Information Note on Family Reunification for Beneficiaries of International Protection in Europe

June 2016

Foreword

The European Council on Refugees and Exiles (ECRE) is a pan-European alliance of 90 NGOs protecting and advancing the rights of refugees, asylum seekers and displaced persons. Our mission is to promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law.

The European Legal Network on Asylum (ELENA) is a forum of legal practitioners who aim to promote the highest human rights standards for the treatment of refugees, asylum seekers and other persons in need of international protection in their daily individual counselling and advocacy work. The ELENA network extends across most European states and involves some 500 lawyers and legal counsellors.

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Introduction and Methodology

1. This information note presents an overview of some of the most pertinent legal aspects of family reunification for beneficiaries of international protection within Europe. Family reunification has become an increasingly pressing topic in the context of the increase in arrivals of asylum seekers to Europe in recent years. A renewed focus has been placed on family reunification as a safe and legal channel for migration to the EU as a means of avoiding the loss of life, showing solidarity to Member States of first entry into the EU, and preventing secondary movement.[1] The evidence also indicates that family reunification policy is becoming an increasingly important factor for asylum seekers in their choice of destination country.[2] In response to this, a number of Member States[3] have introduced restrictive provisions in a 'race to the bottom' of standards aiming to reduce access to family reunification for beneficiaries of international protection as a method of managing migration.

2. This note provides an overview of the applicable legal framework for family reunification in international and EU law, detailing relevant jurisprudence from the European Court of Human Rights and the Court of Justice of the European Union, as well as highlighting useful jurisprudence in national contexts. It provides guidance on how provisions on family reunification should be interpreted in a manner that fully complies with international law and fundamental rights. The note in no way purports to provide a comprehensive assessment of the situation of beneficiaries of international protection in relation to the right to family reunification.

3. Information concerning the experiences of lawyers supporting refugee family reunification claims in Europe was analysed on the basis of primary data obtained from questionnaires submitted by the European Legal Network on Asylum (ELENA) national coordinators.[4] This

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[1] See e.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, Brussels 13.5.2015, COM (2015) 240 final, available here: http://bit.ly/1Yl6Ooa; UNHCR, Stablizing the situation of refugees and migrants in Europe – Proposals to the Meeting of EU Heads of State or Government and Turkey on 7 March 2016, available here: http://bit.ly/1pq4mla.

[2] UNCHR Survey: 41% of Syrians state family reunification as reason of the choice of destination country: http://www.unhcr.org/56cc4b876.html.

[3] Such as Austria, Germany, Finland, Ireland, Sweden, Denmark and Norway. In Austria, a recent Bill was passed that prohibits beneficiaries of subsidiary protection to apply for family reunification for their first three years in Austria. See Guardian 'Ban Ki-moon attacks 'increasingly restrictive' EU asylum policies', 28 April 2016, http://bit.ly/21furAx. Similar practice can also be found in Denmark. In Germany, family reunification is only possible under strict conditions for persons with subsidiary protection status, in particular, it is necessary to prove that sufficient living space and sufficient financial resources exist to support all family members in Germany. These requirements can only be met by few persons. - See more at AIDA, http://bit.ly/1ToF4fn. In Ireland, they have reduced family reunification to core family members, see International Protection Act here http://bit.ly/1ToF4fn. In Sweden, proposals were made by the Government earlier this year to severely restrict family reunification for beneficiaries of international protection, see Government Offices of Sweden 'Proposal to temporarily restrict the possibility of being granted a residence permit in Sweden' 8 April 2016, see here here http://bit.ly/1rZ0jNY.

[4] For more information on the ELENA network see: http://bit.ly/1LOd9ka . This note is informed by data received by ELENA coordinators in the following countries: Austria, Belgium, Cyprus, Denmark, Finland, Germany, Greece, Hungary, the Netherlands, Norway, Poland, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

information was complemented by desk research and analysis of several secondary resources in the form of published articles, reports and literature.

4. The note is organised into a number of chapters: the international and the EU legal frameworks, the status of the sponsor, the scope of family members, documentation and evidentiary requirements, the length of the family reunification procedure and how Dublin family unity cases can impact the Family Reunification Directive.[5]

5. This should be read in conjunction with the comparative report "Disrupted Flight: The realities of the separated families in the EU", published by ECRE and the Red Cross EU Office in November 2014[6] which includes information from legal practitioners in 12 EU Member States on the practical obstacles faced by beneficiaries of international protection and their family members in accessing their right to family reunification. This ECRE/ELENA Information Note aims to expand on the findings of the Disrupted flight report and detail jurisprudence and legal arguments that may be useful to rely upon in any forthcoming litigation and advocacy in Europe.

[5] The paper focuses on these issues as these are areas which were highlighted from responses of national ELENA coordinators as being particularly problematic with the most potential for litigation, using standards from CJEU and ECtHR jurisprudence.

[6] The Red Cross EU office & ECRE, 'Disrupted Flight: The Realities of Separated Refugee Families in the EU', November 2014, available at: http://bit.ly/1S43yvS.

International framework

6. The concept of a family is protected under international law. The Universal Declaration of Human Rights (hereinafter "the UDHR") and International Covenant on Civil and Political Rights (hereinafter "the ICCPR") provide that a family, as a fundamental unit of society, should be respected and protected.[7] In all cases concerning families with children, the UN Convention on the Rights of the Child applies, with both the European Court of Human Rights (hereinafter "the ECtHR") and Court of Justice of the EU (hereinafter "the CJEU") underlining the primacy of the child's best interests.[8] The UN Convention on the Rights of the Child (hereinafter "the CRC") specifies that State Parties should take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of his or her parent's or guardian's legal status and 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. The Convention also provides that children have a right to live with their parents.[9]

7. Under the European Convention of Human Rights (hereinafter "the ECHR"), the right to respect for 'private and family life' is guaranteed in Article 8 of the Convention. The right to respect for family life is engaged where there is an interference by a public authority with the exercise of a person's right to respect for his private or family life.[10] Where a case concerns family life as well as immigration, the Court has pointed out that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory, this will depend on the particular circumstances of the persons involved as well as the general public interest. The receiving State is allowed to put conditions on the entry and residence of new people to its territory in accordance with its obligations under international law.[11] Article 12 of the Convention provides for the right to marry and to found a family, according to the national laws governing the exercise of this right

[7] The Universal Declaration of Human Rights, 1948, Article 16(3), International Covenant on Civil and Political Rights, 1966, article 23(1).

[8] This has been reiterated in CJEU C-540/03 *Parliament v Council* where the CJEU stated for the first time that the CRC has to be taken into account when applying the general principles of Community law and, therefore, equally when applying the EU Family Reunification Directive.

[9] UN Convention on the Rights of the Child, 1989, Article 9(1), 'States Parties shall ensure that a child shall not be separated from his or her parents against their will'; Article 10 (1) 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. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family". UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of 2 May 2013.

[10] ECtHR, *Marckx v. Belgium*, 13 June 1979, Series A no. 31, p. 11, para 31. Noteworthy to mention is that in some States the right to family life has been laid down in the national constitution; Austria, Ireland, Germany and Portugal for example.

[11] See for example, ECtHR, *Gül v. Switzerland*, Application no. 23218/94, 19 February 1996; ECtHR, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09, 6 February 2013 and ECtHR, *Tuquabo-tekle v. the Netherlands,* Application no. no. 60665/00, 1 March 2006.

and Article 14 provides for the prohibition of discrimination which is particularly relevant in terms of the difference in treatment between family unity conditions for beneficiaries of international protection and refugees.

8. The European Social Charter[12] also has provisions in relation to family reunification.[13] Recital 16 of the revised Social Charter provides that the family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development. Article 19 guarantees the right of migrant workers and their families to protection and assistance, and obliges states, *inter alia*, 'to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory'.[14] However, when read in conjunction of the appendix on the personal scope of the European Social Charter, which establishes that the European Social Charter provisions are to be applied to refugees and stateless persons insofar as states are bound under the Geneva Convention and the Convention on the Status of Stateless Persons, Article 19 European Social Charter is also applicable to refugees.[15] The Committee, in their statement of interpretation on the rights of refugees under the European Social Charter, considered that the obligations undertaken by the States Parties by virtue of the European Social Charter 'recalls that these obligations require a response to the specific needs of refugees and asylum seekers, such as […] the liberal administration of the right to family reunion'.[16]

European Union law framework

Primary EU Law

9. The Treaty on the Functioning of the European Union (hereinafter "TFEU") states in Article 79 that 'the Union shall develop a common immigration policy'. Article 79(2) provides that the European Parliament and the Council shall adopt necessary measures in the areas of 'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'.[17] Any action undertaken by a Member State, within the EU law framework, must be read and applied in line with the EU Charter of Fundamental Rights (hereinafter "the Charter"), in other words, when authorities at the national level are implementing EU law, they must ensure that this is done consistently with the Charter. However, the Charter is only applicable when the measure falls within the scope of EU law,[18] and the CJEU in *Akberg Fransson* equated implementation to falling

[12] See also the Explanatory Report to the European Social Charter (Revised) Strasbourg, 3.V.1996.
[13] The European Social Charter, 1961 in Article 16 provides that, 'With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life'.
[14] Article 19 (6) European Social Charter (Revised), 03.V.1996on the right of migrant workers and their families to protection and assistance.
[15] Appendix to the European Social Charter, (paragraphs 2 and 3).
[16] European Committee of Social Rights, 'Statement of interpretation on the rights of refugees under the European Social Charter', (elaborated during the 280th session of the European Committee of Social Rights in Strasbourg, 7-11 September 2015), 5 October, p.3.
[17] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01.
[18] European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, Article 51.

within the scope of EU law.[19] Put more simply, the Charter is only applicable in instances where EU law is applicable. Therefore, the Charter cannot be relied upon for purely national family reunification policies.

10. Article 7 of the Charter (Respect for private and family life) mirrors Article 8 of the ECHR. Similarly, Article 9 of the Charter (Right to marry and right to found a family) is based on Article 12 of the ECHR. In accordance with Article 52 (3) of the Charter, where the Charter provisions contain rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same (and never lower) as that guaranteed by the Convention, but it does not prevent the Charter from offering more extensive protection.

Secondary EU Law

11. The **recast Qualification Directive** provides that Member States shall ensure that family unity can be maintained.[20] The **Family Reunification Directive**[21] governs the family reunification practice and procedure for refugees[22] and the CJEU has found that it established a right to family reunification.[23]

12. The **Dublin III Regulation**[24] also has provisions governing family unity. Recital 14 provides that respect for family life should be a primary consideration of Member States when applying this Regulation and Recital 15, 16 and 17 also deal with family unity. The Regulation, which determines which Member State is responsible for deciding upon an asylum claim shall take into consideration, when deciding on the responsible Member State, any available evidence regarding the presence, on the territory of a Member State, of family members,[25] relatives or

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[19] CJEU, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*,26 February 2013.

[20] Article 23 (1) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereinafter "the recast Qualification Directive"), *OJ* 2011 L 337/9.

[21] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter "the Family Reunification Directive"), *OJ* 2003 L 251/12. The Directive defines the following as family members that qualify for reunification; (a) the sponsor's spouse; (b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations; (c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement; (d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement. The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

[22] Some Member States did not opt into the Directive (DK, IE and UK).

[23] CJEU, Case C-578/08, *Chakroun*, 4 March 2010.

[24] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[25] In accordance with Article 1 (c) of the Regulation, family members include, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States: the spouse of the

any other family relations of the applicant.[26] For unaccompanied minors, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor.[27] Furthermore, where the applicant has a family member who has received international protection in a specific Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.[28] As such, Articles 8, 9 and 10 of the Regulation establish an obligation on States to ensure full respect for the principle of family unity.[29]Articles 16 and 17, which deals with dependent persons and discretionary clauses, imply an obligation to unite dependent family members and also provide the possibility for Member States to apply the discretionary clauses to family members not covered by the definition.

Applicable rights and principles

The best interest of the Child

13. The UN Convention on the Rights of the Child provides for equality in the enjoyment of rights (Article 2(1) CRC) and states that the best interests of the child should be a primary consideration (Article 3(1) CRC). Article 9 and Article 10 CRC obliges State parties to deal with applications for family reunification by a child and his or her parents to enter or leave a State Party for the purpose of family reunification in a positive, humane and expeditious manner.[30] The CRC provides that States shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities of the child's parents, legal guardians, or family members.[31]

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applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals; the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law; when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present; when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present.

[26] As part of the hierarchy of criteria, Article 7 (3) of the Dublin Regulation III provides that '[I]n view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance'.

[27] Article 8 Dublin III Regulation.

[28] Article 9 Dublin III Regulation.

[29] In the new Dublin III Proposal 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)', 2016/0133 (COD), the definition of family unity found in Article 2 is expanded by including the sibling(s) of an applicant and by including family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State.

[30] This is further reiterated in UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of 2 May 2013.

[31] Convention of the Rights of the Child, Article 2(2).

14. The Charter expressly incorporates an obligation to consider the best interests of the child, as is set down in Article 24 (2).[32] Whilst there is no explicit obligation to observe the child's best interests in the ECHR, the ECtHR incorporates that obligation in its case law.[33] This principle incorporates numerous different elements and part of this right entails the right of the child to be cared for by his/her parents. The ECtHR, in family law cases, has found that children should only be separated from their parents in exceptional circumstances and measures should be taken to preserve personal relations and 'when appropriate, to 'rebuild' the family'.[34] The Court has also emphasised the importance of the child parent relationship, including the mutual enjoyment by the parent and child of one another's company that constitutes an essential element of family life.[35] In a recent UK case, the Court examined the extraterritorial application of the best interests of the child, this is discussed at paragraphs 55 and 56.

The right to good administration

15. The EU principle of the right to good administration, which is recognised by the Court of Justice of the EU as a general principle of EU law, requires that one should have their affairs handled impartially, fairly (transparently) and within a reasonable period of time. It also requires that parties to proceedings should not be penalised by virtue of the fact that they did not comply with procedural rules 'when this non-compliance arises from the behaviour of the administration itself'.[36] This is particularly relevant to the time periods under which a family reunification application needs to be submitted, particularly when the failure to comply with strict time limits to submit an application and the documentation required stems from a backlog in a State's embassy. Furthermore, the ECtHR has ruled that procedurally the guarantees of flexibility, promptness and effectiveness must be ensured in the family reunification procedure so as to comply with the right to respect for family life.[37]

The right to an appeal and to an effective remedy

16. The CJEU has clarified that the Family Reunification Directive has established a right to family reunification.[38] When applying EU law, Member States are further constrained to respect the Charter which provides for the right to an effective remedy.[39] The Family Reunification Directive provides that the Member States shall ensure that the sponsor has the right to mount a legal challenge where an application for family reunification is rejected, where a residence permit is either not renewed, or where a removal is ordered.[40] Countries not bound by the Directive and EEA countries should provide for a remedy for any refusal of a family reunification application.[41] Any remedy must be effective, available both in law and practice,

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[32] This was reiterated by Advocate General Bot in CJEU Case C‑184/14, *A v B*, 16 April 2015, paras 30 – 35.
[33] ECtHR, *Ignaccolo-Zenide v. Romania*, Application No. 31679/96, 25 January 2000, para. 94.
[34] Fundamental Rights Agency, 'Handbook on European law relating to the rights of the child', June 2015, p.76, see also ECtHR, *K. and T. v. Finland* [GC], Application No. 25702/94, 12 July 2001, para. 151.
[35] ECtHR, *Saviny y v. Ukraine,* Application no. 39948/06, para 47.
[36] CJEU, Case C‑428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas,* 21 June 2007.
[37] EctHR *Mugenzi v. France*, Application No. 52701/09 and *Tanda-Muzinga v. France* Application No. 2260/10 , 10 July 2014.
[38] Case C-578/08, *Chakroun*, 4 March 2010; Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, C-540/03 *Parliament v Council* 27 June 2006.
[39] Article 41 and 47 of the EU Charter of Fundamental Rights.
[40] Article 18, Family Reunification Directive.
[41] ELENA Questionnaire on Family Reunification, Questionnaire´s on file with the author.

and the proceedings to be fair, numerous requirements need to be fulfilled such as the right to an effective appeal, the right to an appeal or a review before a court or tribunal, and free legal aid ensuring access to an effective remedy.[42]

The principle of effective legal protection

17. Article 4 (3) (b) and (c) TEU obliges Member States to undertake measures to ensure they fulfil their obligations arising from the treaties and to facilitate the achievement of the Unions' tasks. It essentially asks Member States to ensure that provisions of EU law are given effective legal protection. It requires that provisions are given full effect, so as to achieve the result sought by the directive, by good administrative practice. In the *Marks and Spencer* case, the CJEU held 'Member States remain bound actually to ensure full application of the directive even after the adoption of those [implementing] measures. Individuals are therefore entitled to rely before national courts, against the State […]not only where the Directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it'. The CJEU, has stated, when examining the application of the Family Reunification Directive, that Member States must not interpret the provisions of the Directive restrictively and should not deprive them of their effectiveness.[43]

The right to private life

18. The decision to admit relatives of the person into its territory will vary according to the particular circumstances of the persons involved (which must be taken into account)[44] and the general interest.[45] Article 8 ECHR does not require States to absolutely guarantee to the family member the right to enter and reside in their territory. It must be balanced with the States' general interest and right in controlling who enters their territory. Notably, factors to be borne in mind are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law).[46] In two of the leading family reunification cases, the ECtHR found that admitting the foreigner to the territory of the state in question was the most appropriate way of developing the family life of the person concerned and that, by not taking such a decision to admit, the national authorities had failed to meet the positive obligation which Article 8 placed on them.[47]

UNHCR's position on Family Reunification

19. Formal recognition of refugee family unity is rooted in the Final Act of the Conference of Plenipotentiaries that adopted the 1951 Refugee Convention and UNHCR's Executive

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[42] For more information on appeals see in general, ECRE and Dutch Council for Refugees, Chapter 10, *The right to an appeal of an asylum decision in* 'The application of the EU Charter of Fundamental Rights to asylum procedural law', 2014.
[43] CJEU, Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken,* 4 March 2010, para 64.
[44] ECtHR, *Mugenzi v. France*, Application No. 52701/09, 22 January 2015, para 62.
[45] ECtHR, *Gül v. Switzerland*, judgment of 19 February 1996, Reports 1996-I, pp. 174-75, § 38 and *Darren Omoregie and Others v. Norway* Application no. 265/07 31 July 2008.
[46] ECtHR, *Rodrigues da Silva and Hoogkamer* Application no. 50435/99, and *Ajayi and Others v. the United Kingdom* no. 27663/95, 22 June 1999.
[47] ECtHR, *Sen v the Netherlands*, Application no. 31465/96, 21 December 2001 and ECtHR- *Tuquabo-Tekle And Others v The Netherlands*, Application no. 60665/00, 1 March 2006.

Committee conclusions. UNHCR have emphasized the importance of State action to maintain or re-establish refugee family unity on repeated occasions, beginning with their first Conclusion adopted in 1975.[48] They have emphasised the role family unity plays in providing 'essential social, psychological, and economic support needed for effective integration'.[49] In UNHCR's Family Reunification guidelines, it provides that in the 'application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families'.[50]

[48] Executive Committee Conclusions No. 1(XXVI) 1975(f); No. 9 (XXVIII) 1977; No. 24 (XXXII) 1981; No. 84 (XLVIII) 1997; No. 85 (XLIX) 1998 (u)-(x); No. 88 ((L) 1999. See also, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 186. The CJEU has in the past taken into account soft law, in Case C‑601/15, *J. N. v Staatssecretaris voor Veiligheid en Justitie,* the Court referenced and applied some of UNHCR's guidelines on detention.

[49] See for example, UNHCR, 'Integration – A Fundamental Component in Supporting Diverse Societies', January 2016, p.1.

[50] UNHCR, *Note on Family Reunification*, 18 July 1983.

Status of the Sponsor

20. The less preferential treatment of holders of subsidiary protection, as compared to recognised refugees, is a major obstacle for those seeking to enjoy their right to family reunification. In many national contexts, subsidiary protection holders are subject to more restrictive conditions such as waiting periods and income requirements, and in some countries they are treated in the same way as other third-country nationals. This ignores their particular circumstances relating to their forced displacement[51] and the corresponding difficulties they are likely to face in meeting more onerous requirements for family reunification.[52]

21. Article 3(2)(c) of the Family Reunification Directive excludes from its scope third country nationals who are beneficiaries of subsidiary protection, while allowing Member States to adopt or maintain more favourable provisions.[53] The majority of Member States in their national legislation allow beneficiaries of subsidiary protection to apply for family reunification, bringing them into the scope of the Directive. This is a positive step in view of the Stockholm Programme which calls for a uniform status for those granted international protection[54] as an objective for the completion of the Common European Asylum System thus requiring any differential treatment to be "necessary and objectively justified". This aim has led to the subsequent greater harmonisation of rules relating to the grant of refugee status and subsidiary protection status contained in the recast Qualification Directive,[55] as well as the other asylum *acquis,* [56] in accordance with the tenets of the Lisbon Treaty.[57]

22. However, the more favourable conditions granted to refugees for exercising the right to family reunification in relation to family members,[58] documentary evidence,[59] and material

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[51] As Mr. Justice Blake highlighted in *MM, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWHC 1900 (Admin) (05 July 2013) "*As to refugees, they are in a different position from foreigners generally, because they are unable to reside in their country of nationality. Similar considerations are likely to apply to those with humanitarian protection*."

[52] See e.g. UNHCR response to the European Commission Green Paper on the Family Reunification Directive: "*Beneficiaries of subsidiary protection will however face the same difficulties as refugees in fulfilling these conditions as they may have spent lengthy periods of time in asylum reception waiting for the outcome of the asylum procedure with limited access to the labour market. UNHCR considers that the humanitarian needs of persons benefiting from subsidiary protection are not different from those of refugees and differences in entitlements are therefore not justified in terms of the individual's flight experience and protection needs*".

[53] Article 3(5) Family Reunification Directive.

[54] Paragraph 6.2, European Council, "The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens", OJ 2010/C115/01, available at: http://bit.ly/1TQFi2F

[55] See recitals 9, 10, 12 13, 14, 19, 33, 34, 39, 41, 47 and Article 1 recast Qualification Directive.

[56] Directive 2013/33/EU of the European Parliament an of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, at recitals 5 and 13; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' at recitals 3 and 16; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person at recitals 6 and 10; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection at recitals 6, 8 and 11.

[57] Article 78(2) (a) and (b) Treaty on the Functioning of the European Union.

[58] Article 10 Family Reunification Directive.

[59] Article 11(2) Family Reunification Directive.

conditions[60] i.e. exemption from requirements to provide evidence of sufficient stable and regular resources, accommodation, sickness insurance[61] and compliance with integration requirements[62] may not be available to holders of subsidiary protection, as Member States retain discretion on whether to extend such conditions to this group.

The right to family reunification for beneficiaries of subsidiary protection

23. The humanitarian rationale for providing a more favourable regime to refugees[63] applies equally to holders of subsidiary protection as both groups are forced to flee their countries of origin and are only able to continue family life in the host country. The European Commission has highlighted that there is no obligation in the Family Reunification Directive for Member States to deprive subsidiary protection holders of family reunification under more favourable conditions,[64] and encourages them to adopt rules granting them similar rights,[65] considering that 'the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees'.

24. This is recognised by the ECtHR which, when undertaking its proportionality assessment in Article 8 ECHR cases, significantly limits the discretion of Member States to deny family unity where there are major or insurmountable obstacles to developing family life elsewhere,[66] which is the case for beneficiaries of international protection.[67] The Court emphasises that while Article 8 does not guarantee a right to choose the most suitable place to develop family life, interruption of family life due to a genuine fear of persecution[68] or situation of indiscriminate violence disrupts family ties through no choice of the sponsor, who cannot be said to have voluntarily left family members behind.[69]

25. The general principles of equal treatment and non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated in the

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[60] Article 12(1) Family Reunification Directive.
[61] Article 15(1) Family Reunification Directive.
[62] Article 12 Family Reunification Directive.
[63] Recital 8 Family Reunification Directive "special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification."
[64] Article 3(5) Family Reunification Directive.
[65] European Commission Guidelines on Family Reunification, p.24.
[66] ECtHR, *Sen v. the Netherlands*, Application No. 31465/96, 21 December 2001, para.40; ECtHR *Mengesha Kimfe v. Switzerland*, Application No. 24404/05, 29 July 2010, para. 68, where the court considered it particularly important that the applicant and her husband were prevented from returning to their country of origin (Ethiopia) and therefore, developing a family life outside Switzerland
[67] As opposed to the situation in ECtHR, *Ahmut v. the Netherlands*, Application No. 21702/93, 28 November 1996, para. 70-73 where the Court found that the applicant willingly decided to settle in the Netherlands, apart from his son in Morocco; ECtHR, *Gül v. Switzerland*, Application No. 23218/94, 19 February 1996, where the sponsor held a residence permit issued on humanitarian grounds but had subsequently visited his minor son in Turkey, indicating that the original reasons for his application for political asylum were no longer valid; ECtHR, *Berisha v. Switzerland*, Application No. 948/12, 20 January 2014, para. 60 and ECtHR, *Benamar v. the Netherlands*, Application No. 43786/04, where it was possible for the applicants to enjoy family life elsewhere.
[68] ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006, para. 75.
[69] ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, Application No. 60665/00, 1 March 2006, para. 47, "it is questionable to what extent it can be maintained…that Ms Tuquabo-Tekle left Mehret behind of 'her own free will' bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad".

same way unless such treatment is objectively justified. This must pursue a legally permitted aim and be proportionate to the aim pursued. In the case of *Alo and Osso,*[70] that examined restrictions of movement in a Member State, the CJEU interpreted the recast Qualification Directive as affording beneficiaries of international protection the same rights and benefits to those enjoyed by refugees. Its ruling is influenced by the stated intention of the EU legislature to establish a uniform status for beneficiaries of international protection[71] with the Advocate General also highlighting the principle of equal treatment.[72] The CJEU emphasised that national rules that differentiated between subsidiary protection holders and *inter alia* refugees, would only be legitimate if these groups were not in an objectively comparable situation as regards the objective pursued by those rules.[73]

26. The ECtHR has found that Article 14 ECHR in conjunction with Article 8 will be violated where there are differences in the treatment of persons in analogous or relevantly similar situations, with no objective and reasonable justification for such a difference.[74] Such justification requires the impugned measures to pursue a legitimate aim or the existence of a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[75] The Court has found that immigration status is included as one of the prohibited grounds of discrimination[76] within the non-exhaustive concept of 'other status' in Article 14 and that an analogous situation need not be identical, but must be relevantly similar to others treated differently.[77]

27. In *Hode and Abdi v. the UK*[78] the ECtHR held that students, workers and refugees are in an analogous situation given that they are granted a limited period of leave to remain. Pre-flight and post-flight marriage applicants are also in analogous situations, with the only difference being the time of marriage. The Court found that the difference in treatment between students and workers, on the one hand, who were able under national law to reunify with their spouses regardless of whether the marriage took place before or after their grant of leave to remain, and the applicants on the other hand, who could only reunify with pre-flight spouses, did not pursue a legitimate aim and thus had no objective and reasonable justification.[79] The UK government argued that it was fulfilling its international obligations by allowing refugees to be joined by pre-flight spouses but this argument was rejected by the Court: 'where a measure

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[70] CJEU, *Joined Cases C-443/14 and C-444/14 Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, Judgment of the Court (Grand Chamber), 1 March 2016.
[71] *Ibid,* paras. 28-36.
[72] CJEU, *Joined Cases c-443/14 and c-444/14 Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, Opinion of Advocate General Cruz Villalon delivered on 6 October 2015, para. 71.
[73] *Ibid* at para. 54 and 61.
[74] ECtHR, *D.H. and Others v. the Czech Republic [GC],* Application No. 57325/00, § 175, ECHR 2007; ECtHR*, Burden v. the United Kingdom [GC]*, Application No. 13378/05, § 60, ECHR 2008; ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application Nos. 9214/80, 9473/81, 9474/81.
[75] ECtHR, *Niedzwiecki v. Germany*, Application No. 58453/00, 25 October 2003, para. 32 and ECtHR, *Okpisz v. Germany*, Application No. 59140/00, para. 33.
[76] ECtHR, *Ponomaryovi v. Bulgaria, Application No. 5335/05*, ECHR 2011; ECtHR, *Bah v. the United Kingdom*, Application No. 56328/07, 27 September 2011; ECtHR, *Hode and Abdi v the United Kingdom*, Application No. 22341/09, 6 November 2012.
[77] ECtHR, *Clift v. the United Kingdom*, Application No. 7205/07, 13 July 2010.
[78] ECtHR, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09, 6 November 2012.
[79] *Ibid* at para. 52.

results in the different treatment of persons in analogous positions, the fact that it fulfilled the State's international obligation will not it itself justify the difference in treatment'.[80]

28. It is clear from the above analysis, that if refugees are in an analogous position to students and workers, subsidiary protection holders are also in the same position. In view of *Hode and Abdi*, Article 14 ECHR and Article 21 of the Charter[81] it is arguable, given that subsidiary protection holders have been brought within the scope of the Qualification Directive, measures that differentiate between categories of international protection holders are discriminatory, with more favourable treatment for refugees an insufficient defence. Member States must provide an objective and reasonable justification which should be subject to a high level of scrutiny, especially given the absence of free personal choice for beneficiaries of international protection as compared to other types of immigration status.[82]

29. It is unlikely that arguments based on the supposed 'provisional' nature of subsidiary protection will suffice as an objective and reasonable justification.[83] Beneficiaries of subsidiary protection and refugee status have the same protection needs, furthermore, there are divergences between Member States as to which form of protection status is granted to those in similar circumstances from the same nationality,[84] which includes countries where there are protracted conflicts, indicating the likelihood of long-term displacement. The EU legislature has recognised this by extending the scope of the Long Term Residence Directive to make this status accessible to all beneficiaries of international protection. [85] Furthermore justifications based on reducing incentives, and managing migration are also untenable given the underlying purpose of the Family Reunification Directive to promote family reunification.

30. On the basis of non-discrimination, it has successfully been argued in Switzerland that refugees with asylum status and refugees with temporary admission (their equivalent to subsidiary protection) should have the same rights concerning family reunification.[86] Similarly in 2013, the Belgian Constitutional Court held that the differentiation between requirements of family reunification between subsidiary protection beneficiaries and refugees was unlawful.[87] Having regard to Articles 10 and 11 of the Belgian Constitution, which codifies non-discrimination, the judgment specifies that the more beneficial provisions applicable to

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[80] *Ibid* at para. 55.

[81] Which must be interpreted in light of Article 14 ECHR as per article 51 and 52(3) CFREU; see also CJEU Advocate General Opinion in Joint Cases C-443/14 and C-444/14 *Alo and Osso*, 6 October 2015, para 77.

[82] CJEU, Advocate General Opinion in Opinion in Joint Cases C-443/14 and C-444/14 *Alo and Osso,* para. 76.

[83] See also the Explanatory Memorandum to the recast Qualification Directive: "when subsidiary protection was introduced, it was assumed that this status was of a temporary nature. (…) However, practical experience acquired so far has shown that this initial assumption was not accurate."

[84] AIDA Annual Report 2014/2015 Common Asylum System at a Turning Point: Refugees caught in Europe's Solidarity Crisis at section 3.2: *Even where the overall recognition rate for international protection is high across Europe for a particular nationality, such as for Syrians and Eritreans, there are considerable variations in the protection statuses applicants receive in different countries, i.e. refugee status or subsidiary protection*

[85] Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, *OJ* 2011 L 132/1.

[86] See Decision of the AAC of 7 March 2006; in re: M.D., Egypt available at: http://www.ark-cra.ch/emark/index.htm Although this argumentation has been less successful in more recent practice according to the national report.

[87] Arret no. 121/2013 du 26 September 2013, available at: http://bit.ly/1paluJE. Before the judgment sponsors with subsidiary protection had to show sufficient and stable income, health insurance, and sufficient housing.

refugees should also be applied to subsidiary protection holders during the period of one year, independently of whether their permit of stay is for a limited or unlimited period of time.[88] Moreover, although the Constitutional Court judgment did not require this, the Belgian Immigration Office stated that after the judgment beneficiaries of subsidiary protection would also be exempted from the condition of sufficient income after the period of one year (see below) when the sponsor is joined by his/her minor children. This is similarly the case for minor children of a recognised refugee.

31. In light of the purpose of the Family Reunification Directive to promote family reunification[89], the disparity in treatment undermines the effectiveness of their enjoyment of the right to family life, and as a consequence the "effet utile" of the Directive, particularly given the near convergence of protection statuses in the EU asylum *acquis*, and in CJEU and ECtHR jurisprudence. Extending the more favourable conditions provided to refugees to beneficiaries of subsidiary protection would be in conformity with obligations to protect family life enshrined in international law.[90].

Different time periods for sponsors of family reunification applications

32. A particular difficulty faced by beneficiaries of subsidiary protection in enjoying their right to family reunification, is that they are subject to a waiting period before they are able to apply for family reunification in a number of European countries. This is permitted by a 'may' provision in the Family Reunification Directive enabling Member States to require the sponsor to have lawfully resided in their territory for a period of up to two years[91] prior to being joined by family members. Such a delay means a prolonged separation of family members, some of whom may remain in vulnerable situations in countries of origin and transit.

33. This deferment of the right to family reunification is liable to undermine Article 8 ECHR and the essential right to family unity. The recast Qualification Directive makes it clear that the content of international protection applies to all beneficiaries of international protection, and this includes the right to family unity.[92] In cases in which the only possibility for family members to enjoy such rights is by way of family reunification in the host country, a lengthy delay may be deemed to be disproportionate, in the absence of an objective and reasonable justification. The ECtHR has found on occasion that the family reunification procedure needs to guarantee promptness, flexibility and effectiveness to ensure compliance with the right to respect for family life. It is questionable whether in all circumstances, a prolonged delay for beneficiaries of subsidiary protection ensure compliance with Article 8 ECHR.[93]

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[88] *Ibid.* at B.15.6.

[89] CJEU, Case C-578/08, *Chakroun*, 4 March 2010, para 43; Cases C-356/11 and C-357/11, O. & S., 6 December 2012, para 74 and 82.

[90] See Recital 2 Family Reunification Directive.

[91] Article 8 Family Reunification Directive. There is also a 'standstill' derogation clause permitting family reunification to be delayed for up to three years if legislation of a Member State in force at the date of adoption of the Directive takes into account reception capacity.

[92] Article 23 recast Qualification Directive.

[93] See ECtHR, *Mugenzi v France*, Application no. 52701/09, 10 October 2014, *Tanda Muzinga v France*, Application no. 2260/10, 10 October 2014 and ECtHR, *Senigo Longue and Others v. France*, Application no. 19113/09 10 October 2014.

34. While in some countries such delay is justified on the basis of differing duration of residence between the two categories, this is just one of the factors that must be taken into account by Member States.[94] The CJEU has held that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors.[95] Its analysis of Article 8 Family Reunification Directive in *Parliament v. Council* indicates that the objective of this provision is to ensure that family reunification will take place in favourable conditions to enable effective integration.[96] Where applicable national rules distinguish in terms of waiting period between refugees and subsidiary protection holders, decision makers should therefore first determine whether the latter group are able to show that effective integration will be possible by other means. Furthermore there must be a determination of whether subsidiary protection holders would face greater difficulties relating to integration than a refugee, and that they are not in an objectively comparable situation in this regard.[97]

[94] Article 17 Family Reunification Directive.

[95] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para.99.

[96] This is contrary to a number of studies which highlight the detrimental effect of prolonged family separation to integration. See for instance. T Strik, B. de Hart, E Nissen, (2013), "Family Reunification: A Barrier or Facilitator of Integration? A Comparative Study"; UNHCR (September 2013), "A New Beginning: Refugee Integration in Europe."

[97] CJEU, *Joined Cases C-443/14 and C-444/14 Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, Judgment of the Court (Grand Chamber), 1 March 2016, para. 58-64.

Definition of family members

35. The family members eligible for family reunification under the Family Reunification Directive are based on the narrow conception of the nuclear or 'core' family, comprising of the spouse/partner and minor, unmarried (including adopted) children. [98] The CJEU has made it clear that in such cases Member States have a positive obligation to authorise family reunification, with no margin of appreciation.[99] However, for beneficiaries of international protection, the nuclear family concept does not sufficiently account for the special circumstances of forced displacement, the practical and social realities in countries of origin or transit, or the wide cultural divergences in the concept of a family.[100]

36. The CJEU case law requires limitations on the definition of family members to be interpreted in a strict manner[101] given that they are an exception to the general rule that family reunification should be authorised,[102] and in accordance with fundamental rights.[103] As such, certain family members cannot be categorically excluded from family reunification, but there must be an individual assessment of the circumstances of the sponsor and applicant in every case. Moreover, there may be a direct autonomous right to family reunification for categories of family members not covered by the Directive on a case-by-case basis, pursuant to Article 8 ECHR.[104]

37. Where Member States have latitude to extend the scope of family reunification beyond nuclear members,[105] 'dependency' is the determinative factor. While there are a number of additional limitations to the dependent family members,[106] the more favourable provisions mean that "other family members" dependent on refugees are not subject to further limitation with the Commission encouraging Member States to use their margin of appreciation in most humanitarian way.[107] Both ECRE and UNHCR[108] advocate for a broad conception of dependency which covers financial, physical, emotional and psychological dependency taking

[98] Article 4 Family Reunification Directive.
[99] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 60.
[100] Red Cross EU and ECRE: Disrupted Flight, at p.11.
[101] CJEU, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 43.
[102] CJEU, Joint Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para. 74 & 79-82.
[103] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, paras. 62, 105.
[104] See. *ibid.* at para. 82.
[105] Article 4(2) & 10(2) Family Reunification Directive.
[106] I.e. They must be first-degree relatives in the direct ascending line of the sponsor or his spouse, and be unable to enjoy proper support in the country of origin (Article 4(2)) or be adult unmarried children who are objectively unable to provide for their own needs on account of their state of health.
[107] Commission Guidelines at 6.1.1.
[108] UNHCR Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) available here: http://bit.ly/23v9R0v at section 2; UNHCR Resettlement Handbook (reissued 2011)available at: http://bit.ly/1SYbizN at p.178 and p. 273; ECRE, Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC).

into consideration cultural norms and is not necessarily limited to blood ties. Economic and emotional relationships should be given equal weight.

38. Dependency is not defined in the Family Reunification Directive but in accordance with the Commission Guidelines, it has an autonomous meaning in EU free movement law which is applicable by analogy to family reunification.[109] The CJEU jurisprudence[110] thus interprets dependency as a factual situation characterised by legal, financial, emotional or material support focusing on the personal circumstances of the applicant at the time of the application, taking into account factors such as the extent of economic or physical dependence and the degree of relationship. [111] Any particular requirements as to the nature or duration of dependence introduced in national legislation must be consistent with the normal meaning of the words relating to the dependence and cannot deprive it of its effectiveness.[112]

39. In relation to financial dependence, in the case of ***Reyes***[113] the CJEU has recently reiterated principles from its previous case law that such dependency is the result of a factual situation characterised by the sponsor regularly paying the applicant a sum of money as such applicants are not required to show that they have tried without success to find employment, obtain subsistence support and/or otherwise tried to support themselves, which could make the right of residence excessively difficult.[114] This could be applied by analogy to other forms of dependency, meaning that applicants should not be required to show they are unable to rely on other forms of support to establish dependency on the sponsor.

40. The ECtHR jurisprudence supports an expansive interpretation of family life, based on *de facto* rather than formal or legal relationships, depending on the real existence in practice of close personal ties.[115] There is no static, pre-determined family model or legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 ECHR.[116] Rather, it is an evolving and autonomous concept responding to changing societal attitudes and conceptions of the family to encompass ties that go beyond the 'core' family, in line with the recognition of the Convention as a living instrument. This has led to the recognition of family life (inter alia) between unmarried[117] and same-sex couples,[118] those in a committed relationship who have not yet begun to cohabit,[119] adoptive parents and children,[120]

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[109] *Ibid* at section 2.2.
[110] By analogy with CJEU cases, C-316/85, *Lebon*, 18 June 1987, para 21-22; Case C-200/02, *Zhu and Chen*, 9. October 2004, para. 43; C-1/05, Jia, 9 January 2007, paras. 36-37; and Case C-83/11, *Rahman and Others*, 5. September 2012, paras. 18-45; Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para. 56.
[111] CJEU, Case C-83/11, Rahman and Others, 5 September 2012, para. 23.
[112] By analogy with CJEU, Case C-83/11*, Rahman and Others, 5 September* 2012, paras. 36-40.
[113] CJEU, Case C-423/12 *Reyes v Migrationsverket*, 16 January 2014.
[114]*Ibid.* at para. 24-26. See also EU Law Analysis Blog, "When is the family member of an EU Citizen 'dependent' on that citizen?", Chiara Berneri, 19 January 2014.
[115] ECtHR, *Lebbink v.The Netherlands*, Application No, 45582/99, 1 June 2004, at para. 36.
[116] As explained by Sir Stanley Burnton *in Singh & Anor v The Secretary of State for the Home Department* [2015] EWCA Civ 630 (24 June 2015) para. 24, available at: http://bit.ly/23hbWNE.
[117] ECtHR, *X, Y and Z v the UK*, Application Nos. 75/1995/581/667, 22 April 1997.
[118] ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010 para. 94. See also ECtHR, *Pajic v Croatia*, Application No. 68453/13, 23 February 2016, where the ECtHR found that Article 14 in conjunction with Article 8 was violated in the context of a refusal to issue a residence permit for the purposes of family reunification to a same-sex partner.
[119] ECtHR, *Abdulaziz, Cabales and Balkandali v. the UK,* (1985) 7 EHRR 330 at para. 62-63.

uncles and aunts with nieces and nephews,[121] children and grandparents[122] and adult siblings.[123] The ECtHR normally requires additional elements of dependence when considering adult siblings and children,[124] but there is greater willingness to recognise family life for young adults who have not yet formed their own family.[125]

41. The Court seems to draw a distinction between cases concerning 'settled migrants' and those seeking admittance to the territory such as for example in *A.S. v Switzerland*, as an asylum seeker. In this case, an adult asylum seeker wished to avoid a transfer under the Dublin Regulation back to Italy and stay with his two legally resident sisters in Switzerland. The Court found that the applicant's short presence in Switzerland, before lodging his submission, had only been accepted by the Swiss authorities for the purpose of examining his status as an asylum seeker. The Court found that the tolerance of his presence by the Swiss authorities had not enabled him to establish and develop strong family ties there.

42. Where there is a positive obligation created by Article 8 ECHR to admit family members,[126]Member States must strike a fair balance between the competing interests of the individual and the community as a whole, and enjoy a margin of discretion.[127] This necessitates an examination of the personal circumstances of the applicant and sponsor, with a number of factors taken into account such as the extent to which family life is effectively ruptured, the extent of ties in the Contracting States, factors of immigration control[128] as well as the crucial consideration in this context, of whether there are insurmountable obstacles to the family living in the country of origin.[129] The balance can favour the individual in any situation where there are no viable alternatives where they may enjoy their right to family life, with the added consideration that beneficiaries of international protection do not leave family members behind by choice and are separated involuntarily. Furthermore, general considerations of immigration policy should be given less weight than the interest of individuals in enjoying their right to family life.[130] These factors are reflected in Article 17 of the Family Reunification Directive which requires Member States to take due account of *inter alia* the nature and solidity of the person's family relationships[131], as well as the best interests of the child.[132] Where unaccompanied children refugees are involved, the definition of family

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[120] ECtHR, *Pini and Others v. Romania*, Application No.s 78028/01 and 78030/01, 22 September 2004.
[121] See e.g. *Nsona v the Netherlands*, Application No. 23366/94, 28 November 1996.
[122] ECtHR, *Marckx v Belgium*, Application No. 6833/74, 13 June 1979, para. 45.
[123] ECtHR, *Boughenemi v France*, 16/1995/522/608, 27 March 1986.
[124] For instance, ECtHR, *Slivenko v Latvia*, Application No. 48321/99, 9 October 2003, ECtHR, *F.N. v. the United Kingdom* and *A.S. v Switzerland*, Application no. 39350/13, 30 September 2015.
[125] ECtHR, *Maslov v Austria*, Application No. 1638/03, 23 June 2008, para. 62.
[126] ECtHR, *Marckx v Belgium*, Application No. 6833/74, 13 June 1979; ECtHR, *Sen v the Netherlands*, Application No. 31465/96, 21 December 2001.
[127] ECtHR, *Gül v Switzerland,* Application No. 23218/94, 19 February 1996, para. 38; ECtHR, *Ahmut v the Netherlands*, Application No. 21702/93, 28 November 1996.
[128] ECtHR, *Rodrigues da Silva and Hoogkamer* Application No. 50435/99, para 39.
[129] See for example: ECtHR, *Sen v the Netherlands*, Application No. 31465/96, 21 December 2001; ECtHR, *Mengesha Kimfe v Switzerland*, Application No. 24404/05, 29 July 2010; ECtHR, *Gül v Switzerland,* Application No. 23218/94, 19 February 1996
[130] E.g. ECtHR, *Jeunesse v. the Netherlands,* Application No, 12738/10, 3 October 2014, at para. 121.
[131] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006 para. 56 & 64.
[132] *Ibid* para. 58; Article 5(5) Family Reunification Directive.

members is more generous[133] and in all cases Member States must have due regard to the best interests of minor children. [134] The best interests of the child principle has been given greater prominence in the CJEU[135] and ECtHR case law.[136]

43. EU law draws no distinction between whether the family relationship arose before or after the sponsor entered the territory of the host member State.[137] There is a specific derogation from this for refugees in Article 9(2), which the CJEU considers justified by the more favourable provisions for refugees in the Family Reunification Directive.[138] This however, creates the anomalous situation that refugees may in fact be placed in a less favourable position to other third country nationals with regard to family relationships formed after flight, with their specific situation not taken into account.[139] This differential treatment is arbitrary, would appear to contravene the principle of non-discrimination[140] and has no basis in ECtHR case-law on family reunification.

44. The CJEU has given a restrictive ruling in relation to the discretionary provision allowing Member States to require a sponsor and spouse to be of a minimum age, and at maximum 21 years, before family reunification[141]. In *Noorzia*[142], it held that Austrian law which required the sponsor and spouse to be 21 at the time of application, rather than the date of decision, was consistent with the Directive which left a wide margin of appreciation for States. It should be noted that the Advocate General's reached the opposite conclusion and that this judgment goes against the Commission's Guidance and the CJEU's prior case law on the need for an individualised assessment.[143]

Individualised approach

45. Even where it is permissible under the Directive to exclude certain categories of relationship, such as non-nuclear, or post-flight family members, the CJEU jurisprudence indicates that can be no blanket exclusion without first considering the merits of each case, requiring the "actual examination of the situation of each applicant"[144] taking into account all relevant factors.[145] This is also necessary in order to comply with the principle of good administration[146] requiring "the authorities to pay due attention to observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a

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[133] Article 10(3)a) and b) Family Reunification Directive.
[134] Article 5 Family Reunification Directive.
[135] CJEU, Joint Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para. 80-81.
[136] ECtHR, *Jeunesse v. the Netherlands*, Application. No. 12738/10, 3 October 2014.
[137] CJEU, Joint Cases C-356/11 and C-357/11, *O. & S.,* 6 December 2012, para. 59-61 & 66.
[138] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006.
[139]This issue was raised by the Commission in its Green Paper on the Family Reunification Directive at 9.2.
[140] As set out in Article 8 and 14 ECHR; ECtHR, ECtHR, *Hode and Abdi v. the United Kingdom*, Application No, 22341/09, 6 November 2012; Article 7 and 21 CFR and in light of recital 2 Family Reunification Directive.
[141] Article 4(5) Family Reunification Directive.
[142] CJEU, Case C-338/13, *Marjan Noorzia v Bundesministerin für Inneres*, 17 April 2014.
[143] See EU Law Analysis Blog, "The CJEU's approach on the minimum age requirement for spouses in an application for family reunification", Steve Peers, 25 July 2014.
[144] By analogy with CJEU, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010,para. 48.
[145] By analogy with CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 99.
[146] Article 41 Charter of Fundamental Rights.

detailed statement of reasons for their decision"[147], as well as the general principles of proportionality[148] and effectiveness.

46. A recent decision of the Irish High Court takes an individualised, fact-specific approach, drawing on UNHCR and other guidance on dependency in support of a flexible concept not confined to total financial dependence but also all relevant economic, social, personal, physical, familial, emotional and cultural bonds between the refugee and family member. It found that the authorities had erred in law in its assessment of the application of the adult dependent niece and nephew of a former Somali refugee who were *de facto* wards due to being orphaned.[149] It further notes that financial dependency is a flexible state of affairs, not necessarily determined by the size of contribution but rather its effect in the context of the country of residence, and the personal circumstances of the person in receipt.

47. Similarly, the Constitutional Court of Slovenia in January 2015, took a functional approach, finding that in specific factual circumstances the scope of family life should include non-nuclear family members who perform the similar or same function as the nuclear family.[150] An exhaustive definition of eligible family members for family reunification allowing for no exception disproportionately restricted the right to family life for refugees.[151] Even though the extension of the definition of family members in Article 10 of the Directive was not obligatory, domestic legislation that did not allow for an individual examination of specific circumstances violated international instruments including Article 8 ECHR. Furthermore, this violated the Constitution which provided for the protection of the family. This ruling led to an amendment to national legislation on family reunification.

Humanitarian needs

48. Family members of beneficiaries of international protection often have specific humanitarian needs that should be considered when assessing the proportionality of interference with family life. The practice of extending family unity beyond 'core' family members is one of the main avenues through which States can take into account the humanitarian needs of the applicant. While Member States need to abide by their fundamental rights obligations, and in certain cases, must extend the unification beyond core members to comply with their international obligations, much is based on national practice and procedure, some of which is set out below.

49. Protection considerations and the humanitarian needs of the applicants may provide leeway for an expansive interpretation of dependency when considering the particular circumstances

[147] CJEU, Case C-269/90, *HauptzoUamt München-Mitte v Technische Universität München*, 21 November 1991, para 14.
[148] CJEU, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 47-48.
[149] *Ducale & Anor v Minister for Justice & Ors [2013] IEHC 25*, 22 January 2013, para 47-56 available at: http://bit.ly/1qB9VgT
[150] The case related to a recognised refugee from Somalia whose request for family reunification with her dependent minor sister was rejected.
[151] Constitutional Court of the Republic of Slovenia, 14 January 2015, Judgment U-1-309/13, Up-981/13 available here http://bit.ly/1VwZJ4G.

of the case.[152] This is particularly relevant given that family members will normally be vulnerable to acts of persecution in a manner that could also be the basis for refugee status merely due to their relation to the refugee.[153] Such an approach would be coherent and complementary to the asylum *acquis*, given the discretionary clause in the Dublin III Regulation to reunify 'any family relations' on humanitarian grounds. [154] While this Dublin Regulation provision applies to asylum seekers rather than recognised beneficiaries of international protection, both groups are *prima facie* a vulnerable population group,[155] and as such, the reasoning behind allowing Member States to use their discretion to unify asylum seeking family members should also apply to beneficiaries of international protection.

50. One such example is that Belgian law affords a route for non-nuclear family members to be admitted by way of humanitarian visas, at the discretion of the authorities.[156] For example, in a recent case, [157] under the extreme urgency procedure a decision to refuse a visa to an elderly Syrian couple to join their Belgian national son was annulled as the decision failed to take into consideration all relevant factors, which included the risk of Article 3 harm; and the proportionality assessment had to take into account the gravity of the situation in the country of origin and the vulnerability of the applicants.[158] Similar possibilities also exist in the Netherlands.[159] In Spain, family reunification has been extended beyond core family members

[152] See e.g. ECtHR, *Tuquabo-Tekle and others v. the Netherlands,* Application no. 60665/00, 1 March 2006, where the particular circumstances of the applicant in her country of residence where she was at risk of forced marriage weighed in favour of family reunification, despite the fact that by considering her age alone, previous case law would point to the opposite conclusion.

[153] Recital 36 recast Qualification Directive.

[154] Article 17(2) Dublin III Regulation. Note also the greater focus on family unity in the recast. See also CJEU, Case C-245/11 *K v. Bundesylamt*, 6 November 2012 at a para. 40: "given that Regulation No 343/2003 contains, in Articles 6 to 8, binding provisions which seek to preserve family unity in accordance with recital 6 in the preamble to the regulation, the humanitarian clause contained in Article 15, since its purpose is to permit Member States to derogate from the criteria regarding sharing of competences between the Member States in order to facilitate the bringing together of family members where that is necessary on humanitarian grounds, must be capable of applying to situations going beyond those which are the subject of Articles 6 to 8 of Regulation No 343/2003, even though they concern persons who do not fall within the definition of 'family members' within the meaning of Article 2(i) of Regulation No 343/2003."

[155]ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011; and by analogy with ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy*, Application No. 27725/10, 2 April 2014, at para. 75. See also ECtHR, *Mugenzi v. France*, Application No, 51701/09, 22 January 2015, para. 54, ECtHR, *Tanda-Muzinga v. France*, Application No. 2260/10, 10 July 2014, para. 75

[156] This is not strictly under the framework of family reunification, but under the procedure for 'extreme urgency', but there is some overlap.

[157] CCE, 163 309, 29 February 2016.

[158] See also: RvV 31 mei 2012, nr. 82.114 – humanitarian visa for mother of recognized refugee of Iraqi origin, residing in Syria; Cases for spouses and children of Iraqi and Syrians who had subsidiary protection status: RvV 20/01/2012 nr. 73.660, RvV 09/02/2012 nr. 74.796, RvV 28/02/2012 nr. 76.023, RvV 07/09/2012 nr. 87.147, RvV 22/02/2013 nr. 97.746), RvV 26/10/2012 nr. 90 509; RvV 23/10/2014 nr. 131 930). http://bit.ly/26akJDk.

[159] 07-11-2014, Rb Amsterdam, AWB 14/20107, Irak, Meerderjarige Yezidische dochters behoren tot het kerngezin, voor hen dient de meest gunstige regeling voor het recht op gezinsleven worden toegepast (Iraq, Yezidi daughters above 18 belong to the core family, the most favourable arrangement relating to the right to family life must be applied) 27-11-2014, Rb Den Haag, AWB 14/13413, Syrië, Sprake van meer dan normale emotionele afhankelijkheid vanwege detentie ondanks meerderjarigheid vreemdeling bij de mvv-aanvraag (Syria, more than normal emotional dependence resulting from detention despite the foreigner being above 18 years old mentioned in the request for a residence permit)13-1-2015, Rb Groningen, AWB 14/11619, Syrië, In de belangenafweging is onvoldoende rekening gehouden met de persoonlijke omstandigheden van het meerderjarige kind.(Syria, the personal circumstances of the child above 18 years old have not sufficiently been taken into account during the assessment of interests)

when dependence on those and the existence of prior cohabitation in the country is sufficiently established.[160]

51. In Slovenia, the law allows for family reunification to extend beyond the registered partner or partner with whom the beneficiary resides in a long-term partnership and his/her minor, unmarried children, as well as to their adult unmarried children and parents, if the beneficiary, spouse, registered partner or partner with whom the beneficiary resides in a long-term partnership is obliged to maintain them in accordance with the regulations of his/her own state. Parents of an adult beneficiary of international protection can only be brought to Slovenia if the beneficiary is obliged to maintain them in accordance with the regulations of his/her own state.[161]

52. Two recent national court decisions[162] considered the need for family unity under the Dublin III regulation, they considered the balancing act needed between the functioning of the Dublin Regulation and the 'qualified right' of Article 8 ECHR. See paragraphs 81 to 84 for further details.

53. The principle of effectiveness is also relevant, as highlighted in a ruling of the Administrative Court of Berlin.[163] The case related to a Yazidi Kurdish family from Iraq, which included an unaccompanied minor with refugee status in Germany. His parents and five siblings were granted visas for family reunification on the basis that Article 10(3) (b) of the Family Reunification Directive would be deprived of effectiveness if the parents had to choose between waiving their right to reunification with their child in Germany, or leaving the rest of their dependent children behind. These examples reflect the positive practice of showing flexibility to consider 'exceptional' circumstances as part of a humane family reunification policy, with the vulnerability of family members limiting the margin of appreciation for Member States.

54. In a UK Upper Tribunal Case, *AT and another*,[164] the Tribunal allowed an appeal on human rights grounds in the case of a brother and mother who were denied entry to the UK to join their sponsor, a now adult refugee who arrived in the UK as an unaccompanied child on the basis that the Immigration rules have no provision for family reunification in the case of a child who has gained refugee status in the United Kingdom. The Court recognised the family to be 'a strong family unit whose members are clearly united and fortified by strong bonds of love, affection and interdependency. [...] For as long as separation continues, this will be a disfunctioning, debilitated and under achieving family'.[165] Furthermore, McCloskey J. placed weight on the fact that if family reunification could not be secured in the UK, the sponsor

[160] This information was provided by the Spanish ELENA Coordinator in the family reunification questionnaire which is on file with the author.
[161] See Slovenian International Protection Act, this was confirmed by the Slovenian ELENA Coordinator in the family reunification questionnaire which is on file with the author.
[162] *The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v Secretary of State for the Home Department*, JR/15401/2015 JR/15404/2015, available at: http://bit.ly/1Q2MMJ3 and VG Hannover · Beschluss vom 7 March 2016, Az. 1 B 5946/15.
[163] VG Berlin, 26 L 489.15 V, 29.12.2015 December 21, 2015, Ovg 3 S 95.15
[164] *AT and another* [2016] UKUT 227 (IAC), 24 March 2016, available at http://bit.ly/1WVxAH7
[165] Ibid, para 35.

would leave and in doing so would 'deprive him of the protections which he has obtained as a result of being recognised a refugee'. He found that this would be 'manifestly undesirable for him, contrary to the public interest and incompatible with the philosophy and rationale of the Refugee Convention. It would also expose him to a risk of violating his Convention rights, in particular those protected by Articles 3 and 4'.[166] The Court found this to be a significant factor in weighing up public interest considerations against Article 8 considerations and as such allowed the appeal under Article 8 ECHR.

The extraterritorial effect of the best interests of the child principle

55. In *AT and another*, McCloskey J. considered the duties enshrined in Section 55 of the Borders, Citizenship and Immigration 2009 Act, which is derived from Article 3(1) of the UN Convention on the Rights of the Child. He found that they may legitimately be influenced by unincorporated provisions of international law, having regard to the statutory guidance whereby it states that 'the UK Border Agency must fulfil the requirements of these instruments (the ECHR, the ICCPR, the Reception Conditions Directive, the COE Convention against Trafficking and the UNCRC) in relation to children when exercising its functions as expressed in UK domestic legislation and policies'.[167] It found that, as a matter of policy, these instruments of international law should be given effect when the Secretary of State and her various alter egos, are making immigration (and related) decisions which affect children.

56. He noted that whilst the second appellant was outside the UK territory and therefore section 55 does not apply, the Secretary of State's Immigration Directorate Instruction invites Entry Clearance Officers to consider the statutory guidance. This argumentation is further solidified by the lack of territorial limitation of Section 55(2) relating to the functions of the Secretary of State in relation to immigration, asylum or nationality. Therefore, the above argumentation concerning the influence of unincorporated treaties in domestic law applies equally to a child outside the UK territory. As a result, it can be argued that by virtue of international law, and by virtue of Article 24 of the Charter which is binding on Member States and is based on the UNCRC, states must have regard to the best interests of the child in family unity decisions, even when they are not on their territory. This could have significant ramifications in family unity applications. If Member States were obliged to consider the best interests of children that were not in their territory it could impact how time periods, the status of the sponsor, the definition of family members and evidence is assessed. It may require that when assessing individual applications, the best interests of the children affected by the application are taken into account.

[166] Ibid, para 38.

[167] Ibid, para 31. He was referring to a passage in Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children in the publication entitled 'Every Child Matters: Change For Children', para 2.6.

Documentation and Evidentiary requirements

57. Documentary evidence is generally necessary to prove the family relationship between the applicant and sponsor. UNHCR has long emphasised that the absence of documentary proof of the formal validity of marriage or filiation of children should not in itself be considered an impediment to family reunification of those in need of international protection.[168] The Family Reunification Directive provides that an application for family reunification shall be accompanied by documentary evidence of the family relationship as well as evidence of compliance with any relevant conditions and certified travel documents.[169] Member States may carry out interviews and conduct other investigations subject to the limitations of appropriateness and necessity.[170] More favourable provisions with regard to refugees oblige Member States to take into account other evidence of the family relationship, in the absence of official documentary evidence, and prevent them from rejecting an application solely due to the lack of documentary evidence.[171]

58. The particular challenges faced by beneficiaries of international protection and their family members due to the situation in their country of origin which may make it dangerous or impossible to obtain official documentation or other evidence has been well-documented elsewhere.[172] Country of origin information may be relevant, for example to show the lack of systematic birth or marriage registration in some countries, the non-functioning of bureaucratic authorities or the inability to seek State assistance by reason of conflict or persecution.

59. There is no further guidance in the Directive on what type of documents, other evidence or investigations can be considered which means that Member States retain a wide degree of flexibility. In some cases, given the importance of the dependency concept[173] formal documentary evidence may be unavailable. The CoE Committee of Ministers recommends that this be exercised in a 'positive, humane and expeditious manner' adding that the verification of the existence of family ties can be based 'in any other way' apart from documents.[174] Unrealistic or overly rigid[175] document requirements will be disproportionate

[168] UNHCR, EXCOM Conclusion No. 24, 21 October 1981.
[169] Article 5(2) Family Reunification Directive.
[170] As the Commission Guidelines state, this implies that such investigations are not allowed if there are other suitable and less restrictive means to establish the existence of a family relationship.
[171] Article 11(2) Family Reunification Directive.
[172] Red Cross EU and ECRE: Disrupted Flight, Section 2: challenging situations in regions of origin. See also: British Red Cross, "Not so Straightforward: the need for qualified legal support in refugee family reunion, Jacob Beswick, July 2015.
[173] This concept recognises that family links may be based on a relationship of emotional, physical or financial dependency, thus allowing for flexibility to expand the definition of family beyond the 'nuclear' family and blood lineage.
[174] Council of Europe Committee of Ministers Recommendation No. R (99) 23 of the Committee of Ministers to Member States on family reunion for refugees and other persons in need of international protection, 15 December 1999, available here: http://bit.ly/1MruUgf
[175] Parliamentary Assembly Recommendation 1686 (2004) on Human mobility and the right to family reunion, available here: http://bit.ly/1YryCY7, Paragraph 8(e) which urges Member States 'not to consider as grounds for rejecting the application the failure to provide certain documents that are not instrumental in the fulfilment of the conditions for family reunification'.

and undermine the effectiveness of the right to family life. The Commission guidelines reiterate the need to assess every application, accompanying documentary evidence and the appropriateness and necessity of interviews and other investigations on a case by case basis.[176]

60. Member States therefore have a margin of appreciation to take into account all relevant evidence which could include[177] interviews, non-official documents, family photographs and videos, communication records, witness statements and medical documents. When exercising this margin of appreciation, the particular vulnerability of beneficiaries of international protection and an assessment of their individual circumstances, requires a flexible approach.

61. The ECtHR has made it clear that the circumstances of refugee family reunification cases oblige States to put in place a procedure that takes into account the events that have disrupted and disorganised the family life and led to the recognition of refugee status. [178] It draws on its case law[179] relating to documentary evidence in substantiating an asylum claim,[180] emphasising the benefit of the doubt principle. This principle reflects the difficulties that international protection seekers may face in supporting their claims given their special circumstances[181] but is equally applicable to family reunification applications for beneficiaries of international protection.[182] In line with this sponsors and applicants should be given the benefit of the doubt if they are able to provide a credible account of their family relationship or dependency and a reasonable explanation for a lack of documents[183], particularly where there is no reason to doubt their credibility during the asylum determination procedure.

62. In cases where there is no available documentary evidence, it is likely that significant weight will be placed on the establishment of family ties and dependency by way of personal interviews. These should be conducted in a fair, child-friendly (where relevant) and proportionate manner, and minor discrepancies should not be the basis of refusals. Furthermore in order to give effect to the principle of the right to be heard, applicants should have the opportunity to explain any alleged discrepancies prior to a decision being taken.[184]

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[176] Commission Guidelines at 3.2.

[177] Examples of types of evidence accepted in MS surveyed

[178] ECtHR, *Mugenzi v. France*, Application No. 52701/09, 22 January 2015, para.52; ECtHR, *Tanda-Muzinga v. France*, Application No. 52702/09, para. 73

[179] ECtHR, *Mugenzi v. France*, Application No. 52701/09, 22 January 2015, para. 47 and ECtHR, *Tanda-Muzinga v. France*, Application No. 2260/10, 10 July 2014, para. 69

[180] ECtHR, *FN and Others v Sweden,* Application No. 28774/09, 18 December 2012, para. 67; ECtHR, *Mo P v France*, Application No. 55787/09, 30 April 2013

[181] ECtHR "the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof." ECtHR, *R.C. v. Sweden*, Application No. 41827/07, 9 March 2010, para, 50; ECtHR, *N. v. Sweden*, Application No. 23505/09, 20 July 2010, para. 53; ECtHR, *F.H. v. Sweden*, Application No. 32621/06 20 January 2009, para. 95; and UNHCR Handbook, para. 196: "Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing persecution will have arrived with the barest necessities and very frequently even without personal documents."

[182] Given that this principle applies when establishing family links to apply the family unity provisions at the stage of assessing qualification for international protection, see Article 4 recast Qualification Directive

[183] ECRE position on Refugee Family Reunification, July 2000, at para. 41

[184] CJEU, Case C-277/11 *M.M. v Minister for Justice, Equality and Law Reform, Ireland*

63. In the case of *P.O.T. v. Minister for Justice, Equality and Law Reform*,[185] the Irish High Court held that where the examination of supporting documentary evidence for a family reunification application gave rise to a concern as to their validity, constitutional justice requires that the Minister must enter into communication with the applicant and afford him or her an opportunity to explain inconsistencies and/or dispel doubts in that regard. In this case, the judge considered that a letter requiring a satisfactory explanation would be sufficient, especially as the consequences of dissatisfaction regarding the documents could lead to a two-year delay in family reunification, which would be unjust in view of the importance of family unity emphasised in the Irish Constitution.

64. With regard to DNA testing to provide evidence of family links, such an invasive measure should be used as a last resort, only where necessary and appropriate. In any case where DNA testing is used, it should be with the full and informed consent of those involved[186] and any costs involved should not obstruct the possibility for family reunification, by making the exercise of the right to family reunification impossible or excessively difficult.[187] In a recent UK Case, the obligation of DNA testing as part of the family unity provisions under the Dublin regulation was considered. See paragraph 85 for further details.

[185] High Court, Ireland, *P.O.T. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 361, 19 November 2008
[186] ECRE position on Family reunification, July 2000, available here: http://bit.ly/1TOUBcj
[187] By analogy with CJEU, Case C-153/14 *Minister van Buitenlandse Zaken v K and* A, at para. 71

Length of the Family Reunification Procedure and time periods

65. In accordance with the principle of legal certainty States can set time limits in relation to family reunification applications. Under the Family Reunification Directive, there are specific time periods under which a family reunification application can be made. Similarly, the examination of a family reunification application should be done in a timely manner, and specific time periods are set down in the Family Reunification Directive, but it is well documented[188] that family reunification procedures can be lengthy, in some instances lasting several years.[189] These two issues will be examined below.

66. Article 5 (4) of the Family Reunification Directive provides that Member States shall give the applicant written notification of the decision as soon as possible, and in any event no later than nine months from the date on which the application is lodged. Member States, in exceptional circumstances, linked to the complexity of the examination, can extend the time limit beyond nine months. Recital 13 specifies that the procedure for examination of applications should be effective and manageable, taking account of the normal workload of the relevant Member State. According to the 2014 European Commission Guidelines on the Family Reunification Directive, the nine-month period starts from the date on which the application is first submitted, not the moment of notification of receipt of the application by the Member State.[190]

The extension of the family reunification time limit beyond nine months

67. Whilst Member States can extend the nine-month time limit in exceptional circumstances, they are bound by certain standards and obligations in relation to when this can be invoked and how long the exception can last. The European Commission guidelines state that the exceptional circumstances provision found in Article 5 (4) can only be justified where the complexity of the file requires extra time, they state:

> A Member State administration which wants to make use of this possibility must justify such an extension by demonstrating that the exceptional complexity of a particular case amounts to exceptional circumstances. Administrative capacity issues cannot justify an exceptional extension and any extension should be kept to the strict minimum necessary to reach a decision.[191]

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[188] See for example, The Red Cross and ECRE, 'Disrupted Flight, the realities of separated refugee families in the EU'.
[189] This may be caused by the fact that insufficient resources are allocated to embassies, particularly those based in countries which have the largest influx of refugees, and by the lack of accessible and up-to-date information and support provided to applicants.
[190] European Commission, Communication on Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification, COM (2014) 210 final, 3.04.2014 (hereinafter "European Commission Guidelines on Family Reunification")
[191] Ibid, p. 10.

68. This is echoing the general EU principle on the right to good administration which provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.[192] It requires that EU law provisions are given full effect so as to achieve the result sought by the Directive (to provide for family reunification where the conditions are met) by good administrative practice.[193] Having undue delays in processing an application goes against this general EU principle.[194] The principle of effectiveness could be undermined if the objective of the Directive, to facilitate family reunification, was made difficult or virtually impossible if long time periods are encountered by the applicant. Similarly, the general principle of legal certainty requires administrative authorities to exercise their powers within the given period to protect the legitimate expectations of the relevant subjects.[195]

69. In *Chakroun*, the CJEU, when interpreting the conditions that need to be met set out in Article 7 (1) before a family reunification application can be granted, found that the Directive must be interpreted in a strict manner. It found that Member States 'margin for manoeuvre' must not be used 'in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof'.[196] The same reasoning applies to how 'exceptional circumstances' should be applied and interpreted, it cannot be used in a way that would undermine the effectiveness of the Directive. Furthermore, the CJEU has ruled that procedurally the guarantees of flexibility, promptness and effectiveness must be ensured in the family reunification procedure so as to comply with the right to respect for family life.[197]

70. The Commission Guidelines give some indication as to what can be considered exceptional, these include for example, 'the need to assess the family relationship within the context of multiple family units, a severe crisis in the country of origin impeding access to administrative records, difficulties in organising hearings of family members in the country of origin due to the security situation, or difficult access to diplomatic missions, or determining the right to legal custody if the parents are separated'.[198]

71. When examining a family reunification application, consideration must be given to the best interests of the child. The Family Reunification Directive, at Article 10 (3) sets out the

[192] In *HN* the CJEU held that 'as regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law'. Case C-604/12, *H.N v Minister for Justice, Equality and Law Reform*, Ireland 8 Mary 2014, para 50.
[193] In *YS*, the CJEU found that Article 41 of Charter was restricted to the right to good administration by the 'institutions, bodies, offices and agencies of the Union' to whom that Article is addressed. However, the principle of the right to good administration is still applicable to Member States. See CJEU (Joined Cases), C-141/12 and C-372/12, *YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S.* 17 July 2014, paras 66-69.
[194] For more information see ECRE, Dutch Council for Refugees, 'The Application of the EU Charter of Fundamental Rights to asylum procedural law', 2014, section 2.2.5.
[195] CJEU, Joint cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira v. the Commission*, 13 January 2005, para 165
[196] CJEU, Case C‑578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, 4 March 2010, para 43.
[197] ECtHR, *Mugenzi v. France* Application no. 52701/09 and *Tanda-Muzinga v. France* Application no. 2260/10, 10 July 2014.
[198] European Commission Guidelines on Family Reunification p. 10.

conditions under which an unaccompanied child can apply for family reunification[199] and Article 4 stipulates the conditions under which a sponsor can apply to have their children unified with them. The Directive also requires that when an application is being examined, that Member States have due regard to the best interests of minor children. The ECtHR has looked at the degree to which Member States must take into consideration of the best interest of the child. For example, in *Jeunesse v. the Netherlands*,[200] it found that sufficient weight needs to be given to this consideration.[201] In *MA and Others v. Secretary of State for the Home Department*, which related to deciding on the relevant Member State for deciding on an asylum claim where the unaccompanied child had no family or relatives in other EU Member States, the CJEU found that in the absence of a family member legally present in a Member State, the state in which the child is physically present is responsible for examining such a claim. The Court relied on Article 24 (2) of the Charter whereby in all actions relating to children, the child's best interests are to be a primary consideration in reaching its conclusion.

72. Article 24 of the Charter of Fundamental Rights, which is based on the UN Convention on the rights of the child provides that actions taken by institutions must have the child's best interest as their primary consideration and that every child has the right to have regular contact with their parents, unless contrary to their interests. The UN Committee on the Rights of the Child has found that family reunification applications need to be dealt with in an expeditious and humane manner, for undue delays can have adverse consequences for the child in question.[202] The ECtHR has also found that if the best interest of the child cannot be safeguarded unless the child joins the sponsor in the relevant State, this provides grounds for the right to join the family in the State of residence.[203] Should a decision on an application be delayed where children are involved, it could invoke Article 24 of the Charter.

73. In *Mugenzi v France,* the ECtHR recognised the existence of the principle of family reunification. It took into account that in view of the fact that France granted refugee status to the applicants, there was an overriding importance to ensure that the sponsor's children's visa applications were processed with due diligence. France had an obligation to institute a procedure that took into account the events which had disrupted and disturbed their family lives and had led to their being granted refugee status. It found that despite the margin of appreciation France had in this matter, they didn't take into account the applicant's specific situation, and concluded that the family reunification procedure did not provide guarantees of flexibility, speed and effectiveness required by Article 8 of the ECHR, the State failed to strike a fair balance between the applicant's interests and the states right to control secondary migration. Accordingly, there has been a violation of Article 8 of the Convention.[204]

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[199] In accordance with Article 10 (3) of the Directive, unaccompanied children shall be permitted to be joined through family reunification by their first degree relatives and Member States may authorise family reunification of their legal guardian or any other family member where no other relatives can be traced.

[200] ECtHR, *Jeunesse v. the Netherlands*, Application. no. 12738/10, 3 October 2014

[201] See also, Dr. Aoife McMahon, The right to respect for private life under article 8 ECHR – the Irish cases of Dos Santos and CI, 18 March 2016

[202] UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

[203] ECtHR, *Tuquabo-Tekle and others v. the Netherlands,* Application no. 60665/00 1 March 2006.

[204] ECtHR *Mugenzi v. France*, Application No. 52701/09 and *Tanda-Muzinga v. France* Application No. 2260/10 , 10 July 2014, para 62.

74. The need for a decision within a reasonable time has been further highlighted in domestic case law where the right to family life has been enshrined in the Constitution. In the case of *POT v The Minister for Justice, Equality and Law Reform*, the Irish High Court made clear that 'the requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled to a decision within a reasonable time'.[205] This constitutional approach resulted in the reduction in the law of the length of the application procedure from an average of 24 months to 12 months.[206]

Time periods for submitting an application

75. Under the Family Reunification Directive, numerous conditions need to be met before a family reunification application can proceed (see Article 7) but Article 12 (1) provides that refugees will not be obliged to meet these conditions, nevertheless, Member States may require the refugee to meet the conditions set out in Article 7 (1) if the family reunification application is not submitted within a period of three months after granting the refugee status. In order to submit an application, the application shall be accompanied by documentary evidence of the family relationship, and copies of the family member's travel documents.[207]

76. This three-month time frame proves too short for many refugees which can have severe consequences on their integration and raises compatibility questions regarding a state's duty to provide for family reunification when the requisite conditions are met. For some refugees, they need to undertake family tracing before they can begin their application. Many administrative and practical obstacles are met by family members of the sponsor. Member States often require family members to produce civil-status documents or a 'valid' travel document (national passport or equivalent) in order to lodge a file at the embassy and/or to reach the EU once family reunification has been approved. Aside from the fact that it can be difficult or in some instances impossible to obtain these official documents from national authorities,[208] it can also be very difficult for family members to reach the embassy where they need to lodge these documents. If the relevant embassy is in another state the family may need to apply for a visa to be able to go there which can further delay the process, or travel irregularly to the embassy. Other States limit access to their embassies and do not allow non-nationals to enter their premises.[209] Another major problem is the fact that certain embassies are overwhelmed by the amount of applications and documents they have to process leaving people waiting several months before their documents can be reviewed.[210] Given the fact that these factors cause major delays before a full application can be submitted, the three month time frame can be unduly short and is effectively prohibiting them from exercising their right to

[205] *POT v The Minister for Justice, Equality and Law Reform* [2008] IEHC 361 (November 19, 2008).
[206] See T.Strik, B.de Hart and E. Nissen, 'Family Reunification: A Barrier or Facilitator of Integration? A Comparative Study' for further information.
[207] Article 5 (2) Family Reunification Directive.
[208] See, for example, The Red Cross and ECRE, 'Disrupted Flight, the realities of separated refugee families in the EU' p. 17.
[209] Ibid p 18.
[210] Ibid, p. 18

family reunification. The Commission recognises the fact that refugees often face practical difficulties to meet this timeframe and these may constitute a practical obstacle to family reunification. Therefore, it considers, in line with the practice of most Member States, not applying the limitation as the most appropriate solution.

77. The CJEU in *Samba Diouf* ruled that the time-limit for lodging an appeal against a negative (asylum) decision 'must be sufficient in practical terms to enable an applicant to prepare and bring an effective action'. While this related to an asylum procedure appeal, the premise can be applied to the time limits at hand. This is in line with the Court's other case law which found that time limits need to be reasonable and proportionate. It is not only applicable to the time-limits as such, but also to the application of the time-limit to an individual case.[211] The Court importantly has taken into account the personal characteristics of the applicant and the disadvantaged position of certain groups when reviewing time limits. In *Pontin,* the CJEU considered that the time period in that particular case (15 days for a pregnant lady to bring an action for reinstatement) was too short given the particular situation of the applicant. The ECtHR found in *Tuquabo-Tekle and Others v The Netherlands* that the delays in applying for family reunification derived from the applicants lack of understanding of the family reunification requirements in the Netherlands.[212] Therefore, even if this provision by itself would meet the standard of reasonableness and proportionality, when applied to a particularly vulnerable applicant and combined with other factors such as particularly complex procedures, the risks family members need to undertake to reach an embassy or the actual embassy's work load it may not be in compliance with the right to an effective remedy and a fair trial.

78. The right to good administration, a general principle of EU law, needs to be complied with when a decision is being adopted, even when there is no specific procedure in place. This principle also covers instances whereby a party to the proceedings would be penalised by virtue of the fact that they did not comply with procedural rules 'when this non-compliance arises from the behaviour of the administration itself'.[213] Arguably a sponsor cannot be penalised for the delayed submission of an incomplete application due to the fact an embassy only provides appointments to nationals from that particular state entry or persons who are actual residents in their host country (if the family member needed to travel to the particular embassy in question). Addition the sponsor should not be penalised if the embassy itself is causing a delay given the sheer number of applications they are required to process.

79. The right to private and family life is not an absolute one, it needs to be balanced against a States interests, with any restriction needing to be 'in accordance with the law' and 'necessary in a democratic society'. The Court of Justice however has set limits on a State's ability to limit the right, emphasising the need to respect the principle of proportionality.[214] The inability of refugees to benefit from the exemptions in the Family Reunification Directive as a result of a

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[211] CJEU, Case C-327/00, *Santex SpA v Unità Socio Sanitaria Locale, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA*, 27 February 2003, para 57.

[212] ECtHR- *Tuquabo-Tekle And Others v The Netherlands*, Application no. 60665/00, 1 March 2006, para 46.

[213] CJEU, Case C‑428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas*, 21 June 2007.

[214] Gianluca Bascherini, 'Immigrants' Family Life in the Rulings Of The European Supranational Courts' in The Constitutional relevance of the ECHR in domestic and European Law, 2013, p.189.

short time frame, particularly when the delay in submitting the application is the result of the precarious situation family members need to navigate through may call into question the proportionality of the measure. The CJEU in *Chakroun* held that family reunification (which facilitates the right to private and family life) constitutes the general rule, and any limitation should be interpreted strictly and the margin of appreciation should be exercised in a way that does not undermine the purposes of the Directive which is to promote family reunification. Similarly, the strict application of the three-month time frame may well hinder the purpose of the Directive particularly as the conditions laid down in Article 7 are quite onerous on refugees who often are in a disadvantaged and vulnerable positon and as a result, unable to meet the required conditions.

80. The CJEU, in *Dogan,* which concerned whether national rules breached the 1970 Protocol to the EU/Turkey Association Agreement that prohibited new restrictions on establishment or the provision of services, found that national laws should not make family reunion 'difficult or impossible'.[215] The Court found that the national rule on language requirements made family reunion 'difficult or impossible' as the establishment of a self-employed person could be 'negatively affected', since that person would 'find himself obliged to choose between his [or her] activity in the Member State concerned and his family life in Turkey'.[216] The Court further noted that a national measure infringing the standstill clause could be permissible if it could be 'justified by an overriding reason in the public interest', and was 'suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it'. The Courts reasoning can also be applied to time limits and any national rules related thereto that make family reunion 'difficult or impossible'. Importantly, even if a national restriction is justified, it cannot be applied automatically, it must take into account the individual facts of the application.[217]

[215] Case C-138/13, *Naime Dogan v Bundesrepublik Deutschland,* 10 July 2014.
[216] Ibid, para 35.
[217] See Steve Peers, EU Law Analysis, 'The CJEU transforms family reunion for Turkish citizens' 12 July 2014. Peers also suggests that the requirement that the restrictions be 'suitable' also suggests that they must be the only possible means to achieve their end.

How Dublin family unity case law can be relevant to the Family Reunification Directive?

81. Over the last few months, there have been a number of interesting Dublin rulings from national courts in relation to the scope of family members and the evidentiary assessment that states needs carry out to comply with family unity provisions under the Dublin III Regulation.[218] Member States, in these select cases, have used the Discretionary Clause[219] in order to comply with the right to family life inherent in Article 8 ECHR and Article 7 of the Charter. These, by analogy, can be of interest to family reunification applications submitted under the Family Reunification Directive.

Definition of family members

82. A recent UK Upper Tribunal case[220] considered the pressing and urgent need for family reunification of unaccompanied minors and a mentally ill adult with their siblings. It looked at the balancing act between the functioning of the Dublin Regulation and the 'qualified right' of Article 8 ECHR. The Court contended that in this case 'the Dublin Regulation, with its rationale, its overarching aims and principles, has the status of a material consideration of undeniable potency in the proportionality balancing exercise. It follows that 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'.[221] Nevertheless, it went on to find that based on the facts of the case, including deplorable material conditions, which meant that refusal would be disproportionately interfere with their rights under Article 8 ECHR and Article 7 of the Charter.

83. In a decision by the Hannover Administrative Court (Germany), the Court examined the grounds under which family unity can be used to deviate from the responsibility criteria set out in Article 17 of the Dublin III Regulation. The applicants (mother, father and two children) applied for asylum in France but their claim was rejected. The father was then detained in Germany on a criminal charge and the mother subsequently had a breakdown. The children's grandparents were German nationals. They then went to Germany, lodged another asylum claim but a take back request pursuant to the Dublin III Regulation was sent to France and their application was deemed inadmissible. The applicants applied for suspensive effect of the transfer decision on Article 17 (1) grounds of the Dublin Regulation, in particular, the best interest of the child and the respect for family unity when applying the Dublin Regulation. In particular, it was argued that the children needed to keep in contact with the father who was in

[218] See also EDAL blog, 'The formulation of the right to family life beyond ZAT & Others in recent UK jurisprudence' 15 June 2016, available here http://bit.ly/1ZR5iet.
[219] Article 17, Dublin III Regulation.
[220] *The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v Secretary of State for the Home Department*, JR/15401/2015 JR/15404/2015, available at: http://bit.ly/1Q2MMJ3
[221] Ibid, para 55.

prison and the grandparents who live in the immediate vicinity who can provide care and services at this crucial stage of their lives given the absence of the father and the mother's mental health. The Court found that the reunification of families under Dublin and in particular, in cases of particular hardship, allows for the possibility to deviate, on humanitarian reasons, from the responsibility criteria. Such an approach serves to protect the basic rights of the individual and that it provides them with an enforceable right in Court.[222]

84. Member States in Dublin III Regulation cases are invoking the humanitarian clause in order to facilitate family unification when the relevant family members fall outside the strict family member criteria. In both instances discussed above, the Courts took into account the vulnerability of the applicants and the refusal would cause a disproportionate interference with their rights under Article 8 ECHR and Article 7 of the Charter. By analogy, beneficiaries of international protection should be afforded the same humanitarian considerations, particularly when the applicant in question is in a vulnerable situation.

Evidentiary assessment

85. In a UK case, *MK, IK & HK v Secretary of State for the Home Department*,[223] the applicants, two unaccompanied children, applied for asylum in France, and a "take charge" request under the Dublin Regulation was sent to the UK authorities as the unaccompanied children's mother was living there as a recognised refugee. The request was rejected as the documentation submitted was not official and the Home Office found that the evidence did not establish that they were related. The Upper Tribunal made clear that rights relating to respect for private and family life and best interest determination in the ECHR and the Charter cannot be read in a vacuum but instead form part of a broader legal framework which encompasses the UN Convention on the Rights of the Child (UN CRC) as well as the UNCRC's General Comment in 2013 on the child's best interests.[224] The Tribunal states that the procedural element of the child's best interests requires an evaluation of the possible impact of the decision on the child concerned. This coupled with the "Tameside" principle,[225] which has been equated to 'a duty of enquiry', requires the decision maker to have regard to all material considerations.[226] The Tribunal notes that by virtue of Article 8 of the ECHR and ECtHR case law, applications for family reunion involving children must be done in a positive, humane and expeditious manner requiring appropriate proactive steps on the part of the state concerned. The Tribunal found that the Home Office was unlawful in refusing the 'take charge' request, first by reneging on their investigation duties on the possibility of DNA testing of the applicants in France and the possibility of allowing the children's entry to the UK for DNA testing purposes and also found

[222] VG Hannover · Beschluss vom 7 March 2016, Az. 1 B 5946/15.
[223] *MK, IK & HK v Secretary of State for the Home Department* JR/2471/2016, 29 April 2016, available here.
[224] UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of 2 May 2013.
[225] This Principle requires the scope of inquiries to be reasonable and proportionate, i.e. tailored to the instant case and question, see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.
[226] Ibid, para 26.

an explicit and implicit duty of investigation under the Dublin Regulation.[227] Following from this, the Upper Tribunal found that the Secretary of State's erroneous passiveness with regards to the collection or organisation of DNA evidence to be incompatible with the increased procedural mechanisms in the Dublin Regulation, *inter alia* gathering of evidence, as well as the Regulation's emphasis upon the safeguarding of children and family life. Therefore, all decisions of the Secretary of State were in breach of both the Dublin Regulation and the procedural dimension of Article 8 ECHR.

86. By analogy, some of the same reasoning can be applied to the Family Reunification Directive. The rights of the Child, read in light of the UNCRC's General Comment in 2013 on the child's best interests,[228] coupled with the duty of enquiry,[229] the right to good administration, and the principle of effectiveness of the Directive, that being to determine the conditions for the exercise of the right to family reunification, read in light of Article 8 ECHR and its case law, requires Member States, when assessing applications for family reunion, particularly those involving children, to take appropriate proactive steps. As such, it may place an obligation on Member States to actively investigate family relationships when assessing family reunification applications. Where there is a lack of documentary evidence proving a familial relationship, Member States may be obliged to organise the collection of DNA evidence before taking a decision on the family reunification application.

[227] Ibid, paras 36 – 38.

[228] UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of 2 May 2013.

[229] It is also worth taking into account the States duty to investigate as highlighted by the ECtHR in *F.G v Sweden (GC),* Application no 43611/11, 23 March 2016.

Conclusion

87. States have an obligation to protect the family under international and European law. Nevertheless, it has been documented that Member States are imposing stricter rules and regulations on beneficiaries of international protection when they apply for family reunification. This is a significant barrier to integration and can close off one of the few legal routes available for those in need of international protection to reach Europe, essentially forcing them to undertake arduous journeys. Member States have limited discretion under Article 8 ECHR to refuse family union, particularly when there are insurmountable obstacles to developing family life elsewhere, coupled with the obligation to ensure the best interest of the child as a primary consideration of States. This, read in light of the raison d'être of the Family Reunification Directive, limits a State's ability to refuse unification or to make the procedure so difficult that it implicitly makes it almost impossible for beneficiaries of international protection to apply for and receive their right to family life.

88. One of the major obstacles that has arisen is the fact that more countries are subjecting subsidiary protection holders to more restrictive conditions such as waiting periods and income requirements. This ignores their special status and creates an arbitrary distinction between refugees and beneficiaries for subsidiary protection despite the fact that the humanitarian reasons for providing more favourable conditions to refugees are applicable to both groups. States must not discriminate or create artificial differences between groups that have comparable situations. Different situations must not be treated in the same way unless such treatment is objectively justified. At a time when Member States are awarding subsidiary protection to those who are arguably entitled to refugee status, such an approach is questionable. Furthermore, in *Alo and Osso* the CJEU declared that the Geneva Convention is also to be used as interpretative guidance in cases involving subsidiary protection beneficiaries. Its reasoning relies on the fact that EU law has developed in a way to align the two statuses of international protection which was fueled by the Stockholm Programme. It found that the applicable provision in the Qualification Directive (freedom of movement – Article 33) does not specifically allow for differences in treatment between refugees and subsidiary protection beneficiaries, and as such should be treated in a similar manner (unless it could prove that they are not in a comparable situation). By analogy, the relevant provision in the recast Qualification Directive relating to family unity, Article 23, does not provide for a difference of treatment, and as such should be treated in a similar manner.

89. Family reunification can be limited to 'core' family members, but this doesn't take into account the special circumstances of forced displacement or the wide cultural differences of the concept of a family. There is no pre-determined family model for the purposes of Article 8 ECHR and the ECtHR supports an expansive interpretation of family life, based on actual ties rather than legal relationships.[230] Even when it is permissible to exclude certain family

[230] As explained by Sir Stanley Burnton in *Singh & Anor v The Secretary of State for the Home Department* [2015] EWCA Civ 630 (24 June 2015) para. 24, available at: http://bit.ly/23hbWNE

members, CJEU jurisprudence indicates that States must consider each case on its merits, it cannot just apply a blanket exclusion, and should take into account all relevant factors, in line with the right to be heard and the right to good administration. Indeed, certain Member States such as Belgium apply a less restrictive approach to and grant family unification to Syrians who fall outside 'core' family members.

90. Another major obstacle for beneficiaries of international protection to effectively access family reunification relates to the significant amount of documentation Member States can require when submitting an application. Even though there are valid reasons for requiring such documentation, such as for instance, in order to combat smuggling and to uphold the best interests of the child, States nevertheless must take into consideration the special status of beneficiaries of international protection and the difficulties they faced in reaching safety, with the result that is not always possible to obtain the requisite documents required. In accordance with ECtHR case law, any overly rigid documentation requirements will be disproportionate and will undermine the effectiveness of the right to family life. States, in line with ECtHR case law, need to put in place procedures to take into account events that have led the applicant to claim international protection status,[231] which includes having a proportionate approach to what documents will be accepted.

91. Finally, as documented, time limits can impede effective access to the family reunification procedure. Having undue delays in the administration of a family reunification application undermines the EU right to good administration and legal certainty. Under the Family Reunification Directive, Member States must decide on a family reunification application within nine months unless there are 'exceptional circumstances' under which this needs to be extended. However, in accordance with CJEU case law, the Directive must be interpreted in a strict manner and Member States discretion must not be used in a manner that would undermine the Directive and its effectiveness. Extending the time period, cannot be done as a matter of course, but under circumstances that genuinely can be described as exceptional. Similarly, the effectiveness of the Directive can also be undermined if the time periods required to submit an application are such that it is unrealistic or unreasonable to expect a beneficiary of international protection to comply. Many administrative obstacles need to be overcome before all the requisite documents can be gathered and there can be significant practical obstacles, such as the location of the relevant embassy, for family members to overcome in a short time period.

92. Beneficiaries of international protection are still in a very precarious situation when they are granted international protection. Ensuring effective access to family reunification enables beneficiaries to better integrate and allows family members to reach safety through one of the few legal routes still available. States must avoid practices that undermine this essential right, the right of family unity. It has been well documented that progressive integration policies have a positive effect on society as a whole and benefits the community in the long run, and ensuring timely and accessible family reunification policies are the key to better integration.[232] Family reunification studies show that protection holders whose family members are abroad, have much more difficulties to learn the language, to find a job and to stand on their own feet.

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[231] ECtHR, *Mugenzi v. France*, Application No. 52701/09, 22 January 2015, para.52

[232] See for example, Philippe Legrain, *Refugees Work: A humanitarian investment that yields economic dividends,* May 2016, an OPEN publication.

As stated by J. McCloskey, 'the under performance of family members and family units, in this respect, does not further any identifiable public interest. On the contrary it is antithetical to strong and stable societies'.[233] States should give effect to family reunification in a way that accords due importance to the primacy of the fundamental rights involved, in an expansive manner which goes beyond their minimum human rights obligations.

[233] *AT and another,* [2016] UKUT 227 (IAC), 24 March 2016, para 35.