country for more than one year.[214] In the UK, refugee spouses were excluded from these protections, but a successful case was brought leading to a ruling that this exclusion discriminated against the spouses of refugees, both on grounds of their particular legal status and indirectly on grounds of gender.[215]

Concluding observations

This issue paper has clarified that in the case of refugees, broadly understood, the right to respect for their family life requires swift and effective family reunification. Having been recognised as in need of international protection, refugees cannot be expected to make their home elsewhere, and ensuring swift family reunification is imperative to avoid prolonging their suffering and allowing them to rebuild their lives in their new homes. Without family reunification, family separation is often agony for refugees, in particular if their family members have been left behind in conflict zones, camps or are living precariously without means of subsistence, as is often the case.

> ” Family reunification for refugees is integral to their enjoyment of the human right to family life and their integration in host societies.

Both the European Convention on Human Rights and EU law recognise in general that refugees should be accorded a privileged access to family reunification. Article 8 of the Convention will normally tilt the balance decisively in favour of family reunification for refugees, as reunification in the country of origin is impossible (and should be ruled out *ipso facto*) and is highly unlikely to be possible in third countries. 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.

However, in practice, as the analysis in this issue paper reveals, refugees and, in particular, beneficiaries of subsidiary and other forms of protection cannot easily enjoy their right to family reunification. The personal scope of the apparently privileged access to family reunification is often limited, and only available to those refugees who apply promptly or who are willing to wait. Additional legal hurdles include onerous evidential requirements, financial cost barriers, and various challenges for family members in accessing embassies and consulates. Many of the restrictions identified were 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. While there is no question about the challenge some Council of Europe member 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.

To conclude, family reunification, in particular for refugees, is integral to the effective enjoyment of the human right to respect for their family life and to their integration in host societies. Without family reunification, refugees often have little prospect of settling into new lives, even temporarily. Family reunification is also a key aspect of refugee protection – a well-ordered asylum system should, from the outset, give due diligence to questions of family life and the whereabouts of the family members of asylum seekers and refugees. The recommendations set out at the beginning of this paper are addressed to Council of Europe member states in order to make the right to family reunification practical and effective. The obligation is incumbent on all state and regional authorities to make this work. The European Union and its member states are urged to work together to ensure that asylum policies and law, including the Dublin Regulation, enable rather than undermine refugees' right to family unity. Last but not least, the important role for civil society actors, who have both enabled legal challenges where legal processes are violating the right to family life, and in supporting refugees through the costly and complex bureaucracy of family reunification, should be highlighted.

Endnotes

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For refugees, the right to family reunification is crucial because separation from their family members causes significant anxiety and is widely recognised as a barrier to successful integration in host countries. Well-designed family reunification policies also help create the safe and legal routes that are necessary to prevent dangerous, irregular journeys to and within Europe.

Despite the importance of facilitating family reunification for both refugees and European states, the trend is now towards imposing greater restrictions in this area. This paper assesses restrictions on the right to family reunification, as enshrined in United Nations human rights treaties, the case law of the European Court of Human Rights and European Union law, and shows that many of the legal and practical restrictions currently in place raise concerns from a human rights perspective.

Based on this analysis, the Council of Europe Commissioner for Human Rights sets out a number of recommendations to member states intended to assist national authorities in re-examining their laws, policies and practices in order to give full effect to the right to family reunification, for the benefit of both refugees and their host communities.

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