EUROPEAN COURT OF HUMAN RIGHTS

Application No. 31077/23

BETWEEN:

Dotani

Applicant

v.

Greece

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

The AIRE Centre (Advice on Individual Rights in Europe), ECRE (the European Council on Refugees and Exiles), and the Dutch Council for Refugees.

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pursuant to the Registrar's notification dated 2nd February 2024 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

23rd February 2024

Executive Summary

I. The Court is invited to evaluate the quality of procedures for family reunification with consideration of a refugee's specific circumstances. Decisions on the outcome of family reunification applications require guarantees of flexibility, promptness, and effectiveness and the Court must be satisfied that national procedures do not exclude genuine family members entitled to family reunification under Article 8 ECHR.

II. The comply with obligations under Article 13 in conjunction with Article 8, individuals must have access to a decision which they can challenge. The Court will also assess whether there existed objective and reasonable justification for *not* treating an applicant differently to others in a similar but relevantly different situation in accordance with Article 14 in conjunction with Article 8.

III. In light of Contracting States' obligations under Article 53 ECHR, the intervenors invite the Court to consider the rights and obligations guaranteed by other international agreements to which the relevant Contracting State is a party. The Court is invited to refer to:
   a. relevant European Union law, including the relevant provisions of the EU Charter of Fundamental Rights; the EU Family Reunification Directive; the EU Qualification Directive; and relevant jurisprudence of the Court of Justice of the European Union which address the right of family life, children's rights, and the right to family reunification.
   b. relevant international law, including the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights and the associated General Comments issued by the corresponding Committees. Particular attention should be paid to the three over-arching provisions of the Convention on the Rights of the Child: Article 2 (non-discrimination), Article 3 (best interests of the child) and Article 12 (hearing the views of the child).

Obligations under Article 8 ECHR

1. Violations of Article 8 can occur either by an active interference with the protected rights or by a failure to comply with the positive obligations in that article. A violation will be found where the Court is satisfied that the relevant authorities failed to demonstrate an interference with Article 8 was proportionate to the aim pursued and met a pressing social need.[1] It is well established that spouses, parents, and their children are entitled to lead a normal family life.[2] Ties between parent and child are a "fundamental element" of family life and measures which prevent the development of this relationship may constitute an interference with rights under Article 8 ".[3]
2. The Grand Chamber has set out examples of where it has generally been prepared to find that there was a positive obligation to grant family reunification.[4] For instance, there is a positive obligation in cases where a) children are involved in the application and b) where 'there were insurmountable obstacles in the way of the family living in the country of origin of the person requesting reunification.[5]

[1] *El Ghatet v. Switzerland*, no. 56971/10, § 47, 8 November 2016.
[2] *M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021; *El Ghatet v. Switzerland*, no. 56971/10, 8 November 2016; *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31.
[3] *Santos Nunes v. Portugal*, no. 61173/08, § 66, 22 May 2012.
[4] *M.A. v. Denmark* [GC], no. 6697/18, § 135 (i)-(v), 9 July 2021.
[5] See various other examples in *M.A. v. Denmark* [GC], no. 6697/18, §135 (iv) and (v), 9 July 2021.

3. Case law reflects that refugees **are not responsible for the separation of their family or the discontinuation of family**.[6] This Court has therefore clearly stated that family unity and the right to family life is "*an essential right of refugees and that family reunion is an essential element in enabling persons who had fled persecution to resume a normal life*".[7]
4. This Court has stated that an interference by a public authority with a person's right to respect, notably, for family life, must be **in accordance with the law** and must also be "*necessary in a democratic society*", and therefore respond to a pressing social need and be proportionate to the legitimate aim pursued.[8]
5. As recalled in the jurisprudence of the Court, Contracting States are entitled to control the entry of aliens on their territory and, in the context of family reunification, States may need to assure themselves that family reunification procedures are not being abused, for example, for the purposes of evading immigration controls or trafficking in human beings. The intervenors therefore recognise that it is acceptable for a State to wish to satisfy itself that family members seeking to benefit from reunification are indeed related as claimed. **The intervenors emphasise that Contracting States nevertheless must be careful not to exclude genuine family members entitled to reunification as a result of the over-zealous application of procedural rules being applied to spouses and children suspected of not being genuine**. This principle applies *a fortiori* to the inflexible enforcement of procedural requirements where the genuineness of the relationships is not justifiably in question. In this respect, the intervenors invite the Court to note that States can only take reasonable and proportionate steps to check that children are who they say they are and must not exclude precisely those spouses and children the ECHR, the Family Reunification Directive (the FRD)[9] and the Qualification Directive (the QD)[10] are specifically designed to benefit.[11] The Court is therefore invited to consider which procedural requirements are still proportionate to the aim pursued.
6. The Court should consider whether the interference **strikes a fair balance between an individual's right to protection under the ECHR and the interests of the Contracting States**. This should consist of an "*individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned*" and "*the situation in the country of origin*".[12] In particular, the principle of the best interests of children must always be applied when considering a decision concerning family reunification.[13]

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[6] *Tanda-Muzinga v. France*, no. 2260/10, § 75, 10 July 2014; UN Convention Relating to the Status of Refugees (28 July 1951).
[7] *Tanda-Muzinga v. France*, no. 2260/10, § 75, 10 July 2014; *M.A. v. Denmark* [GC], no. 6697/18, § 138, 9 July 2021.
[8] For an example by analogy, see: *Vavřička and Others v. the Czech Republic* [GC], no. 47621/13, § 266, 8 April 2021; *Piechowicz v Poland*, no. 2007/07, § 212, 17 April 2012.
[9] EU Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification.
[10] EU Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
[11] See from § 24 of this intervention on relevant EU law.
[12] *M.A. v. Denmark* [GC], no. 6697/18, § 192-193, 9 July 2021.
[13] *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, 6 July 2010; *Tarakhel v. Switzerland* [GC], no. 29217/12, § 99, ECHR 2014; *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005.

7. Contracting States are afforded a certain margin of appreciation. However, this margin "*will vary in the light of the nature of the issues and the seriousness of the interests at stake*".[14]
8. Regarding the procedural requirements for processing applications for family reunification, the Court has held that the "*national decision-making process* [must] *offer the guarantees of flexibility, promptness and effectiveness required in order to secure the right to respect for family life under Article 8*",[15] attentiveness, "*particular diligence*",[16] and "*give due consideration to the applicant's specific situation*."[17] These considerations apply to both refugees and beneficiaries of subsidiary protection.[18] The intervenors further note the broad consensus that a child's best interest must be considered in such a balancing exercise.[19] If a solution chosen is not in the best interests of the child, grounds must show that their best interests were in practice treated as a primary consideration.
9. In *Tanga-Muzinga*, with reference to the EU Family Reunification Directive,[20] this Court noted the need to show greater flexibility in respect of evidence gathering to attest for family ties.[21] Such flexibility helps to reduce the length of proceedings and decision-making time.[22]
10. In this respect, the Court will also take into consideration the **length of time** where parent and child are separated.[23] Delays and excessive lengths of time in reunification contexts were addressed by the Grand Chamber in *M.A. v. Denmark*.[24] The longer the length of separation, the more likely it is to lead to **"*irreparable consequences for the relationship***" and, where children are concerned, to the "*deterioration in the child's relationship with his or her parent*".[25]
11. In *Senigo Longue and Others,* visas enabling family members to be reunited were finally issued almost four years after an application for family reunification was issued.[26] The Court held that the "*prolongation of the difficulties* [the applicant] *encountered in the course of the proceedings prevented her from asserting her right to live with her children*".[27] It held that the "*decision making process did not offer the guarantees of flexibility, promptness, and effectiveness required to ensure respect for the applicants' right*" under Article 8.[28]
12. **The intervenors submit that the undue length of proceedings results in the prolonged separation of family members. This is particularly harmful for parent and child relationships and the prospect of establishing a normal family life. In**

[14] *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 211, 10 September 2019.
[15] *M.A. v. Denmark* [GC], no. 6697/18, § 137-139 and 163, 9 July 2021; *Tanda-Muzinga v. France*, no. 2260/10, 10 July 2014; *Mugenzi v. France*, no. 52701/09, 10 July 2014; *Senigo Longue and Others v. France*, no. 19113/09, 10 July 2014.
[16] *Tanda-Muzinga v. France*, no. 2260/10, § 73, 10 July 2014.
[17] *Tanda-Muzinga v. France*, no. 2260/10, § 79 and 82, 10 July 2014.
[18] *M.A. v. Denmark* [GC], no. 6697/18, §146, 9 July 2021.
[19] *El Ghatet v Switzerland*, no. 56971/10, § 46, 8 November 2016; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, 6 July 2010; *Tarakhel v. Switzerland [GC],* no. 29217/12, § 99, ECHR 2014; *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005.
[20] See from § 24 of this intervention on relevant EU law.
[21] *Tanda-Muzinga v. France*, no. 2260/10, § 76, 10 July 2014.
[22] *Tanda-Muzinga v. France*, no. 2260/10, § 76, 10 July 2014.
[23] *M.A. v. Denmark* [GC], no. 6697/18, § 139, 9 July 2021.
[24] *M.A. v. Denmark* [GC], no. 6697/18, § 139, 9 July 2021.
[25] *Santos Nunes v. Portugal*, no. 61173/08, § 69, 22 May 2012; *T.C. v. Italy,* no. 54032/18, § 58, 19 May 2022.
[26] *Senigo Longue and Others v. France*, no. 19113/09, § 52, 10 July 2014.
[27] *Senigo Longue and Others v. France*, no. 19113/09, § 74, 10 July 2014.
[28] *Senigo Longue and Others v. France*, no. 19113/09, § 74 and 75, 10 July 2014.

addition to this, the particular vulnerability of refugees and their family members, must be taken fully into consideration.

13. **The Court *will wish* to consider the opinion of Judge Ktistakis in *M.T. and Others v. Sweden*, which addresses the requirement for a guarantee of an individualised assessment of family unity in light of the concrete situation of the persons concerned.[29]**
14. The Grand Chamber has held that applicants must **be afforded a real possibility** of having an individualised assessment of the interests of family unity.[30] In respect of evidence or other supporting documents, the intervenors observe that the burden of proof is lower for persons with refugee status, due to the special situation in which they find themselves, and that it is often appropriate that they are given the benefit of the doubt regarding their statements and the credibility of their evidence.[31] The relevant authorities should also ensure that applicants have had the opportunity to provide a satisfactory explanation for any relevant objections to the authenticity (or in relevant cases, the validation) of their documents.[32] The intervenors further note the international and European consensus that refugees need to have the benefit of a reunification procedure that is more favourable than other aliens.[33]
15. The State is under an **obligation to institute a procedure** that takes into account the events that have disrupted and disturbed the applicant's family life and led to his being granted refugee status. **[34]**
16. **The intervenors submit that it is not the role of the Court to examine documents and evidence but to verify whether the guarantees of Article 8, with adequate consideration of refugee status, were adequately in place.[35] The Court is invited to evaluate the quality of the available procedures for family reunification in light of an applicant's specific circumstances – including by taking into account the events that led to the interruption in family life.[36]**

<u>Article 13 in conjunction with Article 8</u>

17. Remedies must be "*effective*" in practice, not just in law. The effectiveness of a remedy is determined by three factors. Firstly, whether it can directly rectify the impugned situation.[37] Secondly, its speediness,[38] for a remedy which cannot succeed in due time is neither adequate nor effective.[39] Thirdly an individual's ability to access the remedy must not be unjustifiably obstructed by the acts or omissions of the authorities,[40] including the absence of a challengeable decision. Additionally, a remedy must be accessible for the person concerned, and is only effective where the applicant can initiate the procedure directly.[41]

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[29] *M.T. and Others v. Sweden*, no. 22105/18, 20 October 2022, dissenting opinion of Judge Ktistakis § 3 and 4.
[30] *M.A. v. Denmark* [GC], no. 6697/18, § 193, 9 July 2021. See also: *M.T. and Others v. Sweden*, no. 22105/18, 20 October 2022, dissenting opinion of Judge Ktistakis § 3.
[31] *F.G. v. Sweden* [GC], no. 43611/11, § 113, 23 March 2016.
[32] *Tanda-Muzinga v. France*, no. 2260/10, § 69, 10 July 2014.
[33] *B.F. and others v. Switzerland*, no. 13258/18, § 97, 4 July 2023. See from § 24 of this intervention on relevant EU law.
[34] *Tanda-Muzinga v. France*, no. 2260/10, § 73 10 July 2014.
[35] *Tanda-Muzinga v. France*, no. 2260/10, § 73 10 July 2014.
[36] *Tanda-Muzinga v. France*, no. 2260/10, § 73, 10 July 2014.
[37] *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR 2000-XI; *Pine Valley Developments Ltd and Others v. Ireland (Article 50),* 9 February 1993, Series A no. 246-B;
[38] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 292, ECHR 2011 and Greece.
[39] *Payet v. France*, no. 19606/08, § 133, 20 January 2011.
[40] *De Souza Ribeiro v. France* [GC], no. 22689/07, § 80, ECHR 2012.
[41] *Petkov and Others v. Bulgaria*, nos. 77568/01 and 2 others, § 82, 11 June 2009.

18. **The intervenors submit that for Article 13, in conjunction with Article 8, to be meaningful, individuals must have access to a decision which they can challenge. Where no such decision is issued, its absence equates to the absence of an effective remedy.**

Article 14 in conjunction with Article 8

19. A violation of Article 14 in conjunction with another substantive provision of the Convention requires a difference of treatment of persons in "*analogous or relatively similar situations*" without an objective or a reasonable justification for the difference in treatment. **Article 14 also applies when Contracting States fail to treat differently individuals whose situations are different**.[42]
20. For instance, individuals making applications for family reunification should generally not be treated differently to those in similar situations unless the individual's circumstances present an obstacle that cannot be fulfilled without different treatment. The requirement to certify documents that are not recognised by the authorities of a Contracting State presents such an example of an objectively impossible or overly difficult burden for applicant refugees or their families to fulfil. This would therefore require different treatment based on a consideration of the unique or different situation of an applicant.[43]
21. The Court has considered the different circumstances of applicants in other cases. For instance, in *MT and others* the Court assessed an alleged difference in treatment between persons with refugee status and persons with subsidiary protection status. The Court has indicated that it will assess the elements that characterise different situations as well as the measure or reason for why a difference may have occurred.[44]
22. The intervenors submit that the intractable insistence on bureaucratic technicalities is inappropriate and the subjective unwillingness of States to accept documents providing evidence of family relations where there is an objective impossibility for the required verification to be obtained is disproportionate and does not pursue a legitimate aim. In such cases, individuals require different treatment to ensure that they have an opportunity to benefit from the rights that others in analogous situations benefit from. **The Court is invited to assess whether there existed objective and reasonable justification for *not* treating an applicant differently to others in a similar but relevantly different situation.[45] Where no objective or reasonable justification exists, it is invited to find a violation of Article 14 in conjunction with Article 8 ECHR.**

Article 53 ECHR

23. Article 53 prohibits, *inter alia,* a construction of Convention rights which would limit the human rights and fundamental freedoms ensured under any other agreement to which the respondent State is a party. To ensure compliance with Article 53 ECHR, when construing the rights and freedoms which are defined in the Convention, this Court must guarantee at least the level of protection of those human rights and fundamental freedoms already guaranteed by other international agreements to which the relevant Contracting State is a party. Some relevant examples of given below.

Relevant EU law

[42] *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.
[43] *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.
[44] *M.T. and Others v. Sweden*, no. 22105/18, § 95 and 97, 20 October 2022.
[45] *Thlimmenos v. Greece* [GC], no. 34369/97, § 47, ECHR 2000-IV.

24. The EU Charter of Fundamental Rights ('CFR') applies in principle to any situation which falls within the scope of EU Law.[46] Article 7 CFR protects the right to respect for family life and Article 24 CFR integrates the principles and standards of the UN Convention on the Rights of the Child (CRC)[47] into the CFR and thus brings it within the scope of EU Law. This means that all policies and actions impacting children must have their best interests as a primary consideration.[48]
25. The two key EU legal instruments governing family reunification for refugees are the FRD[49] and the QD. Article 23(1) QD requires Member States to ensure that family unity can be maintained. The FRD states that measures concerning family reunification must be adopted in order for Contracting States to meet their obligation to protect family life enshrined in both international law and the corresponding legal provisions on the right to family life under Article 8 ECHR and Article 7 CFR.[50] The Directive emphasises that family reunification is necessary not only to protect family life but to make family life possible.[51] According to recital 8 FRD special attention must 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. The procedure for family reunification applied must thus guarantee the effectiveness of the right to a normal family life by bringing together family members who have fled persecution and serious harm.[52]
26. The FRD re-affirms that the rights of the children must be a primary consideration, with Article 5(5) emphasising that when Contracting States examine an application they must have due regard (as a primary consideration) to the best interests of any minor children involved.[53]
27. The FRD also provides for derogations from procedural requirements for refugees[54] emphasising that they require special assistance given their circumstances, particularly when it comes to the family reunification process.[55]
28. Article 5(2) FRD provides that applications are to be accompanied by documentary evidence of the family relationship. It also states that Contracting States may obtain **alternative evidence** as appropriate such as interviews and other investigations.[56] Moreover, Article 11(2) provides that **an application cannot be rejected solely due to lack of documentary evidence** and that States shall take other evidence into account

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[46] Charter on Fundamental Rights of the European Union, (2012), available at: http://tinyurl.com/4y2dc9b6 . See also: CJEU, *Åklagaren v. Hands Åkerberg Fransson*, Case C-671/10, 26 February 2013.
[47] UN *Convention on the Rights of the Child* (CRC) (20 November 1989) Treaty Series, vol. 1577, p.3.
[48] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35, Explanation on Article 24 – The rights of the child: "*This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof. Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.*"
[49] The Court will wish to note the imperfections of Greece's transposition, see: http://tinyurl.com/2puee5u3
[50] Council of the European Union, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Recital 2.
[51] Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Recital 4.
[52] CJEU Advocate General Opinion Wahl in *E. v Staatssecretaris van Veiligheid en Justitie*, C-635/17, 29 November 2018, § 47.
[53] Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Article 5(5). See also § 36-40 of this intervention.
[54] Council of the European Union, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Article 12.
[55] *Tanda-Muzinga v. France*, No. 2260/10, § 75, 10 July 2014.
[56] See *Tanda-Muzinga v. France*, No. 2260/10, § 76, 10 July 2014.

where needed. **The intervenors draw particular attention to these provisions of the Directive dealing with evidence and the rejection of applications on grounds of lack of evidence.**

29. Where an application is rejected, applicants have the right to a domestic remedy by way of legal challenge under Article 18 FRD. This specific right under the FRD is in addition to the general right to a remedy found in Article 47 of the CFR.
30. The Court of Justice of the European Union (CJEU) has considered how the FRD and the QD are to be interpreted in a number of cases[57] including cases involving recognised refugees. In these cases, the CJEU emphasizes that the FRD's objective is to promote family reunification and that it leaves no margin of appreciation to the State once the conditions of chapter 4 are fulfilled, particularly in the case of minor children.
31. This Court (the ECtHR) may wish to refer to the very recent significant CJEU case of *X, Y, A and B v Etat Belge*.[58] The case concerned the mandatory requirement in Belgian law for an application for family reunion to be made in person by the family members of a recognised refugee in Belgium at a Belgian diplomatic post notwithstanding any practical obstacles. The case illustrates that whilst verifying the identity of applicants is a legitimate aim, the procedural requirements associated with this is disproportionate. The CJEU emphasised that due regard must be had to the general situation in the country of origin and the special situation of refugees and that procedural requirements of national law which were impossible or excessively difficult to meet have ***"the effect of rendering the exercise of the right to family reunification impossible in practice"***[59] and thus deprive the Directive of its effectiveness. It falls to the Member State to provide for the possibility of carrying out the verifications of family ties and identity at the end of the procedure and at the same time as when the documents authorising entry are issued.[60]
32. The CJEU stressed the importance of giving "*special attention*" to third-country nationals who have been granted refugee status, particularly taking into account the reasons for them leaving their home countries and the obstacles they face in leading a normal family life. Furthermore, the CJEU emphasised the need to provide enhanced protection to such individuals.[61] In the *E.* judgement the CJEU has also stressed an application cannot be rejected solely on the ground that official documentary evidence of the biological and actual family relationship has not been provided. In this case the CJEU also emphasised the need to take the general situation in the country of origin into consideration when assessing the possibility to submit documents. At the same time, it held that the explanation given by the applicant to justify her inability to provide such evidence cannot be deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the family members concerned as well as the particular difficulties they have encountered.[62]

[57] For example; CJUE, *G.S. and V.G. v. Staatssecretaris van Justitie en Veiligheid*, C-381/18 and C-382/18, 12 December 2019, §§ 60, 61; or *Minister van Buitenlandse Zaken v. K and A*, C-153/14, 9 July 2015, §§ 5, 46.
[58] CJEU, *X, Y, A, and B v État Belge*, Case C-1/23 PPU, 18 April 2023. The intervenors note that the Greek Government chose **not** exercise its right to submit "statements of case or written observations" to the CJEU so that the Greek Government's views in that case are unknown.
[59] CJEU, *X, Y, A, and B v État Belge*, C-123 PPU, 18 April 2023, § 54.
[60] CJEU, *X, Y, A, and B v État Belge*, C-123 PPU, 18 April 2023, § 90.
[61] CJEU, *X, Y, A, and B v État Belge*, C-123 PPU, 18 April 2023, § 43
[62] CJEU, *E. v. Staatssecretaris van Veiligheid en Justitie*, C-635/17, 13 March 2019, §§ 76, 81.

33. The intervenors further note that a failure to implement EU law will give rise to an action in damages. EU law requires Member States to make good damage to individuals caused by a breach of EU law for which that Member State is responsible.[63]

Relevant International Law

1951 Refugee Convention

34. While the 1951 Refugee Convention lacks explicit provisions on family reunification it firmly upholds family unity as a fundamental principle for all. The UNHCR's Executive Committee has stated that Contracting States should exert "*every effort*" to facilitate family reunification, as maintained by Recommendation B within the Convention.[64]
35. Contracting States must apply the provisions of the 1951 Convention without discrimination as to race or country of origin.[65] The 1951 Convention and its provisions are without prejudice to rights and benefits afforded to refugees by other legal instruments and do not impair on these in any way.[66] Furthermore, refugees' access to domestic remedies, including the right to judicial recourse, must be safeguarded.[67] In this context, refugees should receive equal treatment as nationals of the respective Contracting State.

The role of the UN Convention on the Rights of the Child (CRC) and the ICCPR under Article 24 CFR and Article 53 ECHR[68]

36. All Council of Europe members are party to the CRC. There are three over-arching provisions of the CRC: Article 2 (non-discrimination),[69] Article 3 (best interests of the child)[70] and Article 12 (hearing the views of the child).[71] Several General Comments (GC) are also relevant such as General Comment No. 14 on the best interests of the child,[72] General Comment No. 12 on the right of the child to be heard[73] and two joint General Comments, GC No. 3 and GC No. 22.[74]
37. Article 2(2) relates to discrimination of all kinds - both direct and indirect - based on the situation or status of the child's parents. Article 2 CRC prohibits discrimination on all the usual international law grounds including "*other status*". The Inter-American Court has even suggested that this prohibition belongs to norms that are *jus cogens.*[75] *The Human Rights Committee General Comment No.18 supports this assertion that*

[63] CJEU, *Francovich and Bonifaci v Italy*, Joined cases C-6/90 and C09/90, 19 November 1991, § 36.
[64] The Executive Committee of the High Commissioner's Programme, Conclusion No. 24 (XXXII) on Family Reunification (21 October 1981) accessible at: http://tinyurl.com/mrxrujp2
[65] UN Convention Relating to the Status of Refugees (28 July 1951), Article 3.
[66] UN Convention Relating to the Status of Refugees (28 July 1951), Article 5.
[67] UN Convention Relating to the Status of Refugees (28 July 1951), Article 16.
[68] This is in addition to the role of the CRC under Art 24 of the CFR.
[69] UN *Convention on the Rights of the Child* (CRC) (20 November 1989) Treaty Series, vol. 1577, p.3, Article 2.
[70] CRC, Article 3.
[71] CRC, Article 12.
[72] UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.
[73] UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard.
[74] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration.
[75] Inter-American Court of Human Rights, Advisory Opinion OC-18/03, "Juridical Condition and Rights of Undocumented Migrants" (17 September 2003), §§ 97-101.

discrimination includes grounds such as ''other status" provided there is nullification or impairment of the recognition, enjoyment or exercise of a specific right.[76]

38. Article 3 enshrines the best interests of the child as "***a primary consideration***" in all actions concerning them.[77] GC No. 14 elaborates on the content of Article 3 noting that this is "*a substantive right, an interpretative legal principle and a rule of procedure*".[78] It also states that "*inaction or failure to take action and omissions are also 'actions'*" for the purposes of Article 3.[79] GC No.14 emphasises that any decisions concerning children must be justified and explained. [80] Decision making processes must have procedural guarantees for assessing a child's best interest and there must be an evaluation of the impact of the decision (or the lack thereof) on the children concerned.[81]
39. Joint GC No. 3 and No. 22 sets out in some detail requirements when considering migration-related decisions which may affect children:

> *"the Committees stress the need to conduct systematically best-interests assessments and determination procedures as part of, or to inform, migration-related and other decisions that affect migrant children […] the child's best interests should be assessed and determined when a decision is to be made. A 'best interests **assessment**' involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. A 'best-interests **determination**' is a formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment. In addition, assessing the child's best interests is a unique activity that should be undertaken in each individual case and in the light of the specific circumstances of each child or group of children, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves*."[82]

40. GC No. 14 also makes clear that the best interests principle cannot be properly observed unless the requirements of Article 12 CRC are also met.[83] Article 12 requires State Parties to "*assure to the child who is **capable of forming his or her own views** the right to express those views freely in all matters affecting the child, the views of the child being given **due weight in accordance with the age and maturity of the child***." **All too often childrens' views are neither canvassed, not heard, nor listened to.** The procedure for dealing with requests for family reunification for minor children with one or both parents must include some process which enables **the views of the affected children to be ascertained in the context of their best interest assessment and prior to their best interests determination. All these matters should be recorded in the decision – or where no decision has been taken in the justification put forward for the absence of a decision.**

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[76] Human Rights Committee, General Comment No. 18 (1989) on Non-Discrimination §,8
[77] UN General Assembly, *Convention on the Rights of the Child* (20 November 1989) Treaty Series, vol. 1577, p.3, Article 3.
[78] UNCRC General Comment No. 14 (2013), § 6.
[79] UNCRC, General Comment No. 14 (2013), § 18.
[80] UNCRC, General Comment No. 14 (2013), § 97.
[81] UNCRC, General Comment No. 14 (2013), § 99.
[82] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, § 31.
[83] UNCRC General Comment No. 14 (2013), § 43.

41. **Article 10 CRC**[84] enshrines the right to **family reunification** and is the *lex specialis* of the right to family life.[85] Article 10(1) requires states not only to permit applications for family reunification but expressly requires that such applications should be dealt with "*in a **positive, humane and expeditious** manner*".[86]
42. The word "*positive*" does not require all applications to be approved but it does require that the manner in which they are dealt with should be positive and, in particular, consistent with the Convention as a whole.[87] The next requirement is that the process should be "*humane and expeditious*". As GC No. 14 notes "*the passage of time is not perceived in the same way by children and adults [and] delays in or prolonged decision making may have particularly adverse effects on children as they evolve*".[88] Furthermore, joint GC No. 4 and No. 23 states: "*where a country of destination refuses family reunification to the child and/or his/her family it should provide detailed information to the child, in a child-friendly and age appropriate manner on the reasons for the refusal and on the child's right to appeal*".[89] Given the different perception of time for a child, a justifiable (and *a fortiori* unjustifiable) delay in decision making should be similarly explained to the child together with information on the child's right to appeal.
43. The intervenors further invite the Court to refer to Article 17 and 23 of the International Covenant on Civil and Political Rights protect family life, including the interest in family reunification.[90] In *Aden v Denmark*, the Committee concluded that a rejection of family reunification based on formal evidential deficits placed an unreasonable burden on the applicant. The authorities had failed to consider personal circumstances in their assessment of family relations through oral hearings for examples. Denmark's actions amounted to a barrier to the family being reunited.

[84] Article 9 CRC (the right not to be separated from parents) is closely related to Article 10 CRC.
[85] CRC, Article 10.
[86] CRC, Article 10(1).
[87] CRC, Articles 2, 3, 7, 9(1), 12, 16.
[88] CRC, General Comment No. 14 (2013), § 93.
[89] Joint General Comment No.4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No.23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, § 36.
[90] Human Rights Committee, *Aden v. Denmark* (no. 2531/2015) (2019), §§§ 10.6; 10.7, 10.8.