

# Family Reunification for Refugees in Switzerland

## Legal Framework and Strategic Considerations

October 2017

A paper by  
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Centre Suisse pour la Défense des Droits des Migrants (CSDM)  
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Stephanie A. Motz<sup>2</sup>  
October 2017<sup>3</sup>

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## List of Abbreviations

ARE Regulation	Regulation on Admission, Residence and Employment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
ExCom	Executive Committee (of UNHCR)
FAC	Federal Administrative Court
FNA	Foreign Nationals Act
FSC	Federal Supreme Court
HRC	Human Rights Committee (UN)
ICCPR	International Covenant on Civil and Political Rights
PACE	Parliamentary Assembly of the Council of Europe
SEM	State Secretariat for Migration
UK	United Kingdom
UN	United Nations
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNTS	UN Treaty Series

## 1. INTRODUCTION

The aim of this paper is to consider the situation of family reunification for refugees and for persons with a temporary admission for reasons of war, civil war or general violence (hereinafter “F-permit holders”) resident in Switzerland and to highlight areas where family reunification law in Switzerland may not be compatible with international human rights law. It points to possible solutions to this problem through international litigation and seeks to assist asylum lawyers more generally with strategic litigation in such cases. This paper focuses on issues surrounding family reunification applications concerning relatives resident in non-EU Member States and does not look at family reunification issues arising in the context of the Dublin III Regulation,<sup>4</sup> which deserves a separate discussion.

This paper first summarises the pertinent legal criteria for family reunification with refugees and F-permit holders in Switzerland. Second, it sets out briefly the applicable law in relation to the reunification of refugees with their families in international law. Third, it provides an overview of the case law of the European Court of Human Rights (ECtHR) relating to family reunification. Fourth, it considers some of the most typical and problematic case scenarios leading to a refusal of family reunification for refugees in Switzerland and suggests possible international litigation routes to challenge the *status quo*. Finally, it concludes by summarising the most salient aspects that need to be considered for strategic litigation in this area in the future.

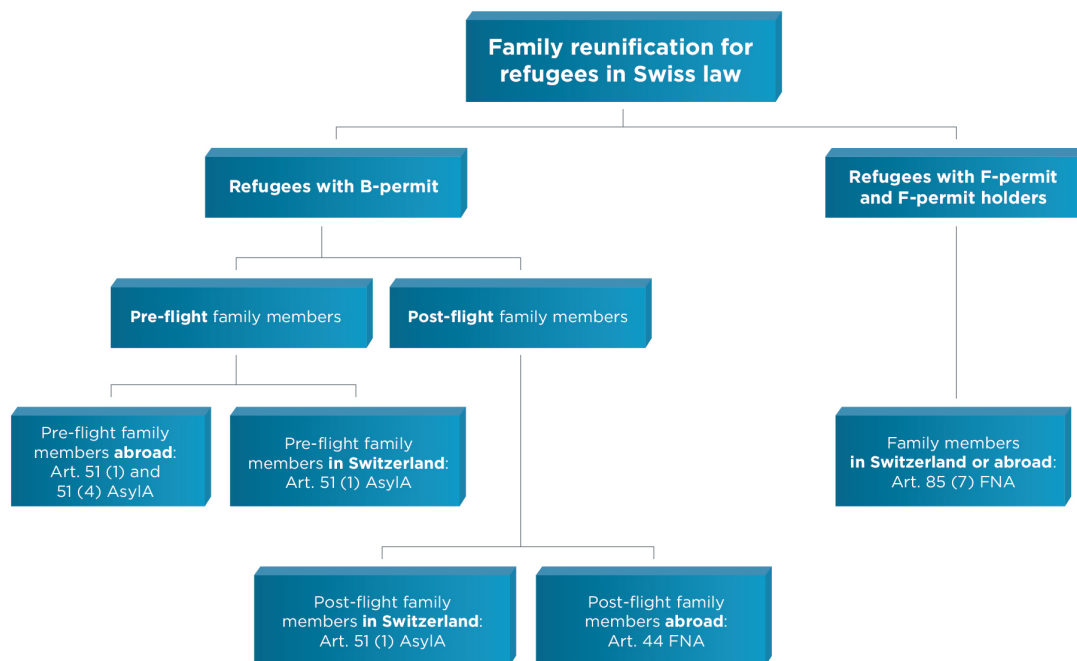
## 2. FAMILY REUNIFICATION FOR REFUGEES IN SWISS IMMIGRATION AND ASYLUM LAW

### 2.1. Introduction

Family reunification for refugees in Swiss law is regulated by a relatively complex set of provisions. In particular, Swiss law distinguishes between different groups based on the type of permit, the question of whether family ties were formed pre- or post-flight, and whether family members applying for family reunification with their refugee family member in Switzerland are already in Switzerland or are abroad at the time of the application. The diagram below seeks to provide a structured overview of the pertinent distinctions and legal bases for family reunification.

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<sup>4</sup> 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), available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R0604>.



As regards the “family members” eligible for family reunification, Swiss legislation only permits family reunification with spouses, registered partners and minor children (Art. 51 (1) Asylum Act (hereinafter “AsyIA”);<sup>5</sup> Art. 85 (7) Foreign Nationals Act (hereinafter “FNA”);<sup>6</sup> Art. 74 (6) Regulation on Admission, Residence and Employment (hereinafter “ARE Regulation”)<sup>7</sup>) as well as adoptive and stepchildren.<sup>8</sup> Other family members, particularly parents and siblings of unaccompanied children, even if they are themselves minors, are no longer eligible for family reunification.<sup>9</sup> For ease of reference, the terms “family members” will be used here to refer to the group of family members who are eligible for family reunification according to Swiss legislation, i.e. spouses, minor children and registered partners.

Other family members may, according to the *Memorandum* to the AsyIA,<sup>10</sup> in certain situations be eligible for family reunification pursuant to Art. 8 of the European Convention on Human Rights (“ECHR”),<sup>11</sup> which guarantees the right to respect for family life. In particular, the *Memorandum* refers to adult disabled children, foster children and other persons who permanently shared a

<sup>5</sup> Asylum Act (Asylgesetz) of 26 June 1998 (status as at 1 October 2016), available at: <https://www.admin.ch/opc/de/classified-compilation/19995092/index.html> and in English at: <https://www.admin.ch/opc/en/classified-compilation/19995092/index.html> (status as of 1 October 2016).

<sup>6</sup> Foreign Nationals Act (Ausländergesetz) of 16 December 2005 (status as at 1 January 2017), available at: <https://www.admin.ch/opc/de/classified-compilation/20020232/index.html> and in English at: <https://www.admin.ch/opc/en/classified-compilation/20020232/index.html> (status as at 1 January 2017).

<sup>7</sup> Regulation on Admission, Residence and Employment (Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit) of 24 October 2007 (status as at 1 May 2017), available at: <https://www.admin.ch/opc/de/classified-compilation/20070993/index.html>.

<sup>8</sup> Federal Administrative Court (Bundesverwaltungsgericht/Tribunal administratif fédéral, FAC), D-1411/2014, 9 July 2014; FAC, D-5536/2013, 24 February 2014. Judgments of the FAC may be found at <https://www.bvger.ch/bvger/en/home/judgments/entscheidatenbank-bvger.html> by searching for the judgment reference number.

<sup>9</sup> See e.g. FAC, E-7481/2014, 20 January 2015.

<sup>10</sup> Memorandum to the Total Revision of the Asylum Act and Amendments to the FNA, BBI 1996 II 1, 70, available at: <https://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10053820> (hereafter “BBI 1996 II 1, 70”).

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

household with the applicant and who are dependent on this common household.<sup>12</sup>

In addition, Swiss law distinguishes between refugees who have been granted asylum (so-called B-permit) and refugees who are only temporarily admitted to Switzerland (F-permit). Their family reunification rights differ in several respects (see further on this below, section 2.2).

There are two main reasons why persons recognised as refugees are granted an F-permit rather than a B-permit according to Swiss law.<sup>13</sup> First, this is because they were recognised as refugees based on *sur place* activities only (Art. 54 AsylA). Second, this is so if they are considered “unworthy” of asylum for one of the following reasons: because they have committed “reprehensible acts”; because they constitute a threat to the internal or external security of Switzerland; or because they are subject to an expulsion order pursuant to the new expulsion provisions in Art. 66a or 66a<sup>bis</sup> of the Swiss Criminal Code or Art. 49a or 49a<sup>bis</sup> of the Military Criminal Code (Art. 53 AsylA).<sup>14</sup>

Persons facing a real risk of a violation of Art. 3 ECHR and persons fleeing from war, civil war or general violence are also granted temporary admission and receive an F-permit (Art. 83 (1), (3) and (4) FNA). They are not granted refugee status and thus have a different legal position in Swiss law. They will be referred to as “F-permit holders” hereafter. Likewise, persons facing a medical emergency in their country of origin are also granted an F-permit (Art. 83 (4) FNA). This latter category of F-permit holders is not part of the focus of this paper.

Approximately 27 per cent of all individuals granted an F-permit are refugees (between 2009 and June 2016).<sup>15</sup> According to a report of the Federal Council, the majority of F-permit holders were nationals of Eritrea and Syria, followed by Afghanistan (as of 30 June 2016).<sup>16</sup> From 2009 to 2015, an average of 0.03% of persons with an F-permit had their temporary admission terminated with a view to their forcible removal to their country of origin.<sup>17</sup> A further average of 3.84 per cent had left Switzerland voluntarily.<sup>18</sup> Thus, the vast majority of F-permit holders, over 96 per cent, remain durably in Switzerland. After five years, an F-permit holder may apply for a B-permit, provided that they meet a number of conditions (Art. 84 (5) FNA).

## 2.2. Distinction Between Refugees with B-permit and Refugees with F-permit

In general, family reunification rights of F-permit refugees and F-permit holders are more limited than those of B-permit refugees.<sup>19</sup> In relation to B-permit refugees Art. 51 (1) and (4) AsylA provide:

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<sup>12</sup> BBl 1996 II 1, 70, above fn. 10 and FAC, D-1590/2014, 8 December 2014, § 7.

<sup>13</sup> A further reason would be the situation of mass influx pursuant to Art. 55 AsylA, but this has not so far been invoked in practice.

<sup>14</sup> Swiss Criminal Code of 21 December 1937 (status as of 1 January 2017), available in English at: <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html> and Military Criminal Code of 13 June 1927 (status as of 1 January 2017), available at: <https://www.admin.ch/opc/de/classified-compilation/19270018/index.html>.

<sup>15</sup> Bericht des Bundesrates, *Vorläufige Aufnahme und Schutzbedürftigkeit: Analyse und Handlungsoptionen*, Juli 2016, p. 27, available at: <https://www.sem.admin.ch/dam/data/sem/aktuell/news/2016/2016-10-14/ber-va-d.pdf>.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Since the publication of a new precedent-setting judgment of the FAC, F-8337/2015, 21 June 2017, F-permit refugees with pre-flight family members who are already in Switzerland can no longer rely on Art. 51 (1) AsylA to lead to inclusion of the family member in the refugee status of the applicant. Their family members thus no longer receive refugee status like them.



### Art. 51 Family asylum

<sup>1</sup> Spouses or registered partners of refugees and their minor children shall be recognised as refugees and granted asylum provided there are no special circumstances that preclude this.

...

<sup>4</sup> If the persons entitled under paragraph 1 were separated during flight and are now abroad, their entry must be authorised on request.

Thus, B-permit refugees have an enforceable right to family reunification with their pre-flight family members in accordance with Art. 51 (4) taken with Art. 51 (1) AsylA, conditioned only upon the existence of a pre-flight family relationship (except for cases in which particular circumstances apply<sup>20</sup>).

On the other hand, F-permit refugees and F-permit holders have no such right.<sup>21</sup> Their situation is regulated in Art. 85 (7) FNA:

### Art. 85 Regulation of temporary admission

...

<sup>7</sup> Spouses and unmarried children under 18 years of temporarily admitted persons and temporarily admitted refugees may be reunited with the temporarily admitted persons or refugees at the earliest three years after the order for temporary admission and included in that order if:

- a. they live with the temporarily admitted persons or refugees;
- b. suitable housing is available; and
- c. the family does not depend on social assistance.

Art. 85 (7) FNA thus firstly provides that F-permit refugees and F-permit holders may not apply for family reunification before the expiry of a three-year period after the grant of their temporary admission. Secondly, after the expiry of this three-year period, F-permit refugees and F-permit holders may only apply for family reunification if the conditions set out in Art. 85 (7) (a)-(c) FNA above are met. The most critical condition in this context is the requirement to prove that they can sustain themselves independently from social assistance (Art. 85 (7) (c) FNA).

F-permit holders encounter various obstacles in accessing the Swiss labour market, including restrictive employment laws during the asylum procedure, unreliable language courses, medical problems and the constant worry about the security and well-being of family members in the country of origin. After three years, approximately 20 per cent are employed.<sup>22</sup> Currently, F-permit holders are only prevented from applying for family reunification if they rely on social assistance, while other financial assistance measures, in particular supplementary benefits to the old-age or survivor's insurance and disability insurance (in German: "Ergänzungsleistungen"; in French: "prestations complémentaires")<sup>23</sup> do not count as social assistance. However, in the context

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<sup>20</sup> As cited, for example, in C. Hruschka, in: Thür/Zünd/Spescha/Bolzli/Hruschka, *Kommentar zum Migrationsrecht*, Orell Füssli 2015, Nr. 2 AsylG, Art. 51 N 4 und N 9 (hereafter "*Kommentar zum Migrationsrecht*"); S. Motz, in: Swiss Refugee Council (SFH), *Handbuch zum Asyl- und Wegweisungsverfahren*, Haupt Verlag 2015, pp. 459-462, para. 1.2.2. (hereafter "*Handbuch zum Asyl- und Wegweisungsverfahren*").

<sup>21</sup> For a recent confirmation of this, see e.g. FAC, F-2186/2015, 6 December 2015, E. 5.2; for a view in disagreement, see C. Hruschka, *Kommentar zum Migrationsrecht*, above fn. 20, Nr. 2 AsylG, Art. 51 N 10.

<sup>22</sup> UNHCR, *Arbeitsmarktintegration: Die Sicht der Flüchtlinge und vorläufig Aufgenommenen in der Schweiz*, Dezember 2014, available at: [http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/UNHCR-Integrationsstudie\\_CH\\_web.pdf](http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/UNHCR-Integrationsstudie_CH_web.pdf), (hereafter "*Arbeitsmarktintegrationsstudie*").

<sup>23</sup> Please see further the website of the Information Centre on old age and survivor's insurance benefits, available at: <https://www.ahv-iv.ch/en/Social-insurances>.

of the implementation of the mass immigration initiative (Art. 121a of the Federal Constitution of the Swiss Confederation),<sup>24</sup> it is planned that these supplementary benefits will also be considered social assistance in the context of family reunification applications.<sup>25</sup>

The Swiss Federal Council justifies the restricted family reunification rights of F-permit holders by referring to the ECtHR's case law on Art. 8 ECHR and the fact that only a small group of F-permit holders has refugee status.<sup>26</sup> The Swiss courts also consider this legal requirement to be compliant with Art. 8 ECHR.<sup>27</sup> Their justification is that immigrants can only rely on Art. 8 ECHR if they have some sort of settled status ("gefestigtes Aufenthaltsrecht"), which F-permit holders regularly do not have according to the Swiss jurisprudence.<sup>28</sup> The case law of the Federal Supreme Court (FSC) and the FAC on whether F-permit holders have a settled status and can thus rely on Art. 8 ECHR is, however, inconsistent.<sup>29</sup> More recently, the FAC has held that the question whether the three-year ban is compatible with Art. 8 ECHR must be resolved on a case-by-case basis but has so far not found it to be incompatible in any given case.<sup>30</sup>

Contrary to the Federal Council's reasoning, F-permit refugees in fact make up one quarter of all F-permit holders (please see on this above, section 2.1). Given that 96 per cent of F-permit holders durably stay in Switzerland, their status also cannot properly be considered as temporary. It could also not be concluded from their status that they can enjoy family life in their countries of origin instead, given that a large number of them come from Eritrea, Syria and Afghanistan. In fact, the three-year ban prevents F-permit refugees from settling down and integrating into Swiss society. Its compatibility with the ECHR in light of the ECtHR's case law will be critically assessed in section 5 below.

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<sup>24</sup> Federal Constitution of the Swiss Confederation of 18 April 1999 (status as of 12 February 2017), available in English at: <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>.

<sup>25</sup> Please see State Secretariat for Migration (Staatssekretariat für Migration, SEM), *Factsheet: Zusatzbotschaft zur Änderung des Ausländergesetzes (Integration): Anpassung an Artikel 121a BV und Umsetzung von parlamentarischen Initiativen*, 4. März 2016, pp. 1-2, available at: [https://www.sem.admin.ch/dam/data/sem/aktuell/gesetzgebung/teilrev\\_aug\\_integration/fs2-zusatzbot-d.pdf](https://www.sem.admin.ch/dam/data/sem/aktuell/gesetzgebung/teilrev_aug_integration/fs2-zusatzbot-d.pdf); for a criticism of this by the Swiss Conference for Social Assistance, please see SKOS, *Stellungnahme zur Änderung des Ausländergesetzes: 1. Umsetzung von Art. 121a BV; 2. Anpassung der Gesetzesvorlage zur Änderung des Ausländergesetzes (Integration)*, Mai 2015, available at: [http://skos.ch/uploads/media/2015\\_Vernehmlassung\\_TeilrevisionAUG-d.pdf](http://skos.ch/uploads/media/2015_Vernehmlassung_TeilrevisionAUG-d.pdf).

<sup>26</sup> See EMARK 2006/7 § 7.3, referring to Bericht des Bundesrates zur Totalrevision der Asylverordnung 1 über Verfahrensfragen, Juli 1999.

<sup>27</sup> S. Motz, *Das Recht auf Familienleben von vorläufig aufgenommenen Personen*, in: Asyl 4/14, with further references.

<sup>28</sup> However, see the ECtHR judgment in *M.P.E.V. and Others v. Switzerland*, Application No. 3910/13, 8 July 2014, available at <http://hudoc.echr.coe.int/eng/?i=001-145348>, where this requirement of a settled status for reliance on Art. 8 ECHR was rejected by the ECtHR.

<sup>29</sup> See e.g. FAC, E-1484/2016, 22 March 2016 (the FAC found an interference with, but no violation of, Art. 8 ECHR in the family reunification case of an F-permit holder who had in the meantime obtained a B-permit); FSC, 2C\_639/2012, 13 February 2012 (the FSC held that an F-permit holder mother had a settled status and could rely on Art. 8 ECHR, as she could not be expected to return to her country of origin, but that she was also married to a B-permit holder and that the refusal of family reunification in this case would amount to a violation of Art. 8 ECHR); FAC, E-4190/2016, 7 September 2016 (finding that an F-permit refugee mother had a settled status in Switzerland, but that the existence of family life between married spouses had to be assessed by reference to whether an intense and active relationship was being enjoyed, §§ 7.2.1 and 7.2.2); FAC, F-2186/2015, above fn. 21 (finding that an F-permit holder who had come to Switzerland over four years previously and had held her F-permit for just under three years did not yet have a sufficiently settled status to be able to rely on Art. 8 ECHR, § 6.3.2).

<sup>30</sup> See FAC, F-2186/2015, above fn. 21, § 6.3 (the FAC held that the applicant mother had no permanent right of residence – so that she could not rely on Art. 8 ECHR – and that there were also no other reasons rendering the three-year ban contrary to Art. 8 ECHR); FAC, F-8197/2015, 13 March 2017.

### 2.3. Different Access to Family Reunification for Post-Flight and Pre-Flight Spouses of B-Permit Refugees

Swiss law provides for different family reunification rights depending on whether family life was formed prior to flight from the country of origin or after flight.<sup>31</sup> According to the FAC's case law, family members can only meet the pre-flight requirement where the family was separated in the country of origin, not during flight. In principle, the wording of Art. 51 (4) AsyIA ("were separated during flight") would be sufficiently open-ended to include family members who became a family during flight and were separated in a transit country. But the FAC has held that this does not apply to family members who were separated outside the country of origin.<sup>32</sup> Thus, where family members have been separated during flight, particularly in a transit country, they no longer meet the pre-flight requirement and are considered post-flight family members.

B-permit refugees who are seeking family reunification with their post-flight family members abroad must rely on Art. 44 FNA, which provides:

**Art. 44 Spouses and children of persons with a residence permit**

The foreign spouse and unmarried children under 18 of a person with a residence permit may be granted a residence permit if:

- a. they live with the permit holder;
- b. suitable housing is available; and
- c. they do not depend on social assistance.

This is a discretionary provision so that they do not have a *right* to family reunification.<sup>33</sup> While the discretion has to be exercised "diligently", it is conditioned on the requirements in subparagraphs (a)-(c). Again, the most critical requirement here is the necessity to be able to sustain the family without depending on social assistance (Art. 44 (c) FNA).<sup>34</sup> Like F-permit holders, B-permit refugees struggle with this requirement. During their first few years in Switzerland, recognised refugees also display a low employment rate (around 20 per cent after three years).<sup>35</sup>

The FSC has nevertheless held that the requirements according to Art. 44 FNA comply with the requirements of the right to family life according to Art. 8 ECHR.<sup>36</sup> To a very limited extent, however, the FSC has found that a B-permit refugee can rely on Art. 8 ECHR, outside of the requirements of Art. 44 FNA, when seeking family reunification.<sup>37</sup> For instance, in the case of an Eritrean refugee who sought family reunification with his post-flight spouse, the FSC

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<sup>31</sup> It used to be the law and practice in relation to family members in Switzerland that post-flight family members could also be included in family asylum pursuant to Art. 51 (1) AsyIA. However, the practice of the SEM in relation to this changed and family reunification with family members in Switzerland was also only possible where the family had been separated pre-flight. Yet, a guidance judgment of the FAC has clarified recently that post-flight family members can also be included in family asylum pursuant to Art. 51 (1) AsyIA as long as they are in Switzerland and not abroad. See FAC, D-3175/2016, 17 August 2017.

<sup>32</sup> ATAF (landmark ruling FAC) 2012/32 § 5.4 with further references. These rulings of the FAC may be found at <https://www.bvger.ch/bvger/en/home/judgments/entscheidatenbank-bvger.html> by searching for the judgment reference number.

<sup>33</sup> ATF (landmark ruling FSC) 139 I 330 § 1.3.2. These rulings of the FSC may be found at <https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?lang=fr> by searching for the judgment reference number.

<sup>34</sup> If the family member who is applying for entry clearance can work in Switzerland and does not add to the existing reliance on social assistance of the refugee residing in Switzerland, there is no *additional* reliance on social assistance contrary to Art. 44 (c) FNA: M. Spescha, *Kommentar zum Migrationsrecht*, above fn. 20, Nr. 1 AuG, Art. 44 N 5.

<sup>35</sup> UNHCR, *Arbeitsmarktintegrationsstudie*, above fn. 22, p. 16.

<sup>36</sup> ATF 137 I 284, § 2.6.

<sup>37</sup> ATF 139 I 330.

considered that the social assistance requirement pursuant to Art. 44 (c) FNA can be qualified somewhat in the context of an Art. 8 ECHR assessment:<sup>38</sup>

Where a refugee with asylum status has undertaken everything that can reasonably be expected in order to earn his living (and that of his post-flight family abroad) without recourse to social assistance, and where he has at least partly managed to break into the labour market, this may be sufficient for family reunification with his spouse and family life in Switzerland to be granted, if despite his efforts he is not able through no fault of his own to create a situation, within the deadline for family reunification, which enables him to meet the requirements of Art. 44 (c) FNA, if the missing amount is justifiable and if that amount could be met in the foreseeable future.<sup>39</sup>

Thus, the FSC held that, provided that the refugee could show that he would in the foreseeable future be in a position to earn sufficient money so as not to rely on social assistance after family reunification, the application for family reunification should be granted on the basis of Art. 8 ECHR. This may be pertinent to situations of working poor, where the money earned is just below the relevant threshold for social assistance. But it does not provide for a more general exception from the financial requirement in Art. 44 (c) FNA.

#### 2.4. Distinction in the Context of Late Family Reunification Cases

B-permit refugees seeking family reunification with their pre-flight family members are not subject to any time limit within which they must apply for family reunification (see Art. 51 (1) and (4) AsylA). However, the following three categories face a time limit for applications for family reunification with their family members abroad:

- B-permit refugees seeking family reunification with post-flight family members;
- F-permit refugees seeking family reunification with family members;
- F-permit holders seeking family reunification with family members.

In these cases, family reunification applications must be made within five years of either the date of the grant of the permit or the constitution of the family relationship, whichever is later (Art. 47 (1) FNA for B-permit refugees; Art. 74 (3) of the ARE Regulation for F-permit holders).

Where the family member seeking entry clearance is a child and above the age of 12 years, the application must be lodged within a year of the date of the grant of the F-permit or the commencement of the family relationship (Art. 47 (1) FNA for B-permit refugees; Art. 74 (3) ARE Regulation for F-permit holders). Applications which are made out of time (so-called “subsequent family reunifications”) can only be granted for “significant family reasons” (Art. 47 (4) FNA for B-permit refugees; Art. 74 (4) ARE Regulation for F-permit holders). Such significant family reasons exist where the best interests of the child can

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<sup>38</sup> *Ibid.*, § 4.2.

<sup>39</sup> Unofficial translation. Original text reads: „Unternimmt der anerkannte Flüchtling mit Asylstatus alles ihm Zumutbare, um auf dem Arbeitsmarkt seinen eigenen und den Unterhalt der (sich noch im Ausland befindenden, nach der Flucht begründeten) Familie möglichst autonom bestreiten zu können, und hat er auf dem Arbeitsmarkt zumindest bereits teilweise Fuss gefasst, kann dies genügen, um den Ehegattennachzug zu gestatten und das Familienleben in der Schweiz zuzulassen, falls er trotz dieser Bemühungen innerhalb der für den Familiennachzug geltenden Frist unverschuldet keine Situation zu schaffen vermag, die es ihm erlaubt, die Voraussetzungen von Art. 44 lit. c AuG zu erfüllen, sich der Fehlbetrag in vertretbarer Höhe hält und in absehbarer Zeit ausgeglichen werden kann.“

only be adequately protected by way of family reunification in Switzerland (Art. 75 ARE Regulation).<sup>40</sup> But this criterion is applied very restrictively in practice.<sup>41</sup>

For F-permit refugees, the authorities must also take account of the “particular situation of refugees” when considering their applications for family reunification (Art. 74 (5) ARE Regulation).

In principle, it is in the interests of refugees to seek speedy family reunification with their family members. However, there may be valid reasons in practice for delays in the submission of a family reunification application, especially in the case of the one-year time limit applied to children above 12 years. Such reasons may relate to losing contact with family members due to war, a change of the care arrangements or country conditions or other unexpected changes. Again, this requirement will be examined in the light of Art. 8 ECHR in section 5.

## 2.5. Standard of Proof Regarding Family Ties

According to Art. 7 AsylA, the standard of proof for demonstrating family ties is that they must be rendered “credible” (“glaubhaft machen”).<sup>42</sup> In case of doubt, the federal State Secretariat for Migration (SEM) can request a DNA test and the payment of an advance fee, provided that the persons concerned agree (see Art. 33 of the Federal Act on Human Genetic Testing).<sup>43</sup> A refusal to undertake a DNA-test will result in the conclusion that the family tie has not been rendered credible. Refugees who have a right to family reunification according to Art. 51 (4) AsylA can apply for an exemption from the costs of the DNA test on the grounds of destitution.<sup>44</sup>

However, in practice the standard of proof as applied by the Swiss authorities and courts often appears unduly high. In particular, applications for family reunification with a spouse often fail, because the authorities and courts do not find it established that the couple were married or used to cohabit prior to flight.<sup>45</sup>

## 2.6. Domestic Legal Remedies

In Swiss law, there are two different legal avenues to appeal against the refusal of a family reunification application. In cases where the application was based on the AsylA and thus had to be made to the SEM (please see diagram above in section 2.1), or in cases where the cantonal office for migration had to forward the application to the SEM (according to Art. 74 (4) ARE Regulation), an appeal

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<sup>40</sup> Art. 75 ARE Regulation expressly refers to Art. 47 FNA; however, for its applicability to applications made by F-permit holders, see P. Bolzli, *Kommentar zum Migrationsrecht*, above fn. 20, Nr. 1 AuG, Art. 85 N 15.

<sup>41</sup> M. Spescha, *Kommentar zum Migrationsrecht*, above fn. 20, Nr. 1 AuG, Art. 47 N 7.

<sup>42</sup> SFH, *Handbuch zum Asyl- und Wegweisungsverfahren*, above fn. 20, p. 459.

<sup>43</sup> Federal Act on Human Genetic Testing of 8 October 2004 (status as of 1 January 2014), available in English at: <https://www.admin.ch/opc/en/classified-compilation/20011087/index.html>, Art. 33. See SEM, *Handbuch Asyl und Rückkehr, Artikel F8, Familiennachzug von vorläufig aufgenommenen Personen und vorläufig aufgenommenen Flüchtlingen (Familienvereinigung)*, pp. 7-8, available at: <https://www.sem.admin.ch/dam/data/sem/asyl/verfahren/hb/f/hb-f8-d.pdf>;

Bundesamt für Migration (BFM), *Weisung 322.126, Einreisegesuche im Hinblick auf einen Familiennachzug: DNA-Profil und Prüfung von Zivilstandsunterlagen*, 25. Juni 2012, p. 6/7, available at:

[https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/auslaender/familie/2012\\_0625-weis-dnaprofil-familiennachzug-d.pdf](https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/auslaender/familie/2012_0625-weis-dnaprofil-familiennachzug-d.pdf).

<sup>44</sup> See C. Hruschka, *Kommentar zum Migrationsrecht*, above fn. 20, Nr. 2 AsylG, Art. 51 N 11; SFH, *Handbuch zum Asyl- und Wegweisungsverfahren*, above fn. 20, p. 459.

<sup>45</sup> See e.g. FAC, D-4847/2006, 19 July 2007; FAC, E-2944/2015, 28 December 2015.

must be made to the FAC (Art. 33 (d) of the Administrative Court Act<sup>46</sup>). In such cases, the FAC is the first and final judicial instance, as a further appeal to the only higher judicial instance, the FSC, is statutorily excluded.<sup>47</sup>

In cases where the application was based on the FNA and was thus made to the cantonal migration authority (namely post-flight family members of refugees), the appeal must be made according to cantonal procedural rules. Normally, this means that there is first an appeal to the internal review authority of the cantonal department responsible for the cantonal migration authority, then the cantonal administrative court and in a final step to the FSC, provided that the applicant can rely on a “right” in domestic or public international law.<sup>48</sup> Such a right has been accepted to exist in Art. 8 ECHR family reunification cases, provided that certain conditions are met.<sup>49</sup>

## 2.7. Conclusion

In conclusion, given the various legal hurdles recognised refugees and F-permit holders face in Switzerland when seeking to reunite with family members, their applications are often refused for failing to meet the legal and practical requirements. The question is thus whether such refusals are generally compatible with the right to family life in Art. 8 ECHR.

## 3. FAMILY REUNIFICATION FOR REFUGEES AND BENEFICIARIES OF INTERNATIONAL PROTECTION IN INTERNATIONAL LAW

Various international human rights provisions are relevant to family reunification cases. This section considers first a selection of international refugee law protection standards, second, different UN human rights treaties pertinent to family reunification cases and, third, certain Council of Europe standards applicable in this context.

### 3.1. International Refugee Law Protection Standards

The 1951 Convention Relating to the Status of Refugees<sup>50</sup> does not itself guarantee refugees a right to family reunification. However, the Final Act of the Conference of Plenipotentiaries made a recommendation to national governments to take the necessary measures for the protection of the refugee’s family with a view to:

(1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.<sup>51</sup>

<sup>46</sup> Administrative Court Act (Verwaltungsgerichtsgesetz) of 17 June 2005 (status as of 1 September 2017), available at: <https://www.admin.ch/opc/de/classified-compilation/20010206/index.html>.

<sup>47</sup> See Federal Supreme Court Act (Bundesgerichtsgesetz) of 7 June 2005 (status at 1 June 2017), available at: <https://www.admin.ch/opc/de/classified-compilation/20010204/index.html>, Art. 83 (d) (1).

<sup>48</sup> In German: “Anspruch”; in French: “droit”. See Federal Supreme Court Act, Art. 83 (c) (2).

<sup>49</sup> ATF 137 I 284 § 1.3; ATF 135 I 143 § 1.3.1 with further references; found to have been met in the context of a B-permit refugee seeking family reunification with his post-flight spouse in ATF 139 I 330.

<sup>50</sup> UN General Assembly (UNGA), *Convention Relating to the Status of Refugees*, 28 July 1951, UN Treaty Series (UNTS), vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> (“Refugee Convention”).

<sup>51</sup> UN, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, UNTS, vol. 189, p. 137, available at:

While this is not binding, this recommendation is observed by the majority of States.<sup>52</sup> In addition, the Executive Committee (ExCom) of the United Nations High Commissioner for Refugees (UNHCR)<sup>53</sup> has agreed several Conclusions on family reunification. They include Conclusion No. 24 (XXXII) of 1981 stating that “every effort should be made to ensure the reunification of separated refugee families” and that “it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay”.<sup>54</sup>

As regards documentary evidence of family ties, the same Conclusion expresses the hope “that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family” and that “the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment”.<sup>55</sup>

Regarding unaccompanied children, the same Conclusion provides that “[e]very effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement”.<sup>56</sup>

Finally, regarding financial and housing requirements it states that “[i]n appropriate cases family reunification should be facilitated by special measures of assistance to the head of family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members”.<sup>57</sup>

ExCom has also stated that this should not only apply to refugees who have been granted a durable status, but that “States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted”.<sup>58</sup> Further, it has stressed that “all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity”.<sup>59</sup>

### 3.2. International Human Rights Law Standards

At an international level, the right to family life is guaranteed in the Universal Declaration of Human Rights (Art. 16 (3))<sup>60</sup> and the International Covenant on Civil and Political Rights (Art. 23 (1)).<sup>61</sup>

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<http://www.refworld.org/docid/3e2becbb4.html>.

<sup>52</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>, § 183.

<sup>53</sup> ExCom is composed of state representatives of UN Member States or Members of any of the specialised agencies. Members are elected by the UN Economic and Social Council “on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem”. See UNGA Resolution 1166 (XII), *International Assistance to Refugees within the Mandate of the UNHCR*, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/1166%20\(XII\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1166%20(XII)), § 5.

<sup>54</sup> UNHCR, *Family Reunification No. 24 (XXXII) - 1981*, 21 October 1981, No. 24 (XXXII) - 1981, available at: <http://www.refworld.org/docid/3ae68c43a4.html>, §§ 1 and 2.

<sup>55</sup> *Ibid.*, §§ 5 and 6.

<sup>56</sup> *Ibid.*, § 7. See also UNHCR, *Refugee Children No. 47 (XXXVIII) - 1987*, 12 October 1987, No. 47 (XXXVIII) - 1987, available at: <http://www.refworld.org/docid/3ae68c432c.html>, § (i).

<sup>57</sup> ExCom Conclusion No. 24, above footnote 54, § 9.

<sup>58</sup> UNHCR, *Refugees Without an Asylum Country No. 15 (XXX) - 1979*, 16 October 1979, No. 15 (XXX) - 1979, available at: <http://www.refworld.org/docid/3ae68c960.html>, § (e).

<sup>59</sup> ExCom Conclusion No. 47, above footnote 56, § (d).

<sup>60</sup> UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>61</sup> UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p.



The UN Human Rights Committee has adopted General Comment No. 19 which states that Art. 23 (1) ICCPR “implies the adoption of appropriate measures, both at the internal level and, as the case may be, in cooperation with other States to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons”.<sup>62</sup> In General Comment No. 15, the Human Rights Committee confirmed that the right to respect for family life under Art. 23 ICCPR may in certain circumstances give an alien a right of entry to or residence in the territory of a State Party.<sup>63</sup>

Further, the UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW),<sup>64</sup> which entered into force for Switzerland on 26 April 1997, prohibits any discrimination against women in Art. 2. The CEDAW Committee elaborates in its General Recommendation No. 26 of 5 December 2008 on women migrant workers:

Women migrant workers may be subjected to particularly disadvantageous terms regarding their stay in a country. They are sometimes unable to benefit from family reunification schemes, which may not extend to workers in female dominated sectors, such as domestic workers or those in entertainment...<sup>65</sup>

In the same General Recommendation the Committee recommends:

Legal protection for the rights of women migrant workers: States parties should ensure that constitutional and civil law and labour codes provide to women migrant workers the same rights and protection that are extended to all workers in the country, including the right to organize and freely associate. They should ensure that contracts for women migrant workers are legally valid. In particular, they should ensure that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations.

...

Non-discriminatory family reunification schemes: States parties should ensure that family reunification schemes for migrant workers are not directly or indirectly discriminatory on the basis of sex (article 2 (f)).<sup>66</sup>

Further, Art. 15 (4) CEDAW provides that men and women should be accorded “the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile”. The CEDAW Committee stated in its General Recommendation No. 21 on “Equality in marriage and family relations” that Art. 15 (4) CEDAW means that “migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them”.<sup>67</sup>

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171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (hereafter “ICCPR”), Art. 23 (1). Entry into force for Switzerland on 18 September 1992.

<sup>62</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, available at: <http://www.refworld.org/docid/45139bd74.html>, § 5.

<sup>63</sup> HRC, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html>, § 5.

<sup>64</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html>.

<sup>65</sup> UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 26 on women migrant workers*, 5 December 2008, CEDAW/C/2009/WP.1/R, available at: <http://www.refworld.org/docid/4a54bc33d.html>, § 19.

<sup>66</sup> *Ibid.*, §§ 26 (b), (e).

<sup>67</sup> CEDAW Committee, *CEDAW General Recommendation No. 21: Equality in Marriage and Family*



A further pertinent human rights framework, regularly referred to in the ECtHR's case law (see below, section 4.2.3.), is the UN Convention on the Rights of the Child of 20 November 1989 (CRC),<sup>68</sup> which entered into force for Switzerland on 26 March 1997. In particular, the Court regularly relies on Art. 3 CRC, which provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The child's best interests may not be considered on the same level as all other considerations, but more weight must be attached to what serves the child best.<sup>69</sup> In the case of vulnerable children, the child's best interests are to be determined with due regard to other human rights norms related to these specific situations, such as the Refugee Convention in relation to refugee children.<sup>70</sup> Art. 37 (a) CRC prohibits subjecting children to torture or other cruel, inhuman or degrading treatment or punishment.

Switzerland entered a reservation to the main provision on family reunification in the CRC, Art. 10 CRC. However, as a *lex specialis* to Art. 10, Art. 22 regulates the situation of refugee children and applies to Switzerland. Art. 22 (2) requires States Parties to cooperate, as they consider appropriate, with the UN and other organisations to "protect and assist such a child" and to trace his or her parents or family members "in order to obtain information necessary for reunification with his or her family". These obligations are consistent with the child's general right under Art. 7 (1) CRC "to know and be cared for by his or her parents". In relation to family reunification generally, also under Art. 9 and Art. 10 CRC, the CRC Committee has stated:

Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, States parties are particularly reminded that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner" and "shall entail no adverse consequences for the applicants and for the members of their family" (art. 10 (1)). Countries of origin must respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country" (art. 10 (2)).<sup>71</sup>

Further, refugee children are entitled to appropriate protection and humanitarian assistance (Art. 22 CRC). Art. 6 CRC recognises every child's "inherent right to life" and requires States Parties to "ensure to the maximum extent possible the survival and development of the child". States must create an environment that respects human dignity and ensures the holistic

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*Relations*, 1994, available at: <http://www.refworld.org/docid/48abd52c0.html>, § 10.

<sup>68</sup> UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>69</sup> 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 (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>, §§ 37, 39.

<sup>70</sup> *Ibid.*, § 75.

<sup>71</sup> CRC Committee, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>, § 83.

development of every child.<sup>72</sup> The same risks and protective factors that underlie the life, survival, growth and development of the child need to be considered for the realisation of the child's right to health pursuant to Art. 24 CRC. Pursuant to Art. 27 CRC States Parties also recognise "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".

In keeping with the right to non-discrimination under Art. 2 CRC, States Parties are obliged to take adequate measures to protect a child from discrimination. This is not a passive obligation, but also requires proactive state measures on effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.<sup>73</sup>

According to Art. 19 CRC, "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse ...". According to Art. 39 CRC:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment. ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

### 3.3. Council of Europe Standards

Art. 8 ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Committee of Ministers of the Council of Europe has issued Recommendation No. R (99) 23 of 15 December 1999 on family reunion for refugees and other persons in need of international protection.<sup>74</sup> In its Recommendation the Committee of Ministers stated that member States should promote the family reunification of "the spouse, dependent minor children and, according to domestic legislation or practice, other relatives of refugees and other beneficiaries of international protection".<sup>75</sup>

Regarding family reunification procedures, it stressed that applications for family reunion by refugees and other persons in need of international protection should be dealt with "in a positive, humane and expeditious manner". Regarding evidence of family ties, member states "should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or

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<sup>72</sup> CRC Committee, *General Comment No. 14*, above fn. 69, § 42.

<sup>73</sup> *Ibid.*, § 41.

<sup>74</sup> Council of Europe, *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 at: <http://www.refworld.org/docid/3ae6b39110.html>.

<sup>75</sup> *Ibid.*, § 2.

in any other way". In addition, "[t]he absence of such documents should not *per se* be considered as an impediment to the application and member states may request the applicants to provide evidence of existing family links in other ways".<sup>76</sup>

Further, the Recommendation drew attention to the situation of vulnerable applicants. Particularly where unaccompanied children are concerned "member states should, with a view to family reunion, co-operate with children or their representatives in order to trace the members of the family of the unaccompanied minor".<sup>77</sup>

The Parliamentary Assembly of the Council of Europe (PACE) has also issued recommendations on this topic, PACE Recommendation 1686 (2004) on human mobility and the right to family reunion. This states that "[t]he right to respect for family life is a fundamental right belonging to everyone", and that "[t]he reconstitution of the families of lawfully resident migrants and refugees by means of family reunion strengthens the policy of integration into the host society and is in the interests of social cohesion".<sup>78</sup>

Further, in PACE Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe,<sup>79</sup> it states that the concept of asylum-seekers' families should be interpreted "as including *de facto* family members (natural family), for example, asylum-seeker's concubine or natural children as well as elderly, infirm or otherwise dependent relations" and recommends that members of the same family should be allowed "to reunite already at the stage of the refugee status determination procedure, which sometimes lasts a very long time" and "to reconsider policy on family reunion in respect of persons granted temporary protection or permission to stay on humanitarian grounds".<sup>80</sup>

## 4. ECtHR CASE LAW ON ART. 8 ECHR RELEVANT TO FAMILY REUNIFICATION

### 4.1. Introduction

Over the past 30 years, the ECtHR has decided on approximately 30 family reunification applications of immigrants (including admissibility decisions). The Court has developed some criteria for the application of Art. 8 ECHR in these cases, but it seems that its jurisprudence is still evolving. In some more recent decisions the Court has, for example, developed criteria relevant to family reunification for refugees.

The Court initially displayed a very conservative approach to family reunification. In its first decision on the issue in 1986, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, the Court held that the refusal of family reunification of immigrants residing in the United Kingdom with their post-migration spouses did not even constitute an interference with family life under Art. 8 ECHR.<sup>81</sup>

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<sup>76</sup> *Ibid.*, § 4.

<sup>77</sup> *Ibid.*, § 5.

<sup>78</sup> Council of Europe: Parliamentary Assembly (PACE), *Recommendation 1686 (2004) Human mobility and the right to family reunion*, 23 November 2004, available at: <http://www.refworld.org/docid/583ed1c77.html>, §§ 1 and 6.

<sup>79</sup> PACE, *Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe*, 24 April 1997, Rec 1327 (1997), available at: <http://www.refworld.org/docid/47fdaf20.html>.

<sup>80</sup> *Ibid.*, §§ vii (o), (p), and (q).

<sup>81</sup> ECtHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application Nos. 9214/80, 9473/81, 9474/81, 28 May 1985, available at: <http://hudoc.echr.coe.int/eng?i=001-57416>, § 68. Four out of the 14 judges wrote Concurring Opinions finding that Art. 8 (1) had been engaged, but that the

The next family reunification decision concerned Switzerland. The case of *Gül v. Switzerland* of 1996 concerned the family reunification application of a Kurdish couple from Turkey with their minor son in Turkey.<sup>82</sup> The Court considered it particularly pertinent that the applicant had only obtained an F-permit in Switzerland on medical grounds and had returned to Turkey several times in order to visit his son. On this basis, the Court found no interference with Art. 8 ECHR,<sup>83</sup> as there were no obstacles to him and his wife and daughter enjoying their family life with the son in Turkey (the Court stated that the situation was “more problematic” in relation to his wife who had obtained her F-permit on more critical medical grounds).<sup>84</sup>

It was in July 1999 and thus after the judgment in *Gül* that the changes to the family reunification rights of F-permit holders in Switzerland were introduced by the Federal Council. Based on this case law, it was at the time thought that reduced family reunification rights for F-permit holders did not give rise to any issues under Art. 8 ECHR.

The Court confirmed its conservative approach to family reunification in the case of *Ahmut v. the Netherlands*.<sup>85</sup> It found no violation of Art. 8 ECHR in the case of a Moroccan father’s application to reunify with his son, whose mother was deceased and whose legal guardian he was. In addition to finding that it was possible for the Moroccan father to enjoy family life with his son in Morocco, the Court placed particular emphasis on the fact that the applicant father had left his son behind in Morocco of his own free will.<sup>86</sup>

The first positive decision on family reunification followed in 2001. In *Şen v. the Netherlands*, concerning a Turkish couple’s family reunification application with their daughter, the Court held that there was a major impediment to their enjoying family life in Turkey.<sup>87</sup> The Court distinguished the case from those of *Ahmut* and *Gül* arguing that the couple had established family life in the Netherlands, where they were residing lawfully and where two further children had been born and were going to school.<sup>88</sup>

The first case considering family reunification with a person having fled a civil war was *Tuquabo-Tekle v. the Netherlands*.<sup>89</sup> This 2005 judgment concerned an Eritrean mother who had been granted a residence permit on humanitarian grounds and had married an Eritrean refugee. While she had been able to obtain family reunification with one of her children soon after her flight, it had not been at the time possible to secure family reunification with the applicant child, for reasons that were beyond her control.<sup>90</sup> She had founded a new family with her second husband in the Netherlands, with whom she had two children who by the time of the Court’s decision had been living in the Netherlands for

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interference was justified under Art. 8 (2).

<sup>82</sup> ECtHR, *Gül v. Switzerland*, Application No. 23218/94, 19 February 1996, available at: <http://hudoc.echr.coe.int/eng?i=001-57975>, § 14.

<sup>83</sup> *Ibid.*, §§ 41, 43.

<sup>84</sup> *Ibid.*, § 41.

<sup>85</sup> ECtHR, *Ahmut v. the Netherlands*, Application No. 21702/93, 28 November 1996, available at: <http://hudoc.echr.coe.int/eng?i=001-58002>. This time four judges wrote Dissenting Opinions disagreeing with the finding of no violation of Art. 8 ECHR.

<sup>86</sup> *Ibid.*, § 70.

<sup>87</sup> ECtHR, *Şen v. the Netherlands*, Application No. 31465/96, 21 December 2001, available in French only at: <http://hudoc.echr.coe.int/eng?i=001-64569>.

<sup>88</sup> *Ibid.*, § 40.

<sup>89</sup> ECtHR, *Tuquabo-Tekle v. Netherlands*, Application No. 60665/00, 1 December 2005, available at: <http://hudoc.echr.coe.int/eng?i=001-71439>.

<sup>90</sup> *Ibid.*, § 9.

nine and 10 years respectively.<sup>91</sup> On this basis the Court found a breach of Art. 8 ECHR.

In 2014 the Court assessed the family reunification rights of refugees in two judgments concerning France. In *Tanda-Muzinga v. France* and *Mugenzi v. France* the Court considered the family reunification applications of a Congolese and a Rwandan father with their children.<sup>92</sup> It held that family unity is “an essential right for refugees” and that family reunification is a “fundamental element in enabling persons who have fled persecution to resume a normal life”.<sup>93</sup> Stressing the particular vulnerability of refugees it found that there was a broad consensus at the international and European level concerning the need for refugees “to benefit from a more favourable family reunification procedure than that foreseen for other foreigners”.<sup>94</sup>

In the context of these cases and the non-refugee case of *Senigo Longue v. France*, the Court made clear that Art. 8 also imposes procedural obligations.<sup>95</sup> Generally, family reunification procedures must guarantee the requisite degree of “flexibility, promptness and effectiveness” to ensure compliance with the right to family life (see further on this below, section 4.3.2).<sup>96</sup>

The Court also recognises that Art. 8 ECHR imposes positive obligations on states to enable family reunification.<sup>97</sup> In a case concerning a refugee mother in Canada and her child, who had been detained by the Belgian authorities and thus prevented from joining her mother, it ruled:<sup>98</sup>

The Court further notes that, far from assisting her reunification with her mother, the authorities’ actions in fact hindered it. Having been informed at the outset that the first applicant was in Canada, the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter. The Court considers that that duty became more pressing from 16 October 2002 onwards, that being the date when the Belgian authorities received the fax from the UNHCR contradicting the information they had previously held.

While Art. 8 ECHR may also apply to the family reunification of family members who are already present in the territory, but without residence permits (see further on this below section 4.3.5),<sup>99</sup> the fact that children or partners have

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<sup>91</sup> *Ibid.*, § 47.

<sup>92</sup> ECtHR, *Tanda-Muzinga v. France*, Application No. 2260/10, 10 July 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-145653>; ECtHR, *Mugenzi v. France*, Application No. 52701/09, 10 July 2014, available in French only at: <http://hudoc.echr.coe.int/eng?i=001-145356>.

<sup>93</sup> *Tanda-Muzinga v. France*, *ibid.*, § 75; *Mugenzi v. France*, *ibid.*, § 54; see also the earlier decision in ECtHR, *Mubilanza Mayeka and Others v. Belgium*, Application No. 13178/03, 12 October 2006, available at: <http://hudoc.echr.coe.int/eng?i=001-77447>, § 75.

<sup>94</sup> *Tanda-Muzinga v. France*, *ibid.*, § 75; *Mugenzi v. France*, *ibid.*, § 54.

<sup>95</sup> See *Tanda-Muzinga v. France*, *ibid.*; *Mugenzi v. France*, *ibid.*; but also ECtHR, *Senigo Longue and Others v. France*, Application No. 19113/09, 10 July 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-145355>.

<sup>96</sup> *Tanda-Muzinga v. France*, *ibid.*, § 82; *Mugenzi v. France*, *ibid.*, § 62; *Senigo Longue v. France*, *ibid.*, § 75.

<sup>97</sup> See e.g. *Mubilanza Mayeka v. Belgium*, above fn. 93, §§ 76, 82; ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Application No. 50435/99, 31 January 2006, available at: <http://hudoc.echr.coe.int/eng?i=001-72205>, § 38; *Senigo Longue v. France*, above fn. 95, § 64.

<sup>98</sup> *Mubilanza Mayeka v. Belgium*, *ibid.*, § 82.

<sup>99</sup> See *Rodrigues da Silva and Hoogkamer v. the Netherlands*, above fn. 97; ECtHR, *Nuñez v. Norway*, Application No. 55597/09, 28 June 2011, available at: <http://hudoc.echr.coe.int/eng?i=001-105415>; ECtHR, *Polidario v. Switzerland*, Application No. 33169/10, 30 July 2013, available in French at: <http://hudoc.echr.coe.int/eng?i=001-122977>; ECtHR, *Mengesha Kimfe v. Switzerland and Agraw v. Switzerland*, Applications Nos. 24404/05, 3295/06, 29 July 2010, available in French at: <http://hudoc.echr.coe.int/eng?i=001-100119> and at: <http://hudoc.echr.coe.int/eng?i=001-100121>

been staying with their family member in the destination country for several years does not in itself impose a positive obligation on the state to allow them to stay there.<sup>100</sup>

## 4.2. Main Criteria for Family Reunification Cases under Art. 8 ECHR

The main criteria which can be distilled from the ECtHR's case law on family reunification are the following: (i) whether the family separation was voluntary or not; (ii) whether there are (insurmountable) obstacles to family life being enjoyed elsewhere; and (iii) what must be done to ensure the best interests of the child are a primary consideration. These issues are set out below.

### 4.2.1. Voluntary or Involuntary Family Separation

An important factor for the Court is whether the family was separated voluntarily, i.e. whether the members made "a conscious decision" to leave family members behind and settle in the destination country.<sup>101</sup> This is particularly relevant for refugees and F-permit holders who seek family reunification with their pre-flight family members.<sup>102</sup> In *Tuquabo-Tekle* the Court stressed that in the case of a humanitarian permit holder family separation could not be considered to be voluntary:

At this juncture the Court would remark that it is questionable to what extent it can be maintained in the present case, as the Government did, that Mrs 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 following the death of her husband.<sup>103</sup>

Regarding recognised refugees, in *Mubilanza Mayeka and Others v. Belgium* the Court stressed that "the interruption of family life was solely a result of her decision to flee her country of origin out of a genuine fear of persecution within the meaning of the Geneva Convention Relating to the Status of Refugees of 28 July 1951".<sup>104</sup>

Similarly in *Tanda-Muzinga* the Court stressed:

À cet égard, la Cour observe que la vie familiale du requérant n'a été interrompue qu'en raison de sa fuite, par crainte sérieuse de persécution au sens de la Convention de Genève de 1951... Ainsi, ..., la séparation du requérant d'avec sa famille ne lui était pas imputable. La venue de son épouse et de ses enfants âgés de trois, six et treize ans à l'époque de la demande de regroupement, eux-mêmes réfugiés dans un pays tiers, constituait donc le seul moyen pour reprendre la vie familiale.<sup>105</sup>

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respectively; ECtHR, *M.P.E.V. v. Switzerland*, above fn. 28; ECtHR, *Solomon v. the Netherlands*, Application No. 44328/98, admissibility decision, 5 September 2000, available at: <http://hudoc.echr.coe.int/eng?i=001-5398>.

<sup>100</sup> ECtHR, *Benamar and Others v. the Netherlands*, Application No. 43786/04, admissibility decision, 5 April 2005, available at: <http://hudoc.echr.coe.int/eng?i=001-68832> (the children had been staying with their mother in the Netherlands from 1997 until the date of the decision on 5 April 2005); see also ECtHR, *Chandra and Others v. the Netherlands*, Application No. 53102/99, admissibility decision, 13 May 2003, available at: <http://hudoc.echr.coe.int/eng?i=001-23210>.

<sup>101</sup> *Ahmut v. the Netherlands*, above fn. 85, § 70; see also ECtHR, *Knel and Veira v. the Netherlands*, Application No. 39003/97, admissibility decision, 5 September 2000, available at: <http://hudoc.echr.coe.int/eng?i=001-5399>; *Benamar v. the Netherlands*, *ibid.*

<sup>102</sup> See e.g. *Tuquabo-Tekle v. Netherlands*, above fn. 89; *Mubilanza Mayeka v. Belgium*, above fn. 93; ECtHR, *El Ghatet v. Switzerland*, 8 November 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-168377>.

<sup>103</sup> *Tuquabo-Tekle v. the Netherlands*, above fn. 89, § 47.

<sup>104</sup> *Mubilanza Mayeka v. Belgium*, above fn. 93, § 75.

<sup>105</sup> *Tanda-Muzinga v. France*, above fn. 92, § 74.

The Court also recognises that the grant of international protection is in itself “proof of the vulnerability of those involved”.<sup>106</sup> Thus, national authorities have to “take into account the vulnerability and the particularly difficult personal history of the applicant” when deciding on family reunification applications.<sup>107</sup>

The refusal of an asylum application is not necessarily decisive for the question of whether separation was voluntary. In *El Ghatet v. Switzerland* the Court considered a case where the asylum application of the Egyptian applicant had been refused by the Swiss authorities. Contrary to the situation in *Gül v. Switzerland*, the applicant in *El Ghatet* had not gone back to Egypt since coming to Switzerland. The Court was reluctant to conclude from the refusal of the asylum application that the separation from his son had been voluntary. It stressed:

Even though his application for asylum was rejected by the Swiss authorities, caution is called [for] when determining whether he left his child behind of “his own free will” ... The Court considers that these circumstances do not suggest a clear answer to the question whether or not the first applicant had always planned to live with his son in Switzerland.<sup>108</sup>

Nevertheless, the positive obligations imposed on states under Art. 8 ECHR to enable refugees to reunite with their families do not apply with the same force to persons who are coming from a situation of general violence or war, but who did not apply for asylum or were refused recognition as a refugee. In *Haydarie v. the Netherlands* an Afghan mother who had fled together with one of her sons and her sister first to Pakistan and then on to the Netherlands had been refused family reunification with her three children.<sup>109</sup> The applicant mother did not have refugee status, but had first been granted a conditional residence permit based on reasons of undue hardship, then a residence permit for asylum for a fixed period, and after three years this became an indefinite period residence permit. The children’s father had disappeared, probably kidnapped by the Taliban, and the children were in the care of the maternal grandfather. Family reunification had been refused, because the applicant mother was not able to comply with the Dutch income requirement for such cases. The Court held that the case hinged “on the question whether the Netherlands authorities were under a duty to allow the first applicant’s children and the second applicant’s siblings to settle with them in the Netherlands”. Despite the context of the applicant mother’s flight, the Court seems to have considered it a voluntary separation, qualifying this finding only in the following way:

The Court notes in this context, however, that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with his or her children who, for the time being, have been left behind in their country of origin or a third country, and that it may be unreasonable to force the parent to choose between giving up the position which he or she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other’s company which constitutes a fundamental element of family life.<sup>110</sup>

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<sup>106</sup> *Tanda-Muzinga v. France, ibid.*, § 75, referring to ECtHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, available at: <http://hudoc.echr.coe.int/eng?i=001-109231>, § 155.

<sup>107</sup> *Tanda-Muzinga v. France, ibid.*, § 75.

<sup>108</sup> *El Ghatet v. Switzerland*, above fn. 102, § 48.

<sup>109</sup> ECtHR, *Haydarie v. the Netherlands*, Application No. 8876/04, admissibility decision, 20 October 2005, available at: <http://hudoc.echr.coe.int/eng?i=001-71026>.

<sup>110</sup> *Haydarie v. the Netherlands, ibid.*; see also the case of the Somali mother in ECtHR, *I.A.A. v. United Kingdom*, Application No. 25960/13, admissibility decision, available at: <http://hudoc.echr.coe.int/eng?i=001-161986>, § 43, referring again to its standard phrase for

The question whether family separation was voluntary or involuntary is, however, not necessarily decisive for the outcome of such cases. According to the Court, “parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunification”.<sup>111</sup> In *Şen v. the Netherlands*, the separation of the family was found to be due to the deliberate decision of the parents to settle abroad, but this did not mean that the parents had given up family life with their child abroad.<sup>112</sup> In fact, the factor considered in the next section below was decisive for the positive outcome of the case in *Şen*, namely the question of whether family life could be enjoyed elsewhere.

#### 4.2.2. Insurmountable Obstacles or Major Impediments to Family Life Being Enjoyed Elsewhere

The second core factor in family reunification cases is whether family life could be enjoyed in the country of origin or elsewhere. The question is whether there are “insurmountable obstacles”<sup>113</sup> or “major obstacles”<sup>114</sup> to enjoying family life elsewhere. In its recent decision in *I.A.A. v. UK*, the Court made it clear that the threshold is no lower than this (although see below on the question whether further children already living in the destination state can be expected to relocate elsewhere):

In the appeal in early 2009 by two of the applicants’ siblings against the refusal of their entry clearance, the Asylum and Immigration Tribunal accepted, in relation to those two siblings, that their mother could not reasonably relocate to Ethiopia to care for her children as she would have no job and no means of survival there. ... However, in considering whether the applicants’ mother could “reasonably relocate”, the Tribunal applied a lower standard than the test of “insurmountable obstacles” or “major impediments” commonly applied by this Court. Applying its own test, the Court considers that while it would undoubtedly be difficult for the applicants’ mother to relocate to Ethiopia, there is no evidence before it to suggest that there would be any “insurmountable obstacles” or “major impediments” to her doing so.<sup>115</sup>

The grant of refugee status (or a permit based on humanitarian grounds in *Tuquabo-Tekle*) is decisive for the question whether there are insurmountable obstacles and the Court accepts that family reunification is the only means by which family life can be resumed.<sup>116</sup>

For F-permit holders, however, the situation is again more complicated. The Court’s finding on obstacles to relocation in *I.A.A. v. United Kingdom* is somewhat surprising in this respect. The Somali mother, who had come to the United Kingdom by way of family reunification with her second husband, a Somali refugee, was found to be able to relocate to Ethiopia or Mogadishu in order to enjoy family life with her children there.

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voluntary separation of “parents who leave children behind while they settle abroad”.

<sup>111</sup> *Şen v. the Netherlands*, above fn. 87, § 40; *Tuquabo-Tekle v. Netherlands*, above fn. 90, § 45; *I.A.A. v. UK*, *ibid.*, § 43; *El Ghatet v. Switzerland*, above fn. 102, § 45.

<sup>112</sup> *Şen v. the Netherlands*, above fn. 87, §§ 39-40.

<sup>113</sup> *Benamar v. the Netherlands*, above fn. 100; *Solomon v. the Netherlands*, above fn. 99.

<sup>114</sup> ECtHR, *Andrade v. the Netherlands*, Application No. 5365/00, admissibility decision, 6 July 2004, available at: <http://hudoc.echr.coe.int/eng?i=001-24037>; *Şen v. the Netherlands*, above fn. 87, § 40.

<sup>115</sup> *I.A.A. v. UK*, above fn. 110, § 44; see also *El Ghatet v. Switzerland*, above fn. 102, § 45.

<sup>116</sup> *Mugenzi v. France*, above fn. 92, § 53; *Tanda-Muzinga v. France*, above fn. 92, § 74.



Yet, in cases where an asylum application had been lodged and refused, the Court is more cautious. In *Haydarie v. the Netherlands* concerning an Afghan mother who had not been recognised as a refugee but in the meantime been granted permanent asylum, the Court stated that there was “the possible existence of an objective obstacle” to her return to Afghanistan.<sup>117</sup>

As a further factor, the fact that the applicant had made several visits to the country of origin may indicate that there are no insurmountable obstacles to enjoying family life there.<sup>118</sup> However, such visits are not decisive for the question and the Court takes into account all of the circumstances of the case.<sup>119</sup>

In addition, a significant factor in the context of insurmountable obstacles is whether there are further children in the destination country. In both *Şen v. the Netherlands* and *Tuquabo-Tekle v. the Netherlands* this was a material factor, as the applicants had founded new family life in the Netherlands and given birth to children there. In *El Ghatet v. Switzerland*, the applicant seeking to bring his son from his first marriage to Switzerland also had a daughter who was born in Switzerland with his second wife from whom he was later divorced. This led the Court to conclude that he could not relocate to Egypt as this would disrupt family life with his daughter in Switzerland.<sup>120</sup> On this basis, other cases have been distinguished and refused.<sup>121</sup>

The legal test in the context of children in the destination state appears to be different. The Court asks whether family reunification in the destination state “would be the most adequate means for the applicants to develop family life together”.<sup>122</sup> In contradiction to the above-quoted statement in *I.A.A. v. UK*, the Court held in *El Ghatet* that it was relevant “that it would be unduly difficult for the applicants to enjoy family life together anywhere but in Switzerland”<sup>123</sup> and that “it would be unreasonable to ask the first applicant to relocate to Egypt to live together with the second applicant there, as this would entail a separation from his daughter”.<sup>124</sup> In similar vein, in *Jeunesse v. the Netherlands* the Court found that the return of the couple with their small children to Suriname would not confront them with insurmountable obstacles, but would mean “a degree of hardship” for them as they were deeply rooted in the Netherlands, *inter alia* leading to a violation of Art. 8 ECHR.<sup>125</sup>

In conclusion, the question generally is whether there are insurmountable obstacles or major impediments to family life being enjoyed elsewhere. Where children are already living in the destination country, however, a lower threshold may apply. In the case of refugees and F-permit holders, the answer to this question should normally be that there are insurmountable obstacles, though separate issues may arise where family members are living in a third country.

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<sup>117</sup> *Haydarie v. the Netherlands*, above fn. 109, p. 4.

<sup>118</sup> *Gül v. Switzerland*, above fn. 82, § 41.

<sup>119</sup> *Şen v. the Netherlands*, above fn. 87, § 18 (where the applicants had also visited their children in Turkey three times, as in *Gül*); and *Senigo Longue v. France*, above fn. 95 (where the applicant had undertaken several trips to Cameroon in order to obtain civil registry documents).

<sup>120</sup> *El Ghatet v. Switzerland*, above fn. 102, § 49.

<sup>121</sup> See e.g. *Andrade v. the Netherlands*, above fn. 114, holding that “unlike the parents in the *Şen* case, the applicant does not have children who were born in the Netherlands, who are dependent on her and who have few or no ties with their mother’s country of origin”.

<sup>122</sup> *Şen v. the Netherlands*, above fn. 87, § 40; *Tuquabo-Tekle v. Netherlands*, above fn. 90, § 47.

<sup>123</sup> *El Ghatet v. Switzerland*, above fn. 102, § 49 (emphasis added).

<sup>124</sup> *El Ghatet v. Switzerland*, *ibid.*, § 49 (emphasis added).

<sup>125</sup> ECtHR, Grand Chamber, *Jeunesse v. the Netherlands*, Application No. 12738/10, 3 October 2014, available at: <http://hudoc.echr.coe.int/eng/?i=001-147117>, §§ 117-119 (emphasis added).

### 4.2.3. The Best Interests of the Child

The Court recognises that the best interests of the child must be a primary consideration in the context of family reunification cases.<sup>126</sup> In considering the best interests of the child, the Court pays particular attention to the circumstances of the minor children concerned, especially “their age, their situation in their country of origin and the extent to which they are dependent on their parents”.<sup>127</sup> However, the best interests of the child are not “a ‘trump card’ which requires the admission of all children who would be better off living in a Contracting State”, but “domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it”.<sup>128</sup>

In extreme cases, the best interests of the child even override a parent’s unreasonable decision on separation of the family. In *Osman v. Denmark*<sup>129</sup> the father of a Somali girl who had grown up in Denmark had sent her back to a refugee camp in Kenya in order to look after her grandmother. Although it had been the father’s decision to send her back, which fell within his parental rights, the Court held that in this case the child’s best interests outweighed the public interest in effective immigration control.<sup>130</sup>

The following factors influence the assessment of the best interests of the child in family reunification cases.

#### 4.2.3.1. Age of the Child and Delay in Making the Application

The age of the child applying for an entry permit is the first pertinent factor in the Court’s assessment and, in this context, whether there has been any delay on the part of the parent applying for family reunification. The considerations set out below are particularly pertinent for the assessment of subsequent family reunification provisions in Switzerland (set out above in section 2.4).

Where the children concerned have “reached an age where they [a]re presumably not as much in need of care as young children and increasingly able to fend for themselves”, this speaks against family reunification.<sup>131</sup> In addition, it is pertinent “whether the children had grown up in the cultural and linguistic environment of their country of origin”.<sup>132</sup>

But a child’s advanced age and his or her close ties to the country of origin are not necessarily decisive for his or her best interests. In *Tuquabo-Tekle* the applicant child was 15 years old at the time of the application for family reunification, and had strong cultural and linguistic ties with Eritrea. However, the Court accepted that the delay was not evidence of her mother’s lack of interest in family reunification, but that she had done all that was in her power to achieve family reunification with her daughter at the earliest opportunity.<sup>133</sup>

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<sup>126</sup> *El Ghatet v. Switzerland*, above fn. 102, § 46; *I.A.A. v. UK*, above fn. 110, § 46; ECtHR, Grand Chamber, *Neulinger and Shuruk v. Switzerland (GC)*, Application No. 41615/07, 6 July 2010, available at: <http://hudoc.echr.coe.int/eng?i=001-99817>, § 135; ECtHR, *M.P.E.V. v. Switzerland*, above fn. 28, § 52; see also ECtHR, Grand Chamber, *Tarakhel v. Switzerland*, Application No. 29217/12, 4 November 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-148070>, § 99.

<sup>127</sup> *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 44; *I.A.A. v. UK*, above fn. 110, § 41; *El Ghatet v. Switzerland*, *ibid.*, § 46; see also ECtHR, *Berisha v. Switzerland*, Application No. 948/12, 30 July 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-122978>, §§ 60-61.

<sup>128</sup> *I.A.A. and Others v. UK*, above fn. 110, § 46; *El Ghatet v. Switzerland*, *ibid.*, § 46.

<sup>129</sup> ECtHR, *Osman v. Denmark*, Application No. 38058/09, 14 June 2011, available at: <http://hudoc.echr.coe.int/eng?i=001-105129>.

<sup>130</sup> *Ibid.*, §§73-76.

<sup>131</sup> *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 49.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, §§ 45-46.

The Court distinguished it from other cases,<sup>134</sup> and held that the applicant daughter's advanced age was in that case not a reason for rejecting the application. The applicants had argued that her age made her in fact particularly vulnerable, because she had been taken out of school by her grandmother and was at an age where she could be married off, something the applicant mother could do nothing about. Therefore, the case could not be distinguished from *Şen v. the Netherlands* on that basis.<sup>135</sup>

The traumatising experiences that refugee children may have undergone are also considered pertinent, regardless of their advanced age. The Court so held in relation to the 15 and 17-year old children of a Rwandan refugee in *Mugenzi v. France*:

En l'espèce, la Cour observe que le requérant a, à plusieurs reprises, fait part de sa crainte que ses deux enfants, prétendument âgés de quinze et dix-sept ans au moment de la demande de regroupement familial, ne soient rapatriés au Rwanda et qu'ils risquent d'y subir des mauvais traitements; il a souligné que l'un d'entre eux avait des problèmes de santé liés aux expériences traumatiques subies au Rwanda et qu'il était soigné pour une dépression, ... Dans ce contexte, la Cour considère qu'il était essentiel que les autorités nationales tiennent compte de la vulnérabilité et du parcours personnel particulièrement difficile du requérant, qu'elles prêtent une grande attention à ses arguments pertinents pour l'issue du litige, et enfin qu'elles statuent à bref délai sur les demandes de visa.<sup>136</sup>

On the other hand, difficult country conditions are not sufficient. In *I.A.A. v. UK* the Court held that while the situation of the Somali child applicants was "certainly unenviable" they were no longer young children and could fend for themselves, without an adult family member looking after them, in Ethiopia.<sup>137</sup> The Court's reasoning was also based on the mother's delay in applying for family reunification:

Contrary to what the applicants argue before this Court, there is nothing to suggest that she fled a situation of armed conflict. Rather, she appears to have made a conscious decision to leave her children in Somalia in order to join her new husband in the United Kingdom, knowing that he would not agree to the children joining them. Therefore, as long as she remained in a relationship with her second husband, she cannot have had any expectation that the applicants would join her new family unit.<sup>138</sup>

Further, even after her separation from her husband, the mother in *I.A.A. v. UK* had waited another two years before attempting to bring the applicants to the United Kingdom.<sup>139</sup>

Delayed family reunification applications can be fatal to an Art. 8 ECHR claim. For instance, in *I.M. v. the Netherlands* a Cape Verdean applicant had left behind her daughter, had settled in the Netherlands and given birth to a son.<sup>140</sup> Six-and-a-half years after coming to the Netherlands, the applicant mother applied for a residence permit for her daughter, who had in the meantime turned 12, to

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<sup>134</sup> *Benamar v. the Netherlands*, above fn. 100; ECtHR, *I.M. v. the Netherlands*, Application No. 41226/98, admissibility decision, 25 March 2003, available at: <http://hudoc.echr.coe.int/eng?i=001-23149>; and *Chandra v. the Netherlands*, above fn. 100.

<sup>135</sup> *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 50.

<sup>136</sup> *Mugenzi v. France*, above fn. 92, § 55.

<sup>137</sup> *I.A.A. v. UK*, above fn. 110, § 46.

<sup>138</sup> *Ibid.*, § 43.

<sup>139</sup> *Ibid.*, § 43.

<sup>140</sup> *I.M. v. the Netherlands*, above fn. 134.

come to the Netherlands. The Court considered that the lateness of the family reunification application and the advanced age of the daughter meant that there was no violation of Art. 8 ECHR. In particular, the Court stated that the daughter “had reached an age where she was presumably not as much in need of care as a young child, and also that she has a considerable number of relatives living in the Cape Verde Islands”.<sup>141</sup> In addition, the Court found that the applicant mother had failed to demonstrate that she would be unable to relocate to the Cape Verde Islands with her son.

Similarly, in *Chandra and Benamar*, the Court placed emphasis on the fact that the children had grown up in the cultural and linguistic environment of their country of origin, where they had other relatives,<sup>142</sup> and in the case of *Ly v. France* that the applicant’s request had only been lodged seven years after the birth of the child without any good explanation.<sup>143</sup>

These are all important factors particularly in considering the compatibility with international human rights law of the subsequent family reunification provisions in Switzerland. As a further factor, the Court considers care and custody arrangements of children as set out in the next section to determine their best interests.

#### **4.2.3.2. Dependence on Applying Family Members and Other Family Members and Custody Rights**

The situation of children, who are living in the country of origin, whether they are in the care of a parent or relative, and who has custody rights over them are further material factors to be taken account of in Art. 8 ECHR cases. In both *Şen v. the Netherlands* and *Tuquabo-Tekle v. the Netherlands* the cases concerned family reunification applications with both parents or with one parent where the other parent was deceased. The question whether other family members or older siblings are there to care for the children is further taken into account by the Court.<sup>144</sup>

Further, custody rights over the child are relevant, though not determinative, in the Art. 8 ECHR compatibility assessment.<sup>145</sup> In *El Ghatet v. Switzerland* the applicant child had been living with his mother at the time of the application, but the mother subsequently emigrated to Kuwait. The Court held that, given the initial situation, there was “no presumption that reuniting with the first applicant in Switzerland was per se in the best interests of the second applicant”.<sup>146</sup> In addition, however, the applicant father had custody of the child. The Court held in relation to custody rights:

The Court observes that the first applicant had the right of custody for the second applicant pursuant to Egyptian law. While this legal status suggests that it would be in the best interests of the second applicant to live with his

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<sup>141</sup> *Ibid.*, p. 8.

<sup>142</sup> *Chandra v. the Netherlands*, above fn. 100; *Benamar v. the Netherlands*, above fn. 100; see also *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 49.

<sup>143</sup> ECtHR, *Ly v. France*, Application No. 23851/10, admissibility decision, 17 June 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-145549>, § 37.

<sup>144</sup> See e.g. *I.M. v. the Netherlands*, above fn. 134; *Benamar v. the Netherlands*, above fn. 100; *I.A.A. v. UK*, above fn. 110; *Mugenzi v. France*, above fn. 92 (where the Court found the applicants in a state of isolation “puisque leurs trois frères et sœurs aînés ne vivaient pas au Kenya comme le ministre de l’Immigration l’avait affirmé, mais en Europe où ils avaient tous obtenu le statut de réfugié”, § 55).

<sup>145</sup> See e.g. *Ahmut v. the Netherlands*, above fn. 85 (where the applying parent also had custody of the child, yet the Court found no violation of Art. 8 ECHR); and *Benamar v. the Netherlands*, above fn. 100 (where the children had been in the care and custody of the father in Morocco and the Court considered this material in refusing the mother’s application for family reunification).

<sup>146</sup> *El Ghatet v. Switzerland*, above fn. 102, § 50.

father in Switzerland, it cannot be the sole decisive factor. The Court considers that the second applicant's [sic] had lived almost all his life in Egypt and had strong social, cultural and linguistic ties to his country of origin. In Egypt he was cared for by his mother and later, after his mother's relocation to Kuwait, by his grandmother.<sup>147</sup>

At the same time, the fact that an applicant does not have custody of the child does not preclude family reunification. In several decisions concerning family reunification rights of illegally staying parents with their children who were in the custody of the other parent, the Court found that removing the parent would be in violation of Art. 8 ECHR.<sup>148</sup>

### 4.3. Further Factors Relevant under Art. 8 ECHR

#### 4.3.1. Assessment of Existence of Family Life

As a starting point, it is important to establish in family reunification cases that the relationship between the applicants constitutes family life. The Court's case law is relatively clear on which family relationships fall within the scope of "family life" according to Art. 8 ECHR. It distinguishes between *de jure* family life and *de facto* family life. The following family relationships constitute *de jure* family life: married couples,<sup>149</sup> registered partners,<sup>150</sup> parents and their children born of a marriage<sup>151</sup> or of a stable relationship,<sup>152</sup> adopted children and their adoptive parents.<sup>153</sup> Half-siblings may also enjoy family life.<sup>154</sup> The family tie between parents and their children born of marriage or of a stable relationship can only be broken in exceptional circumstances and not just by a difficult parent-child relationship or non-cohabitation.<sup>155</sup>

Biological fathers and their children born out of wedlock and not of a stable relationship enjoy *de facto* family life, provided that close personal ties exist and there is a demonstrable interest in and commitment by the father to the child.<sup>156</sup> Unmarried couples also enjoy *de facto* family life where there is a real existence in practice of close personal ties, such as cohabitation, a long relationship or a common child.<sup>157</sup>

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<sup>147</sup> *Ibid.*, § 51.

<sup>148</sup> *Rodrigues da Silva and Hoogkamer v. the Netherlands*, above fn. 97, § 41; *Polidario v. Switzerland*, above fn. 99, § 74; *M.P.E.V. v. Switzerland*, above fn. 28, § 46; *Nuñez v. Norway*, above fn. 99, § 79.

<sup>149</sup> *Abdulaziz, Cabales and Balkandali v. UK*, above fn. 81, § 62.

<sup>150</sup> ECtHR, Grand Chamber, *Burden v. United Kingdom*, Application No. 13378/05, 29 April 2008, available at: <http://hudoc.echr.coe.int/eng?i=001-86146>, § 65.

<sup>151</sup> ECtHR, *Berrehab v. the Netherlands*, Application No. 10730/84, 21 June 1988, available at: <http://hudoc.echr.coe.int/eng?i=001-57438>, § 21; *Ahmut v. the Netherlands*, above fn. 85, § 60; *Gül v. Switzerland*, above fn. 82, § 32; ECtHR, *Boughanemi v. France*, Application No. 22070/93, 24 April 1996, available at: <http://hudoc.echr.coe.int/eng?i=001-57991>, § 35; *M.P.E.V. v. Switzerland*, above fn. 28, § 33.

<sup>152</sup> ECtHR, *Kroon v. the Netherlands*, Application No. 18535/91, 27 October 1994, available at: <http://hudoc.echr.coe.int/eng?i=001-57904>, § 30; ECtHR, *Keegan v. Ireland*, Application No. 28867/03, 18 July 2006, available at: <http://hudoc.echr.coe.int/eng?i=001-76453>, § 45.

<sup>153</sup> ECtHR, *Pini and Others v. Romania*, Applications nos. 78028/01, 78030/01, 22 June 2004, available at: <http://hudoc.echr.coe.int/eng?i=001-61837>, § 148.

<sup>154</sup> *El Ghatet v. Switzerland*, above fn. 102, Concurring Opinion of Judge Serghides.

<sup>155</sup> *Boughanemi v. France*, above fn. 151, § 35; *Berrehab v. the Netherlands*, above fn. 151, § 21; *Ahmut v. Netherlands*, above fn. 85, § 60; ECtHR, *Moustaquim v. Belgium*, Application No. 12313/86, 18 February 1991, available at: <http://hudoc.echr.coe.int/eng?i=001-57652>, § 36; *Şen v. Netherlands*, above fn. 87, § 28.

<sup>156</sup> ECtHR, *Nylund v. Finland*, Application No. 27110/95, admissibility decision, 29 June 1999, available at: <http://hudoc.echr.coe.int/eng?i=001-21999>; ECtHR, *Nekvedavicius v. Germany*, Application No. 46165/99, admissibility decision, 19 June 2003, available at: <http://hudoc.echr.coe.int/eng?i=001-23277>.

<sup>157</sup> ECtHR, Grand Chamber, *K. and T. v. Finland*, Application No. 25702/94, 12 July 2001, available at: <http://hudoc.echr.coe.int/eng?i=001-59587>, § 150; ECtHR, *L. v. the Netherlands*, Application No. 45582/99, 1 June 2004, available at: <http://hudoc.echr.coe.int/eng?i=001-61799>, § 36; ECtHR, *Al-*

Grandparents have also been found to have family life with their grandchildren,<sup>158</sup> as have uncle-nephew relationships.<sup>159</sup> Relationships between adult siblings generally require further elements of dependency involving “more than the normal emotional ties”.<sup>160</sup>

#### 4.3.2. Procedural Guarantees and Delay in the Domestic Decision-Making Process

Art. 8 ECHR also imposes procedural obligations on states in family reunification cases. Such procedures must provide for sufficient “flexibility, promptness and effectiveness”.<sup>161</sup> The quality of the family reunification procedure particularly depends on its promptness.<sup>162</sup>

In a line of cases involving family reunification applications of refugees, the Court found an Art. 8 violation due to delay. In *Tanda-Muzinga v. France* the authorities’ delay of three-and-a-half years in granting family reunification in itself constituted a violation of Art. 8 ECHR.<sup>163</sup> In *Mugenzi v. France*, the Court found a procedural duration of five years excessive and in violation of Art. 8 ECHR.<sup>164</sup>

Also in cases involving non-refugees, a long delay in complying with the positive obligations under Art. 8 ECHR may be in breach of Art. 8 ECHR, such as in *Polidario v. Switzerland* where there was a delay of over six years.<sup>165</sup> Further, delay on the part of the authorities in refusing asylum applications or removing illegally staying immigrants may impact on the Art. 8 ECHR assessment. In *Nuñez v. Norway*, the Court considered the authorities’ four-year delay in ordering the illegally staying applicant mother’s expulsion a pertinent factor.<sup>166</sup> Similarly, in *M.P.E.V. v. Switzerland*, the Court placed weight on the 10-year processing time of the applicant father’s asylum claim, which was eventually refused.<sup>167</sup> Further, in *Jeunesse v. the Netherlands* concerning a Surinamese applicant who had lost her Dutch nationality when Suriname became independent in 1975, the Court emphasised that the Dutch state had tolerated her presence for 16 years, which was one of the factors leading to a finding of a breach of Art. 8 ECHR.<sup>168</sup>

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*Nashif v. Bulgaria*, Application No. 50963/99, 20 June 2002, available at: <http://hudoc.echr.coe.int/eng?i=001-60522>, § 112.

<sup>158</sup> ECtHR, *Marckx v. Belgium*, Application No. 6833/74, 13 June 1979, available at: <http://hudoc.echr.coe.int/eng?i=001-57534>, § 45; ECtHR, *L. v. Finland*, Application No. 25651/94, 27 April 2000, available at: <http://hudoc.echr.coe.int/eng?i=001-58783>, § 101.

<sup>159</sup> ECtHR, *Boyle v. United Kingdom*, Application No. 16580/90, 24 February 1994, available at: <http://hudoc.echr.coe.int/eng?i=001-57864>, § 45; ECtHR, *Butt v. Norway*, Application No. 47017/09, 4 December 2012, available at: <http://hudoc.echr.coe.int/eng?i=001-115012>, § 76.

<sup>160</sup> ECtHR, *Ezzouhdi v. France*, Application No. 47160/99, 13 February 2001, available in French at: <http://hudoc.echr.coe.int/eng?i=001-63772>, § 34; ECtHR, *Konstatinov v. the Netherlands*, Application No. 16351/03, 26 April 2007, available at: <http://hudoc.echr.coe.int/eng?i=001-80312>, § 52; ECtHR, *Advic v. United Kingdom*, Application No. 25525/94, admissibility decision, 6 September 1995, available at: <http://hudoc.echr.coe.int/eng?i=001-2300>; ECtHR, *Samsonnikov v. Estonia*, Application No. 52178/10, 3 July 2012, available at: <http://hudoc.echr.coe.int/eng?i=001-111842>, § 81.

<sup>161</sup> *Tanda-Muzinga v. France*, above fn. 92, § 82; *Mugenzi v. France*, above fn. 92, § 62; *Senigo Longue v. France*, above fn. 95, § 75.

<sup>162</sup> *Tanda-Muzinga v. France*, *ibid.*, § 68; *Mugenzi v. France*, *ibid.*, § 46.

<sup>163</sup> *Tanda-Muzinga v. France*, *ibid.*, §§ 55, 58.

<sup>164</sup> *Mugenzi v. France*, above fn. 92, § 61; see also *Senigo Longue v. France*, above fn. 95.

<sup>165</sup> *Polidario v. Switzerland*, above fn. 99, § 77.

<sup>166</sup> *Nuñez v. Norway*, above fn. 99, § 82; see also ECtHR, *A.A. v. United Kingdom*, Application No. 8000/08, 20 September 2011, available at: <http://hudoc.echr.coe.int/eng?i=001-106282>, §§ 61, 66; ECtHR, *Mokrani v. France*, Application No. 52206/99, 15 July 2003, available at: <http://hudoc.echr.coe.int/eng?i=001-65778>, §§ 34-35.

<sup>167</sup> *M.P.E.V. v. Switzerland*, above fn. 28, § 55.

<sup>168</sup> *Jeunesse v. the Netherlands*, above fn. 125, §§ 115-116.

Generally in cases of family reunification, states enjoy a certain margin of appreciation in relation to the evaluation of such evidence, as they are better placed to assess the authenticity of documents submitted by an applicant. National authorities must nevertheless examine the application promptly, attentively and with particular diligence and must provide the applicant with any reasons that may lead to the refusal of the application.<sup>169</sup> Where children are involved, the domestic authorities must take into account the best interests of the child in this context,<sup>170</sup> and where refugees are concerned they must additionally take into account the events that led to the disruption of family life and to the recognition of refugee status.<sup>171</sup> As the Court emphasised in *Tanda-Muzinga v. France*:

In this context, the Court considers that it is essential that national authorities take into account the vulnerability and the particularly difficult personal history of the applicant, that they pay significant attention to his arguments relevant to the outcome of the case, that they make him aware of the reasons for which they have prevented the implementation of family reunification, and finally that they decide without delay on the visa applications [by his family members].<sup>172</sup>

In the context of refugee family reunification applications, a certain flexibility is required in relation to the proof of family ties. The Court recognises that refugees are regularly unable to obtain official documentation from their countries of origin.<sup>173</sup> Thus, while the case law set out in section 4.3.1 above indicates quite clear tests for the existence of family life, in refugee family reunification cases, the difficulty is often proving the existence of biological parenthood or lawful marriage for lack of any or any reliable documentation. The Court therefore applies a lower standard of proof to refugee family reunification applications. Refugees should be given the “benefit of the doubt” in relation to any documents submitted and any declarations made by them.<sup>174</sup> However, where the information provided by them gives good reason to doubt the veracity of the declarations of the applicant, it is for the applicant to provide a “satisfactory explanation” for the inconsistencies or for any pertinent objections to the authenticity of the documents submitted by him or her.<sup>175</sup>

#### 4.3.3. Relevant Date of Assessment and Reaching of Majority by a Child

In general, the relevant date for considering a family reunification case before the Court is the date of the final domestic judgment, rather than the date of the first application for family reunification or the date of the ECtHR’s decision.<sup>176</sup> However, developments prior and subsequent to this may still be taken into account. In *Tuquabo-Tekle* the Court also paid regard to the situation which had applied at the time the applicant mother had sought family reunification with her daughter for the very first time (in particular the younger age of the

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<sup>169</sup> *Mugenzi v. France*, above fn. 92, §§ 51-52; see also *Senigo Longue v. France*, above fn. 95, §§ 66-67.

<sup>170</sup> *Senigo Longue v. France*, *ibid.*, § 67.

<sup>171</sup> *Mugenzi v. France*, above fn. 92, § 52.

<sup>172</sup> *Tanda-Muzinga v. France*, above fn. 92, § 75 (unofficial UNHCR translation as provided in UNHCR, *Secretary of State for the Home Department v. ZAT (Syria) and Others: UNHCR’s Intervention*, 13 June 2016, Appeal No. C2/2016/0712, available at: <http://www.refworld.org/docid/57602e484.html>).

<sup>173</sup> ECtHR, *N. v. Sweden*, Application No. 23505/09, 20 July 2010, available at: <http://hudoc.echr.coe.int/eng?i=001-99992>, § 53; ECtHR, *F.N. and Others. v. Sweden*, Application No. 28774/09, 18 December 2012, available at: <http://hudoc.echr.coe.int/eng?i=001-115396>, § 67.

<sup>174</sup> ECtHR, *Mugenzi v. France*, above fn. 92, § 47; see also *Senigo Longue v. France*, above fn. 95, § 63.

<sup>175</sup> *Mugenzi v. France*, *ibid.*, § 47; *Senigo Longue v. France*, *ibid.*, § 63.

<sup>176</sup> *Chandra and Others v. the Netherlands*, above fn. 100.



daughter at that time).<sup>177</sup> Similarly, in *El Ghatet* the Court, in accordance with domestic law, relied on the age of the applicant child at the time the request for family reunification had been lodged, as well as the fact that the mother had later left Egypt for Kuwait.<sup>178</sup>

In the context of family reunification applications of children, the Court has not considered the fact that a child has in the meantime reached majority in itself as a reason for refusing family reunification. In *El Ghatet*, it found an Art. 8 ECHR violation regardless of this.<sup>179</sup>

#### 4.3.4. Significance of the Quality of the Domestic Assessment

The Court has repeatedly emphasised that it will only intervene where the domestic courts have failed in their assessment of the relevant aspects of the case, given that domestic authorities enjoy a considerable margin of appreciation under Art. 8 ECHR in family reunification cases.<sup>180</sup>

In particular where the best interests of the child are concerned, the Court sets demanding standards for the domestic assessment.<sup>181</sup> In the case of *M.P.E.V. v. Switzerland*, the Court emphasised the fact “that the Federal Administrative Court [FAC], when considering the first applicant’s case, did not make any reference to the child’s best interests”, because it had found that there was no family life within the meaning of Art. 8 of the Convention. As a result, the Court was not convinced that sufficient weight had been attached to the best interests of the child.<sup>182</sup> Similarly, in *El Ghatet v. Switzerland*, the Court stressed that it is not its “task to take the place of the competent authorities in determining the best interests of the child, but to ascertain whether the domestic courts secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child’s best interests, which must be sufficiently reflected in the reasoning of the domestic courts”.<sup>183</sup>

Where the child’s best interests are examined only “in a brief manner and [with] a rather summary reasoning”, this amounts to a violation of Art. 8 ECHR in itself, because the domestic courts failed to place the child’s best interests “sufficiently at the center of the balancing exercise and its reasoning”<sup>184</sup> and thus “failed to demonstrate convincingly that the respective interference with a right under the Convention was proportionate to the aim pursued and thus met a ‘pressing social need’ ...”.<sup>185</sup>

In a concurring opinion in *El Ghatet*, Judge Serghides even stated that the Swiss FSC had “violated the rule of law, one of the fundamental principles of democratic society, inherent in all the provisions of the Convention and its Protocols”.<sup>186</sup> Judge Serghides stressed that “the exercise of balancing

<sup>177</sup> *Tuquabo-Tekle*, above fn. 89, § 51; see also *Senigo Longue v. France*, above fn. 95, § 52.

<sup>178</sup> *El Ghatet v. Switzerland*, above fn. 102, §§ 33, 51.

<sup>179</sup> See *El Ghatet v. Switzerland*, *ibid.*, and *Benamar v. the Netherlands*, above fn. 100, neither of which was refused on this basis.

<sup>180</sup> See e.g. *Tanda-Muzinga v. France*, above fn. 92; *Mugenzi v. France*, above fn. 92; *Senigo Longue v. France*, above fn. 95.

<sup>181</sup> *Neulinger and Shuruk*, above fn. 126, §§ 133, 141; ECtHR, *B. v. Belgium*, Application No. 4320/11, 10 July 2012, available in French at: <http://hudoc.echr.coe.int/eng?i=001-112087>, § 60; ECtHR, *X. v. Latvia* Application No. 27853/09, 26 November 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-138992>, §§ 106-107; *M.P.E.V. v. Switzerland*, above fn. 28, § 57; *El Ghatet v. Switzerland*, above fn. 102, §§ 47, 52-53; *Jeunesse v. the Netherlands*, above fn. 125, § 120.

<sup>182</sup> *M.P.E.V. v. Switzerland*, *ibid.*, § 57

<sup>183</sup> *El Ghatet v. Switzerland*, above fn. 102, § 47.

<sup>184</sup> *Ibid.*, § 53.

<sup>185</sup> *Ibid.*, § 47.

<sup>186</sup> *Ibid.*, Concurring Opinion of Judge Serghides.



competing interests, especially in cases involving the welfare and the best interests of a child, must be thorough and well-reasoned". He further elaborated that, in cases involving the best interests of the child, the balancing exercise under Art. 8 (2) ECHR becomes akin to a strict proportionality assessment like the one employed under Art. 2 (2) ECHR (where the absolute necessity of a measure interfering with the right to life must be demonstrated).

#### 4.3.5. Relevance of Immigration History and Illegal Entry

The immigration background is deemed particularly pertinent in family reunification cases where the family members have already entered the destination state and are without status awaiting the decision on family reunification.<sup>187</sup> The Court generally states that in such cases there will be a violation of Art. 8 ECHR "in exceptional circumstances" only.<sup>188</sup> For instance, in *Chandra v. the Netherlands*, the Court emphasised that the children had entered the Netherlands on a visitor visa and had "chosen not to apply for a provisional residence visa from Indonesia prior to travelling to the Netherlands".<sup>189</sup>

Similarly, in *Gereghiher Geremedhin v. the Netherlands*<sup>190</sup> the Court emphasised that the applicant should have applied for family reunification while the children were abroad. It stressed:

Taking into account that the applicant was assisted by counsel at the material time, the Court has found no reason in the present case why at the material time it could not be expected of the applicant, who chose to seek an advice only on his four oldest children's eligibility for refugee family reunification, to ensure that his four children would lodge a formal request for such reunification at the Netherlands mission in Khartoum which would have allowed the applicant, as the children's sponsor, to appeal a negative decision on that visa application and which would afford the Netherlands administrative and judicial authorities the opportunity to examine his allegation of a violation of Article 8 and, if that allegation were to be considered well-founded, to prevent or put right that violation.<sup>191</sup>

However, the Court does not always assess this in the same way. For instance, in *Rodrigues da Silva and Hoogkamer v. the Netherlands* the Court held that the Dutch "authorities had indulged in excessive formalism" by attaching paramount importance to the fact that the mother had been residing illegally in the Netherlands.<sup>192</sup>

In addition, Art. 8 ECHR rights regarding family reunification may even apply to two illegally staying refused asylum-seekers, where they cannot be removed and have been prevented from living together by the authorities.<sup>193</sup>

## 5. POTENTIAL CONFLICTS BETWEEN SWISS FAMILY REUNIFICATION PRACTICE AND ART. 8 ECHR

This section looks at strategic case scenarios in which the Swiss family reunification practice may be contrary to Art. 8 ECHR.

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<sup>187</sup> *Solomon v. the Netherlands*, above fn. 99.

<sup>188</sup> *Jeunesse v. the Netherlands*, above fn. 125, §§ 108, 114; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, above fn. 97, § 39.

<sup>189</sup> *Chandra v. the Netherlands*, above fn. 100; see also *Benamar v. the Netherlands*, above fn. 100.

<sup>190</sup> ECtHR, *Gereghiher Geremedhin v. the Netherlands*, Application No. 45558/09, admissibility decision, 23 August 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-166754>.

<sup>191</sup> *Ibid.*, § 42.

<sup>192</sup> *Rodrigues da Silva and Hoogkamer v. the Netherlands*, above fn. 97, § 44.

<sup>193</sup> *Mengesha Kimfe v. Switzerland*; *Agraw v. Switzerland*, above fn. 99.

## 5.1. Art. 85 (7) FNA: F-permit Holder Refugee Seeking Family Reunification Prior to Expiry of Three-Year Time Limit

In accordance with Art. 85 (7) FNA, F-permit holders are barred from applying for family reunification during the first three years after the granting of temporary admission. In addition, they must meet requirements as to their residence and social assistance (Art. 85 (7) (a)-(c) FNA). In this respect, they are *in a worse situation* than B-permit refugees who can apply for reunification immediately after the grant of asylum and with no such requirements (Art. 51 (1) and (4) AsylA).

### 5.1.1. Compatibility with Art. 8 ECHR

The differentiation between two groups of refugees based on the type of permit is *problematic*. Several arguments support the conclusion that, particularly in the case of a recognised refugee with an F-permit, this is not compatible with Art. 8 ECHR.

First, the ECtHR accords stronger family reunification rights to refugees than to other migrants, including F-permit holders. It accepts that family unity is “*an essential right for refugees*” and that family reunification is a “*fundamental element in enabling persons who have fled persecution to resume a normal life*”.<sup>194</sup> Refugees are therefore entitled to “*a more favourable family reunification procedure than that foreseen for other foreigners*”.<sup>195</sup> This would apply to F-permit refugees in the same way as it applies to B-permit refugees.

Second, Art. 8 ECHR imposes positive obligations to enable refugees to reunify with family members promptly,<sup>196</sup> and in the case of a refugee the procedural duration of three-and-a-half years has been found excessive.<sup>197</sup> Against this background, the three-year ban on family reunification seems particularly problematic, as this guarantees in virtually every case a delay of more than three-and-a-half years.

Third, the positive obligation under Art. 8 ECHR is not absolute, but the following factors are pertinent when determining its extent: (i) was family separation voluntary? (ii) are there insurmountable obstacles to family life being enjoyed elsewhere? (iii) are children involved and, if so, what do the best interests of the child require?

As regards (i), in the case of refugees who have been separated from their family through flight, such separation is accepted to be involuntary.<sup>198</sup> It could, however, be argued in the case of *sur place* F-permit refugees that their initial flight was voluntary and they only became refugees later. In fact, this is the reasoning that the FAC recently adopted in a decision dismissing the family reunification appeal of an F-permit refugee:<sup>199</sup>

It is important to remember that the appellant’s pre-flight reasons for asylum were not considered credible; she was granted refugee status solely on the basis of her illegal exit from Eritrea. Therefore, one must assume that she left without any emergency and that there were no compelling reasons for her to give up her family unit.<sup>200</sup>

<sup>194</sup> *Tanda-Muzinga v. France*, above fn. 92, § 75; *Mugenzi v. France*, above fn. 92, § 54; see also the earlier decision in *Mubilanza Mayeka v. Belgium*, above fn. 93, § 75.

<sup>195</sup> *Tanda-Muzinga v. France*, *ibid.*, § 75; *Mugenzi v. France*, *ibid.*, § 54.

<sup>196</sup> *Tanda-Muzinga v. France*, *ibid.*, § 68; *Mugenzi v. France*, *ibid.*, § 46.

<sup>197</sup> *Tanda-Muzinga v. France*, *ibid.*, §§ 55, 58.

<sup>198</sup> *Mubilanza Mayeka v. Belgium*, above fn. 93, § 75; *Tanda-Muzinga v. France*, *ibid.*, § 74.

<sup>199</sup> FAC judgment F-2186/2015, above fn. 21, E. 6.3.5.

<sup>200</sup> Unofficial translation from the German original which reads: „So gilt es zunächst in Erinnerung

In an individual case, the compatibility with Art. 8 ECHR would thus depend on the nature of the initial grounds for asylum (and the authority's or court's reasoning in refusing the pre-flight grounds). Further, it is important to recall the Court's cautious approach in *El Ghatet*, where the father's asylum application had been refused by the Swiss authorities. The Court held that "caution is called [for] when determining whether he left his child behind of 'his own free will'" and that there was no clear answer to this question.<sup>201</sup>

As regards (ii), it is accepted that for a refugee there are insurmountable obstacles to family life being enjoyed elsewhere, with family reunification being "the only means by which family life can be resumed".<sup>202</sup>

Finally, if children of a refugee are involved, this would further speak in favour of a violation of Art. 8 ECHR. The Court accepts the particular vulnerability of refugees<sup>203</sup> and has stressed that in these circumstances prompt reunification with children is particularly important.<sup>204</sup> In addition, precarious care arrangements for children abroad seem to be taken more seriously by the Court in the context of refugee family reunification cases.<sup>205</sup>

An interpretation of Art. 8 ECHR as guaranteeing the same family reunification rights to persons with a less stable immigration status is also supported by UNHCR ExCom Conclusion No. 15, confirming that family reunification with the core family should also be facilitated for refugees with a temporary status.<sup>206</sup> PACE Recommendation 1327 (1997) similarly recommends the reconsideration of "policy on family reunion in respect of persons granted temporary protection or permission to stay on humanitarian grounds".<sup>207</sup>

### 5.1.2. Compatibility with Art. 14 Taken with Art. 8 ECHR

It is arguable that where an F-permit holder refugee seeks family reunification prior to the expiry of the three-year time limit, this may constitute a violation of the right to non-discrimination in Art. 14 taken with Art. 8 ECHR on the basis of his or her "other status", since an applicant's immigration status or type of permit constitutes "other status".<sup>208</sup> In addition, this scenario involves differential treatment, namely stricter versus less stringent family reunification regimes, of persons in similar situations, namely recognised refugees with a B-permit and those with an F-permit.<sup>209</sup>

Further, the question is whether there is an objective and reasonable justification for this. *The Federal Council's initial justification* for their different

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zu rufen, dass die Beschwerdeführerin ihre Vorfluchtgründe nicht glaubhaft machen konnte; ihre Flüchtlingseigenschaft wurde vielmehr allein aufgrund der illegalen Ausreise aus Eritrea anerkannt. Es ist mithin davon auszugehen, dass sie ohne Not ausgereist ist und die Familiengemeinschaft ohne zwingende Gründe aufgegeben hat."

<sup>201</sup> *El Ghatet v. Switzerland*, above fn. 102, § 48.

<sup>202</sup> *Mugenzi v. France*, above fn. 92, § 53; *Tanda-Muzinga v. France*, above fn. 92, § 74.

<sup>203</sup> *Tanda-Muzinga v. France*, *ibid.*, § 75, referring to *Hirsi v. Italy*, above fn. 106, § 155.

<sup>204</sup> *Mugenzi v. France*, above fn. 92, § 55.

<sup>205</sup> Contrast *I.A.A. v. UK*, above fn. 110 (no family members to look after them, but no Art. 8 violation) with *Mugenzi v. France*, above fn. 92 (where the Court found the applicants in a state of isolation "puisque leurs trois frères et sœurs aînés ne vivaient pas au Kenya comme le ministre de l'Immigration l'avait affirmé, mais en Europe où ils avaient tous obtenu le statut de réfugié", § 55).

<sup>206</sup> UNHCR, ExCom Conclusion No. 15, above fn. 58, § (e).

<sup>207</sup> PACE Recommendation 1327 (1997), above fn. 79, § 8.7 (q).

<sup>208</sup> ECtHR, *Hode and Abdi v. United Kingdom*, Application No. 22341/09, 6 November 2012, available at: <http://hudoc.echr.coe.int/eng?i=001-114244>, § 48.

<sup>209</sup> See ECtHR, Grand Chamber, *D.H. v. Czech Republic*, Application No. 57325/00, 13 November 2007, available at: <http://hudoc.echr.coe.int/eng?i=001-83256>, §§ 175, 196.

treatment has already been discussed above (in section 2.2). In particular, it cannot be said that F-permit holders only stay in Switzerland temporarily, as over 96 per cent stay durably here, or that refugees make up a small percentage of them, given that every fourth F-permit holder is a recognised refugee (please see above, section 2.1). Further, the Federal Council's assessment was based on outdated Art. 8 ECHR case law (see above, section 4.1).

The FAC has rejected the argument that the differential treatment between F-permit and B-permit refugees constitutes unlawful discrimination. It has argued that refugees have no right to family reunification under the Refugee Convention itself, as a result of which the relevant comparator group for F-permit refugees should be other foreigners admitted provisionally and not B-permit refugees.<sup>210</sup> This reasoning is, however, problematic. First, the difference in treatment between different refugees cannot be justified on the basis that the Refugee Convention does not grant this specific right, where the right to family reunification is guaranteed by the ECHR. Second, it uses as comparator group other F-permit holders, but not other foreigners with a temporary status, such as B-permit holders, to whom no three-year-ban applies (see Art. 44 FNA).

In addition, an objective justification based on the purportedly temporary nature of an F-permit is rendered less forceful in the context of countries of origin which are in a situation of conflict or war, especially considering the current policy on family reunification for Syrian refugees. Syrian refugees with an F-permit currently benefit from relaxed provisions for humanitarian visas for their family members as part of a general policy to admit Syrian refugees.<sup>211</sup>

A further objective justification which could be advanced is that F-permit refugees are F-permit holders because of their own doing or for self-induced reasons. On the one hand, F-permit holders who were refused asylum and a B-permit based on Art. 54 AsylA are *sur place* refugees. Normally, their initial account regarding their reasons for the flight has not been believed by the Swiss authorities. This could be advanced as evidence that the refugee's actual decision to flee was voluntary, even if they now enjoy refugee status, justifying differential treatment. The FAC judgment set out above seems to support this type of reasoning. However, given the ECtHR's reluctance to infer too much from the refusal of an asylum application, this could effectively be fought in a strong individual case (such as one with a credible asylum account and depending on the authority's or court's reasoning for rejecting this account).<sup>212</sup>

Similarly, refugees who have been found unworthy of asylum and a B-permit based on Art. 53 AsylA have either violated or endangered Swiss security, are guilty of serious misconduct, or are subject to an expulsion order. This could be advanced as an objective and reasonable justification for differential treatment.

A further factor supporting an Art. 14 ECHR argument would be the CERD Committee's decision in *A.M.M. v. Switzerland*, in which the Committee on the elimination of Racial Discrimination denied race discrimination between F-

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<sup>210</sup> See FAC judgment F-8197/2015, above fn. 30: "que dite Convention ne leur accorde ainsi aucun privilège en matière de séjour, « ce qui fait que, sur ce point, les réfugiés admis provisoirement sont sur un pied d'égalité avec les autres étrangers admis provisoirement » (cf. ch. 6.3.7 de la Directive du SEM du 1<sup>er</sup> janvier 2008 [état au 24 octobre 2016], document publié sur le site internet [www.sem.admin.ch](http://www.sem.admin.ch) Accueil SEM Publications & service Directives et circulaires III. Loi sur l'asile 6. Situation juridique ; site consulté en février 2017)".

<sup>211</sup> See SEM, *Humanitaire Krise in Syrien*, available at: <https://www.sem.admin.ch/sem/de/home/asyl/syrien.html>.

<sup>212</sup> *El Ghatet v. Switzerland*, above fn. 102, but also *Tuquabo-Tekle v. Netherlands*, above fn. 89.

permit holders in general and other immigrants (as differential treatment was based on the type of permit, rather than race), but nevertheless urged the Swiss government to limit any fundamental rights restrictions for F-permit holders:

Notwithstanding the conclusion it has reached in this case, the Committee notes that the State party has itself acknowledged the adverse consequences of temporary admission status on essential areas of life for this category of non-nationals, some of whom find themselves permanently in a situation that ought to be temporary...

Accordingly, the Committee recommends that the State party review the regulations governing its temporary admission regime, with a view to limiting as far as possible the restrictions on the enjoyment and exercise of fundamental rights and in particular rights relating to freedom of movement, particularly when that regime is applied for a long period.<sup>213</sup>

This supports the lack of an objective justification for the far-reaching consequences, as admitted by Switzerland in *A.M.M.*, of an adverse status in the case of F-permit holders. Given that Art. 14 ECHR prohibits discrimination on the grounds of immigration status, this could be argued before the ECtHR (but not the CERD Committee).

### 5.1.3. Potential Justifications under Art. 8 ECHR

Given the duration of domestic proceedings, it would be likely that the three-year time limit would have expired by the time that an ECHR application was lodged, and certainly by the time that the ECtHR decided on it. A *strategic consideration* in this context is whether it would be best to argue incompatibility with Art. 8 ECHR on behalf of an applicant who would likely be able to meet the financial etc. requirements of Art. 85 (7) FNA and thus have already succeeded by the time the ECtHR decides the case. This scenario would be analogous to the situation in *Tanda-Muzinga v. France* and *Senigo Longue v. France*, in both of which the children had been granted visas by the time the ECtHR decided their cases.<sup>214</sup>

A further factor speaking in favour of choosing a case where family reunification has been granted after the expiry of the three years is that family reunification cases do not currently seem to be treated with priority by the ECtHR. The proceedings in *El Ghatet v. Switzerland* were lodged in 2010 and the case was decided almost six years later in November 2016. By the time of the judgment, the son had attained 26 years of age.

A further scenario in which this provision may be incompatible with Art. 8 ECHR is where an F-permit refugee is unable to meet the financial requirements of Art. 85 (7) FNA because of a medical condition or disability. Disability-specific considerations are discussed further below in section 5.4. A further supporting factor may be where it could be shown that the person has made efforts to obtain work, but due to his disability or medical condition has not been able to find employment (see the ECtHR's decision in *Haydarie*, discussed further below).

The quality of the reasoning of a FAC judgment would be a further factor to consider, and particularly the question of whether refugee rights and children's rights were adequately considered by the FAC. Art. 8 ECHR standards regarding an assessment of the best interests of the child are exigent and the

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<sup>213</sup> CERD Committee, *A.M.M. v. Switzerland*, Comm. No. 50/2012, 18 February 2014, available at: <http://www.ohchr.org/EN/HRBodies/CERD/Pages/Jurisprudence.aspx>, §§ 10-11.

<sup>214</sup> *Tanda-Muzinga v. France*, above fn. 92, § 55; *Senigo Longue v. France*, above fn. 95, § 52.

Court applies particularly rigorous scrutiny to the domestic court's reasoning in such cases.<sup>215</sup> This would make it more likely that a finding of a violation of Art. 8 ECHR would be made in a case involving children.

#### 5.1.4. Conclusion

There are strong grounds to believe that the three-year ban on family reunification may constitute a violation of Art. 8 ECHR, in particular in the context of F-permit refugees. However, the three-year ban may also amount to an Art. 8 ECHR violation for F-permit holders generally, although the Court's case law is less clear on this. Both Art. 8 ECHR and Art. 14 taken with Art. 8 ECHR would provide sound grounds for an application to the ECtHR.

The ideal scenario for litigation would be a case where an F-permit holder applies for family reunification as quickly as possible after being granted an F-permit. It would perhaps be useful to consider a case where the applicant is likely to be able to find work and meet the financial requirements for family reunification upon expiry of the three years, so that any delay of the Court in deciding the case would not impact on the person concerned so much and so that the negative impact of the three-year ban would be even more evident.

#### 5.2. Art. 44 FNA: Family Reunification with Post-Flight Spouse (and Post-Flight Child) of a B-Permit Holder Refugee Relying on Social Assistance

B-permit refugees seeking family reunification with a post-flight spouse cannot rely on Art. 51 (1) and (4) AsylA, but must rely on the more restrictive Art. 44 FNA, which includes requirements as to non-reliance on social assistance and suitable housing. Thus, the provisions for family reunification with a post-flight spouse are far more restrictive than those for reunification with a pre-flight spouse.

##### 5.2.1. Compatibility with Art. 14 taken with Art. 8 ECHR

A similar scenario was considered by the Court in the case of *Hode and Abdi*.<sup>216</sup> The Court found that the differential treatment of post-flight and pre-flight spouses constituted unjustifiable discrimination contrary to Art. 14 taken with Art. 8 ECHR, on the basis of the two applicants' "other status" as a refugee and post-flight spouse.<sup>217</sup>

It is thus first necessary to consider the arguments under Art. 14 taken with Art. 8 ECHR. In the current scenario involving family reunification with a post-flight spouse, there is differential treatment based on the "other status" of the spouse (post-flight as opposed to pre-flight) in a similar situation, namely being married to a refugee in Switzerland.

A further pertinent comparator group could be Swiss nationals and C-permit (resident permit) holders who are arguably in a comparable situation to refugees (both those with an F-permit and a B-permit), given that the status of refugees is durable. The FSC accepted that B-permit refugees have a durable status (based on the then-applicable law that they had a right to apply for a C-

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<sup>215</sup> *M.P.E.V. v. Switzerland*, above fn. 28, § 57; *El Ghatet v. Switzerland*, above fn. 102, § 47.

<sup>216</sup> *Hode and Abdi v. UK*, above fn. 208, and see the CJEU decision in *C-578/08 Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, available at:

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-578/08&td=ALL> finding no justification for the different treatment of post-flight and pre-flight spouses in relation to the reliance on public funds under the Family Reunification Directive 2003/86/EC (not adopted by Switzerland).

<sup>217</sup> *Hode and Abdi v. UK*, above fn. 208, §§ 48, 52.



permit after five years – this provision has since been revoked).<sup>218</sup> It is arguable that, based on the prohibition of *refoulement* in the Refugee Convention and the *de facto* situation of B-permit refugees as durably staying persons, B-permit refugees are in fact in a similar situation to C-permit holders and Swiss nationals. C-permit holders and Swiss nationals are not subject to the income requirements contained in Art. 44 FNA (see Art. 42 and 43 FNA). Rather, they may themselves rely on social assistance but the family member for whom reunification is being sought may not cause substantial further reliance on social assistance. Thus, the differential treatment would be based on their immigration status, which qualifies as “other status”.<sup>219</sup> Someone who only relies on social assistance to a limited extent or someone who relies on social assistance, but whose spouse would be able to work, could constitute a test case in the context of this scenario.

The main question is whether there would be an objective and reasonable justification for such differential treatment. While the ECtHR denied this in *Hode and Abdi*, the situation in Switzerland needs to be distinguished at least to some extent from the situation in the UK. The difficulties of a straightforward reliance on *Hode and Abdi* are discussed further below in section 5.2.3.

### 5.2.2. Compatibility with Art. 8 ECHR

Further, this situation may be incompatible with Art. 8 ECHR, as positive obligations under Art. 8 ECHR may apply in this context. However, the cases in which the Court found a violation of positive obligations under Art. 8 ECHR all concerned children.<sup>220</sup> Where a child was also concerned the pertinent factors for the existence of positive obligations in this scenario would be: (i) Was family separation voluntary? (ii) Are there insurmountable obstacles to family life being enjoyed elsewhere? (iii) What do the best interests of the child require?

As regards (i), voluntariness of separation, the Court has previously stressed that states are not required to respect the post-migration spousal choices of migrants. It effectively views this as a voluntary choice of separation. In *Abdulaziz, Cabales and Balkandali v. UK*, the Court held:

The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage .... The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.<sup>221</sup>

However, the situation would be different if a spouse who was separated from the applicant during flight was concerned. While such a spouse would fall outside the restrictive interpretation of family members in Art. 51 (4) AsyIA, it would most likely nevertheless fall within the category of involuntary separations in the context of Art. 8 ECHR. This is also supported by UNHCR ExCom Conclusions, which also regularly speak of “separated refugee families”

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<sup>218</sup> See e.g. ATF 139 I 330.

<sup>219</sup> *Hode and Abdi v. UK*, above fn. 208, § 48.

<sup>220</sup> See e.g. *Mubilanza Mayeka v. Belgium*, above fn. 93, §§ 76, 82; *Rodrigues da Silva and Hoogkamer v. Netherlands*, above fn. 97, § 38; *Senigo Longue v. France*, above fn. 95, § 64.

<sup>221</sup> *Abdulaziz, Cabales and Balkandali v. UK*, above fn. 81, § 68 (four out of the 14 judges wrote Concurring Opinions finding that Art. 8 (1) had been engaged, but that the interference was justified under Art. 8 (2)).

without specifying that separation must have taken place in the country of origin.<sup>222</sup>

In addition, the Court's statements on the particular situation and vulnerability of refugees referred to above (section 5.1.1) and their right to family reunification are applicable here too.

A further argument against a financial requirement is provided by UNHCR ExCom Conclusion No. 24, which also emphasises that family reunification should be facilitated "by special measures of assistance to the head of family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members".<sup>223</sup>

It is particularly pertinent that employment rates of B-permit refugees in Switzerland in the first three years are rather low, reaching just 20 per cent (see above, section 2.2). Integration into the labour market is extremely difficult for refugees. While their employment rates increase to 48 per cent after five years, the first few years are particularly hard. Indeed, a refugee who is actively seeking employment but unable to find a stable job may be an ideal case from a strategic point of view (see on this *Haydarie* and section 5.3.2 below).

As regards (ii), obstacles to relocation, the second requirement for positive obligations in this scenario, it is again clear that a refugee cannot be expected to live elsewhere (see above, section 5.1.1).

As regards (iii), the best interests of the child, where a post-flight child is concerned, arguments relating to the best interests of the child would speak in favour of family reunification obligations under Art. 8 ECHR (see above, section 5.1.1.). The same considerations regarding prompt reunification of refugees with their children and considerations regarding precarious living conditions abroad would be pertinent here.<sup>224</sup>

### 5.2.3. Potential Justifications under Arts. 14 and 8 ECHR

Potential justifications under Art. 8 ECHR have already been set out above in section 5.1.3.

In relation to an application under Art. 14 taken with Art. 8 ECHR, it is important to note that the situation in the UK prior to the judgment in *Hode and Abdi v. UK* was significantly different from the current situation in Switzerland. In the UK, refugees used to have no possibility at all of seeking family reunification with post-flight family members. As a result, the UK courts had already prior to the ECtHR's judgment declared the then state of the law to be in violation of Art. 8 ECHR.<sup>225</sup> It was based on this domestic judgment that the ECtHR found that there was no objective justification for the differential treatment:

The Court accepts that offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Article 14 of the Convention. However, it observes that this "justification" does not appear to have been advanced in the recent domestic cases cited by the applicants. While the Court recognises that the Government were estopped from arguing this point in *A (Afghanistan)*, it notes that in the later case of *FH*

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<sup>222</sup> UNHCR ExCom Conclusion No. 24 (XXXII) of 1981 on Family Reunification, §§ 1-3.

<sup>223</sup> *Ibid.*, § 9.

<sup>224</sup> *Tanda-Muzinga v. France*, above fn. 92, § 75; *Mugenzi v. France*, above fn. 92, § 55.

<sup>225</sup> UK: Upper Tribunal (Immigration and Asylum Chamber), *FH (Post-flight Spouses) Iran v. Entry Clearance Officer, Tehran*, [2010] UKUT 275 (IAC), 19 July 2010, available at: [http://www.refworld.org/cases,GBR\\_UTIAC,4c6962f92.html](http://www.refworld.org/cases,GBR_UTIAC,4c6962f92.html)



(Post-flight spouses) Iran the Upper Tribunal (Asylum and Immigration) found no justification for the particularly disadvantageous position that refugees had found themselves to be in when compared to students and workers, whose spouses were entitled to join them. In fact, the Tribunal went so far as to call on the Secretary of State for the Home Department to give urgent attention to amending the Immigration Rules so as to extend them to the spouses of those with limited leave to remain as refugees. The Immigration Rules were subsequently amended in the manner suggested by the Tribunal.<sup>226</sup>

The difference between the UK and Swiss situations is therefore that the differential treatment was more far-reaching in the UK. In Switzerland, refugees can apply for family reunification with post-flight spouses, provided they meet the requirements in Art. 44 (a)-(c) FNA. Thus, the question is whether the Court would find that no objective justification exists for such a differential treatment. Two different comparator scenarios are pertinent: Is it justified to treat pre-flight and post-flight family members differently? And is it justified to treat B-permit refugees differently from C-permit holders and Swiss nationals?

While the Court has not yet pronounced itself on the question of whether financial requirements are permissible in the case of refugee family reunification with post-flight family members, it has looked at such requirements in the context of a person fleeing from a general situation of war in *Haydarie v. the Netherlands*.<sup>227</sup> The case concerned an Afghan mother who had fled together with one of her sons and her sister first to Pakistan and then to the Netherlands. She had left three of her children behind in Afghanistan in the care of their maternal grandfather. The father of the children had likely been arrested by the Taliban in 1998 and had not been seen since. The applicant, her son and her sister were refused asylum but were granted conditional residence permits on the grounds that their return to Afghanistan would entail undue hardship. These permits were first renewed and then transformed into a residence permit for asylum for a fixed period, which later became permanent. The applicant mother was not in gainful employment, but was looking after her wheel-chair-bound sister and had attended language and sewing classes in the Netherlands. The main issue in the case was whether the applicant mother could be required to comply with an income requirement under domestic immigration rules, requiring her to have an independent and lasting income of an amount equal to benefits under the General Welfare Act.

The Court in *Haydarie* made it clear that it did “not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought”.<sup>228</sup> In particular, the Court considered it reasonable that such an income requirement would apply only for three years if an applicant had unsuccessfully tried to find work:

The Court further understands that the Netherlands authorities would not maintain this income requirement if the first applicant could demonstrate to have made, during a period of three years, serious but unsuccessful efforts to find gainful employment, also bearing in mind the possible existence of an objective obstacle for the applicants’ return to Afghanistan.<sup>229</sup>

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<sup>226</sup> *Hode and Abdi v. UK*, above fn. 208, § 53.

<sup>227</sup> *Haydarie v. the Netherlands*, above fn. 109.

<sup>228</sup> *Ibid.*, p. 13.

<sup>229</sup> *Ibid.*, p. 13.

#### 5.2.4. Conclusion

From a strategic perspective, Art. 44 FNA in post-flight spouse scenarios will most likely be found in violation of Art. 8 ECHR in the context of a refugee who either unsuccessfully tried to obtain employment or who formed family life during flight and was separated from his spouse during flight in a transit country.

In addition, it would strengthen the argument under Art. 8 ECHR if post-flight children were also involved, for instance where the father left his wife and newly-born children in a transit country and fled to Switzerland.

#### 5.3. Art. 44 FNA: Female Refugee with Child(ren) in Switzerland Reliant on Social Assistance and Seeking Family Reunification with her Post-Flight Spouse

This is the same scenario as set out above in section 5.2 with the facts slightly changed. In particular, children are involved, which adds an important factor to the assessment of whether positive obligations under Art. 8 ECHR arise.

##### 5.3.1. Compatibility with Art. 8 ECHR

As regards obstacles to relocation, given that the children are living with the mother in Switzerland in this scenario, they would likely have developed close ties to Switzerland and the applicant mother could not enjoy family life in a third country on this basis. However, this is also clear in the case of refugees in general according to the Court's case law, namely that a refugee cannot be expected to live elsewhere (see above, section 5.1).

As regards voluntariness of separation, this would be assessed similarly to the situation in section 5.2 above.

A further factor speaking to an Art. 8 ECHR violation would be in scenarios where the husband would be likely find work after a while in Switzerland and could thus alleviate the burden on social funds.

##### 5.3.2. Compatibility with CEDAW

This scenario also concerns *de facto* discrimination against women. Men typically flee without their children, while women typically seek to stay with their children during flight and are thus more likely to claim asylum along with their children. However, Swiss authorities sometimes actively discourage refugee women with small children from working, because the costs for publicly funded childcare would be higher than the cost of social assistance. Where a refugee mother has been discouraged from working, this would be a particularly strong factor in favour of positive obligations under Art. 8 ECHR.

In addition, there may be grounds for challenging this situation before the CEDAW Committee. The Committee has stressed that "migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them"<sup>230</sup> and that "family reunification schemes for migrant workers [should not be] directly or indirectly discriminatory on the basis of sex".<sup>231</sup> Further, the CEDAW Committee

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<sup>230</sup> CEDAW Committee, *General Recommendation No. 21*, above fn. 67.

<sup>231</sup> CEDAW Committee, *General Recommendation No. 26*, above fn. 65, § 26 (e).

recognises that “[w]omen migrant workers may be subjected to particularly disadvantageous terms regarding their stay in a country”.<sup>232</sup>

If statistical data can be collected demonstrating a *de facto* prejudicial situation for women regarding family reunification rights, this would support an argument that such a situation could amount to discrimination against women contrary to Art. 2 (f) CEDAW and a violation of the right of women freely to choose their domicile pursuant to Art. 15 (4) CEDAW. An application could thus also be lodged before the CEDAW Committee, for which Switzerland has ratified the Optional Protocol on Individual Communications.

### **5.3.3. Potential Justifications under Art. 8 ECHR and CEDAW**

The problematic aspects of an Art. 8 ECHR application have been discussed above in section 5.1.3. While the existence of children in this scenario would strengthen the case somewhat, it needs to be borne in mind that the children would not necessarily be related to the post-flight spouse, so that the impact of the existence of children is limited.

In relation to a CEDAW application, the main question would be an evidential one, namely whether it can be shown that this situation constitutes *de facto* discrimination against women. This would chiefly depend on the existence of a survey with statistical data on this situation.

### **5.3.4. Conclusion**

An application under Art. 8 ECHR would be particularly strong if the post-flight spouse would be likely to find work in Switzerland and thus to alleviate the burden on social funds (which could be demonstrated by way of the spouse’s qualifications or an assurance from a future employer that would guarantee the spouse work). In relation to CEDAW, an application would be more interesting, as it could address a systemic problem and a *de facto* discriminatory attitude towards such cases. The chances of success of such an application would chiefly depend on the strength of the data collected supporting the *de facto* discriminatory situation against women.

## **5.4. Disabled/III Refugee Reliant on Social Assistance, Seeking Family Reunification with Post-Flight Spouse (and/or Children)**

This scenario, where a refugee reliant on social assistance as a result of disability or illness seeks reunification with a post-flight spouse and/or children, is again similar to the scenarios set out above in sections 5.2 and 5.3. However, this time the applicant in Switzerland is ill or suffering from a disability, which means that he or she is unable to work and it can also not be said that the person is making insufficient efforts to work.

### **5.4.1. Compatibility with Art. 8 ECHR**

The arguments under Art. 8 ECHR would be akin to those discussed in sections 5.2 and 5.3. However, the material additional factor in this scenario is the applicant’s disability/illness. According to the Court, refugees already display particular vulnerability.<sup>233</sup> Where a further vulnerability such as disability or illness applies, the Court finds this an “accumulation of special circumstances”. The Court so held in *Nasri v. France* in the context of an expulsion case of a

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<sup>232</sup> *Ibid.*, § 19.

<sup>233</sup> *Hirsi v. Italy*, above fn. 106, § 155; *Tanda-Muzinga v. France*, above fn. 92; *Mugenzi v. France*, above fn. 92.

disabled person.<sup>234</sup> The applicant required the support of his family in order to attain “a minimum psychological and social equilibrium”, leading the Court to find that his expulsion would have been disproportionate under Art. 8 ECHR.<sup>235</sup>

In addition, the UN Convention on the Rights of Persons with Disabilities (CRPD),<sup>236</sup> which entered into force for Switzerland on 13 December 2013, is pertinent. The CRPD prohibits discrimination against disabled persons and requires states to make reasonable accommodation, which means “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (Art. 2 CRPD). In addition, Art. 23 CRPD requires states to “take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships”.

This could be used to argue in favour of a disability-sensitive interpretation under Art. 8 ECHR. The Court has recognised that positive obligations may arise in the context of disabled persons.<sup>237</sup> While it has been reluctant to adopt a disability-sensitive interpretation of Art. 3 ECHR,<sup>238</sup> the case of *Nasri v. France* demonstrates that the same reluctance does not apply in the context of Art. 8 ECHR.

In addition, if children were concerned by the family reunification application, their best interests would again have to be taken into account as a primary consideration. Normally, arguments relating to the best interests of the child would speak in favour of family reunification obligations under Art. 8 ECHR (see above section 5.1.1), even if the ECtHR sometimes takes a surprising stance regarding children awaiting family reunification in precarious circumstances. Again, the arguments in favour of an incompatibility with Art. 8 ECHR would likely be stronger if a refugee were concerned.<sup>239</sup>

#### 5.4.2. Potential Justification under Art. 8 ECHR

One factor suggesting caution in this context is the Court’s decision in *Haydarie v. the Netherlands*. In this case, the applicant was unable to meet the income requirement for family reunification, because she had been looking after her wheel-chair bound sister. The Court displayed little sympathy for the situation of the disabled family relative in this case. Regarding the particular circumstances of the case with the disabled sister, the Court held that the applicant mother had not actively sought gainful employment, because it appeared that “she preferred to care for her wheel-chair bound sister at home”.<sup>240</sup> According to the Court, however, she should have sought to entrust the care of her sister to an agency providing care for handicapped persons. The

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<sup>234</sup> ECtHR, *Nasri v. France*, Application No. 19456/92, 13 July 1995, available at: <http://hudoc.echr.coe.int/eng?i=001-57934>.

<sup>235</sup> *Ibid.*, § 46.

<sup>236</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, available at: <http://www.refworld.org/docid/4680cd212.html>.

<sup>237</sup> C. O’Cinneide, “Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities”, in O. Mjöll Arnardóttir and G. Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009), 168-170; I.E. Koch, “Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective” (2006) 10 *IJHR* 405.

<sup>238</sup> ECtHR, *S.H.H. v. United Kingdom*, Application No. 60367/10, 29 January 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-116123>, but see dissenting opinions of Judges Ziemele, Thór Björgvinsson and De Gaetano arguing in favour of a disability-sensitive interpretation taking account of the CRPD.

<sup>239</sup> *Tanda-Muzinga v. France*, above fn. 92, § 75; *Mugenzi v. France*, above fn. 92, § 55.

<sup>240</sup> *Haydarie v. the Netherlands*, above fn. 109.

Court therefore found the case manifestly ill-founded and declared it inadmissible.

### **5.4.3. Conclusion**

In conclusion, such a case scenario would constitute the first case for the Court to consider a disability-sensitive interpretation of Art. 8 ECHR in the context of family reunification. The existing case law would support good chances of success under Art. 8 ECHR.

## **5.5. Art. 44 (c) FNA or Art. 85 (7) (c) FNA: Working Poor, for Example Family with Several Children, Seeking Family Reunification with Spouse**

This scenario, where a working refugee parent still partially dependent on social assistance with several children seeks reunification with his or her spouse, is similar to the scenario set out above in section 5.2. However, two important factors distinguish this scenario from the one in section 5.2. First, the applicant in Switzerland is working and doing what he or she can. Second, where children are involved, which is as in the scenario in section 5.3, this is a significant factor.

### **5.5.1. Compatibility with Art. 8 ECHR**

The Art. 8 ECHR considerations in general are the same as already set out above. In addition, the following further factors impact on an assessment of this scenario under Art. 8 ECHR.

The fact that the applicant is working but simply not able to achieve a salary sufficient to meet income requirements would be an important factor distinguishing this scenario from the scenario in *Haydarie v. the Netherlands*, where the Court found that the applicant had made insufficient efforts to obtain gainful employment. Especially where the family includes several children, it is often impossible to earn sufficient money in the low-skilled sector to achieve independence from social assistance.

If the case concerned an F-permit refugee under Art. 85 (7) FNA rather than a B-permit refugee under Art. 44 (c) FNA, it could relate to a pre-flight spouse. In that case, the several factors speaking in favour of positive obligations under Art. 8 ECHR in refugee family reunification cases set out in section 5.1 above would apply here too.

In addition, in the case of an F-permit refugee with a pre-flight spouse the best interests of the child would have an important impact. It would be a further factor clearly speaking in favour of family reunification if the person who is seeking entry clearance is a parent of the children present in Switzerland.<sup>241</sup>

### **5.5.2. Conclusion**

The potentially problematic aspects of this scenario are the same as set out in those above. However, as indicated above in section 5.5.1, a particularly strong scenario from a strategic perspective would be that of an F-permit refugee with children seeking family reunification with the pre-flight spouse, as stronger positive obligations apply under Art. 8 ECHR where the separation of children from a parent is concerned.

## **5.6. Art. 75 ARE Regulation or Art. 47 FNA: Late Family Reunification Cases**

This scenario concerns the Swiss provisions prohibiting late family reunification applications save in exceptional circumstances for significant family reasons

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<sup>241</sup> See *Rodrigues da Silva and Hoogkamer v. Netherlands*, above fn. 97; *Nuñez v. Norway*, above fn. 99; *Polidario v. Switzerland*, above fn. 99; *M.P.E.V. v. Switzerland*, above fn. 28.

(Art. 75 ARE Regulation for F-permit holders and Art. 47 FNA for B-refugees with post-flight family).

### 5.6.1. Compatibility with Art. 8 ECHR

As regards (i), voluntariness of the separation, and (ii), insurmountable obstacles to enjoying family life elsewhere, the same considerations as set out above apply with varying strength depending on whether the person is a refugee or an F-permit holder. In addition, however, (iii), the best interests of the child, would have to be considered here.

This scenario would be particularly likely in the context of an F-permit refugee or F-permit holder who is seeking family reunification with a child over 12 years of age. He or she would have to wait for the expiry of the three-year ban and would then have to apply within the one-year time limit. However, given that only 20 per cent of F-permit holders are in employment after three years (see above section 2.3), it is highly likely that he or she would not yet be able to fulfil the financial requirements imposed by Art. 85 (7) (c) FNA. If such a person thus delayed the family reunification application with the child until he or she was in gainful employment and the one-year time limit set out in Art. 75 ARE Regulation had expired, an interesting refusal situation would arise. In this scenario, there may be relevant objective reasons for the delay, such as the difficult employment situation for F-permit holders (recognised by the Swiss government in *A.M.M. v. Switzerland*, discussed above in section 5.1.2). This would speak in favour of positive obligations arising under Art. 8 ECHR.

A further factor speaking in favour of this would be a case where the children were traumatised because of the situation in their country of origin or transit. The traumatic experiences of refugee children are considered pertinent, regardless of their advanced age.<sup>242</sup>

Further, particular risk factors for the child in the country of origin or transit, such as in *Tuquabo-Tekle* where the applicant daughter's advanced age made her more vulnerable, because she was running the risk of being married off, clearly weigh in favour of a finding of positive state obligations.<sup>243</sup>

### 5.6.2. Potential Justification under Art. 8 ECHR

The Court's case law is very strict on late family reunification and reunification with children of an advanced age.<sup>244</sup> Delays of six-and-a-half years in *I.M. v. the Netherlands* and of seven years in *Ly v. France* have been found material in finding family reunification refusals proportionate.<sup>245</sup> Similarly, the Court places considerable weight on the cultural and linguistic environment in which children have grown up,<sup>246</sup> and on their advanced age as a reason for being "not as much in need of care as young children and increasingly able to fend for themselves".<sup>247</sup>

The most important factor in order to address the difficulties under Art. 8 ECHR in relation to late family reunification applications would be to demonstrate that the applicant parent has done all in his or her power to seek family reunification as quickly as possible. This would distinguish the scenario from *I.A.A. v. UK*,

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<sup>242</sup> *Mugenzi v. France*, above fn. 92, § 55.

<sup>243</sup> *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 50.

<sup>244</sup> *I.A.A. v. UK*, above fn. 110, § 43.

<sup>245</sup> *I.M. v. the Netherlands*, above fn. 134; ECtHR, *Ly v. France*, above fn. 143, § 37; see also *I.A.A. v. UK*, above fn. 110.

<sup>246</sup> *Chandra v. the Netherlands*, above fn. 100; *Benamar v. the Netherlands*, above fn. 100; see also *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 49.

<sup>247</sup> *Tuquabo-Tekle v. Netherlands*, above fn. 89, § 49.

where the mother had not taken any steps for several years to seek family reunification with her children.<sup>248</sup> It would thus make the case more analogous to *Tuquabo-Tekle*, in which the mother had done all that was in her power to achieve family reunification with her daughter at the earliest opportunity, and had in fact applied for family reunification for the first time immediately after having been granted a permit on humanitarian grounds.<sup>249</sup>

### 5.6.3. Conclusion

In conclusion, such a case would most likely be found incompatible with Art. 8 ECHR if an F-permit refugee seeking family reunification with pre-flight children were concerned. Ideally, the person would have sought family reunification at the earliest opportunity and demonstrated a clear interest in family reunification from an early stage, but would have failed due to the financial requirements.

## 5.7. Family Reunification Rights for Children

This scenario applies, for instance, where an unaccompanied child has been granted asylum or temporary admission and is seeking family reunification with one or both of his parents. Swiss law does not provide any legal basis for the family reunification of migrant children with their parents abroad. The only situation in which the FSC has granted rights under Art. 8 ECHR is that of Swiss children seeking family reunification with their non-Swiss parent (so-called “reverse family reunification” – “umgekehrter Familiennachzug”). The FSC has decided that Swiss children can apply for family reunification with their parent based on Art. 8 ECHR, where the parent has custody of the child or an intensive relationship with the child. However, children who are C-permit or B-permit holders have no such right.<sup>250</sup>

### 5.7.1. Compatibility with Art. 8 ECHR

This scenario involves the positive obligations of Switzerland in relation to unaccompanied children. Art. 8 ECHR imposes more exigent standards where children are concerned. The Court has held that states are under positive obligations to facilitate the reunification of children with their parents in such situations in *Mayeka Mitunga v. Belgium*:

The Court further notes that, far from assisting her reunification with her mother, the authorities’ actions in fact hindered it. Having been informed at the outset that the first applicant was in Canada, the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter. The Court considers that that duty became more pressing from 16 October 2002 onwards, that being the date when the Belgian authorities received the fax from the UNHCR contradicting the information they had previously held.<sup>251</sup>

Further, the Committee of Ministers Recommendation No. R (99) 23 states in relation to unaccompanied children that “member states should, with a view to family reunion, co-operate with children or their representatives in order to trace the members of the family of the unaccompanied minor” (at § 5).

<sup>248</sup> *I.A.A. v. UK*, above fn. 110, § 43.

<sup>249</sup> *Tuquabo-Tekle v. Netherlands*, above fn. 89, §§ 45-46.

<sup>250</sup> FSC decision of 19 May 2011 (2C\_327/2010, 2C\_328/2010), and see further M. Spescha, *Kommentar zum Migrationsrecht*, above fn. 20, Nr. 18 Kommentar BV/EMRK/UNO-KRK, N 18, 19-21a.

<sup>251</sup> *Mubilanza Mayeka v. Belgium*, above fn. 93, § 82.



In addition, the CRC Committee has stressed that, where family reunification is not possible in the country of origin, states parties are under obligations regarding family reunification under Arts. 9 and 10 CRC.<sup>252</sup> However, Switzerland has entered a reservation to Art. 10 (1) CRC on family reunification, stating that this may not apply to certain categories of immigrant children. Questions may arise as to whether this reservation is specific enough and whether it is compatible with Switzerland's other obligations under the CRC, in particular under Art. 3 CRC on the best interests of the child and Art. 2 CRC on non-discrimination, including on the basis of "other status". In addition, Art. 9 CRC guarantees that a child may not be separated from his or her parents against his or her will, to which Switzerland has also not entered a reservation.

The legality of Switzerland's reservation is thus questionable, both because it is vague and does not specify which categories of immigrants are concerned, and because Switzerland has failed to enter reservations to other rights impacting on the same situation, notably Arts. 2, 3 and 9 CRC. It would be interesting to challenge the legality of the reservation before the CRC Committee now that the Optional Protocol on Individual Communications has entered into force for Switzerland.<sup>253</sup>

In any event, where the child is recognised as a refugee, Art. 22 (2) CRC would impose positive obligations on Switzerland to trace the parents of the child and facilitate family reunification. Art. 22 (2) CRC can be considered a *lex specialis* to Art. 10 as regards asylum-seeking and refugee children, and may therefore be applicable to family reunification of such children in any event. UNHCR has also repeatedly stated that states should make every effort to trace the parents of unaccompanied children. Its 1997 Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum state in relation to tracing:

Tracing for parents or families is essential and should begin as soon as possible. To that end, the services of the National Red Cross or Red Crescent Societies and the International Committee of the Red Cross (ICRC) should be requested where necessary. In cases where there may be a threat to the life or integrity of a child or its close relatives, particularly if they have remained in their country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety.<sup>254</sup>

There are a number of reasons why the lack of family reunification rights for children is incompatible with Art. 8 ECHR and the CRC.

### **5.7.2. Compatibility with Art. 14 taken with Art. 8 ECHR**

In addition, it is possible that this situation is in violation of Art. 14 taken with Art. 8 ECHR, because there is unjustified differential treatment between Swiss children and refugee children. This could also be F-permit holders generally, but refugees are likely in a stronger position as comparators (see also argumentation on this above, section 5.2). It could be argued that the two are in very similar situations in terms of the stability of their rights of residence. In fact,

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<sup>252</sup> CRC Committee, *General Comment No. 6 (2005)*, above fn. 71, § 83.

<sup>253</sup> Switzerland ratified the Optional Protocol to the CRC on Individual Communications on 24 April 2017 and it entered into force on 24 July 2017; see Swiss Federal Council, *Beitritt der Schweiz zum dritten Fakultativprotokoll zur UNO-Kinderrechtskonvention*, available at: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-66468.html>.

<sup>254</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <http://www.refworld.org/docid/3ae6b3360.html>, § 5.17.



if anything, refugee children are in a worse position, because as opposed to Swiss children, they do not even have the choice of enjoying family life with their parents in the country of origin. In addition, refugee children are in a comparable situation to Swiss children for the following reason. Swiss children have a right to freedom of domicile and benefit from the prohibition of expulsion (Arts. 24 and 25 of the Swiss Constitution).<sup>255</sup> The FSC considered this a material factor in favour of the right to reverse the family reunification of Swiss children.<sup>256</sup> Similarly, refugee children benefit from the prohibition of *refoulement* (Art. 33 Refugee Convention, Art. 3 ECHR) and fall within the scope of the right to freedom of movement and free choice of residence (Art. 26 Refugee Convention, in addition to Art. 12 (1) and (4) ICCPR).

The question would thus be whether there is an objective and reasonable justification for the differential treatment. Given that Switzerland has not entered a reservation to Art. 22 CRC, it would appear difficult for Switzerland to advance an objective and reasonable justification for failure to comply with its obligations under international law.

### 5.7.3. Conclusion

This scenario presents strong grounds in favour of a finding of an ECHR violation. It should be brought at the domestic level first and has a likely chance of success domestically, both under Art. 8 and Art. 14 taken with Art. 8 ECHR.

### 5.8. Family Reunification with Non-Core Family Members

Family reunification applications with relatives not considered part of the “nuclear family”, such as adult unmarried children, uncles, aunts or dependent parents, are not further dealt with here for the following reasons. While the Court in theory postulates a relatively flexible approach to family life with non-core family members (see case law set out above, section 4.3.1), the requirement of additional dependence for such ties to fall within the scope of family life under Art. 8 ECHR constitutes an extremely high threshold.<sup>257</sup> In addition, the domestic legal provisions have also been revoked in relation to this (former Art. 51 (2) AsyIA), which would be a pertinent consideration according to the Recommendation of the CoE Committee of Ministers No. R (99) 23 (§ 2).

So far no family reunion case with non-core family members has succeeded before the ECtHR.<sup>258</sup> It is therefore not an area of law on which it would make sense to focus strategic litigation resources, at least not before more positive decisions have been achieved in situations in which the incompatibility with Art. 8 ECHR is more glaring.

### 5.9. Practical and Procedural Problems

In practice, various practical and procedural problems arise in family reunification cases. The SEM regularly refuses to recognise pre-flight family life of cohabiting spouses, especially in cases from Eritrea. In addition, there may be problems with DNA testing. Further, problems regularly arise regarding the documentation submitted by applicants to prove family ties, where the

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<sup>255</sup> Swiss Constitution, above fn. 24.

<sup>256</sup> FSC decision 2C\_327/2010, 2C\_328/2010, above fn. 250, § 4.2.3.

<sup>257</sup> On the elements of additional dependence required, please see ECtHR, *Kwakyé-Nti and Dufie v. the Netherlands*, Application No. 31519/96, admissibility decision, 7 November 2000, available in French at: <http://hudoc.echr.coe.int/eng?i=001-31668>; and ECtHR (Grand Chamber), *Slivenko v. Latvia*, Application No. 48321/99, 9 October 2003, available at: <http://hudoc.echr.coe.int/eng?i=001-61334>, § 97.

<sup>258</sup> See for instance *M.P.E.V. v. Switzerland*, above fn. 28, where the Court expressly excluded the adult, married stepdaughter from the scope of its judgment (at §§ 36-37).

difficulty is often proving the existence of biological parenthood or lawful marriage due to lack of any or any reliable documentation.

Art. 8 ECHR imposes strict procedural obligations in relation to family reunification cases, particularly concerning “flexibility, promptness and effectiveness”.<sup>259</sup> The Committee of Ministers Recommendation No. R (99) 23 also states, in relation to family reunification procedures concerning refugees and other persons in need of international protection, that these should be dealt with “in a positive, humane and expeditious manner”.<sup>260</sup>

Generally, the Court has emphasised that particular reliance should be placed on the declarations of an applicant, especially where refugees are concerned. Refugees are regularly unable to obtain official documentation from their countries of origin,<sup>261</sup> and should therefore be given the benefit of the doubt in relation to any documents submitted and any declarations made by them.<sup>262</sup>

The Committee of Ministers Recommendation No. R (99) 23 again extends this guarantee to beneficiaries of international protection by stating that member states “should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way” (at § 4). In addition, “[t]he absence of such documents should not per se be considered as an impediment to the application and member states may request the applicants to provide evidence of existing family links in other ways” (at § 4).<sup>263</sup>

However, where the information provided by the applicant gives good reason to doubt the veracity of the declarations of the applicant, the court has found that it is for the applicant to provide a “satisfactory explanation” for the inconsistencies or for any pertinent objections to the authenticity of the documents submitted by him.<sup>264</sup> In addition, if the applicant is not a refugee, the person may be required to correct those inconsistencies and produce new reliable documents, where inconsistencies in relation to documentation or declarations arise.<sup>265</sup>

In addition, it is important to note that states enjoy a certain margin of appreciation when assessing evidence, as they are better placed to assess the authenticity of documents submitted by an applicant. Their duty is to examine the application promptly, attentively and with particular diligence and they must provide the applicant with any reasons that may lead to the refusal of the application.<sup>266</sup> Further, the more important the interests at stake (e.g. children and refugees), the narrower the state’s margin of appreciation, leading to a stricter scrutiny by the Court.

Finally, if member states insist on documentation where this is not reasonable and this leads to significant delays in family reunification, this may in itself constitute a violation of Art. 8 ECHR.<sup>267</sup>

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<sup>259</sup> *Tanda-Muzinga v. France*, above fn. 92, § 82; *Mugenzi v. France*, above fn. 92, § 62; *Senigo Longue v. France*, above fn. 95, § 75.

<sup>260</sup> Committee of Ministers Recommendation No. R (99) 23, above fn. 74, § 4.

<sup>261</sup> *N. v. Sweden*, above fn. 173, § 53; ECtHR, *F.N. and Others. v. Sweden*, above fn. 173, § 67.

<sup>262</sup> *Mugenzi v. France*, above fn. 92, § 47; see also *Senigo Longue v. France*, above fn. 95, § 63.

<sup>263</sup> Committee of Ministers Recommendation No. R (99) 23, above fn. 74, § 4.

<sup>264</sup> *Mugenzi v. France*, above fn. 92, § 47; *Senigo Longue v. France*, above fn. 95, § 63.

<sup>265</sup> *Ly v. France*, above fn. 143.

<sup>266</sup> *Mugenzi v. France*, above fn. 92, §§ 51-52; see also *Senigo Longue v. France*, above fn. 95, §§ 66-67.

<sup>267</sup> See *Tanda-Muzinga v. France*, above fn. 92; *Mugenzi v. France*, *ibid.*; *Senigo Longue v. France*, *ibid.*

## 6. CONCLUSION

The analysis presented in this paper suggests that the legal regulation of family reunification rights of refugees in Switzerland is *deeply problematic* from a human rights perspective. Their family reunification rights are severely restricted in many respects. In particular, the situation of F-permit refugees and F-permit holders is *problematic*, with a three-year ban on seeking family reunification after the person has been granted an F-permit and financial and accommodation requirements imposed on those seeking family reunification. In addition, family reunification rights in relation to post-flight family members of B-permit refugees (which includes family ties that were formed during flight) are relatively restrictive and *problematic*, given that strict financial requirements are also imposed there.

Both from the perspective of Switzerland's international human rights obligations, particularly under the CRC, CEDAW, the CRPD and CERD, and from the perspective of its obligations under the ECHR, the existing legal framework appears untenable in several respects.

The above analysis has demonstrated that, according to the ECtHR's case law on family reunification, the Court pays particular attention to three factors: (i) whether the family was separated voluntarily; (ii) whether family life could be enjoyed elsewhere; and (iii) the best interests of the child. In addition, it applies heightened scrutiny where children and refugees are concerned. As discussed in detail above, various individual case scenarios could well be litigated successfully at the international level. Most case scenarios are analysed through the lens of Art. 8 ECHR. From the ECtHR's case law it is clear that the cases with the highest prospects of success would be those which involve children, considering that the Court has so far only found a violation of Art. 8 ECHR on its own in the context of family reunification where children are involved. In addition, according to the Court's case law, the protection of family life under Art. 8 ECHR is stronger where refugees are concerned. This means that prospects of success are higher where a case concerns a B-permit or F-permit refugee than in a case concerning F-permit holders generally.

Certain cases may additionally raise issues under the prohibition of discrimination under Art. 14 taken with Art. 8 ECHR. Most prominent amongst these is the situation of post-flight family members of B-permit refugees, as compared with family reunification rights of B-permit refugees with pre-flight family members. Further possible case scenarios in which an application could be brought based on Art. 14 ECHR (taken with Art. 8 ECHR) concern the family reunification rights of refugee children as compared with Swiss children, and the differential treatment between F-permit refugees and B-permit refugees regarding the three-year ban for F-permit refugees.

In addition, certain case scenarios may best be litigated before one of the UN human rights committees. In particular, cases concerning unaccompanied refugee children seeking family reunification with their parents could be litigated before the UN Committee on the Rights of the Child under Art. 22 CRC now that the Optional Protocol to the CRC has entered into force for Switzerland. In relation to other children, the situation under the CRC is more difficult due to Switzerland's ongoing reservation to Art. 10 CRC regarding the child's right to family reunification.

Further, case scenarios concerning mothers with children in Switzerland who are seeking family reunification with their spouse or with further children may fall within the definition of *de facto* discrimination against women under CEDAW, where they cannot meet the financial requirements due to their childcare obligations.