



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *Abdi Ali Mahamud v. the Netherlands* (Appl. no. 64534/19)
before the European Court of Human Rights**

1. Introduction*

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for them.¹ UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights (“the Court”) by its letter of 18 March 2021.

1.2. The question before the Court is, in essence, whether the positive obligations under Article 8 of the European Convention on Human Rights (ECHR) require a State party to grant a request for family reunification where a particular relationship of dependence existed between an applicant and his adult brother. While UNHCR will not comment on the facts or merits of the case, it will outline the relevant domestic legislative framework and applicable practice in Part 2 below. It will also provide its interpretation of the relevant principles of international and European law governing the family reunification of refugees, with a particular focus on the definition of family, the concept of dependence and the requirement for efficiency of family reunification procedures (Part 3).

2. Dutch law and practice regarding family reunification of refugees

2.1. The Dutch family reunification procedure must be implemented in line with international³ and European⁴ legal instruments, jurisprudence and standards governing the right to family life and to family reunification, as they are directly applicable in the Netherlands.⁵

2.2. The definition of family that applies in the Netherlands in the context of refugee family reunification includes the spouse or partner, minor children, and, subject to certain conditions, young adult children (aged 18 to 25), as well as unmarried dependent adult children of the refugee sponsor.⁶ These family members benefit from the more favourable conditions for reunification of refugee families set out in the EU Family Reunification Directive (FRD).⁷

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, www.refworld.org/docid/3ae6b3902.html.

¹ UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.unhcr.org/refworld/docid/3ae6b3628.html>, para. 1.

² *Ibid.*, para. 8(a) and Article 35 of the *1951 Convention relating to the Status of Refugees* (“1951 Convention”) and Article II of the *1967 Protocol Relating to the Status of Refugees*, <https://www.unhcr.org/4ec262df9.pdf>.

³ Including, *inter alia*, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

⁴ Including the EU Family Reunification Directive, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, and the EU Charter of Fundamental Rights.

⁵ Constitution of the Kingdom of the Netherlands, <https://wetten.overheid.nl/BWBR0001840/2018-12-21>, Articles 90-94; Dutch legislation regulating family reunification on grounds of Article 8 ECHR is codified in Article 3.13 of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*, <https://wetten.overheid.nl/BWBR0011825/2020-08-01/>). The applicable policies concerning family reunification are elaborated in paragraph B7/3.8.1 of the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire 2000*, <https://wetten.overheid.nl/BWBR0012289/2021-01-01/>).

⁶ See Article 29(2) of the Aliens Act. *Vreemdelingenwet 2000*, <https://wetten.overheid.nl/BWBR0011823/2021-02-20>.

⁷ European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, <https://www.refworld.org/docid/3f8bb4a10.html>.

2.3. Where persons are not considered to be family members under this definition, refugees can apply for family reunification under the “Article 8 ECHR” family reunification procedure. Under this procedure, the Immigration and Naturalisation Service (IND) assesses whether a decision to deny reunification would breach the Netherlands’ obligations under Article 8 ECHR. An Article 8 ECHR application for family reunification requires the applicant to lodge a separate application for this specific purpose. UNHCR is aware that in some cases the IND automatically assesses its obligations under Article 8 ECHR when refusing family reunification in the refugee family reunification procedure, but it is not standard practice to do so.⁸

2.4. Under the Article 8 ECHR family reunification procedure, the IND requires the sponsor to substantiate that “more than normal emotional ties” with the dependent family member exist. Furthermore, the sponsor (unless he or she is an unaccompanied child refugee) must in principle meet the stricter requirements of the regular family reunification procedure (including income and integration requirements). The IND has waived these requirements in some cases because the family members were not able to meet them due to their refugee situation.⁹ There are, however, no specific policies on the criteria for waiving the stricter requirements. In 2019, UNHCR issued a report on family reunification in the Netherlands. Based on case studies, UNHCR expressed its concern that the Dutch government applies a restrictive interpretation of the concept of dependency and requires a very high level of dependency.¹⁰

2.5. In practice, the IND’s assessment of the existence of “more than normal emotional ties” is heavily focused on elements of dependency between the family members. The IND requires family ties and dependency between the family members to be so strong as to amount to the family members being unable to function independently upon separation.¹¹ This narrow interpretation demands a very high threshold of dependency. In multiple cases, the domestic (lower) courts have ruled that the IND places too much weight on the inability to function independently in the assessment, and have stated that the question of whether more than normal emotional ties exist is a factual one and depends on the actual existence of close personal ties.¹² In one case, the IND argued that while the family members were dependent on the sponsor in the Netherlands at the time of the decision, it was not substantiated that they would remain dependent in the future.¹³

2.6. The IND further assesses whether the family members are exclusively dependent on one another, examining the possibilities (or lack thereof) that the family member(s) can rely on a different family member or a third party (including medical providers). UNHCR’s report found that applicants must essentially provide evidence that no one except the refugee can care for their family member.¹⁴ The Council of State has recently ruled that while the lack of exclusive dependency cannot be the decisive factor in and of itself, it can be given weight in assessing the existence of more than normal emotional ties.¹⁵ However, the Dutch courts have repeatedly found the IND to have placed too much weight on the lack of exclusive dependency in their assessments.¹⁶

⁸ UNHCR, *No Family Torn Apart: Challenges refugees face securing family reunification in the Netherlands and recommendations for improvements* (“UNHCR, No Family Torn Apart”), September 2019, www.unhcr.org/nl/wp-content/uploads/UNHCR-Family_Reunification-screen.pdf, pp. 42-44.

⁹ UNHCR, No Family Torn Apart, see note 8 above, pp. 42-44.

¹⁰ UNHCR recommended the adoption of guidelines on the concept of dependency consistent with international and European standards defining clearly what is understood as dependency in relation to a refugee for the purposes of family reunification. UNHCR further recommended the IND to take greater account of the vulnerability of family members of refugees, whether this is a result of their experience of persecution, conflict or flight or relates to age, gender, disability or other relevant factors. See, UNHCR, No Family Torn Apart, see note 8 above.

¹¹ See for example the IND’s Decision of 4 August 2016 in the domestic proceedings, p. 5.

¹² See among others, Rechtbank Den Haag, 7 December 2018, ECLI:NL:RBDHA:2018:14825.

¹³ UNHCR, No Family Torn Apart, see note 8 above, pp. 42-43.

¹⁴ UNHCR, No Family Torn Apart, see note 8 above, pp. 5, 40-41.

¹⁵ Council of State, 4 April 2019, ECLI:NL:RVS:2019:1003.

¹⁶ See amongst others: Rechtbank Den Haag, zittingsplaats Middelburg, 27 August 2020, AWB 19/1908; Council of State, 8 April 2020, ECLI:NL:RVS:2020:996; Council of State, 12 June 2019, ECLI:NL:RVS:2019:1864.

2.7. The IND considers the current circumstances of family members when assessing the degree of dependency between them, with a particular focus on medical circumstances and financial dependency. Case studies have shown that the IND's assessment of dependency does not sufficiently take into account the vulnerability of family members of refugees, such as disability, gender or other factors; nor does it take into account the impact and consequences of conflict and displacement on refugees' lives, which can lead to family structures changing and to new or renewed dependency among family members.¹⁷

2.8. In multiple cases, the IND has taken the continuing separation of family members, resulting from the sponsor's flight from the country of origin and lasting throughout the asylum procedure, as part of the evidence of a lack of dependency, finding that the family members have been able to support themselves and are, thus, not sufficiently dependent on the family member in the Netherlands.¹⁸ In 2020, in a case concerning a son who had generated some very limited income in Syria to support his mother with the family's household expenses (i.e. rent, food) after his father had fled the country, the Council of State ruled that the IND had erred in finding that this job was evidence that the son was not dependent on his family members and that the IND had failed to sufficiently consider that conflict, flight from the country of origin and forced displacement, and not the wish to be independent, may compel a family member to work in order to try to support him or herself.¹⁹ The Council of State further ruled that the IND had not sufficiently taken into account the personal circumstances of family members involved, including the family's statelessness.²⁰

3. Principles of international refugee and human rights law regarding family life and the concept of dependence in the context of family reunification of refugees

3.1. The right to family life for refugees and the definition of "family"

3.1.1. The right to family life is recognized as an essential right under international human rights law. The Universal Declaration of Human Rights recognizes that "the family is the natural and fundamental group unit of society", which is "entitled to protection by society and the State".²¹ This fundamental principle is reiterated in and given binding effect by other international human rights instrument which contain similar provisions.²² In addition, international human rights bodies have adopted a broad understanding of "family". The Human Rights Committee has affirmed that the term should "be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned".²³ The UN Committee on the Rights of the Child (CRC) and the UN Committee on Migrant Workers call on States to "comply with their international legal obligations in terms of maintaining family unity, including siblings".²⁴

3.1.2. While the 1951 Convention does not specifically refer to family reunification, the Final Act of the UN Conference of Plenipotentiaries at which the Convention was adopted affirmed "that the unity of the family [...] is an essential right of the refugee" and issued a specific recommendation that Governments "take the necessary measures for the protection of the refugee's family, especially with a view to ensuring

¹⁷ UNHCR, No Family Torn Apart, see note 8 above.

¹⁸ See amongst others: Council of State, 27 November 2020, ECLI:NL:RVS:2020:2823, para. 6.1.

¹⁹ Council of State, 1 April 2020, ECLI:NL:RVS:2020:910.

²⁰ Council of State, 1 April 2020, ECLI:NL:RVS:2020:910.

²¹ Article 16(3) of the 1948 *Universal Declaration of Human Rights*.

²² See Article 23(1) ICCPR; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ("UNHCR Handbook"), April 2019, HCR/1P/4/ENG/REV. 4: www.refworld.org/docid/5cb474b27.html, para. 181; See also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.A. v. Denmark (Appl. no. 6697/18) before the European Court of Human Rights*, 21 January 2019, www.refworld.org/docid/5c4591164.html, para. 3.1.1.

²³ Human Rights Committee, *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, www.refworld.org/docid/453883f922.html, para. 5.

²⁴ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, www.refworld.org/docid/5a12942a2b.html, para. 27. See also paras. 32, 37-38.

that the unity of the family is maintained.”²⁵ Furthermore, UNHCR’s Executive Committee (ExCom) has adopted a series of Conclusions that reiterate the fundamental importance of family unity and reunification.²⁶ In particular, ExCom Conclusion No. 24 calls on countries of asylum to “apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family”.²⁷

3.1.3. UNHCR therefore promotes an inclusive family reunification policy and encourages States to allow family reunification for family members beyond the “nuclear family”.²⁸ UNHCR recalls that “nuclear” family members are generally accepted as consisting of spouses and, their minor or dependent, unmarried children and minor siblings. Nuclear family members also include adopted children, whether adopted legally or on a customary basis, foster children, and unmarried dependent adult children who resided with the parents in the country of origin.²⁹ As for “other family members”, UNHCR considers this to include dependent elderly parents of adult refugees, siblings, uncles, aunts, cousins and other non-blood related persons who lived with and were dependent on the family unit in the country of origin, or whose situation has subsequently changed so as to make them dependent upon the refugee.³⁰

3.1.4. Recalling that in many cultures around the world, extended family links can be very strong, UNHCR encourages States to adopt a pragmatic and flexible approach to family reunification.³¹ This is required given that family separation, in the case of refugees, is not a deliberate choice, but rather the result of forced displacement due to persecution and war. In their case, family reunification is often the only way to ensure respect for the right to family unity.³² It is important not to “overlook the reality of people in need of international protection” and that limiting family reunification to spouses and minor children “disregards the profound changes to the family structure which come about as a result of forced displacement. In regions of conflict and following severe crisis, it is not unusual for households to be composed of children whose parents are no longer alive or are missing as a result of the conflict.”³³

3.1.5. The absence of siblings in the definition of family members for the purpose of family reunification prevents orphaned children from being reunited with their siblings and may also prevent young adults who were previously the head of the household in their country of origin to reunite with brothers and/or sisters

²⁵ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1: www.refworld.org/docid/40a8a7394.html; UNHCR Handbook, note 22 above, para. 183.

²⁶ See in particular, ExCom Conclusions No. 9 (XXVIII) on Family Reunion, 1977; No. 24 (XXXII) on Family Reunification, 1981; No. 84 (XLVIII) on Refugee Children and Adolescents, 1997; No. 88 (L), 1999 on the Protection of the Refugee’s Family; No. 104 (LVI), 2005 on Local Integration; and No. 107 (LVIII), 2007 on Children at Risk. See UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th edition, June 2014, <http://bit.ly/2YLY78e>, pp. 223-229. [ExCom Conclusions](#) are adopted by consensus by the States which are Members of ExCom and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 107 States are [Members of the Executive Committee](#), including the Netherlands which has been a member since 1955.

²⁷ UNHCR ExCom, Conclusion No. 24 on Family Reunification, para. 5.

²⁸ UNHCR, *Families Together, Family Reunification for Refugees in the European Union* (“UNHCR, Families Together”), <https://www.unhcr.org/uk/5f5743f84.pdf>, pp. 12-13. See also UNHCR, Background note for the agenda Item: family reunification in the context of resettlement and integration - protecting the family: challenges in implementing policy in the resettlement context. Annual Tripartite Consultations on Resettlement Geneva, 20-21 June 2001, <https://www.unhcr.org/protection/resettlement/3b30baa04/background-note-agenda-item-family-reunification-context-resettlement-integration.html>, para. 1(c).

²⁹ 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)* (“UNHCR Response to Green Paper”), February 2012, www.refworld.org/docid/4f55e1cf2.html, pp. 7-8; UNHCR, No Family Torn Apart, note 8 above, p. 39.

³⁰ UNHCR, *UNHCR Resettlement Handbook, 2011*, July 2011, <http://bit.ly/2KjLlhm>, pp. 271-274; UNHCR Response to Green Paper, note 28 above, pp. 7-8; UNHCR, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, January 2018, 2nd edition: www.refworld.org/docid/5a9029f04.html, p. 34.

³¹ UNHCR, *Note on the Integration of Refugees in the European Union* (“UNHCR Note on Integration”), May 2007, www.refworld.org/docid/463b24d52.html, para. 36.

³² UNHCR, No Family Torn Apart, see note 8 above, p. 19.

³³ Red Cross EU Office and European Council on Refugees and Exiles, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, November 2014, www.refworld.org/docid/58514a054.html, p. 11.

who were dependent on them.³⁴ Some States have already adopted positive practices and provide for the possibility of sibling family reunification where they are dependent.³⁵

3.1.6. As noted in the 2017 UNHCR Summary Conclusions on the Right to Family Life, “[w]hen refugees are separated from family members as a consequence of their flight, a prolonged separation can have devastating consequences on the wellbeing of the refugees and their families. The negative consequences impact on the refugees’ ability to integrate in their country of asylum, become active contributors to the society, and rebuild their lives.”³⁶ By contrast, the restoration of the family unit can help to ease the sense of loss often experienced by persons in need of international protection who have had to abandon their countries of origin, communities and previous ways of life. In UNHCR’s experience, the possibility of being reunited with one’s family is therefore vital for integration.³⁷

3.1.7. This Court has recognized this specificity of family reunification of refugees, and acknowledged that in their case, family separation is caused by flight, and family reunification is the only way to re-establish family life.³⁸ Consequently, and in line with UNHCR’s position outlined above, it has recognized 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”.³⁹ In such situations, UNHCR recalls that Article 8 ECHR may create positive obligations inherent in the effective “respect” for family life.⁴⁰ As for the concept of “family life” under Article 8 ECHR, it is rooted in real personal ties, not formal legal relationships. As the Court has held, whether family life exists “is essentially a question of fact depending on the real existence in practice of close personal ties”.⁴¹ The Court has thus recognized family life between foster parents and children due to the close inter-personal bond, even in the absence of a recognized parental relationship,⁴² as well as between extended family members where more than the normal emotional ties existed.⁴³ Family life can therefore also exist between siblings.⁴⁴ Between adult siblings, the Court has however regularly required evidence of further elements of dependency, involving more than normal emotional ties.⁴⁵ Furthermore, the Court has found that family life existed between an aunt and her adult niece, who lived with her and was dependent as a result of her vulnerable mental state.⁴⁶

³⁴ UNHCR Response to Green Paper, note 28 above, p. 9; UNHCR, *Families Together*, see note 28 above, pp. 12-13.

³⁵ Bulgaria, Croatia, Denmark, Finland, Iceland, Ireland, Romania, Spain and Sweden provide for sibling reunification in certain circumstances, usually on account of dependency. See UNHCR, *Families Together*, see note 28 above, pp. 12-13. See also, UNHCR Response to Green Paper, note 28 above, p. 9; see also Frances Nicholson, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, January 2018, 2nd edition: www.refworld.org/docid/5a902a9b4.html, p. 39 ff.

³⁶ UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection*, 4 December 2017, Expert Roundtable, www.refworld.org/docid/5b18f5774.html, para. 1.

³⁷ UNHCR Note on Integration, note 30 above, paras. 35-36.

³⁸ *Tanda-Muzinga c. France*, Appl. no. 2260/10, ECtHR, 10 July 2014, www.refworld.org/cases,ECHR,53be80094.html, para. 74; *Mugenzi c. France*, Appl. no. 52701/09, ECtHR, 10 July 2014, www.refworld.org/cases,ECHR,53be81784.html, para. 53.

³⁹ *Tanda-Muzinga c. France*, note 38 above, para. 75; *Mugenzi c. France*, note 38 above, para. 54.

⁴⁰ As the Court has ruled, the principles applicable to such obligations are comparable to those which govern negative obligations. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and the community as a whole; and in both contexts the State enjoys a certain margin of appreciation. See *Sen c. the Netherlands*, Appl. no. 31465/96, ECtHR, 21 December 2001, <http://hudoc.echr.coe.int/eng?i=001-64569>, para. 31.

⁴¹ *Kopf and Liberda v. Austria*, Appl. no. 1598/06, 17 January 2012, ECtHR, <http://hudoc.echr.coe.int/fre?i=001-108686>, para. 35.

⁴² *Moretti and Benedetti v. Italy*, Appl. no. 16318/07, ECtHR, 27 April 2010, <http://hudoc.echr.coe.int/eng?i=001-9844>, paras. 48-50; and *Kopf and Liberda v. Austria*, note 41 above, para. 37.

⁴³ Criteria are, *inter alia*, a sufficient constancy of the relationship, living together, the enjoyment of each other’s company, etc. See, for example, *A.W. Khan v. the United Kingdom*, Appl. no. 47486/06, ECtHR, 12 January 2010, www.refworld.org/cases,ECHR,4b4f05c02.html, para. 32 [adult child]; *Javeed v. the Netherlands (dec.)*, Appl. no. 47390/99, ECtHR, 3 July 2001, www.refworld.org/cases,ECHR,584a94e44.html [nieces].

⁴⁴ *Moustaquim v. Belgium*, Appl. no. 12313/86, 18 February 1991, ECtHR, <http://hudoc.echr.coe.int/eng?i=001-57652>, para. 36.

⁴⁵ *Mokrani v. France*, Appl. no. 52206/99, ECtHR, 15 July 2003, <http://hudoc.echr.coe.int/eng?i=001-65778>, para. 33; *Onur v. the United Kingdom*, Appl. no. 27319/07, ECtHR, 17 February 2009, <http://hudoc.echr.coe.int/eng?i=001-91286>, para. 45; *Slivenko v. Latvia* [GC], Appl. no. 48321/99, ECtHR, 9 October 2003, <http://hudoc.echr.coe.int/eng?i=001-61334>, para. 97; *A.H. Khan v. the United Kingdom*, Appl. no. 47486/06, ECtHR, 20 December 2011, www.refworld.org/cases,ECHR,4b4f05c02.html, para. 32.

⁴⁶ *F.N. v. the UK*, Appl. no. 3202/09, ECtHR, 17 September 2013, www.refworld.org/cases,ECHR,583ff73d4.html.

Where young adults have not yet founded a family of their own, the Court has also accepted family life between them and their parents or other close family members.⁴⁷

3.1.8. This inclusive interpretation finds further support in Council of Europe standards. Following the Court's ruling that there can be family life between grandparents and their grandchildren,⁴⁸ the Council of Europe considers that "[t]he same applies to siblings who have taken the role of a parent in taking care of each other."⁴⁹ Notably, the European Social Charter requires States "to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory."⁵⁰ The potential scope of this provision has been developed in recent years. The European Committee of Social Rights (ECSR) has clarified that the rights under the Charter "are to be enjoyed to the fullest extent possible by refugees" and that States' obligations under the Charter "require a response to the specific needs of refugees and asylum seekers, such as [...] the liberal administration of the right to family reunion."⁵¹ In 2018, the Parliamentary Assembly of the Council of Europe called on States to "adopt an enabling approach to family reunification" and to apply a family definition that goes "beyond the traditional definition of family which does not necessarily correspond to the multitude of ways in which people live together as a family today."⁵² Most recently, the Council of Europe issued a comprehensive set of standards and practices, and recalls the "need for a more inclusive definition of the family in order to provide for an effective protection of the right to respect for family life to fit the diversity of family situations (dependency, tradition or custom)."⁵³

3.1.9. EU law also authorizes Member States to adopt a broader notion of family for the purpose of family reunification. The FRD explicitly allows EU Member States to expand its scope to other dependent family members,⁵⁴ and the Dublin III Regulation considers siblings to be family members for the purpose of ensuring family unity.⁵⁵ The Court of Justice of the EU (CJEU) has ruled that the FRD's objective is to promote family reunification,⁵⁶ and that it must be applied "in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law."⁵⁷ The European Commission has encouraged Member States "to use their margin of appreciation in the most humanitarian way".⁵⁸

⁴⁷ *Maslov v. Austria* [GC], Appl. no. 1638/03, ECtHR, 23 June 2008, www.refworld.org/docid/5852a8b97.html, para. 62; *A.A. v. United Kingdom*, Appl. no. 8000/08, ECtHR, 20 September 2011, www.refworld.org/docid/583edcf1124.html, paras. 46-49. While such "family life" was not accepted in *A.W. Khan v. UK*, note 43 above, the applicant in this case had children of his own, and had thus founded his own family. See also Swedish Migration Court of Appeal, UM 795-12, MIG 2013:16, 18 September 2013, <https://bit.ly/3vRCcCs> [adult son covered by the principle of family unity], where the Court assesses the case with reference to the principle of family unity under international law, citing paras. 181-188 of the UNHCR Handbook, note 22 above, as well as Article 8 ECHR.

⁴⁸ *Marckx v. Belgium*, Appl. no. 6833/74, ECtHR, 13 June 1979, www.refworld.org/cases,ECHR,3ae6b7014.html, para. 45.

⁴⁹ Council of Europe, *Family Reunification for Refugee and Migrant Children, Standards and promising practices* ("Council of Europe, Family Reunification for Refugee and Migrant Children"), April 2020, <https://rm.coe.int/family-reunification-for-refugee-and-migrant-children-standards-and-pr/16809e8320>, p. 27.

⁵⁰ Article 19(6) of the European Social Charter, see Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, www.refworld.org/docid/3ae6b3784.html.

⁵¹ Council of Europe: European Committee of Social Rights, *European Social Charter - Conclusions 2015*, January 2016, www.refworld.org/docid/5c0e96354.html, p. 8.

⁵² Council of Europe: Parliamentary Assembly, *Family Reunification of Refugees and Migrants in the Council of Europe Member States*, 11 October 2018, Resolution 2243, www.refworld.org/docid/5c5981284.html, para. 3.

⁵³ Council of Europe, Family Reunification for Refugee and Migrant Children, note 49 above, p. 42. See also Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe* ("Council of Europe, Realising family reunification"), June 2017, www.refworld.org/docid/5a0d5eae4.html, p. 8.

⁵⁴ Article 10(2) FRD.

⁵⁵ Recital 16, Articles 6(4) and (5), 8, 11 and 15 Dublin III Regulation, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013; see also Article 31(4) EU Qualification Directive, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

⁵⁶ *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C578/08, CJEU, para. 43.

⁵⁷ *Chakroun*, note 56 above, para. 44.

⁵⁸ European Commission, *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, 3 April 2014, COM/2014/0210 final, www.refworld.org/docid/583d7d0b7.html, p. 22.

3.2. The concept of dependency

3.2.1. In order to address obstacles to family reunification, UNHCR recommends the application of “a broader definition of family, prioritizing dependency as the primary criterion”.⁵⁹ UNHCR uses the following definition:

*“Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. [T]he concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.”*⁶⁰

3.2.2. While the relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration, dependency does not require exclusive, complete and utter dependence, such as that of a parent and minor child, but can be mutual or partial dependence.⁶¹

3.2.3. For UNHCR, this “relationship of social, emotional or economic dependency” is presumed between close family members. For other family members, it must be established on a case-by-case basis. In particular, dependency of children may continue after they reach the age of majority if they remain within the family unit and retain economic, social and emotional bonds. Dependency should also be recognized if a person has a disability and is incapable of self-support, either permanently or for a period expected to be of long duration.⁶²

3.2.4. The dependency determination requires a detailed examination of all available evidence, must be culturally sensitive and take into account the specific context of refugees, as well as their personal circumstances which make the reasons for dependency compelling.⁶³ Given the disruptive factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who may not fit neatly into preconceived notions of a nuclear family but who depend on each other for mutual support and survival. This requires a broader definition of dependency, namely one that includes not only financial but also physical, psychological, and emotional attachment.⁶⁴ Emotional dependency should therefore factor equally with financial dependency.⁶⁵

3.2.5. Relying *inter alia* on UNHCR’s position, the Court has recalled 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”.⁶⁶ The Court’s case law on “additional elements of dependency”⁶⁷ should therefore be applied with the necessary flexibility in order to pay specific attention to refugees’ “particularly difficult personal experience”.⁶⁸ In line with UNHCR’s position that not only material assistance should be taken into account, the Court also considers contributions made to a child’s care and upbringing and quality and regularity of contact,⁶⁹ the degree of the family member’s (mental) health issues and whether there is other care available, in particular whether the sponsor is the only surviving relation;⁷⁰ whether the dependent has not yet founded a family of his or her own;⁷¹ and whether

⁵⁹ UNHCR, Families together, see note 28 above, p. 35.

⁶⁰ UNHCR Resettlement Handbook, note 30 above, p. 178.

⁶¹ UNHCR Response to Green Paper, note 28 above, fn 22.

⁶² UNHCR Response to Green Paper, note 28 above, pp. 7-8.

⁶³ UNHCR, No Family Torn Apart, see note 8 above, p. 45; UNHCR Response to Green Paper, note 28 above, pp. 7-8. See also Recital 8 FRD.

⁶⁴ UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe* (“UNHCR Refugee Integration and Indicators”), December 2013, www.refworld.org/docid/532164584.html, p. 71.

⁶⁵ UNHCR Refugee Integration and Indicators, note 64 above, p. 71; UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, www.refworld.org/docid/4ae9aca12.html, p. 1.

⁶⁶ *Tanda-Muzinga c. France*, note 38 above, para. 75; *Mugenzi c. France*, note 38 above, para. 54.

⁶⁷ See, e.g. *Slivenko v. Latvia* [GC] and *A.H. Khan v. the United Kingdom*, both note 45 above. See above cases, at note 42 ff.

⁶⁸ *Tanda-Muzinga c. France*, note 38 above, para. 75; *Mugenzi c. France*, note 38 above, para. 55.

⁶⁹ *Onur v. United Kingdom*, Appl. no. 27319/07, ECtHR, 17 February 2009, <http://hudoc.echr.coe.int/eng?i=001-91286>, para. 44.

⁷⁰ *A.W. Khan v. the UK*, note 38 above, *F.N. v. the United Kingdom*, note 46 above.

⁷¹ *A.A. v. the UK*, note 47 above.

there are insurmountable obstacles preventing the family from living in the country of origin⁷² (which must be assumed in the case of refugees).

3.2.6. In interpreting the above principles of international refugee and European law, national courts have also provided relevant guidance on the concept of dependency.⁷³ In a case concerning a Somali refugee who had unsuccessfully sought family reunification with her niece and nephew, who had been orphaned as infants and had been part of her family ever since, the Irish High Court ruled, after assessing international guidance, that “[t]here is thus objective support for the contention that “dependency” is not confined to total financial dependence but involves a wider concept taking account of all relevant economic, social, personal, physical, familial, emotional and cultural bonds between the refugee and the family member who is the subject of the FRU application.”⁷⁴ In another noteworthy judgment, concerning a Somali refugee seeking to bring his mother, wife, daughter, and siblings to join him, the Irish High Court found that the “central and often exclusive focus placed on financial dependency in family reunification decisions [was] misplaced”, highlighted that the family has always lived together as a family unit, and that the sponsor was, “it would appear, the father figure in his own marital family and in the family of his birth” – a manifestation of dependency which the authority had failed to assess.⁷⁵

3.2.7. The Council of Europe Commissioner for Human Rights (CoE CHR) has adopted a broad approach to dependency and has recommended that CoE Member States ensure that the concept “allows for a flexible assessment of the emotional, social, financial, and other ties and support between refugees and family members.” In addition, the CoE CHR considers that “[i]f those ties have been disrupted due to factors related to flight, they should not be taken to signal that dependency has ceased.”⁷⁶

3.2.8. EU law recognises that dependency can be based on various circumstances. The FRD broadly authorises family reunification of other family members where they are “dependent on the refugee”⁷⁷ and in particular, notes that family reunification may be granted for adult unmarried children “where they are objectively unable to provide for their own needs on account of their state of health”.⁷⁸ The CJEU has held that the status of a “dependent” family member is the result of a factual situation characterized by the sponsor’s legal, financial, emotional or material support for that family member and “the extent of economic or physical dependence and the degree of relationship”.⁷⁹ These considerations, originally

⁷² *F.N. v. the United Kingdom* note 46 above; *A.S. v. Switzerland*, Appl. no. 39350/13, ECtHR, 30 June 2015, <http://hudoc.echr.coe.int/eng?i=001-155717>, para. 47.

⁷³ See, e.g., Swedish Migration Court of Appeal, note 47 above, where the Swedish MCA interpreted Article 8 ECHR (relying in particular on *A.A. v United Kingdom*) and UNHCR’s guidance to conclude in favour of an adult man being dependent on his mother. See also the Luxembourg Administrative Tribunal, 37507, 31 January 2017, <https://bit.ly/3ra10SP>, where the Tribunal found that dependency was established between an adult and her mother, due to clear economic dependency of the mother. See also *K*, C245/11, CJEU, where the referring Austrian Asylgerichtshof is quoted as having ruled that an applicant’s daughter-in-law was dependent on the applicant, as she had a new-born baby and suffered from a serious post-traumatic illness with the applicant being her confidante and closest friend.

⁷⁴ *Casha Digale Ducale & Anor v Minister for Justice and Equality & Anor* [2013] IEHC 25, Ireland: High Court, 22 January 2013, [https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original Judgment - High Court - Ducale v Min 2013 IEHC 25.pdf](https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20Judgment%20-%20High%20Court%20-%20Ducale%20v%20Min%202013%20IEHC%2025.pdf) <https://bit.ly/3lCyKXT>.

⁷⁵ *A.M.S. v. The Minister for Justice and Equality*, [2014] IEHC 57, Ireland: High Court, 13 February 2014, www.refworld.org/docid/5319c49d4.html, paras. 6, 41 and 61.

⁷⁶ Council of Europe, Realising family reunification, note 53 above, p. 8.

⁷⁷ Article 10(2) FRD.

⁷⁸ Article 4(2)(b) FRD. See also the Recital 19 EU Qualification Directive, which refers to the necessity “to broaden the notion of family members, taking into account the *different particular circumstances of dependency*” (emphasis added), and the Dublin III Regulation which indeed broadens this notion by including siblings and offers a concrete definition of dependency in its Article 16(1): “Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.” See also Recital 16, referring to the aim of ensuring full respect with the principle of family unity.

⁷⁹ *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman, Fazly Rabby Islam & Mohibullah Rahman*, C-83/11, CJEU, 5 September 2012, <https://www.refworld.org/cases/E CJ.58c15b054.html>, para. 23. See also *TB*, C-519/18, CJEU, 12 December 2019, <https://curia.europa.eu/juris/liste.jsf?num=C-519/18>, para. 19, where the referring Hungarian Supreme Court is quoted as remarking “it is apparent from the case-law of the Court of Justice that the concept of dependence implies not only

developed in cases concerning the Free Movement Directive, were later considered also in FRD cases, with the CJEU adding that in such cases, “regard must also be had to the fact that [...] special attention should be paid to the situation of refugees, since they have been obliged to flee their country and cannot conceivably lead a normal family life there”.⁸⁰ The CJEU thus defines dependency in the FRD context as a situation where the family member is:

“genuinely dependent in the sense that, first, having regard to his or her *financial and social conditions*, the family member is *not in a position to support himself or herself* [...] and, secondly, it is ascertained that the family member’s material support is actually provided by the refugee, or that, *having regard to all the relevant circumstances*, such as the degree of relationship of the family member concerned with the refugee, the nature and solidity of the family member’s other family relationships and the age and financial situation of his or her other relatives, the *refugee appears as the family member most able to provide the material support required*.”⁸¹

As for the concrete examination, the CJEU requires:

“Specifically, the examination on a case-by-case basis of the application must take into account, in a *balanced and reasonable manner*, all the relevant aspects of the personal situation of a refugee’s [family member], such as her *age, level of education, professional and financial situation, and state of health*. The national authorities must also take account of the fact that the extent of needs can vary greatly depending on the individual [...], and also of the *special situation of refugees*”.⁸²

3.3. The requirement of swift family reunification procedures

3.3.1. In addition to the need for a broad and flexible definition of the concept of “family” and the definition of family members, UNHCR’s ExCom has repeatedly emphasized that States should “ensure that the reunification of separated refugee families takes place with the least possible delay.”⁸³ Being able to reunite with family members is often essential in helping refugees rebuild their lives and provides critical support as they adapt to new and challenging circumstances. In addition, as emphasized by the CoE CHR, “[t]he urgency of family reunification lies also in the fact that families left behind are often at great risk – in particular if they remain in conflict zones or are living precariously in countries in the region of conflict, where the protection available often falls well below international legal standards.”⁸⁴

3.3.2. Delays in family reunification procedures may run counter to States’ obligations under international and European law. The CRC requires that family reunification applications by children or their parents “shall be dealt with by States Parties in a positive, humane and expeditious manner”,⁸⁵ and the CoE Committee of Ministers in its Recommendation No. 23 require the same for all family reunification requests of refugees, whether they involve children or not.⁸⁶ As noted by UNHCR, “the

material dependence, but also physical and intellectual dependence, with the relationship of dependence thus being able to be characterised as a complex relationship of dependence the material burden of which is but one aspect.”

⁸⁰ *TB*, note 79 above, paras. 49-50. See also *K and B*, C380/17, EU:C:2018:877, para. 53.

⁸¹ *TB*, note 79 above, paras. 52, emphasis added.

⁸² *TB*, note 79 above, paras. 75, emphasis added. For dependency in the Dublin context, see also *K*, C245/11, CJEU, 6 November 2012, <https://curia.europa.eu/juris/liste.jsf?num=C-245/11&language=EN>, where the Court ruled that in a situation of dependence [a daughter-in-law dependent for serious health reasons, in this case], non-core family members should be kept together, see para. 44. For dependency between children who are EU citizens and their third country national parents, see *K.A. and Others*, C82/16, where the Court rules that in assessing this dependence, account must be taken “of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium” (para. 72).

⁸³ UNHCR intervention in *M.A. v. Denmark*, note 22 above, para. 3.1.5.

⁸⁴ Council of Europe, Realising family reunification, note 53 above, p. 13.

⁸⁵ Article 10(1) CRC.

⁸⁶ 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

effective implementation of obligations of States requires that all reasonable steps be taken in good faith” and that family reunification is made possible “without unreasonable delay.”⁸⁷ This Court has ruled that refugee family reunification applications must be “examined rapidly, attentively and with particular diligence”.⁸⁸ Long delays and the authorities’ failure to take account of the specific situation of the applicants have led the Court to find a violation of Article 8 ECHR where the decision making process had not shown the requisite guarantees of “flexibility, promptness and effectiveness” required to respect his right to family life.⁸⁹ As for the CJEU, it recently clarified that delays in the family reunification procedure must not be at the expense of the applicant, as the right to family reunification cannot depend on “random and unforeseeable circumstances, entirely attributable to the competent national authorities and courts”, such as processing time.⁹⁰ Another interpretation would not be in line with the principles of equal treatment and legal certainty. Thus, according to the CJEU, the fact that an applicant has reached the age of majority during the proceedings is irrelevant.⁹¹

4. Conclusion

4.1. As widely recognised in international and European law and jurisprudence, “family life” must be interpreted broadly in the case of refugees, who have been obliged to flee their country and cannot conceivably lead a normal family life there. The concept of “family” and the definition of family members must be culturally sensitive and must take into account the reality of refugees’ lived experiences and current situation. Where “family life” exists under this broader definition, UNHCR considers that Article 8 ECHR may create a positive obligation to grant family reunification.

4.2. Regarding the concept of dependency, UNHCR submits that States should undertake a detailed assessment of all relevant facts and circumstances, taking into account social, emotional and/or economic factors. The reality of the refugees’ experience, which may lead to a reformed or reconstructed family unit and family ties as a result of conflict and flight, should be considered both in assessing family life and in assessing dependency between family members. A narrow approach, which does not fully consider the above referenced aspects of the definition of family life and the concept of dependency, may be at variance with the right to family unity as protected by international and European law.

4.3. Finally, States should ensure that the reunification of separated refugee families takes place with the least possible delay. The effective implementation of States’ obligations requires that all reasonable steps be taken in good faith and that family reunification is made possible without unreasonable delay. This is an essential guarantee for refugees, for whom family reunification is often the only way to re-establish family life.

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1999, Rec(99)23, www.refworld.org/docid/3ae6b39110.html, Recommendation 4. See also, UNHCR, *Summary Conclusions on Family Unity* (“UNHCR Summary Conclusions 2001”), November 2001, <https://www.unhcr.org/protection/globalconsult/3c3d556b4/summary-conclusions-family-unity.html>, para. 11.

⁸⁷ UNHCR Summary Conclusions 2001, note 86 above, para. 11.

⁸⁸ *Tanda-Muzinga c. France*, note 38 above, para. 73; *Mugenzi c. France*, note 38 above, para. 52.

⁸⁹ *Tanda-Muzinga c. France*, note 38 above, para. 82; *Mugenzi c. France*, note 38 above, para. 62. And as the CoE highlights, there are a number of cases currently pending before the Court, where the applicants claim excessively long family reunification procedures amounted to a violation of Article 8 ECHR. See Council of Europe, *Family Reunification for Refugee and Migrant Children*, note 49 above, p. 35.

⁹⁰ *B.M.M and Others*, C133/19, C136/19 and C137/19, CJEU, 16 July 2020, <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-133/19>, para. 43.

⁹¹ *B.M.M and Others*, note 90 above, para. 44.