UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Discussion paper prepared for the

Expert Roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification

Organized by UNHCR in cooperation with Odysseus Network,
Brussels, Belgium, 4 December 2017

This paper has been prepared for the purposes of discussion and exchange at the Expert Roundtable on the Right to Family Life and Family Unity in the context of Family Reunification. It does not represent the official position of UNHCR or the United Nations unless indicated.

A. Introduction

1. When people flee persecution and conflict and are separated from their families this can have devastating consequences on family members' well-being and ability to integrate in their new home country and rebuild their lives. Finding and reuniting with family members are often one of the most pressing concerns of asylum-seekers, refugees, and beneficiaries of complementary forms of international protection.[1] Family reunification in the country of asylum is often the only way to ensure respect for their right to family life and family unity. In an increasingly restrictive environment in many countries, it has become even more difficult for them to realize this fundamental and essential right.

Purpose and scope

2. This discussion paper aims to inform an Expert Roundtable organized by the Office of the United Nations High Commissioner for Refugees (UNHCR) and the subsequent development of normative guidance on this subject.

3. In terms of scope, the present discussion paper sets out the applicable international legal standards, guiding principles and related jurisprudence relevant to ensuring the right of beneficiaries of international protection to family life and family unity. It also outlines some of the legal and practical challenges they often face reunifying with family members, together with the legal principles and jurisprudence which may help identify appropriate policies and practices to address these challenges. The situation of beneficiaries of complementary/subsidiary protection and of children seeking family reunification are issues of particular focus.

[1] In some jurisdictions, individuals who do not meet the refugee definition under international refugee law but who are nevertheless in need of international protection are granted complementary forms of international protection. See UN High Commissioner for Refugees (UNHCR), Executive Committee, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, para. (i).

4. The forthcoming normative guidance will primarily address government policy-makers and administrative bodies, as well as legal practitioners and decision-makers, to assist them in developing and implementing legislation and policies regarding family reunification. The aim of the forthcoming normative guidance will be to assist States to ensure that national systems are better equipped to take account of the specific situation of refugees and other beneficiaries of international protection and enable States to deal with applications for family reunification in a positive, humane and expeditious manner. The aim is to assist States to uphold their international and regional legal obligations and enable beneficiaries of international protection to enjoy their right to family life and family unity more effectively.

5. The process builds on existing UNHCR and other research and documents on the issue,[2] including the paper written[3] as part of the commemoration of the 50th anniversary of the 1951 Convention relating to the Status of Refugees[4] in 2001 and on the Summary Conclusions on family unity[5] reached at the expert roundtable that year.

6. The right to family life and family unity is a right that applies to everyone, including asylum-seekers, but this paper does not address issues such as their right to family unity in the context of reception, nor the increased protections for this right in the context of the Dublin III Regulation, [6] even though as the 2001 Summary Conclusions note: "Preparation for possible family reunification in the event of recognition should, in any event, begin in the early stages of an asylum claim, for instance, by ensuring that all family members are listed on the interview form."[7] Nor does the paper cover situations where a protection status is granted to family members already present in the country of asylum to enable family unity to be maintained, which is sometimes known as derivative status.

7. This discussion paper does not address the question of family unity in the context of mass influx, although the member States of UNHCR's Executive Committee have agreed that in situations of large-scale influx "minimum basic human standards" require that "family unity should be respected" and that "all possible assistance should

[2] See, for instance, UNHCR, *Note on Family Reunification*, 18 July 1983; UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012; Council of Europe, Human Rights Commissioner, *Realising the Right to Family Reunification of Refugees in Europe*, June 2017 (Council of Europe, *Realising the Right to Family Reunification in Europe*).

[3] K. Jastram and K. Newland, "Family Unity and Refugee Protection", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Feller et al eds), Cambridge University Press, 2003, pp. 555-603.

[4] UN General Assembly (UNGA), *Convention relating to the Status of Refugees*, 28 July 1951, UN Treaty Series (UNTS), vol. 189, p. 137 (1951 Convention).

[5] UNHCR, "Summary Conclusions: Family Unity, Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Feller et al. eds), CUP, 2003, pp. 604-608, (UNHCR, Summary Conclusions, Family Unity).

[6] Council of the European Union (EU), *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU) No. 604/2013.

[7] UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 13.

be given for the tracing of relatives".[8] There are thus no derogations from the right to family life in situations of mass influx.

B. The right to family life and family unity in international and regional law

8. The legal framework regarding the right to family life and to family unity is contained in numerous provisions of international human rights law, international humanitarian law, and international refugee law. The basis for these rights has been summarized as follows:

> "As the foundation, there is universal consensus that, as the fundamental unit of society, the family is entitled to respect and protection. A right to family unity is inherent in recognizing the family as a 'group' unit: if members of the family did not have a right to live together, there would not be a 'group' to respect or protect. In addition, the right to marry and found a family includes the right to maintain a family life together. The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family and from the special family rights accorded to children under international law."[9]

9. The right to family unity is entrenched in universal and regional human rights instruments and international humanitarian law. It applies to all human beings, regardless of status. It therefore also applies in the refugee context. At international level, the right is derived, inter alia, from Article 16 of the Universal Declaration of Human Rights; Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR); Article 10 of the International Covenant on Economic, Social and Cultural Rights; Article 74 of Additional Protocol 1 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War; and Articles 9, 10, 16, and 22 of the Convention on the Rights of the Child (CRC).[10]

10. The CRC sets out some of the strongest protections of the child's right to family unity, including notably the requirement that "[i]n all actions concerning children … the best interests of the child shall be a primary consideration" (Article 3). Other key provisions of the CRC include the requirement to ensure that a child is not separated from his or her parents against their will, except when this is in the child's best interests and to respect the right of a child separated form his or her parents to maintain personal relations and direct contact with both parents on a regular basis (Article 9). States are also required to treat applications for family reunification "in a positive, humane and expeditious manner" (Article 10).

---

[8] UNHCR, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (XXXII) - 1981, para. II.B.2(h) and (i). See also, for instance, UNHCR, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, No. 100 (LV) - 2004, para. (d) refering to the importance of "maintaining family unity wherever possible".

[9] Jastram and Newland, "Family Unity and Refugee Protection", above footnote 3, pp. 555-603.

[10] UNGA, *Universal Declaration of Human Rights*, 1948; *International Covenant on Civil and Political Rights*, 1966; *International Covenant on Economic, Social and Cultural Rights*, 1966; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1977; Additional Protocol 1 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War 1949, 1977; UNGA, *Convention on the Rights of the Child*, 1989.

11. In addition, the principle of non-discrimination which underpins international human rights law prohibits discrimination, inter alia, on the grounds of status, including as regards family reunification.

12. In international refugee law, the 1951 Convention relating to the Status of Refugees does not specifically refer to the family. The Final Act of the Conference of Plenipotentiaries at which the Convention was adopted nevertheless agreed a recommendation referring "the unity of the family ... [as] an essential right of the refugee" and recommending that Governments "take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained".[11]

13. At regional level, the right to family unity derives, inter alia, from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 16 of the European Social Charter; Article 16 of the Revised European Social Charter; Article 7 of the European Union (EU) Charter of Fundamental Rights; Article 17 of the American Convention on Human Rights; Article 18 of the African Charter on Human and Peoples' Rights; and Articles XXIII and XXV of the African Charter on the Rights and Welfare of the Child.[12]

14. In terms of standards specifically regarding the right to family reunification, this is provided for at regional level by Article 25(2)(b) of the African Charter on the Rights and Welfare of the Child, which requires States Parties "to take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters". In Central America, the 1984 Cartagena Declaration acknowledges that the "reunification of families constitutes a fundamental principle in regard to refugees."[13] In the EU, the 2003 Directive on the Right to Family Reunification provides for a right to family reunification of third country nationals residing lawfully in the territory of the Member States, including refugees.[14]

15. As the 2001 Summary Conclusions agreed:

> "Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere."[15]

---

[11] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 1951.
[12] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 1950; Council of Europe, *European Social Charter*, 1961; Council of Europe, *European Social Charter (Revised)*, 1996; EU, *Charter of Fundamental Rights of the European Union*, 2012; Organization of American States, *American Convention on Human Rights*, 1969; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 1981; OAU, *African Charter on the Rights and Welfare of the Child*, 1990.
[13] *Cartagena Declaration on Refugees*, 1984.
[14] Council of the EU, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 2003 (Family Reunification Directive).
[15] UNHCR, Summary Conclusions, Family Unity, above footnote 5, para. 5.

C. The right to family life and family unity in international and regional jurisprudence

16. International and regional jurisprudence, in particular of the Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), provides further guidance on how these standards and principles are to be implemented in practice.[16] Certain key judgments are referred to here and as relevant in subsequent sections.

17. With regard to jurisprudence of the **HRC**, it has confirmed that Article 23 of the ICCPR "guarantees the protection of family life including the interest in family reunification".[17] In *El Dernawi v. Libya*, it has also specified that a refugee "cannot reasonably be expected to return to his country of origin" to enjoy his or her right to family unity.[18] The HRC has also advised that, while it is "for the State to decide who it may admit to its territory", "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of ... respect for family life arise". [19]

18. The case of *El-Hichou v. Denmark*[20] concerned the son of a Moroccan, whose parents were divorced and who had been brought up by his grandparents in Morocco, who then entered Denmark illegally to join his immigrant father, who had another family in Denmark. The HRC found that, even where family life would have been possible for father and son in Morocco, in the "very specific circumstances" of the case, where the grandparents had died and custody had been formally transferred to the father, "continued refusal of the authorities to allow father and son to reunify in Denmark and the order to leave Denmark would, if implemented, violate Article 23 and 24 of the Covenant [ICCPR]".

19. With regard to the case law of the **ECtHR**, when balancing right of States to control admission for foreign nationals to their territory, the Court generally rules that where a family can enjoy family life "elsewhere", the State may refuse admission to family members.[21]

---

[16] A more detailed analysis is found in Council of Europe, *Realising the Right to Family Reunification in Europe*, above fn. 2; C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press (OUP), 2016; UNHCR, *The "Essential Right" to Family Life and Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, research paper, forthcoming.

[17] *Ngambi and Nébol v. France*, CCPR/C/81/D/1179/2003, UN HRC, 16 July 2004.

[18] HRC, *Farag El Dernawi v. Libya*, No. 1143/2002, CCPR/C/90/D/1143/2002 (2007), para. 6.3. For more on this case, see below. See also, *Gonzalez v. Republic of Guyana*, CCPR/C/98/D/1246/2004, HRC, 21 May 2010, para. 14.3, which also concerned a couple unable to enjoy their right to family life elsewhere.

[19] UN HRC, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 5.

[20] HRC, *Mohamed El-Hichou v. Denmark*, No. 1554/2007, CCPR/C/99/D/1554/2007 (2010), paras. 7.4, 7.5 and 8.

[21] See e.g. *Gül v. Switzerland*, ECtHR, 1996, Application no. 23218/94, ECtHR, 19 February 1996; *Ahmut v. The Netherlands*, ECtHR, 1996, Application no. 73/1995/579/665, ECtHR, 28 November 1996.

20. This "elsewhere approach" has, however, been tempered in cases concerning the admission of children wishing to join their parents. In such cases, the ECtHR has set out additional considerations that need to be taken into account in weighing the interests of the family members in reunification and that of the State in controlling immigration. The case of *Sen c. Pays-Bas,* for instance, concerned a Turkish couple residing in the Netherlands with two daughters who had been born there, who wished to bring their eldest daughter to live with them. The Court determined that under the circumstances, bringing the eldest daughter to the Netherlands would be the most appropriate means of developing family life with her, given her young age and her parents' capacity and willingness to care for her.[22] Thus, in family reunification where there is also a new family in the country of settlement, the Court has recognized that family reunification may be most adequate or appropriate means of developing family life.[23]

21. The case of *Tuquabo-Tekle v. The Netherlands*[24] is particularly relevant for persons fleeing armed conflict. The Court ruled that an Eritrean mother should be allowed to bring her eldest daughter to the Netherlands, where she resided with her second husband, with whom she had two children. The Court questioned whether she could be said to have left her eldest daughter "behind of 'her own free will', bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad".[25] Thus, for refugees, persons fleeing armed conflict violence, and others in need of international protection, the Court recognizes that family life is not possible in country of origin[26] and that such persons cannot be said to have left family members behind voluntarily.[27]

22. ECtHR judgments have also provided increasingly detailed guidance on how the best interests principle should be applied. The Court has noted that "the best interests of the child cannot be a 'trump card' which requires the admission of all children who would be better off living in a Contracting State". At the same time, it has also affirmed that the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it."[28] Where the domestic authorities fail to undertake a "thorough balancing of the interests in issue" that places the child's best interests "sufficiently at the center of the balancing exercise and its reasoning", this has led the ECtHR to conclude that there has been a violation of Article 8 ECHR.[29]

23. The ECtHR has also found that undue delay, lack of diligence,[30] and failure to provide requisite guarantees of the "flexibility, promptness and effectiveness" needed

[22] *Sen c. Pays-Bas*, Application no. 31465/96, ECtHR, 21 December 2001, para. 40.
[23] Ibid.; *Tuquabo-Tekle and Others v. The Netherlands*, Application no. 60665/00, ECtHR, 1 December 2005, paras. 47-48; *Jeunesse v. The Netherlands*, Application No. 12738/10, ECtHR Grand Chamber, 3 October 2014.
[24] *Tuquabo-Tekle v. The Netherlands*, ibid., paras. 47-50.
[25] Ibid., paras. 47-50.
[26] See also *Agraw c. Suisse*, Requête no. 3295/06, ECtHR, 29 July 2010; *Mengesha Kimfe c. Suisse*, Requête no. 24404/05, ECtHR, 29 July 2010.
[27] *Tuquabo-Tekle v. The Netherlands*, ECtHR, above fn. 23, paras. 47-50.
[28] See e.g. *El Ghatet v. Switzerland*, Application no. 56971/10, ECtHR, 8 November 2016, para. 46 (references removed).
[29] Ibid., paras. 46-52. See also, *Jeunesse v. the Netherlands*, above fn. 23, paras. 109, 118.
[30] *Saleck Bardi c. Espagne*, Requête no. 66167/09, ECtHR, 24 May 2011, paras. 49, 55, 57, 58, and 64-66.

to respect the appellant's right to family life[31] may constitute a breach of Article 8 ECHR. In *Tanda-Muzinga v. France* the Court stated:

> "The Court recalls that family unity is an essential right of refugees and that family reunification is a fundamental element allowing persons who have fled persecution to resume a normal life. It recalls also that it has also recognized that obtaining such international protection constitutes a proof of the vulnerability of the persons concerned. It notes in this respect that the necessity for refugees to benefit from a family reunification procedure that is more favourable than that available to other foreigners is a matter of international and European consensus ... In this context, the Court considers that it was essential for the national authorities to take account of the vulnerability of the applicant and his particularly difficult personal experience, for them to pay great attention to the pertinent arguments he raised in the matter, for them to provide reasons for not implementing his family reunification, and for them to rule on the visa request promptly." [32]

24. Jurisprudence concerning the question of potential violations of the right to family life/family unity in conjunction with the principle of non-discrimination is set out in the section G below.

25. In the EU context, the **CJEU**'s jurisprudence interprets specific Directives, notably in this context the Family Reunification Directive, including to determine how they comply with primary EU law obligations *inter alia* under the Charter of Fundamental Rights. The Court has ruled in relation to that Directive that "the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof".[33] Other judgments on specific issues are referred to at relevant points below.

D. The right to family unity and family reunification in practice

26. The right to family life and family unity is thus well-anchored in international and regional law. Yet, refugees and other beneficiaries of international protection frequently face major challenges realizing this right in practice. Too often, the accumulation of obstacles renders refugees' family reunification rights ineffective in practice. This can seriously undermine their well-being, threaten the safety and lives of family members left behind, and slow the integration process, ultimately to the detriment of the host community as well.

---

[31] *Tanda-Muzinga c. France*, Requête no. 2260/10, ECtHR, 10 July 2014, paras. 73, 81, and 82; *Mugenzi c. France*, Requête no. 52701/09, ECtHR, 10 July 2014, para. 62, See also *G.R. v. The Netherlands*, Application no. 22251/07, ECtHR, 10 January 2012, para. 55.

[32] *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 31, para. 75 (unofficial translation, references omitted). See also *Mugenzi c. France*, ECtHR, 2014, above fn. 31, para. 54.

[33] *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, CJEU, 4 March 2010, para. 43; *Minister van Buitenlandse Zaken v. K. and A.*, C-153/14, CJEU, 9 July 2015, para. 50.

27. These challenges can be divided into legal and practical challenges, while the situation of beneficiaries of complementary/subsidiary protection and of children is also of concern. These issues are set out in subsequent sections and focus on:

- **Legal obstacles,** including the family definition applied, the situation of marriages/families formed after leaving the country of origin and different types of marriage/partnership, documentation requirements, deadlines for submission and other requirements;
- **Practical obstacles,** including lack of information and administrative delays, access to embassies and accumulated costs;
- **The situation of beneficiaries of complementary/subsidiary protection** who are subject to more stringent terms compared to refugees; and
- **The situation of children,** including unaccompanied children, children who reach the age of majority, adopted and foster children, questions of guardianship and custody and other issues.

The gap between principles and practice

28. First, however, it is worth examining briefly why is there such a gap between principles and practice refugees and other beneficiaries of international protection.

29. It would seem that family migration policy and practice have generally been developed and implemented in the migration context without there always being sufficient recognition of the situation of refugees and other beneficiaries of international protection and the additional challenges their situation presents. The focus tends therefore to be on immigration control without sufficient acknowledgment that States must in this regard demonstrate that any restrictions imposed are – in the language of the HRC – necessary and proportionate to a legitimate aim, or – in that of the ECtHR – in accordance with the law, necessary in a democratic society and proportionate to the aim pursued.

30. Sometimes there appears to be a focus on the possibility of abuse of the process rather than on respecting the right to family unity and acknowledging the vulnerability of beneficiaries of international protection and their families. Statistics indicating the extent of the problem are limited and in any case relate to immigrants seeking family reunification generally. A 2012 report on the situation in EU countries finds a "wide variation in the perceptions of [the] extent [of misuse]", ranging "from it being unclear, to a minimal or marginal issue, to increased observations, to being a policy priority".[34]

31. Some governments in countries of asylum have argued that the arrival of large numbers of asylum-seekers will result in increased family reunification and therefore put pressure on reception facilities, integration and ultimately social cohesion. Governments nevertheless have a range of measures they can adopt to address such concerns. The situation of beneficiaries of international protection is generally a small part of a larger picture. A different approach could acknowledge States' positive obligations to respect the right to family life of beneficiaries of international protection,

[34] See generally European Migration Network (EMN), *Misuse of the Right to Family Reunification: Marriages of convenience and false declarations of parenthood*, June 2012.

who cannot enjoy family life elsewhere. It could underline the contribution they make to society and the contribution reuniting families makes to integration both for the families concerned and society generally.

E. Legal Obstacles Beneficiaries of International Protection Face Accessing Family Reunification

32. The sections below set out some of the challenges faced by beneficiaries of international protection and then suggest related questions participants at the roundtable may wish to consider.

Family definition applied

33. International human rights bodies and the member States of UNHCR's Executive Committee have taken a broad approach to the question of how the term "family" should be defined and who can be considered a family member.

34. The HRC has affirmed: "Regarding the term 'family', the objectives of the Covenant require that … this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned."[35] Similarly, the Committee on the Rights of the Child states that the term family "must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom" in accordance with Article 5 of the CRC.[36]

35. The realities of life in many refugees' regions of origin mean that family units may not be nuclear families based on a formal marriage. Flight and protracted exile also impact on family units and structures. Recognizing this, UNHCR's Executive Committee calls for facilitated entry of family members and hopes that "countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family".[37]

36. UNHCR encourages States "to adopt inclusive definitions of family members, in recognition of the severe hardship separation causes to individuals who depend on the family unit for social and economic support even if they are not considered by the prospective country of reception to belong to what is known as the 'nuclear family'". While it acknowledges that "there is justification in giving priority to safeguarding this basic unit", UNHCR calls on governments "to give positive consideration to the inclusion of other family members – regardless of age, level of education, marital status or legal status – whose economic and social viability remains dependent on the nuclear family".[38]

---

[35] HRC, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para. 5. See, also, 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, para. 2.
[36] CRC Committee, *General Comment No. 14*, 2013, above fn. 106, para. 59.
[37] UNHCR ExCom, *Family Reunification*, Conclusion No. 24 (XXXII) - 1981, para. 5.
[38] UNHCR, *Resettlement Handbook*, July 2011, p. 180.

37. In the Americas, the Inter-American Court of Human Rights (IACtHR) goes beyond "the traditional notion of a couple and their children" to include in the family definition other blood relatives and others with no biological relation among whom there are "close personal ties". It has determined that "there is no single model for a family" and has ruled:

> "Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, "family ties" may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes."[39]

38. In Europe, the Parliamentary Assembly of the Council of Europe (PACE) has urged member States to interpret the concept of "family" as including "de facto family members (natural family), for example […] a partner or natural children as well as elderly, infirm or otherwise dependent relations"[40] and "to apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents".[41]

39. The jurisprudence of the HRC, ECtHR, the IACtHR, as well as various national courts, has found that family life can exist between a wide range of persons beyond the nuclear or close family.[42] Such persons include couples whose marriage is informal or religious; unmarried (stable) partners; engaged couples; couples who are not cohabiting; same-sex couples and their children; children whose parents are divorced; children born outside marriage, adopted and foster children; parents and adult children; siblings in the same family; and others.

40. With regard to the concept of **dependency**, States often appear to define this in financial terms. By contrast, the CJEU has held that the status of a "dependent" family member is the result of a factual situation characterised by the fact that legal, financial, emotional or material support for that family member is provided by the sponsor or by

---

[39] Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, IACtHR, 19 August 2014, (footnotes omitted), para. 272.
[40] Council of Europe: Parliamentary Assembly (PACE), *Recommendation 1327 (1997) on Protection and Reinforcement of the Human Rights of Refugees and Asylum-seekers in Europe*, para. 8.7(o); PACE), *Recommendation 1686 (2004) on human mobility and the right to family reunion*, 23 November 2004, para. 8.
[41] PACE, *Recommendation 1686 (2004) on human mobility and the right to family reunion*, ibid., para. 12.3(a). See also PACE, Committee on Migration, Refugees and Displaced Persons, *Position Paper on Family Reunification*, 2 February 2012, AS/Mig (2012) 01, para. 11.
[42] See e.g. UNHCR, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, research paper, forthcoming, section 3; Council of Europe, *Realising the Right to Family Reunification in Europe*, above fn. 2, p. 15.

his or her spouse/partner and "the extent of economic or physical dependence and the degree of relationship between the family member" and the person he or she wishes to join.[43]

41. State practice in family reunification cases frequently applies a narrow definition of family based on the traditional notion of the "nuclear" family although there are exceptions. Such a "nuclear" or "close" family is generally accepted as consisting of married spouses and their minor or dependent, unmarried children. In some countries, it also includes partners, adopted children, whether adopted legally or on a customary basis, dependent adult children, as well as married minor children where it is in their best interests. Parents and minor siblings of an applicant, if it is in their best interests, may occasionally also be considered. There are nevertheless "considerable tensions between tight formal national definitions, in particular when combined with demands for documentary proof of family links, and refugee realities", which together "often render refugees' family reunification rights ineffective in practice".[44]

Marriages/families formed after leaving the country of origin and different types of marriage/partnership

42. A particular challenge is faced when **families have been formed after leaving their country of origin**. Yet the experience of flight from conflict and persecution frequently results in the formation of families in exile, in the inclusion of extended family members and/or the inclusion of children without blood relations in families. International and regional human rights law does not distinguish between families formed in their country of origin and those formed elsewhere. Policies that maintain such distinctions may well violate States' non-discrimination obligations.

43. Challenges are also faced by couples and families formed on the basis of **common law and religious marriages** and/or proxy marriages. Some States deny family reunification to couples who have been married only under religious law, while legislation in quite a number of States requires common law partners to have lived in a stable relationship within the same household for a certain number of years (usually one or two years), this not being required if the couple have a child together. In practice it can be very difficult for unmarried couples or couples who are unable to provide a marriage certificate to prove their cohabitation. This is less of a problem where there are children.

44. **Proxy marriages**, where one party is not present at the ceremony, are common traditions in some countries and are not as such to be doubted as invalid, at least in the practice of some States. Cultural sensitivity and accurate country of origin information are therefore important when evaluating family reunification applications. If doubts do arise or other concerns such as the risk of forced marriage appear, it is important that

[43] *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others*, C-83/11, CJEU, 5 September 2012, para. 23. While this determination relates to the definition of family in the Free Movement Directive, the European Commission has noted that it may serve as guidance in the family reunification context. See European Commission, *Communication from the Commission to the European Parliament and the Council of 2014 on guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210 final, 3 April 2014, p. 6.

[44] Council of Europe, *Realising the Right to Family Reunification in Europe*, above fn. 2, p. 15.

careful and detailed examination of the individual cases is provided for in legislation and implementing regulations.

45. With regard to **polygamous marriages**, international human rights law deems them discriminatory.[45] In countries, where polygamy is prohibited, legislation and/or practice will generally permit only one spouse to reunify with the beneficiary of international protection.

46. As for **same-sex relationships/partnerships**, both the ECtHR and IACtHR now accept that same-sex couples are able to establish family life and therefore that they can come within the definition of family.[46] Legislation in some States that requires partnerships to be registered to qualify for family reunification would appear problematic in the case of lesbian or gay couples granted protection on the basis of their sexual orientation. It is highly unlikely that they would be able to live together in their country of origin or register their partnership. A flexible approach is thus needed to the evaluation of the situation of same-sex couples recognized as being in need of international protection who are seeking to reunify, so as to take into account the realities of life in countries from which such couples have fled.

47. Family reunification can be a complex issue in the case of **marriages deemed invalid, such as child and forced marriages**.[47] Generally, a marriage concluded abroad is recognized even if the foreign legal norms, for instance regarding age or legal capacity, have not been appropriately followed, on the condition that the marriage in question is considered valid in the State where it was solemnized. The only exception is where such recognition would be against public policy (*ordre public*), as for instance in cases of child or early marriage and forced marriage. Both are prohibited under international law.[48] Such cases raise complex questions regarding *ordre public*, where State responsibility lies, what protection obligations may arise, and how to ensure the best interests of any child involved are a primary consideration.

48. One relevant ECtHR judgment concerns an Afghan couple who sought asylum in Switzerland and who had been married at the ages of 14 and 18 years. In *Z.H. and R.H. v. Switzerland*[49] the Court and the Swiss authorities did not initially recognize the marriage, although the Swiss authorities did recognize their family life once the girl

[45] HRC, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, available at:, para. 24; UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, para. 14.

[46] See e.g., *Schalk and Kopf v. Austria*, Application no. 30141/04, ECtHR, 24 June 2010; *Caso Atala Riffo y Niñas v. Chile*, IACtHR, 24 February 2012. See notably in the family reunification context, *Pajić v. Croatia*, Application no. 68453/13, ECtHR, 23 February 2016, and *Taddeucci et McCall c. Italie*, Requête no. 51362/09, ECtHR, 30 June 2016.

[47] For definitions see, Council of Europe: Parliamentary Assembly, *Resolution 1468 (2005) on Forced Marriages and Child Marriages*, 5 October 2005, 1468 (2005).

[48] CEDAW, Article 16(2); CRC, Article 24(3); UNGA, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962; UN Economic and Social Council, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, Article 1; UN Human Rights Council, *Preventing and eliminating child, early and forced marriage: Report of the Office of the United Nations High Commissioner for Human Rights*, 2 April 2014, A/HRC/26/22, including information on definitions and international legal framework.

[49] *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, ECtHR, 8 December 2015.

reached the age of 17 years, after which their marriage was judicially recognized under Swiss law. It should be noted, however, that this case concerned two people already within Swiss jurisdiction as opposed to individuals seeking reunification.

49. There is thus considerable scope for the family definition applied by States in the context of family reunification to take account of the evolution of international and regional jurisprudence in recent years. This is particularly so in the case of refugees and other beneficiaries of international protection whose families may be formed and reformed in the course of flight and exile to include persons who would otherwise only be considered members of the wider family.

Questions regarding the definition of family to consider include:

- What would be the correct definition of family to apply in the context of family reunification?
- How should the concept of dependency be defined and how can this help define the family?
- What is needed for policies to be adapted to include couples/families formed before entry to the country of asylum (rather than after leaving the country of origin) so as to reflect the reality of the refugee experience and ensure States uphold their non-discrimination obligations?
- What different types of relationships should be included in the family definition? (marriages post-dating departure from the country or origin, common law spouses, religious marriages, polygamy, same sex partners, couples of different nationalities, proxy marriages, invalid (child/forced) marriages)?

Documentation requirements, deadlines for submission and other requirements

50. Numerous other legal hurdles await beneficiaries of international protection seeking to reunite with their family. These include extensive documentation requirements; requirements to undergo DNA testing; requirements to apply within a limited time frame in order to benefit from preferential terms; income/subsistence, accommodation and other requirements; requirements to seek family reunification from outside the country of asylum; entitlement to apply for family reunification only after a period of time; high fees; and lack of legal aid/support and/or appeal possibilities in family reunification cases. Once reunified, the status granted to family members may also present problems.

51. Beneficiaries of international protection often have great difficulty meeting the **extensive documentation requirements** imposed by many States to prove their marriage or common law partnership, the filiation and adoption of children, etc. Some States will, for instance, only accept a formal marriage, birth, adoption or death certificate. For beneficiaries of international protection, the documents needed may have been destroyed in the conflict or left behind in the urgency of flight; they may have been lost or destroyed during flight. Seeking replacements may expose family members of the beneficiary to repeated contact with the authorities of the country of

origin, which may put them in a difficult situation or even direct danger. It may simply be impossible to obtain documents, if the country of origin is a failed State or in the midst of serious conflict, or indeed if the beneficiary is stateless.[50]

52. Despite these obstacles, multiple attestations may have to be obtained from different State authorities at various levels in the country where the document was issued or from an embassy of that State abroad. They may include replacement birth or marriage certificates, documents confirming a child's age where no formal birth certificates available or medical documentation regarding the health status of family members where dependency is claimed. Single-parent families and non-biological children face additional challenges providing documentation required. Even if there are minor discrepancies among these documents, this can result in the rejection of applications, leaving families divided between the country of origin and asylum. In some situations, countries of asylum may ask beneficiaries of international protection or their family to contact authorities in the country of origin, which may place family members at risk.

53. Recognizing these challenges, UNHCR's Executive Committee underlines that "[w]hen deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment." [51] The 2001 Summary Conclusions on family unity state further:

> "The requirement to provide documentary evidence of relationships for the purposes of family unity and family reunification should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin. A flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences. An example was given where strict documentation requirements had created a market for forged documents in one host country."[52]

54. In Europe, the Committee of Ministers of the Council of Europe recommends, with regard to evidence of family ties, that member States "should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way," and that "[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".[53]

55. The ECtHR has ruled that family reunification procedures must take account of the events that disrupted and disorganized the sponsor's family life and led to

---

[50] See generally, UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 2, p. 6; UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, December 2012, p. 8.

[51] UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 37, para. 6.

[52] UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 12.

[53] Council of Europe: Committee of Ministers, *Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, 15 December 1999, Rec(99)23, para. 4.

recognition of refugee status.[54] Given this acknowledgement, the Court's statement that "owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereto"[55] can also be seen to apply to the situation of beneficiaries of international protection seeking to fulfil documentation requirements in the context of family reunification.

56. The EU's Family Reunification Directive recognizes that there may be situations where "official documentary evidence of the family relationship" cannot be provided. It requires Member States to "take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship" and bars the rejection of an application "based solely on the fact that documentary evidence is lacking".[56]

57. The European Commission has recalled in this respect that Member States "have a certain margin of appreciation in deciding whether it is appropriate and necessary to verify evidence of the family relationship through interviews or other investigations, including DNA testing". It advises that "[t]he appropriateness and necessity criteria imply that such investigations are not allowed if there are other suitable and less restrictive means to establish the existence of a family relationship". The Commisiosn continues: "Beside such factors as a common child, previous cohabitation and registration of the partnership, the family relationship between unmarried partners can be proven through any reliable means of proof to show the stable and long-term character of their relationship, for instance, correspondence, joint bills, bank accounts or ownership of real estate, etc."[57]

58. Increasingly, States require beneficiaries of international protection to provide **DNA proof of parent-child relationships**. Yet DNA testing is not always affordable or available in locations they can reach. UNHCR affirms that "[d]ocumentary proof, registration records, interviews with the individuals concerned and other forms of verification of the claimed family relationship should normally be relied on first". It states:

> "DNA testing to verify family relationships may be resorted to only where serious doubts remain after all other types of proof have been examined, or, where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud."[58]

59. Many States acknowledge that refugees may not be in a position to meet the same **requirements** that can be imposed on immigrants generally, for instance, **as**

---

[54] *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 31, para. 73 (unofficial translation); *Mugenzi c. France*, ECtHR, 2014, above fn. 31, para. 52.

[55] See e.g. *N.A.N.S. v. Sweden*, Application no. 68411/10, ECtHR, 27 June 2013, para. 25; *F.N. and Others v. Sweden*, Application no. 28744/09, ECtHR, 18 December 2012, para. 67.

[56] Family Reunification Directive, above fn. XXX, Art. 11(2). Alternative methods to determine family links include carrying out interviews (Art. 5(2).

[57] European Commission, *Communication from the Commission to the European Parliament and the Council of 2014 on guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210 final, 3 April 2014, p. 9.

[58] UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, paras. 28 and 13.

regards income, accommodation, and non-reliance on social security, and therefore offer preferential terms as regards these issues. The CJEU has ruled that such requirements "must be interpreted strictly" with States' margin for manoeuvre in such situations not being permitted to "undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof" [59] and in light of Article 7 of the Charter on the right to family life.[60]

60. The CJEU has also determined that "specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into consideration" and that where "circumstances … do not allow regard to be had to special circumstances objectively forming an obstacle to the applicants [meeting the requirements] … those conditions make the exercise of the right to family reunification impossible or excessively difficult".[61]

61. In some States, however, sometimes quite short **deadlines are imposed for the submission of applications** if applicants are to benefit from preferential terms, which do not appear to take sufficient account of the challenges faced. Beneficiaries of international protection may lack information and/or understanding of these deadlines. They may not be able to trace family members in time and may face numerous hurdles to meet documentation requirements.

62. The Family Reunification Directive permits States to require refugees to submit applications within three months of the granting of refugee status if they are to benefit from the preferential terms under the Directive. [62] The European Commission recommends, however, that States refrain from doing so and, if they do, that they "take into account objective practical obstacles" faced "when assessing an individual application"; allow the sponsor to submit the application in the country of ayslum; and that, where there are "objective practical obstacles" meeting the deadline, "a partial application" should permitted that can then "be completed as soon as documents become available or tracing is successfully completed".[63] Indeed, while around half of EU Member States apply a three-month deadline, other Member States apply six or 12-month deadlines or no such deadline at all.[64]

63. Where preferential terms are not available or are applied only to refugees, or where any deadline applied cannot be met, income and accommodation acquirements and the obligation not to rely on social security present further obstacles.

---

[59] Chakroun, para. 43; Khachab, para. 25

[60] *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 33, paras. 43-44; *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, C-558/14, EU CJEU, 21 April 2016, paras. 25, 28; *O. and S. v. Maahanmuuttovirasto* (C-356/11), and *Maahanmuuttovirasto v. L.*, (C-357/11), Joined Cases C-356/11 and C-357/11, CJEU, 3 December 2012, para. 80.

[61] *Minister van Buitenlandse Zaken v. K. and A.*, CJEU, 2015, above fn. 33, paras. 58 and 71. The case the case concerned the fees levied in relation to integration tests, but the principles are relevant.

[62] Family Reunification Directive, Art. 12(1).

[63] European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 57, pp. 23, 24.

[64] UNHCR, *The "Essential Right" to Family Life and Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, above fn. 16, section 4.5.

64. Where States **require family members to apply for family reunification from outside the country**, this may render the search for family unity costly, potentially dangerous, and difficult if not impossible for beneficiaries of international protection. It can involve significant costs, especially if more than one visit to an embassy/consulate is required. Crucially, it may expose family members to great danger if they have to travel to an embassy/consulate in their country of origin and security is precarious or conflict ongoing or if they have to travel abroad because there is no embassy/consulate in their own country. Family members, of whom the majority are women and children, may need to travel great distances sometimes several times. UNHCR therefore recommends that legislation provide for the possibility of sponsors applying for family reunification in the country of asylum.[65]

65. Where States **only permit applications for family reunification to be made after the sponsor has resided legally for a certain period of time**, this affects beneficiaries of international protection negatively. It fails to take account of the often precarious and even endangered situation of family members left behind or of the fact that beneficiaries of international protection may well have spent considerable time in the asylum procedure before being recognized and have thus already left family members in an uncertain situation for some time. Imposing waiting periods exposes family members to greater vulnerability and additional threats.

66. While the Family Reunification Directive specifies that refugees should be exempt from any required period of legal residence, [66] such requirements are particularly problematic for beneficiaries of complementary/subsidiary protection. The CJEU has ruled on the issue of waiting periods before family reunification may be sought, which Member States are otherwise permitted to impose under the Directive. It determined that "a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors" and that it was necessary to have deu regard "to the particular circumstances of specific cases [and] the best interests of minor children".[67]

67. **High fees** can hamper the efforts of beneficiaries of international protection to reunify with their families. Combined with other family reunification costs (see below), they may put beneficiaries of international protection and their families in precarious, exploitative situations. Families may even have to choose which family member to reunite with first, leaving other family members behind until they can gather sufficient resources. Beneficiaries of international protection may not have had access to the labour market for lengthy periods during the asylum procedure and can face difficulties accessing mainstream banking systems and private loan schemes. Family members may themselves be refugees with restrictions on their rights to work. High fees and other costs may thus significantly delay or even prevent family reunification altogether.

68. As for the ECtHR, it has determined that overly formalistic approaches to decision-making combined with high fees may affect, inter alia, enjoyment of the right to family life.[68] In a case concerning the fees levied in relation to integration tests, the

[65] *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 2, p. 12.
[66] FRD, Art. 12(2).
[67] Ibid., paras. 9, 100-101.
[68] *G.R. v. Netherlands*, Application no. 22251/07, ECtHR, 10 January 2012, para. 55.

CJEU stated that "in accordance with the principle of proportionality, the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult if it is not to undermine the objective of [the Family Reunification] Directive 2003/86 and render it redundant".[69] With regard to minors, the European Commission has encouraged Member States "to exempt applications submitted by minors from administrative fees" in order to promote the best interests of the child.[70]

69. Good State practice takes into account the particular vulnerability of beneficiaries of international protection and the challenges they face as regards fees. It applies reduced administrative or visa fees or even waives them. Good practice may also provide financial assistance schemes, such as interest free loans, for beneficiaries of international protection to cover the costs of family reunification.

70. Other legal obstacles include **legislation or regulations denying access to legal aid or support in family reunification cases**. This can present serious obstacles to the effective presentation of claims and thus to effective family reunification. Such advice and support can be critical for beneficiaries of international protection, especially if their command of the language of the country of asylum is limited and they do not understand the complex systems that often apply.

71. Procedures require adequate procedural safeguards and an effective remedy against negative decisions, if States are to uphold their international and regional human rights law obligations.[71] Where there are **no regulations or procedures regarding family reunification for beneficiaries of international protection** this obliges beneficiaries of international protection to rely on sometimes unpredictable ad hoc arrangements.

72. Where family members joining beneficiaries of international protection are able to enjoy the **same status**, this allows them access to the same rights and support as their sponsor. In some States, however, reuniting family members do not have access to the same residency status and rights as their sponsors, while others have reduced the period for which a residence permit is granted. Where family members are only granted temporary residence permits, their access to integration support can be severely restricted. Where their status is dependent on that of the sponsor or where the path to an independent status is a long one, this can create problems, especially for victims of domestic violence.

73. UNHCR therefore recommends that the residence of the family member should be independent of those of the sponsor,[72] while ExCom recommends: "In order to promote the rapid integration of refugee families in the country of settlement, joining close family members should in principle be granted the same legal status and facilities

[69] *Minister van Buitenlandse Zaken v. K. and A.*, CJEU, 2015, above fn. 33, paras. 64 and 71.
[70] European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 57, p. 9.
[71] See UDHR, Art. 8, ICCPR, Art. 2(3); African Charter on Human and Peoples' Rights, Art. 7; ACHR, Art. 25; ECHR, Art. 13; EU Charter of Fundamental Rights, Arts. 41 and 47; Family Reunification Directive, Art. 18.
[72] UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 2, p. 18.

as the … family [member] who has been formally recognized as a refugee."[73] The Council of Europe's Committee of Ministers similarly recommends that "[a]fter admission for family reunification, the family member should be granted an establishment permit, a renewable residence permit of the same duration as that held by the principal or a renewable residence permit".[74]

74. It may also be that Article 25 of the 1951 Convention concerning administrative assistance could be relevant in the family reunification context. Article 25(1) requires Contracting States in which a refugee is residing to "arrange that such assistance be afforded to him by their own authorities or by an international authority", "[w]hen the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse". Legal commentary indicates that "any right to which an individual refugee is lawfully entitled, whether under domestic or international law, could form the basis of the obligation to furnish a refugee with administrative assistance".[75] This could therefore include the refugee's right to family unity.

75. Article 25(2) refers to "such documents or certifications as would normally be delivered to aliens by or through their national authorities", which the explanatory note to the Secretary-General's original proposal defines as referring to such documentation as needed to enable the refugee "to perform the acts of civil life", including e.g. "marriage, divorce, adoption, … etc.".[76] Legal commentary states that "such documents or certifications" "should be given a broad meaning, and may be regarded as including certificates relating to family position (attesting e.g. to birth, marriage, adoption, death or divorce), … copies or translations of originals, and attestations as to the regularity of documents or their conformity with the law."[77] Article 25(3) affirms that "[d]ocuments or certifications so delivered … shall be given credence in the absence of proof to the contrary" and Article 25(4) that any fees charged for these services "shall be moderate".

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

[73] UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 37, para. 8.
[74] Committee of Ministers, *Recommendation on the legal status of persons admitted for family reunification*, Rec(2002)4, 26 March 2002.
[75] A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, OUP, 2011, p. 1138.
[76] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex, 1950, pp. 43-44.
[77] Robinson, *Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)*, 1997, p. 109; Zimmermann (ed), above fn. 75, p. 1143.

Questions regarding documentation requirements, deadlines for submission and other requirements to consider include:

- What type of documentation requirements are reasonable to impose, taking into account the particular situation of beneficiaries of international protection and their families, while acknowledging the legitimate aim of States to control entry into their territory?
- How can support be provided in this respect to take account of the particular situation of beneficiaries of international protection?
- Is it reasonable to impose limitations on the time frame within which applications by beneficiaries of international protection must be submitted to benefit from preferential terms and, if so, what should these be?
- How can the obstacles and dangers faced by family members required to submit applications at embassies/consulates be overcome?
- What alternatives to DNA testing to prove filiation should be offered to beneficiaries of international protection in the family reunification context?
- When can DNA testing be required?
- Is it reasonable to require a period of legal residence before beneficiaries of international protection may seek family reunification?
- If so, should regulations specify, for instance, that the period spent in the asylum procedure should be taken into account when calculating the period of residence?
- What fees are States entitled to apply in the family reunification process?
- What preferential terms should beneficiaries of international protection enjoy (e.g. regarding accommodation/income/social security dependence requirements, applications from abroad, fees, etc)?
- What appeal arrangements need to be in place to ensure an effective remedy against negative decisions on family reunification applications?
- What status should family members joining beneficiaries of international protection enjoy?
- Could Article 25 of the 1951 Convention be applicable in the family reunification context, both in relation to the issuance of "such documents or certifications as would normally be delivered to aliens by or through their national authorities" as needed for "the exercise of a right by a refugee", and the requirement for any fees charged in this context to be "moderate"?

F. Practical Obstacles Beneficiaries of International Protection Face Accessing Family Reunification

77. Beneficiaries of international protection also face numerous practical obstacles to enjoying their right to family life and family unity. They include difficulties linked to their specific situation, such as problems maintaining the contact with the family left in the country of origin or tracing family members separated in flight; long periods in exile or in the asylum procedure; family members caught up in conflict, traumatized or facing extreme hardship; prolonged delays in processing of applications; limited

availability of affordable migration advice, and long, costly and complicated procedures.[78]

78. The process involved in securing family reunification can mean that families spend years apart in sometimes precarious and even dangerous situations before they are able to reunite, if at all. The following subsections examine some of these practical challenges.

Lack of information and administrative delays

79. In order for beneficiaries of international protection to enjoy their right to family unity, they need information about applicable deadlines and procedures. Yet the reality is too often that relevant information is not provided promptly in a clear and accessible way, thus undermining their capacity to fulfill requirements. This is particularly important where applications must be submitted within a short time frame in order to be able qualify for preferential terms.

80. Once a beneficiary of international protection is entitled to apply for family reunification, it can take time before families are able to assemble the required official and other documents in the required format. Family members may face long waiting times before getting an appointment at embassies to be able to file an application, deliver documentation, and/or attend interview. It can take months or longer for the authorities to process the application and related visa and/or residence requests. An initial negative decision may need to be appealed or additional information provided. Children may reach the age of majority before an application for reunification can be made or a decision on the application is made. If reunification is approved, visas and travel arrangements need to be made.

81. Such delays and obstacles run counter to the CRC's requirement that States deal with family reunification applications "in a positive, humane and expeditious manner".[79] UNHCR's Executive Committee also calls for the reunification of separated refugee families "with the least possible delay".[80]

82. The ECtHR has also ruled on the requirement for promptness, rapidity, attentiveness and particular diligence in family reunification matters in several cases. It has found that States' "positive obligation" in parent-child family reunification cases require them to take effective and prompt measures, since the passage of time can cause irremediable damage to the parent-child relationship if they are separated.[81] The Court has also found that in granting the applicants refugee status and recognizing the principle of family reunification, the State was required to examine their visa applications rapidly, attentively and with particular diligence. The family reunification

[78] See e.g. European Commission, *Green Paper on the Right to Family Reunification of Third-country Nationals Living in the European Union (Directive 2003/86/EC)*, 2011, above fn. XX, p. 6; UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 2, pp. 3-4; European Council on Refugees and Exiles (ECRE) and Red Cross EU Office, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, November 2014; Refugee Council of Australia. *Addressing the Pain of Separation for Refugee Families*, November 2016, p. 1.
[79] CRC, Article 10(1).
[80] UNHCR ExCom, Conclusion No. 24 *Family Reunification*, above fn. 37, para. 2.
[81] *Saleck Bardi c. Espagne*, Requête no. 66167/09, ECtHR, 24 May 2011, paras. 50-53.

procedure had therefore to take into account the events which had disrupted and disturbed their family lives and had led to their being granted refugee status. Ultimately, the Court determined that the accumulation and prolongation of multiple difficulties and the authorities' failure to take account of the specific situation of the applicant meant that the decision making process had not shown the requisite guarantees of "flexibility, promptness and effectiveness" needed to respect the appellant's right to family life.[82]

83. In the EU, the right to good administration, including the right to have one's "affairs handled impartially, fairly and within a reasonable time", as set out in Article 41 of the Charter of Fundamental Rights has been recognized as a general principle of EU law.[83]

Questions regarding lack of information and administrative delays to consider include:

- How can appropriate information on family reunification rights and requirements best be provided to beneficiaries of international protection?
- Who should do so and at what stage?
- How can delays in administrative procedures be reduced?
- What should happen when restrictions/delays, which cannot be attributed to a child, result in that child turning 18?

Access to embassies and accumulated costs

84. A particular challenge faced by family members of beneficiaries of international protection concerns **access to embassies or consulates**. Where the family of a refugee is still in his or her country of origin, approaching a foreign embassy can in some cases pose a risk to their safety, in particular where the regime may be a possible source of persecution and/or the security situation is unstable. Family members may need to travel to a neighbouring country to approach an embassy or consulate if there is no functioning embassy in country.

85. Where family members of refugees are themselves refugees outside their country of origin and travelling to an embassy may be difficult or impossible. Where refugee camps are remote and/or there are no embassies in the country of asylum, family members may have to travel long distances, sometimes to another country and sometimes by irregular means, to reach an embassy.

86. The situation is exacerbated where States require family reunification applications to be submitted outside the country of asylum and where family members are required to travel several times to an embassy or consulate. Where appointments

[82] *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 31, paras. 73, 81, and 82 and *Mugenzi c. France*, ECtHR, 2014, above fn. 31.
[83] See also *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 33, paras. 47 and 64, requiring Member States to take "account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness".

can only be given in several months' time, this can prevent refugee family members from being able to benefit from exemptions from the obligation to meet income, accommodation, and health insurance requirements applied for a limited time in some States, thus effectively erecting additional hurdles for families.

87. Measures that might help alleviate these problems include: permitting the sponsor to apply in the country of asylum; waiving a requirement for the family member to confirm the application at an embassy; lifting any requirement applied by the country of asylum for family members to have legal residence in the country where applications must be made as far as beneficiaries of international protection are concerned, at least in contexts where legal residence is not practically possible for them; collaborating with other States in the same region to accept applications in other embassies, or extending such collaboration; reducing the number of times family members are required to come to embassies; and strengthening efforts to ensure appointments are made closer together so as to reduce the number of journeys required.

88. Once an application for family reunification has been accepted, obtaining **travel documents** for the journey may represent a further obstacle to family reunification. This creates particular difficulties for refugees from conflict zones and/or from countries without fully functioning administrations.

89. The HRC ruled on this issue in *El Dernawi v. Libya* concerning the wife and children of a Libyan refugee recognized in Switzerland who had been unable to leave Libya because the authorities there had confiscated the passport of the mother on whose passport the children were travelling. The HRC found that this action "amounted to a definitive, and sole, barrier to the family being reunited in Switzerland" in violation of Articles 17, 23 and 24 of the ICCPR.[84]

90. Approaches to allow address these issues include accepting refugee Convention Travel Documents (CTD) or emergency travel documents issued by the International Red Cross Committee (ICRC) and/or providing for the issue of a one-way *laissez-passer* document. Issuing humanitarian visas may also be a useful approach.

91. The cumulative effect of meeting the numerous requirements of the reunification process often makes family reunification **very costly** for families. Expenses can include the costs of (i) obtaining documentation required; (ii) providing biometric photographs, certified copies of documents; (iii) translating official documents with an accepted notary; (iv) lodging marriage or birth certificates with the authorities; (v) paying visa application and embassy fees; (vi) applying for residence permits; (vii) visits to the embassy or consulate (travel including outside the country of origin, overnight accommodation, living expenses); (viii) DNA tests; (ix) courier delivery; (x) appeals; (xi) legal representation; and (xii) the cost of the journey to join the sponsor.

92. All these accumulated costs are another obstacle that may prevent families from applying for reunification within the time limit imposed in some countries to benefit from more preferential terms and/or may oblige families to choose mow many family members can reunify. Ultimately they may bar reunification.

[84] HRC, *Farag El Dernawi v. Libya*, No. 1143/2002, CCPR/C/90/D/1143/2002, 2007, para. 6.3.

Questions regarding access to embassies and accumulated costs to consider include:

- How can access to embassies for family members be enhanced (by authorities, UNHCR, NGOs)?
- What can be done to improve issuance of visas and travel documentation?
- How can the costs of travel and procedures be mitigated for beneficiaries of international protection?

G. The situation of beneficiaries of complementary/subsidiary protection

93. While many States offer refugees family reunification on preferential terms compared to immigrants generally, some States have excluded beneficiaries of complementary/subsidiary protection from these terms, in particular recently in European States in response to the increased numbers of asylum-seekers arriving in 2015-16.

94. Recent restrictions introduced then or those already in place principally involve requiring beneficiaries of complementary/subsidiary protection to wait up to three or more years before applying for family reunification and obliging them to meet income, accommodation and health insurance requirements from which refugees are otherwise exempt. They may also require spouses to be above a certain age where this is not required of refugees or apply a more restricted family definition to beneficiaries of complementary/subsidiary protection compared to refugees. Some States applying these restrictions have provided for exceptions, for instance, where there is a pressing need and the best interests of the child require it. Such restrictions nevertheless create major obstacles for their equal enjoyment the right to family reunification.

95. Are these restrictions justified on the grounds that complementary/subsidiary protection beneficiaries will soon return once wars end? As the European Commission has noted, when subsidiary protection was introduced in the EU, "it was assumed that this status was of a temporary nature", but "practical experience … has shown that this initial assumption was not accurate".[85] Significant arrivals have undoubtedly put administration and reception systems under strain in some European States and there are legitimate concerns regarding integration and social cohesion. Yet, there are various other responses open to States that it might be more appropriate to investigate.

96. At first sight, States appear to have focussed on beneficiaries of subsidiary protection at least in part because the Family Reunification Directive states that it does not apply to persons granted "a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States" (Article 3(2)(c)). It has been suggested, however, that "as regards subsidiary protection

[85] European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 57, section 6.2.

beneficiaries with a status granted under EU law, it is at least arguable that they are covered by the [Family Reunification Directive], as they are not explicitly excluded".[86]

97. As outlined in further detail below, it is questionable whether these restrictions are compatible with States' international and regional human rights obligations on several grounds.

States' positive obligations where family life cannot be enjoyed in another State

98. First, States have positive obligations under international and regional human rights law towards individuals unable to enjoy their right to family life and family unity in another State. As the ECtHR has stated on numerous occasions, "there may ... be positive obligations inherent in an effective 'respect' for family life".[87] Thus, while States enjoy a "certain margin of appreciation" in exercising their powers regarding the admission of foreigners, they must strike "a fair balance … between the competing interests of the individual and of the community as a whole".[88]

99. Factors to be taken into account include whether the family separation was voluntary or not, which the Court has recognized is not the case for refugees and persons fleeing armed conflict,[89] and whether there are insurmountable obstacles to family life being enjoyed elsewhere – again recognized as not being the case in States' own recognition that both groups are in need of international protection and cannot be returned to their country of origin.

100. The ECtHR has also recognized that the situation of both refugees and persons who have fled generalized violence is different as regards family reunification from that of persons who have left their country of origin for other reasons. It distinguishes "the interruption of family life [due to flight from] … a genuine fear of persecution" or from a situation of indiscriminate violence meaning that the person could not "be said to have voluntarily left family members behind"[90] from other migration situations, where family life can be resumed in the country of origin. The discretion of Member States to deny family unity where there are major or insurmountable obstacles to developing family life elsewhere is thus significantly limited.

101. Where States bar beneficiaries of complementary/subsidiary protection from family reunification, they are unable to balance these interests in the individual case. In addition, where exceptions are not provided for in legislation/regulations, States cannot ensure they are upholding their obligations towards beneficiaries of complementary/subsidiary protection unable to enjoy their right to family life elsewhere.

[86] Council of Europe, *Realising the Right to Family Reunification in Europe*, above fn. 2, p. 28.
[87] *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, Applications nos. 9214/80; 9473/81; 9474/81, ECtHR, 28 May 1985, para. 67 and numerous subsequent judgments.
[88] See e.g. *Jeunesse v. Netherlands*, ECtHR Grand Chamber, 2014, above fn. 23, para. 106.
[89] *Tuquabo-Tekle v. The Netherlands*, ECtHR, above fn. 23.
[90] See respectively, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, ECtHR, 12 October 2006, para. 75, and *Tuquabo-Tekle v. The Netherlands*, ECtHR, above fn. 23, para. 47.

The principle of best interests of the child

102. Second, States' capacity to ensure respect for the rights of the child and that their best interests are a primary consideration may be called into question. The restrictions may also not be in line with States' obligations to deal with applications for family reunification in such cases "in a positive, humane and expeditious manner".[91]

103. The restrictions can be expected to have a particularly harmful effect on children with complementary/subsidiary protection. For instance, where waiting periods are imposed before family reunification can be sought, older child beneficiaries of complementary/subsidiary protection may find they are no longer entitled to reunify with their parents (and in some cases siblings, where national rules permit this), if they become adults in the interim with the result that their parents may no longer be entitled to seek to join them.

104. It is not clear how States may have considered and taken into account the best interests of the children affected when introducing these restrictions, nor to what extent and how States may have balanced these interests, when introducing restrictions on the right to family reunification of beneficiaries of subsidiary protection. It is nonetheless clear that States have a responsibility to do so. Where legislation bars child beneficiaries of complementary/subsidiary protection from seeking family reunification, even if only for a period of time, there is no process whereby States can assess in the individual case how they are ensuring the best interests of the child are a primary consideration and thereby determine whether they are upholding their international obligations.

A trend in the EU towards a uniform status for refugees and SP beneficiaries

105. Third, such restrictions run counter to trend in EU towards uniform status for all beneficiaries of international protection. Since the adoption of the Family Reunification Directive in 2003, the trend in EU legislation has been towards a uniform status for all beneficiaries.[92]

106. All beneficiaries of international protection have been included within the scope of the Long-Term Residents Directive from 2011, while under the recast Qualification Directives the content of international protection granted applies "both to refugees and persons eligible for subsidiary protection unless otherwise indicated".[93] As the European Commission has noted: "[T]he humanitarian protection needs of persons

[91] For instance, CRC, Art. 10(1).

[92] See e.g. Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Council document 17024/09, 2 December 2009, at 6.2, adopted by the European Council, 10/11 December 2009 and EU, *Consolidated version of the Treaty on the Functioning of the EU*, 2012, Articles 78(2)(a) and 78(2)(b).

[93] Council of the EU, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU (Recast Qualification Directive), Articles 20(2) and 23(1). Recital 39 also states: "[W]ith the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility."

benefiting from subsidiary protection do not differ from those of refugees."[94] It therefore encourages Member States "to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection".[95]

107. Two CJEU judgments are particularly relevant. In the first, the European Parliament questioned whether the Family Reunification Directive was in line with the right to family life.[96] The CJEU's judgment included an examination of Article 8 of the Directive permitting Member States to require up to two years' lawful stay before third country nationals can apply for family members to join them (although refugees are exempt from this provision). The Court found that "a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors" and that any waiting period must be sufficiently flexible to take account of the particular circumstances of specific cases and must have due regard to the best interests of minor children.[97]

108. The second judgment concerned two Syrian subsidiary protection beneficiaries in Germany and their freedom to reside in a different part of that country (as then permitted for refugees in Germany but not for subsidiary protection beneficiaries).[98] The CJEU determined that policies that treat two groups of persons differently are only legitimate if these groups are not in an objectively comparable situation as regards the objective pursued by those rules. Applying these pronouncements to the family reunification context, this suggests that States implementing different rules for subsidiary protection beneficiaries and refugees need to substantiate how the situation of each group is not objectively comparable.

The principle of non-discrimination among similarly situated persons

109. Fourth, the restrictions may run counter to the principle of non-discrimination, which holds that similarly situated individuals must enjoy the same rights and receive similar treatment, unless such distinctions can be objectively justified. At European level, the principle is reflected in both Article 14 ECHR and Article 21 of the Charter of Fundamental Rights.

110. The ECtHR has addressed these issues in six judgments. All found violations of Article 8 ECHR in conjunction with Article 14 ECHR. In *Abdulaziz, Cabales and Balkandali v. UK*, the Court found that the UK Immigration Rules discriminated against three women seeking to bring their husbands to the UK on grounds of their (female) sex.[99] In *Hode and Abdi*, which concerned UK rules preventing a temporary residence permit holder of five years from being able to apply for family reunification, confirmed that it is discriminatory to treat persons in "analogous, or relevantly similar, situations" differently if this has no objective and reasonable justification, if it does not pursue a

[94] European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, 2014, above fn. 57, section 6.2.
[95] Ibid.
[96] *European Parliament v. Council of the EU*, C-540/03, CJEU, 27 June 2006.
[97] *European Parliament v. Council of the EU*, ibid., para. 99.
[98] *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, C-443/14 and C-444/14, CJEU, 1 March 2016.
[99] *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, Applications nos. 9214/80; 9473/81; 9474/81, ECtHR, 28 May 1985.

legitimate aim, or if the relationship between the means employed and the aim sought to be realised is not proportionate.[100]

111. The remaining four judgements date from 2016 and show how the ECtHR's jurisprudence is evolving as regards protection from discrimination in the context of Article 8 cases. *Novruk v. Russia* concerned the failure to grant a residence permit to HIV+ non-nationals. In this case, the Court found that, while States' normally have a wide margin of appreciation in immigration matters:

> "If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered significant discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for imposing the restrictions in question."[101]

112. *Biao v. Denmark* also refers to the very narrow margin of appreciation that applies. This case concerned Danish legislation that required applicants for family reunification to show that their aggregate ties with Denmark were stronger than those to any other country, unless one family member had been a Danish national for at least 28 years or lived there lawfully for 28 years. In its 2016 judgment the Grand Chamber determined that the government had "failed to show compelling or very weighty reasons unrelated to ethnic origin justifying the indirectly discriminatory effect of the 28-year-rule".[102]

113. The last two judgments concerned the different treatment of lesbian and gay couples respectively compared to heterosexual ones.[103] The Court found that where the State's margin of appreciation is narrow, the principle of proportionality requires the measure chosen to be suitable in principle for achieving the aim sought. It also found that this principle requires that the exclusion of certain categories of people from the scope of the provisions must be shown to be necessary to achieve that aim. The Court specifically stated that this equality requirement holds true not only for same-sex couples but also in immigration cases where States are otherwise allowed a wide margin of appreciation.[104]

114. Applying these principles to the restrictions on family reunification introduced for beneficiaries of complementary/subsidiary protection, strong similarities in their situation vis-à-vis that of refugees can be seen. Both are unable to enjoy family life in their country of origin, both have not left voluntarily, and both have been recognized as in need of international protection. The compatibility of restrictions with the principle of non-discrimination then depends on the weight given to public interest and whether unequal treatment is sufficiently legitimate, proportionate and necessary, which will depend on the national context.

---

[100] *Hode and Abdi v. UK*, Application no. 22341/09, ECtHR, 6 November 2012.
[101] *Novruk and Others v. Russia*, Applications nos. 31039/11, 48511/1, 76810/12, 14618/13 and 13817/14, ECtHR, 15 March 2016, para. 100 (emphasis added).
[102] *Biao v. Denmark*, Application no. 38590/10, ECtHR, Grand Chamber, 24 May 2016, para. 138.
[103] *Pajić v. Croatia*, Application no. 68453/13, ECtHR, 23 February 2016; *Taddeucci et McCall c. Italie*, Requête no. 51362/09, ECtHR, 30 June 2016.
[104] *Pajić v. Croatia*, ECtHR, ibid., para. 82.

Questions regarding access for beneficiaries of complementary/subsidiary protection to family reunification to consider include:

- How different is the situation of refugees and of beneficiaries of complementary/subsidiary protection?
- If their situation is similar, is the different treatment of beneficiaries of complementary/subsidiary protection and refugees sufficiently legitimate, proportionate and necessary?
- Where exceptions to the restrictions are permitted on grounds of pressing need or best interests, does this mean that the restrictions generally can be considered compatible with international and regional human rights law standards or not?
- How can the situation of beneficiaries of complementary/subsidiary protection be appropriately adapted where accommodation, income or subsistence requirements are otherwise imposed?
- What is the impact of permitting such beneficiaries only to apply for reunification after a period of time (on host societies, on the family members concerned, on integration)?

H. Family reunification and children

115. As summarized in section B above, international and regional law provides a strong legal framework protecting the rights of the child in the context of family reunification.

116. In particular, the principle of the **best interests of the child** set out in Article 3 CRC and numerous regional instruments underpins much of the positive evolution of international and regional jurisprudence in this area.[105] As the CRC Committee has advised, the assessment of the best interests of the child in family reunification cases needs to take into account elements including the child's views, the preservation of the family unit, the care protection and safety of the child, their situation of vulnerability, and their right to health and to education.[106] The CRC Committee also notes that the relevance and weight to be accorded to each element "will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances".[107]

117. Among various other relevant CRC provisions, Article 10 also requires States to deal with family reunification applications by a child or his or her parents "in a positive, humane and expeditious manner".

[105] See Section C above; UNHCR, *The "Essential Right" to Family Life and Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, above fn. 16; Council of Europe, *Realising the Right to Family Reunification in Europe*, above fn. 2.
[106] CRC Committee, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, paras. 52-79.
[107] Ibid., para. 80.

118. Issues that can present challenges for child beneficiaries of international protection and/or for children in families where one or more family member(s) has fled and who are seeking to reunify with their family, are outlined below.

Unaccompanied and separated child beneficiaries of international protection

119. The situation of unaccompanied and separated child beneficiaries of international protection can be particularly precarious, especially in the few States where they are not permitted to bring their parents or other family to join them.

120. As the CRC Committee states in its General Comment No. 6 on the treatment of such children who are outside their country of origin:

> "Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations. … Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights."[108]

121. The 2001 Summary Conclusions on Family Unity state that "expedited procedures be adopted" in such cases.[109]

122. With regard to the jurisprudence of the ECtHR, it ruled in the case of a five-year old Congolese girl intercepted in Belgium who was seeking to join her mother in Canada, but who was returned to the Democratic Republic of Congo, that the "State was under an obligation to facilitate the family's reunification".[110]

123. In the EU, the Family Reunification Directive *requires* States to authorize the entry and residence of the parents of unaccompanied refugee children and *permits* States to do the same for the child's "legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced" (Article 10(3)).

---

[108] 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, paras. 81-83.
[109] UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 11.
[110] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 2006, above fn. 90, para. 85, reiterated in Advisory Opinion, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, IACtHR, 2014, above fn. 39, para. 167.

124. For its part, UNHCR recommends that "as part of the examination of the best interest of minor children, to consider and provide the possibility for refugee children to be reunited with other family members or guardians where their parents in direct ascending line cannot be traced."[111] Indeed, good practice in a number of States permits not only parents but also grandparents, guardians and/or minor siblings to join the child.

125. Practice with regard to unaccompanied child beneficiaries of international protection seeking family reunification in a few European States appears problematic in situations where they do not (or no longer) qualify for family reunification under preferential terms accorded to refugees. These States appear to require the *parents* of such children to meet accommodation, income and other requirements, thus apparently treating child and adult beneficiaries of international protection in the same way without taking into account that children cannot be expected to meet such requirements, without considering their best interests and without accepting that parents who are outside the country cannot be expected to meet these requirements either. Rather, States are obliged to examine family reunification applications "in the interests of the child and with a view to promoting family life".[112]

126. The situation of married unaccompanied child beneficiaries of international protection may also be of concern, since some States appear effectively to deny them the right to family reunification when legislation specifies that it is only where such children are unmarried that they may reunify with their parents. This may leave a particularly vulnerable group of children without potentially vital support.

127. In addition, children may end up being left behind if parent(s) are obliged to chose between reunifying with one child and leaving behind another, whether because it is only parents and not siblings who are able to reunify with an unaccompanied beneficiary of international protection or because an older child may recently have reached the age of majority no longer qualifies for reunification or because income requirements that may be imposed are linked to family size and mean that reunification can only be sought for some children in the family. The effect is to split rather than reunite families and result in vulnerable children or young adults being left to fend for themselves in a potentially hostile environment.

Children who reach the age of majority

128. Child beneficiaries of international protection who reach the age of 18 years generally lose the right for their parents (and in some countries siblings or other family members) to join them. This is particularly problematic where children have to wait a long time for a decision on their asylum claim, where parents or other family members cannot immediately be traced and/or required documentation obtained.

129. State practice varies as to whether the point at which majority is calculated is defined as being the date of applying for family reunification or the date on which the family reunification decision is made. A case before the CJEU concerns the right to family reunification of a child who reached the age of majority after seeking asylum

[111] UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 2, pp. 9-10.
[112] *European Parliament v. Council of the EU*, CJEU, 2006, above fn. 96, para. 88.

but before being granted asylum, whose subsequent application for her parents to join her was rejected on the grounds that she was no longer a minor. The Advocate General argued in his October 2017 Opinion that it was necessary to take into account "the particular vulnerability of unaccompanied minors arriving [in the EU], and of young adults who have refugee status", that the relationship of dependency between parents and children did not cease immediately upon reaching the age of 18; that to ignore the vulnerability of such a child would run counter to the objectives of the Family Reunification Directive". He therefore concluded that an unaccompanied child asylum-seeker who attains the age of majority before being granted asylum, with retroactive effect to the date of the application, who subsequently applies for family reunification as granted to unaccompanied minor refugees may be considered to be an unaccompanied minor.[113] It remains to be seen what the CJEU itself will conclude.

130. In addition, where there are families with children in both a country of asylum and in the country of origin/first asylum, parents wishing to rejoin an unaccompanied child beneficiary of international protection may face difficult choices. As the ECtHR has ruled, "[w]hen assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family".[114]

Adopted and foster children, questions of guardianship and custody and other issues

131. Adopted children, foster children, children born out of wedlock, children of earlier marriages/relationships, children where custody has not been formally granted, and children where parents have joint custody and permission is required to have been granted by the other parent all face additional hurdles when seeking reunification.

132. Many States impose strict limitations, requiring for instance that sole custody be formally proven and legal guardianship be recognized. Additional documentation required may not be available depending on national systems and practice in place in the country of origin and/or situations of conflict and instability that prevent such documentation being issued or result in it being destroyed. Where children have been born in exile this can also be problematic, notably if the child's birth has not been formally registered.

133. It is nevertheless important that States take into account both the particular situation of persons fleeing persecution and fleeing armed conflict and different cultural customs, such as the *kafalah* system of guardianship in the Arab world, regarding such matters. As UNHCR notes: "Where a child has lost his/her parents during conflict or due to persecution by the government, it may be impossible to formalize legally the fact that s/he has since been taken care of by an uncle or a grandparent."[115]

134. As for the ECtHR, it has confirmed that Article 8 ECHR "makes no distinction between the 'legitimate' and the 'illegitimate' family. Such a distinction would not be

[113] *A.S. v. Staatssecretaris van Veiligheid en Justitie*, C-550/16, Opinion of Advocate General Bot, 26 October 2017, paras. 54, 56, 57, 67.
[114] *Jeunesse v. The Netherlands*, ECtHR, 2014, above fn. 23, para. 117.
[115] UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 2, pp. 9-10.

consonant with the word 'everyone', and this is confirmed by Article 14 with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on 'birth'."[116] The ECtHR has also found that a lawful and genuine adoption may constitute "family life", even in the absence of cohabitation or any real ties between an adopted child and the adoptive parents.[117] The adoption need not, however, necessarily be formal, since the Court has also recognized the existence of *de facto* "family life" between foster parents and a child placed with them, having regard to the time spent together, the quality of the relationship and the role played by the adult *vis-à-vis* the child.[118] Nor does family life cease when a child is taken into care.[119] Both the ECtHR and the IACtHR now accept that homosexual couples who have adopted or natural children and are living together can constitute family life.[120]

Questions regarding children and family reunification to consider include:

- How can the protections afforded by the CRC be used to strengthen children's realization of their right to family reunification?
- How should the principle of the best interests of the child be applied in the family reunification context?
- What about unaccompanied/separated children and their right to family life?
- What about children who reach the age of majority in the course of family reunification proceedings?
- What about adopted and foster children including where guardianship is not officially assigned?
- What should be done in cases involving custody that need to be clarified?
- What about married (un)accompanied minors?

I. Conclusion

135. For refugees and other beneficiaries of international protection, the right to family life and family unity entails a right to family reunification, since they are unable to enjoy family life in their country of origin. Yet, cumulatively the many legal and practical obstacles to family reunification they face put reunification out of reach for many families of beneficiaries of international protection.

[116] *Marckx v. Belgium*, Application No. 6833/74, ECtHR, 13 June 1979, available at: (concerning an unmarried mother and her illegitimate daughter); *A.W. Khan v. United Kingdom*, Application no. 47486/06, ECtHR, 12 January 2010, paras. 34-35 (concerning a father originating from Pakistan and a daughter with a British citizen who was unable to live with his partner and daughter but who had daily contact with them, even though he had lived with his mother and brothers until facing expulsion).
[117] *Pini and Others v. Romania*, Applications nos. 78028/01 and 78030/01, ECtHR, 22 June 2004, paras. 143-148. See also *Topčić-Rosenberg v. Croatia*, Application no. 19391/11, ECtHR, 14 November 2013, para. 38.
[118] *Moretti et Benedetti c. Italie*, Requête no. 16318/07, ECtHR, 27 April 2010, paras. 48-52.
[119] *Johansen v. Norway*, Application no. 24/1995/530/616, ECtHR, 27 June 1996, para. 52.
[120] *Schalk and Kopf v. Austria*, Application no. 30141/04, ECtHR, 24 June 2010; *Gas and Dubois v. France*, Application no. 25951/07, ECtHR, Admissibility Decision, 31 August 2010; *Caso Atala Riffo y Niñas v. Chile*, IACtHR, 2012, above fn. 46.

136. Measures to enable beneficiaries of international protection to realize their right to family unity, include adopting a flexible family definition; ensuring that any legal requirements that may be applied in the general immigration context do not present insurmountable obstacles for them bearing in mind their particular circumstances; ensuring procedures are expeditious, flexible, transparent, and efficient; acknowledging that refugees and beneficiaries of complementary/subsidiary protection have comparable protection needs and require equal treatment as regards family reunification; ensuring that the best interests of the child are a primary consideration; and that child beneficiaries of international protection are able to reunite promptly with their parents and other family members, where this is in their best interests.

137. It is hoped this paper will assist the expert roundtable's discussions on these and other issues relevant to identifying solutions to the challenges faced by States and individuals, so as to ensure that States can uphold their international obligations and the right to family unity of refugees and others in need of international protection can be enjoyed more effectively.