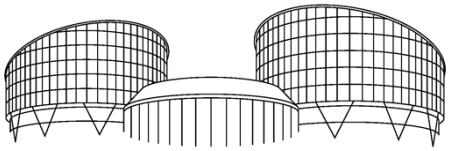

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF M.A. v. DENMARK

(*Application no. 6697/18*)

JUDGMENT

Art 8 • Positive obligations • Family life • Unjustified statutory three-year waiting period for family reunification of persons benefitting from subsidiary or temporary protection status, not allowing individualised assessment • Wide margin of appreciation to be accorded to States in deciding whether to impose a waiting period • Insurmountable obstacles to family life progressively assuming more importance in the fair-balance assessment for waiting periods beyond two years • Decision-making process required to include fair-balance assessment and to safeguard flexibility, speed and efficiency • Three-year rule not revised after the sharp fall in the number of asylum-seekers • Long period of separation from family member left in a country characterised by violent attacks and ill-treatment, with insurmountable obstacles to reunification in country of origin • Fair balance not struck between relevant interests at stake

STRASBOURG

9 July 2021

This judgment is final but it may be subject to editorial revision.

In the case of M.A. v. Denmark,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President,*
Jon Fridrik Kjølbro,
Ksenija Turković,
Paul Lemmens,
Síofra O'Leary,
Yonko Grozev,
Faris Vehabović,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Pere Pastor Vilanova,
Georgios A. Serghides,
Jolien Schukking,
Péter Paczolay,
María Elósegui,
Lorraine Schembri Orland, *judges,*

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 10 June 2020, 10 March and 12 May 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The application concerns the Danish authorities' temporary refusal to grant the applicant's wife a residence permit in Denmark based on family reunification. In particular the applicant complained that persons like him, who had been granted "temporary protection" in Denmark, were subject to a statutory three-year waiting period before being granted family reunification (unless exceptional reasons existed), whereas other persons being granted international protection in Denmark were not subject to such a restriction. The applicant relied on Article 8 read alone and in conjunction with Article 14.

PROCEDURE

2. The case originated in an application (no. 6697/18) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms

("the Convention") by a Syrian national, Mr M.A. ("the applicant"), on 30 January 2018. The President of the Grand Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

3. The applicant was represented by Mr Christian Dahlager, a lawyer practising in Copenhagen. The Danish Government ("the Government") were represented by their Agent, Mr Michael Braad, from the Ministry of Foreign Affairs, and their Co-Agent, Mrs Nina Holst-Christensen, from the Ministry of Justice.

4. The applicant alleged that the final refusal by the Danish authorities on 16 September 2016 to grant him family reunification with his wife in Denmark had been in breach of Article 8 of the Convention, read alone and in conjunction with Article 14.

5. The case was allocated to the Fourth Section of the Court, pursuant to Rule 52 § 1 of the Rules of Court. It was communicated to the Government on 7 September 2018.

6. The applicant and the Government filed observations on the admissibility and merits of the application.

7. On 19 November 2019 the Chamber of the Fourth Section, composed of Faris Vehabović, President, Jon Fridrik Kjølbro, Iulia Antoanella Motoc, Carlo Ranzoni, Georges Ravarani, Péter Paczolay, Jolien Schukking, judges, and Andrea Tamietti, Deputy Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to such relinquishment (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

9. The Commissioner for Human Rights of the Council of Europe exercised her right under Article 36 § 3 of the Convention to intervene in the proceedings before the Grand Chamber and submitted written observations.

10. Leave to intervene, under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court, was granted to the Governments of Norway and Switzerland, the United Nations High Commissioner for Refugees and the Danish Institute for Human Rights.

11. A hearing took place in the Human Rights Building, Strasbourg, on 10 June 2020 (Rule 59 § 3); on account of the public-health crisis resulting from the Covid-19 pandemic, it was held via video-conference. The webcast of the hearing was made public on the Court's Internet site on the following day.

There appeared before the Court:

(a) *for the Government*

Mr M. BRAAD, Ministry of Foreign Affairs, *Agent*,
Mrs N. HOLST-CHRISTENSEN, Ministry of Justice, *Co-Agent,*

Mrs L. ZEUNER, Ministry of Immigration and Integration,
Mrs M-L. LINDSAY-POULSEN, Ministry of Immigration and Integration,
Mrs A-S. SAUGMANN-JENSEN, Ministry of Justice,
Mrs Ø. AKAR, Ministry of Immigration and Integration,
Mr C. WEGENER, Ministry of Foreign Affairs,
Mr N.R. BRANDT, Ministry of Immigration and Integration,
Mrs S. LARSEN VAABENGAARD, Ministry of Justice,
Mrs S. BACH ANDERSEN, Ministry of Foreign Affairs, *Advisers.*

(b) for the applicant
Mr C. DALAGER, Lawyer,
Mrs D. KYNDE NIELSEN, Lawyer, *Counsel*.

(c) *for the Office of the Commission for Human Rights*
Mrs D. MIJATOVIĆ, Commissioner for Human Rights, *Agent*,
Mrs A. WEBER, Adviser to the Commissioner *Adviser.*

(d) *for the Swiss Government*
Mr A. CHABLAIS, Head of the International Unit for Protection of Human Rights, *Agent*,
Mrs D. STEIGER LEUBA,
Mrs K.M. HAMANN, *Advisers*.

The Court heard addresses by Mr Braad, Mr Dahlager, Mrs Mijatovic and Mr Chablais. The Court also heard replies from the representatives of the parties to questions from judges.

THE FACTS

12. The applicant is a Syrian national, born in 1959, who fled Syria in January 2015. He entered Denmark in April 2015 and requested asylum.

13. In his interview with the Immigration Service (*Udlændingestyrelsen*) on 11 May 2015, the applicant explained that he had left Syria legally by plane from Damascus, via Beirut, to Istanbul. He had stayed in Istanbul for two months in a rented apartment. His brother, born in 1965, joined him there, and via an agent, they travelled by boat to Greece, and from there, hidden in a truck, to Denmark. The trip had cost him around 7,000 euros (EUR). In support of his request for asylum, he submitted that being a doctor, he was at risk of being subjected to ill-treatment by both the

authorities and the rebel movement. He had twice been stopped at a checkpoint. He also stated that his wife, G.M., born in 1966, whom he had married in 1990, worked as a media consultant. She and their two adult children had remained in Syria.

14. On 8 June 2015 the Immigration Service granted him "temporary protection status" for one year, under section 7(3) of the Aliens Act, concerning individuals who face capital punishment, torture or inhuman or degrading treatment or punishment due to severe instability and indiscriminate violence against civilians in their home country. His residence permit was subsequently extended for one year at a time.

15. The Immigration Service did not find that the applicant fulfilled the requirements for being granted protection under section 7(1) of the Act (individuals falling under the protection of the UN Refugee Convention, "Convention status") or under 7(2) (individuals, who do not qualify as refugees under the UN Refugee Convention, but who are facing capital punishment, torture or inhuman or degrading treatment or punishment, if returned to their home country, "protection status"). At the relevant time, residence permits under subsections 1 and 2 were normally granted for five years.

16. The applicant appealed against the decision to the Refugee Appeals Board (*Flygtningenævnet*), arguing that he should be granted protection under section 7(1) or (2) of the Aliens Act. By decision of 9 December 2015 the Refugee Appeals Board upheld the Immigration Service's decision to grant the applicant temporary protection under section 7(3). The reasoning was as follows:

> "The majority of the members of the Refugee Appeals Board accept as a fact, based on the information provided by the Immigration Service, that the appellant satisfies the conditions for being granted residence under section 7(3) of the Aliens Act. The majority of the members of the Refugee Appeals Board find that the appellant has failed to render it probable that he has placed himself in such an adversarial position to the Syrian authorities or to the opposition of the regime due to his specific and personal circumstances that he risks persecution or ill-treatment falling within section 7(1) or section 7(2) of the Aliens Act if returned to Syria.
>
> The majority of the Board have emphasised in this context that the appellant was not subjected to specific and personal persecution during his stay in Damascus despite the fact that he was stopped at a checkpoint on two occasions because he is a doctor. In making this assessment, it was taken into account that the appellant was stopped solely for the reason that he was a doctor and that on both occasions he was permitted to continue, and that he had not been called on at his house by authorities or other groups, nor had they otherwise approached him about specific matters.
>
> The majority of the Board accordingly find, regardless of the generally difficult conditions of doctors in Syria, that the appellant cannot be deemed to have caught the attention of the authorities or others in such manner that he falls within section 7(1) or section 7(2) of the Aliens Act. Reference is also made to the circumstance that it is solely based on the appellant's own assumption that [he] will experience problems due to his medical profession. Accordingly, [the applicant] does not satisfy the

> conditions for being granted residence under section 7(1) or section 7(2) of the Aliens Act, for which reasons the Refugee Appeals Board upholds the decision made by the Immigration Service."

Under Danish law, decisions of the Refugee Appeal Board are final and not subject to appeal (section 56 (8) of the Aliens Act).

17. In the meantime, on 4 November 2015, the applicant requested family reunification with his wife and two adult children, who were born in 1992 and 1993 respectively. The children are not part of the proceedings before the Court. In the application the applicant's wife, who at the relevant time was 48 years old, declared that she did not suffer from any serious illness or disability.

18. On 5 July 2016, the applicant's request was rejected by the Immigration Service because he had not been in possession of a residence permit under section 7(3) of the Aliens Act for the last three years as required under section 9(1)(i)(d) of the Act, and because there were no exceptional reasons, including concern for the unity of the family, to justify family reunification under section 9c(1) of the Act. The Immigration Service emphasised that it had not taken a stand on whether other conditions had been fulfilled, including whether the marriage could be legally acknowledged in Denmark.

19. The applicant appealed against the refusal to grant him family reunification with his wife. On 16 September 2016 the Immigration Appeals Board (*Udlændingenævnet*) upheld the decision. It noted in particular that the applicant was in good health, that the applicant's wife had confirmed that she did not suffer from any serious illness or disability and that she was not in need of care provided by others.

20. The applicant instituted proceedings before the courts complaining that the refusal to grant him family reunification with his wife was in breach of Article 8 read alone and in conjunction with Article 14 of the Convention. He submitted that he had been discriminated against as compared to persons who had been granted protection under section 7(1) and (2) of the Aliens Act. By Act 102 of 3 February 2016, the Danish Parliament had amended section 9(1)(i)(d) of the Aliens Act, so that the right to family reunification for a person who, like him, had been granted "temporary protection status" under section 7(3) could be exercised only after three years (in the absence of exceptional reasons), while individuals enjoying "Convention status" or "protection status" could be granted family reunification without being subjected to a waiting period.

21. The High Court of Eastern Denmark (*Østre Landsret*) found against the applicant in a judgment of 19 May 2017.

22. On appeal, by a judgment of 6 November 2017, the Supreme Court (*Højesteret*) also found against him. Sitting as a panel of seven judges, it stated as follows:

"The case involves judicial review of the decision made by the Immigration Appeals Board on 16 September 2016, in which the application for residence in Denmark for [G.M.], the spouse of [M.A.], was rejected. [G.M.] had applied for a residence permit based on her marriage to [M.A.], who had been granted residence in Denmark under section 7(3) of the Aliens Act (temporary protection status due to the general situation in Syria, his country of origin).

The reason for the decision is that [M.A.] had not yet had his residence permit issued under section 7(3) of the Aliens Act for at least the last three years, see section 9(1)(i)(d), and that there were no exceptional reasons, including regard for family unity, for issuing a residence permit under section 9c(1) of the Aliens Act.

[M.A.] has submitted that the refusal of his application for family reunification was contrary to Article 8 read alone and to Article 14 of the European Convention on Human Rights read in conjunction with Article 8, when the decision of the Immigration Appeals Board was made, or at least the refusal is contrary to the Convention at the present time.

The Supreme Court notes in this respect that a judicial review of the Immigration Appeals Board's decision under section 63 of the Danish Constitution (*grundloven*) must be based on the circumstances existing at the time when the decision was made, see, *inter alia*, the Supreme Court decision reproduced on p. 639 of the Weekly Law Reports for 2006 (UfR 2006.639 H).

The issue of the right to respect for family life under Article 8

...

According to the case-law of the European Court of Human Rights, any State is entitled to control immigration into its territory provided that the State complies with its international obligations. Article 8 does not imply a general obligation on the part of a State to respect immigrants' choice of their country of residence or to grant them the right to family reunification on its territory. In a case which concerns family life as well as immigration, the extent of a State's obligations will vary according to the particular circumstances of the person involved and the general interest, see, for example, paras 43 and 44 of the judgment delivered by the Court of Human Rights on 10 July 2014 in *Mugenzi v. France*.

The decision in the case at hand was made in accordance with the provision that persons who are not recognised as refugees according to the UN Refugee Convention, but who cannot return because they risk ill-treatment falling within Article 3 of the Convention on Human Rights because of the general conditions in their country of origin, must normally have held a residence permit for three years before they become eligible for family reunification. A number of other signatory countries to the Convention on Human Rights also have rules stipulating that persons who are granted protection status without being UN Convention refugees can only be granted family reunification after the expiry of a certain period. The European Court of Human Rights has not yet considered to what extent such statutory waiting periods applicable to persons who are granted protection status without being UN Convention refugees are compatible with Article 8.

The Court said in its judgments of 10 July 2014 in *Tanda-Muzinga v. France* and *Mugenzi v. France* that refugees need to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens and that such applications must be examined promptly, attentively and with particular diligence. The applicants in the above two cases were not persons granted temporary protection status, but refugees recognised under the UN Refugee Convention. As a matter of fact, the cases

did not concern a statutory waiting period as in the case at hand, but situations in which the visa application examination procedure had been unreasonably lengthy.

The Court of Human Rights found in its judgment of the same date (10 July 2014) in *Senigo Longue and Others v. France* that Article 8 had been violated in a situation in which the French authorities had, in connection with the examination of an application for family reunification, doubted the applicant's maternal relationship with two children who had been left alone in Cameroon and had taken four years to reach a decision. In that case, the Court said that, despite the margin of appreciation enjoyed by the State, the decision-making process did not sufficiently safeguard the flexibility, speed and efficiency required to observe the right to respect for family life. The applicant in that case was not a refugee, but had come to France as a result of family reunification with her spouse. The case did not concern the period of 18 months that she had to wait under French law before being able to apply for family reunification, but only the long processing time after the application had been lodged.

It follows from the ... Court's case-law that the factors to be taken into account when determining whether a State is obliged to grant family reunification are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion, see, *inter alia*, § 70 of the judgment delivered on 28 September 2011 in *Nunez v. Norway*.

It appears from the *preparatory notes* of section 7(3) and section 9(1)(i)(d) of the Aliens Act that the separate treatment of this group of people whose need for protection is based on the general situation in their country of origin (temporary protection status under section 7(3) and the limited right to family reunification afforded to this group were introduced in the light of the conflict in Syria, which has caused millions of people to flee and has led to a significant increase in the number of new asylum-seekers in Denmark. It also appears from the *preparatory notes* that the Government is ready to assume joint responsibility and safeguard the protection of this group of asylum-seekers for as long as they need protection, but that Denmark is not to accept so many refugees that it will threaten national cohesion. Moreover, it appears that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society.

Against this background, the Supreme Court finds that the restriction on the eligibility for family reunification is justified by interests to be safeguarded under Article 8 of the Convention.

The question is now whether the restriction is necessary in a democratic society in order to safeguard the said interests.

The Supreme Court finds that the situation of [M.A.] is not comparable with the situations considered by the European Court in *Tanda-Muzinga v. France, Mugenzi v. France* and *Senigo Longue and Others v. France*. The first two cases concerned UN Convention refugees, and all three cases concerned long processing times.

The assessment of whether the decision of the Immigration Appeals Board to refuse family reunification is compatible with Article 8 must therefore be based on the general criteria listed by the European Court of Human Rights, see *Nunez v. Norway* (cited above).

[M.A.] had held a residence permit for Denmark for about one year and three months when the application was refused by the Immigration Appeals Board.

Accordingly, he had limited ties in Denmark, and [G.M.], his spouse, has no ties in Denmark.

The Supreme Court accepts as a fact that the couple face insurmountable obstacles to cohabiting in Syria because [M.A.] risks ill-treatment falling within Article 3 if returned to Syria due to the particularly serious situation characterised by arbitrary violence and ill-treatment of civilians. In reality, the refusal of the application for family reunification therefore implies that he is prevented from cohabiting with his spouse, although the barrier to his right to exercise his family life is only temporary.

It follows from the decision of the Refugee Appeals Board of 9 December 2015 that [M.A.] has not placed himself in an adversarial position to the Syrian authorities or to the opposition of the regime due to his specific and personal circumstances so that he risks persecution or ill-treatment falling within section 7(1) or section 7(2) of the Aliens Act and that he has not caught the attention of the Syrian authorities or others in such manner as to fall within those provisions. Therefore, he can return to Syria when the general situation in the country improves. If there is no such improvement within three years from the date on which [M.A.] was granted residence in Denmark, he will normally be eligible for family reunification with his spouse. An application to this effect can be lodged two months prior to expiry of the three-year period, and the Supreme Court accepts as a fact that, in that case, the application will be examined as set out in the preparatory notes of the Act as quickly as possible when he has resided in Denmark for three years and a decision has been made to renew his temporary residence permit under section 7(3). Should exceptional circumstances emerge before the expiry of the three-year period, such as serious illness, which will make the separation from his spouse particularly severe, it will be possible to be granted family reunification under section 9c(1) of the Aliens Act.

Against this background, the Supreme Court finds that the condition that [M.A.] must normally have been resident in Denmark for three years before he can be granted family reunification with his spouse falls within the margin of appreciation enjoyed by the State when balancing the regard for the respect for his family life and the regard for the interests of society, which can be safeguarded according to Article 8.

The Supreme Court finds that the decrease in the number of asylum-seekers in 2016 and 2017 cannot result in a different outcome of the assessment of whether the decision made by the Immigration Appeals Board in the case of [M.A.] was justified. The Supreme Court observes in this respect that it was decided by Act No. 153 of 18 February 2015, which introduced the one-year residence permit requirement as a condition for the right to family reunification, that a review of the Aliens Act should be introduced in the Parliamentary year 2017/2018 at the latest. By Act No. 102 of 3 February 2016, which amended the three-year residence permit requirement, this review clause was maintained. The reason for this amendment given in the preparatory notes is that the Government found that the extraordinary situation with a very large number of asylum-seekers and applications for family reunification in Denmark had made it necessary to tighten rules as proposed.

The Supreme Court therefore concurs in the view that the decision made by the Immigration Appeals Board is not contrary to Article 8 of the European Convention on Human Rights.

The issue of differential treatment under Article 14 of the European Convention on Human Rights read in conjunction with Article 8

The requirement of three years' residence as a condition for family reunification applies to persons like [M.A.] issued with a residence permit under section 7(3) of the

Aliens Act who risk ill-treatment falling within Article 3 of the Convention on Human Rights if returned to their country of origin because the situation in the country of origin is generally characterised by arbitrary violence against civilians. As opposed to those situations, the three-year residence requirement does not apply to aliens issued with a residence permit under section 7(1), because they fall within the Refugee Convention, or under section 7(2), because they risk ill-treatment falling within Article 3 if returned to their country of origin due to their personal circumstances.

Article 14 of the Convention ... prohibits differential treatment based on the rights protected by the Convention, such as sex, race, colour, language, religion, etc. or 'other status'.

[M.A.] had not experienced differential treatment based on sex, race or any other status as expressly listed in Article 14 by the date of the decision made by the Immigration Appeals Board. However, it appears from the ... Court's case-law that a person's immigration status can be any 'other status' falling within Article 14, see § 45 of the judgment of 27 September 2011 in *Bah v. the United Kingdom* and §§ 44 to 47 of the judgment of 6 November 2012 in *Hode and Abdi* v. *the United Kingdom*. It further appears that differential treatment contrary to Article 14 occurs if persons in similar or comparable situations are afforded a more favourable treatment in terms of the rights protected by the Convention and such differential treatment is not based on objective and fair reasons, that is, if the differential treatment is disproportionate to the legitimate aim pursued and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Finally, it appears that the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment and that the scope of this margin will vary according to the circumstances, the subject matter and the background.

According to the preparatory notes to section 9(1)(i)(d) of the Aliens Act, the different rules on family reunification applicable to aliens granted residence under section 7(1) and (2) and aliens like [M.A.] who are granted residence under section 7(3) are justified by the circumstance that aliens granted residence under section 7(1) and (2) are subjected to personal persecution, usually because of a conflict with the authorities or others in their country of origin, whereas aliens granted residence under section 7(3) are not subject to personal persecution but have fled due to the general situation, such as war, in their country of origin. Those individuals therefore do not have a specific conflict with anybody in their country of origin, and the preparatory notes considered it a fact that, in general, this group of individuals have a more temporary need for protection than persons subjected to personal persecution as the situation in their country of origin may quickly change in nature and become more peaceful.

The Supreme Court considers it doubtful whether the situation of [M.A.] is comparable with the situation of aliens granted residence under section 7(1) and (2) of the Aliens Act because they risk persecution due to their personal circumstances if returned to their country of origin. Despite this assumption, the Supreme Court finds that the difference in the right to family reunification, which is, as already mentioned, based on an assessment of the need for protection among different groups of individuals, must be deemed to have been based on objective and fair reasons falling within the margin of appreciation enjoyed by the State in a case concerning differential treatment based on immigration status.

Accordingly, the Supreme Court finds no basis for dismissing the assessment made by the Danish Parliament, according to which, from a general perspective, the need

for protection of persons falling within section 7(3) of the Aliens Act is more temporary than that of persons falling within section 7(1) and (2). The general situation in a person's country of origin, which has justified a temporary need for protection, may quickly change. This is illustrated by the judgments delivered by the Court of Human Rights on 28 June 2011 in *Sufi and Elmi v. the United Kingdom* and on 5 September 2013 in *K.A.B. v. Sweden*.

In assessing whether the restriction on the right of [M.A.] to be granted family reunification in Denmark with his spouse is compatible with Article 14, taken in conjunction with Article 8, the Supreme Court has also emphasised that his separation from his spouse, as mentioned in the above paragraph on Article 8, is only temporary and that he can be granted family reunification at a later point if exceptional reasons apply.

Against this background, the Supreme Court concurs with the view that the decision made by the Immigration Appeals Board is not contrary to Article 14 of the Convention ... taken together with Article 8, either."

23. On 26 April 2018, having resided in Denmark for two years, ten months and two weeks, the applicant submitted a new request for family reunification. His request was refused on 22 October 2018 because the applicant had failed to submit documentation regarding the authenticity of the marriage. Having submitted the necessary documentation, on 24 June 2019 the applicant's wife was granted a residence permit, initially valid for one year. She entered Denmark on 29 September 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

24. The relevant provisions of the Aliens Act read as follows:

Section 7

"(1) Upon application, a residence permit will be issued to an alien if the alien falls within the provisions of the Convention Relating to the Status of Refugees (28 July 1951).

(2) Upon application, a residence permit will be issued to an alien if the alien risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his or her country of origin. An application as mentioned in the first sentence hereof is also considered an application for residence under subsection (1).

(3) In cases falling within section 7(2) in which the alien's risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment is based on a particularly serious situation in his or her country of origin characterised by arbitrary violent attacks and ill-treatment of civilians, temporary residence will be granted upon application. An application as mentioned in the first sentence hereof is also considered an application for residence under subsections (1) and (2)."

25. In 2015, protection under section 7(1) and (2) was granted for five years at a time. Protection under section 7(3) was initially granted for one year and subsequently, after one year, for two years at a time.

26. In 2016, the Aliens Act was amended, so that protection under section 7(1) was granted for two years at a time; protection under section 7(2) was initially granted for one year at a time and subsequently two years at a time, and protection under section 7(3) was granted for one year at a time the first three years and subsequently for two years at a time.

27. In 2019, by Act No. 174 of 27 February 2019, which entered into force on 1 March 2019, sections 7(1) and (2) of the Aliens Act were amended, inserting the words "for the purposes of temporary residence" after the words "residence permit".

28. Section 9(1)(i) of the Aliens Act regulated the basic criteria for family reunification:

Section 9

"(1) Upon application, a residence permit can be issued to:

(i) an alien over the age of 24 who cohabits at a shared residence, either in marriage or in regular cohabitation of prolonged duration, with a person permanently resident in Denmark over the age of 24 who –

(a) is a Danish national;

(b) is a national of one of the other Nordic countries;

(c) has been issued with a residence permit under section 7(1) or (2) or section 8;

(d) has held a residence permit under section 7(3) for at least the last three years; or

(e) has held a permanent residence permit for Denmark for at least the last three years; ..."

29. Section 9c(1) of the Aliens Act, which provided for a general exception to section 9 where exceptional reasons made it appropriate, had the following wording:

Section 9c

"(1) Upon application, a residence permit can be issued to an alien if exceptional reasons make it appropriate, including regard for family unity and, if the alien is under the age of 18, regard for the best interests of the child. Unless particular reasons make it inappropriate, including regard for family unity and, if the alien is under the age of 18, regard for the best interests of the child, the issue of a residence permit under the first sentence hereof as a result of family ties with a person living in Denmark is subject to the conditions set out in section 9(2) to (24), (34) and (35). The provisions of section 9(26) to (33) and (36) to (42) apply with the necessary modifications."

30. Sections 7(3) and 9(1)(i)(d) of the Aliens Act were introduced by Act No. 153 of 18 February 2015, which entered into force on 20 February 2015. The Act made a distinction between, on the one hand, individuals who were not eligible for Convention status under section 7(1) but who

risked the death penalty or being subjected to torture or inhuman or degrading treatment or punishment if returned to their country of origin (protection status under section 7(2)) and, on the other, individuals who risked the death penalty or being subjected to torture or inhuman or degrading treatment or punishment due to a particularly serious situation in their country of origin characterised by arbitrary violent attacks and ill-treatment of civilians (temporary protection status under section 7(3)). Section 9(1)(i)(d) postponed the right to family reunification in general for individuals with temporary protection status under section 7(3) by one year, with the exception provided for under section 9c(1). Finally, the Act introduced a review clause into section 3 in order to evaluate the amendments during the 2017/2018 Parliamentary year at the latest.

31. The preparatory notes to the bill (Bill No. L72 of 14 November 2014) leading to Act No. 153 of 18 February 2015, stated, among other things:

> "1. Introduction and background
>
> The developments in Syria have caused millions of people to flee their homes. Denmark and various other countries have offered massive aid to help the many people affected by the conflict cope with the unfortunate situation they find themselves in. To date, Denmark has thus provided relief measures worth approximately DKK 800 million to the region. Also, Denmark has already received a significant share of spontaneous asylum-seekers from Syria, and has decided to earmark 140 of the resettlement places for 2014 to quota refugees from Syria.
>
> The Government takes a humane approach to asylum policy and is fundamentally of the view that Denmark should take a share of the responsibility for the world's refugees. At the same time, it is necessary to acknowledge that Denmark cannot offer residency to all those who need help.
>
> In the course of 2014, we have seen a dramatic increase in the number of asylum-seekers arriving in Denmark and our neighbouring countries. Some of the asylum-seekers arriving in Denmark from countries like Syria come from areas with extreme and random ill-treatment of civilians because of the current conflict in the country and are consequently entitled to protection under Article 3 of the European Convention on Human Rights (ECHR).
>
> The Government wants to meet its international obligations and offer this group of asylum-seekers protection for as long as they need it. At the same time, the Government wants to make sure that these aliens, whose need for protection is temporary, can be returned as soon as the situation in their country of origin makes it possible.
>
> In line with the cases previously decided by the Refugee Appeals Board, this group of asylum-seekers are granted a residence permit with protection status under section 7(2) of the Aliens Act, despite the fact that this is not wholly consonant with the original intention behind the provision. With the bill, it is proposed to introduce temporary protection status for aliens whose need for protection is based on a particularly serious situation in their country of origin in connection with an armed conflict or a similar situation. The bill does not extend the right to asylum in Denmark, but makes it easier to return this group of people to their country of origin once the fighting in Syria has calmed down.

It is proposed that aliens falling within the rules on temporary protection should be granted residence permits allowing them to stay temporarily in Denmark. The residence permits can be renewed after one year and subsequently two years after the date of any renewal, in which connection an assessment will be made of whether they still need protection.

Owing to the temporary nature of the protection status, it is further proposed that, in the absence of exceptional circumstances, an alien granted temporary protection should not be eligible for family reunification unless the temporary residence permit is renewed after one year.

The introduction of a temporary protection status for certain aliens will not affect refugees covered by the UN Refugee Convention (see section 7(1) of the Aliens Act) or aliens granted protection under section 7(2) in special individual circumstances which, on their own, would have entitled the relevant individuals to a residence permit under section 7(2) of the Aliens Act – even before the asylum authorities changed the practice with respect to section 7(2) of the Aliens Act as a result of *Sufi and Elmi v. the United Kingdom*. ...

2.4. Family reunification ...

2.4.2. Considerations by the Ministry of Justice

It is proposed that a spouse, cohabitant or children of an alien issued with a residence permit under the proposed section 7(3) and whose residence permit has not been renewed should not be eligible for a residence permit under section 9 of the Aliens Act. The reason is that the nature of the stay in Denmark of an alien issued with a one-year residence permit under the proposed scheme is so uncertain, and the duration of the stay so limited, that the relevant alien's family should generally not be granted residence in Denmark, *inter alia*, for the purposes of maintaining effective immigration control. If the temporary residence permit is renewed, aliens will be eligible for family reunification under section 9 of the Aliens Act, and it will still be possible to be granted family reunification under section 9c of the Aliens Act, see paragraph 2.4.2.1. ...

2.4.2.1. Section 9c(1) of the Aliens Act

Depending on the circumstances, a member of the family of an alien issued with a one-year temporary residence permit under the proposed section 7(3) can obtain a residence permit under section 9c(1) of the Aliens Act if the applicable conditions are met and if so dictated by Denmark's international obligations.

Under section 9c(1), it will thus be possible to be granted residence rights in all cases where Denmark's international obligations so require. In this connection, it is assumed that the immigration authorities meet these obligations and that the immigration authorities thus make a case-by-case assessment, applying relevant case-law from, in particular, the European Court of Human Rights.

The temporary one-year right to reside in Denmark must generally have the consequence that personal links to Denmark will be limited. In the opinion of the Ministry of Justice, it must be assumed that this factor – the short stay in Denmark and the fact that the residence permit is granted for only one year – will carry significant weight in the assessment of whether the relevant aliens will be eligible for family reunification under Article 8 of the ECHR. The assessment will further take into account the fact that this is a scheme which does not permanently prevent aliens from reuniting with their family members, but merely postpones family reunification in the light of the alien's special temporary residence status.

In some cases, it will, however, be necessary to make a specific assessment to determine whether a right to family reunification exists, as only in special situations will family unity considerations carry more weight. This applies, for example, if the person resident in Denmark cared for a disabled spouse in the country of origin before leaving that country of origin or if the person resident in Denmark has seriously ill minor children in the country of origin. In such cases, a refusal to grant family reunification may already have a particularly strong impact in the first year. Also, in relation to children of an alien issued with a residence permit under the proposed section 7(3) of the Aliens Act, there may be situations where the UN Convention on the Rights of the Child, including its Article 3(1) on the best interests of the child, may affect the decision of whether to grant family reunification.

The relationship to Denmark's international obligations is described in further detail in paragraph 5 below. ...

In all cases where an alien applies for family reunification, the immigration authorities will thus assess whether Denmark's international obligations require Denmark to grant the application."

32. Act No. 102 of 3 February 2016, which entered into force on 5 February 2016, amended section 9(1)(i)(d) of the Aliens Act again, extending the generally required period of residence for individuals granted temporary protection status under section 7(3) to qualify for family reunification from one year to three years.

33. The preparatory notes to the bill (Bill No. L87 of 10 December 2015) leading to Act No. 102 of 3 February 2016 stated, among other things:

"1. Introduction ...

1.2. Background to and purpose of the bill

Europe currently receives a high number of refugees. This puts pressure on all countries, including Denmark. And the pressure grows day by day. We assume a shared responsibility, but in the Danish Government's opinion, we should not accept so many refugees that it will threaten the social cohesion in our own country, because the number of newcomers has an impact on the subsequent success of integration. It is necessary to strike the right balance to maintain a good and safe community. ...

1.3. Main elements of the bill

With the bill, it is proposed to tighten up asylum and immigration laws.

The bill postpones the right to family reunification for aliens granted temporary protection under section 7(3) of the Aliens Act, extending the current minimum one-year residence period to three years. This means that, in the absence of exceptional reasons, aliens granted temporary protection status are not eligible for family reunification in the first three years. Reference is made to paragraph 2. ...

Under the current rules, section 9 of the Aliens Act makes an alien resident in Denmark eligible for family reunification if his or her temporary residence permit has been renewed after one year. As is evident from the Government's plan presented on Friday 13 November 2015 to amend asylum laws, the Aliens Act will be amended to the effect that, in future, a residence permit under section 7(3) of the Aliens Act will be extended by one year after the first and second years and subsequently by two years in order to emphasise – to a greater extent than is currently the case – that this

group's need for protection must be deemed to be of a more temporary nature than that, for example, of UN Convention refugees granted residence under section 7(1) of the Aliens Act.

Overall, the Government wants to limit the influx of refugees and migrants to Denmark. The nature of the stay in Denmark of an alien issued with a residence permit under section 7(3) of the Aliens Act must usually be considered so uncertain, and the duration of the stay so limited, that the alien's family should not be granted residence in Denmark until the alien has resided in Denmark for at least three years, *inter alia*, for the purpose of maintaining an effective immigration policy.

Against this background, it is proposed to refuse family reunification rights under section 9 of the Aliens Act to aliens issued with a residence permit under section 7(3) of the Aliens Act until they have held a residence permit for at least three years.

If the relevant alien is entitled to family reunification pursuant to Denmark's international obligations within the first three years, family reunification has to be granted under section 9c(1) of the Aliens Act.

Due to the expected temporary nature of the need for protection combined with the one-year duration of the residence permits, Denmark is generally not obliged under Article 8 of the European Convention on Human Rights to grant family reunification on the basis of the parties' overall links with Denmark.

In this context, it should be noted that this will still be a scheme that does not permanently prevent aliens from reuniting with their family members, but merely postpones family reunification in the light of the alien's special temporary residence status.

As previously, family reunification must be granted – also within the first three years of residence in Denmark – if so dictated by Denmark's international obligations.
...

2.2.2. The relationship to Denmark's international obligations

2.2.2.1. Article 8 of the European Convention on Human Rights

...

According to the case-law of the European Court of Human Rights, the right to respect for family life includes the right to continue an existing family life. This right may require the State to refrain from expelling a family member or, in certain situations, to meet the prerequisites for enjoying family life, for example by granting a family member residence. The Member States, however, enjoy a relatively wide margin of appreciation in this respect. ...

Under the proposed amendment, an alien granted special temporary protection will generally not be eligible for family reunification for the first three years of his or her residence in Denmark. To the Ministry's knowledge, the European Court of Human Rights has not decided any cases on family reunification in a comparable situation, but there is reason to believe that the Court will use the above factors as their starting point when considering whether to grant family reunification or whether the public interest in maintaining effective immigration control (see the interests of the economic well-being of the country, which according to Article 8(2) may justify a refusal.

For the first three years, the temporary right to stay in Denmark must generally lead to ties in Denmark that are of limited nature and scope. It must be assumed that the limited duration of the stay in Denmark, the expected temporary nature of the need for protection and the fact that the residence permit is granted for only one year at a time

will carry significant weight in the assessment of whether the relevant aliens are eligible for family reunification under Article 8 of the Convention. The assessment will further have regard to the fact that this is a scheme that does not permanently prevent aliens from reuniting with their family members, but merely postpones family reunification in the light of the alien's special temporary residence status.

As mentioned above, it will be necessary in a few cases to make a specific assessment of whether there exists a right to family reunification within the first three years. This applies, for example, if the person resident in Denmark cared for a disabled spouse in the country of origin before leaving the country or if the person resident in Denmark has seriously ill minor children in their country. In such cases, a refusal to grant family reunification may have a particularly strong impact already in the first three years.

As also mentioned, the Ministry has no knowledge of any case-law of the European Court of Human Rights that concerns the question of postponement of the right to family reunification in such a situation. Seen in this light, and as Article 8 of the ECHR always includes a balancing element, there is a certain risk that when reviewing a specific case, the Court may decide that Denmark cannot generally make it a condition for family reunification that aliens issued with a residence permit under section 7(3) of the Aliens Act have resided for three years in Denmark.

Considering the limited duration of a resident alien's stay in Denmark, the expected temporary nature of the need for protection and the fact that a residence permit is granted for only one year at a time, it is, however, the Government's opinion that there are weighty arguments to support the view that the proposed scheme is compatible with Article 8 of the Convention.

2.2.2.2. Article 14 of the European Convention on Human Rights

According to Article 14 of the Convention ...

As aliens holding temporary protection status under section 7(3) of the Aliens Act are not in a situation comparable to that of UN Convention refugees (see section 7(1)) or to the situation of aliens in special individual circumstances, which would, on their own, have justified a need for protection (see section 7(2) of the Aliens Act) the proposed restriction on family reunification rights for aliens falling within section 7(3) of the Aliens Act does not, in the Ministry's opinion, call into question Denmark's compliance with Article 14 of the Convention."

34. The review clause in section 3 of Act No. 153 of 18 February 2015 was repealed by Act No. 562 of 29 May 2018, which entered into force on 1 June 2018, as it was found that the rules on temporary protection status under section 7(3) of the Aliens Act and the three-year waiting period under section 9 (1)(i)(d) operated as intended. Having heard numerous institutions, organisations and NGOs, the preparatory notes to Bill No. 180 of 14 March 2018, leading to Act No. 153, referred, among other things, to the statistics and the reasoning set out by the Supreme Court in its judgment of 6 November 2017 in this case (see paragraph 22 above). It was noted that:

"... The Ministry of Immigration and Integration has ascertained that the rules on temporary protection status under section 7(3) of the Aliens Act have predominantly been applied to persons from Syria and to a lesser extent to persons from Somalia.

In this context, it should be noted that one of the reasons for introducing the rules on temporary protection status under section 7(3) of the Aliens Act was that the previous rules did not sufficiently allow for the fact that some aliens might need protection because of a particularly serious general situation, which, depending on the circumstances, could change over a short period of time. The purpose of introducing the rules on temporary protection status was thus to tailor the need for protection for this group of people to make it easier to return them to their country of origin when the situation in their country of origin makes it possible. It is thus a fundamental principle for the protection status that the protection will cease when it is no longer needed.

The Ministry further observes that it is important to strike the right balance between, on the one hand, the protection of people in need of protection and, on the other hand, a restriction of the influx and the number of refugees and migrants in Denmark in order to ensure an efficient integration. In this context, it should be noted that the number of refugees and reunited families has an impact on the possibility of local authorities to keep up in terms of their integration efforts so that their integration in Denmark can be successful.

Against this background, it is the opinion of the Ministry that the rules on temporary protection status under section 7(3) of the Aliens Act operate as intended.

Consequently, the Ministry finds that there should be no amendments to or clarifications of the current provision of section 7(3) of the Aliens Act as adopted by Act No. 153 of 18 February 2015 amending the Aliens Act (Temporary protection status for certain aliens and the right to refuse the examination of applications for asylum on their merits if the applicant has been granted protection in another EU Member State, etc.) or other rules and regulations that may affect the application of the rules on temporary protection status.

...

The overall aim with the proposal is to limit the influx of refugees and migrants to Denmark."

35. In Denmark, the municipalities are obliged to provide social benefits and allowances as well as housing, language training and employment initiatives for all persons granted different forms of international protection in Denmark.

II. INTERNATIONAL LAW AND MATERIAL

36. The principal global instrument concerning refugees is the Convention relating to the Status of Refugees (Geneva, 1951: "the Refugee Convention" or "the 1951 Convention"; henceforth "the UN Refugee Convention). Initially it protected persons who had become refugees owing to events occurring in Europe before 1 January 1951, in the aftermath of World War II. It set out the definition of "refugee" as follows:

Article 1
"Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

37. The 1967 Protocol broadened its applicability by removing the geographical and time limits that were part of the UN Refugee Convention from 1951.

38. The relevant parts of the International Covenant on Civil and Political Rights 1966 (ICCPR) provide:

Article 17

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

Article 23

"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

39. In its conclusion No. 22 (XXXII) "On Protection of Asylum-seekers in Situations of Large-Scale Influx" (1981), the UNHCR Executive Committee set out:

"B. Treatment of asylum-seekers who have been temporarily admitted to country pending arrangements for a durable solution

...

2. It is therefore essential that asylum-seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards:

...

(h) family unity should be respected;

..."

40. On 15 August 2016, in its sixth periodic report on Denmark (CCPR/C/DNK/6), the UN Human Rights Committee stated, among other things, n its concluding observations:

"Family reunification

35. The Committee is concerned at the amendment to the Aliens Act adopted by Parliament in January 2016 that introduces restrictions on family reunification for persons under temporary protection status by requiring a residence permit for more than the last three years, unless warranted by the international obligations of Denmark (art. 23).

36. The State party should consider reducing the duration of residence required of persons under temporary protection status in order for them to obtain family reunification, in compliance with the Covenant."

41. In February 2012, the UNHCR responded to a "Green Paper" published by the European Commission on 15 November 2011, to launch public consultations on the right to family reunification of third-country nationals living in the European Union. The Green Paper raised a number of questions on Council Directive 2003/86/EC on the right to family reunification (see paragraphs 45-49 below). The UNHCR noted that beneficiaries of subsidiary protection are not included in the scope of the Directive pursuant to Article 3(2)(b), but recommended that all member States provide beneficiaries of subsidiary protection access to family reunification under the same favourable rules as those applied to refugees.

III. EU LAW AND OTHER EUROPEAN MATERIAL

42. From the outset it should be noted that Denmark has opted out of the common European asylum and immigration policies (Title V of Part III of the Treaty on the Functioning of the European Union) and is not bound by measures adopted pursuant to those policies. This follows from Articles 1 and 2 of the Protocol (No. 22) on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

A. The Charter

43. The right to family life is set out in the Charter of Fundamental Rights of the European Union (hereafter "the Charter") and a number of EU legislative acts. Article 7 of the Charter reads as follows:

Article 7

"Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications."

44. The Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) contain the following guidance in the interpretation of Article 7:

"Explanation on Article 7 – Respect for private and family life

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. ...

In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR: ..."

B. The Family Reunification Directive

45. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereafter "the Family Reunification Directive") is the main EU secondary legislation dealing with family reunification rights of third-country nationals (i.e., those who are not nationals of an EU member State). The purpose of the Family Reunification Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the member States.

46. The Directive provides for an opportunity for the member States to postpone the right to family reunification by two or three years (see below), except where the sponsor is a refugee (i.e. under the UN Refugee Convention). The relevant provisions of the Family Reunification Directive read as follows:

Article 8

"Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more

than three years between submission of the application for family reunification and the issue of a residence permit to the family members."

Article 12

"...

2. By way of derogation from Article 8, the Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her."

47. According to the Commission's initial proposal for the Council Directive (OJ C 116 E, 26.4.2000, p. 66, Article 10), waiting periods for family reunification were prohibited for both UN Refugee Convention refugees and persons enjoying subsidiary protection. The explanatory memorandum to the amended proposal for the Council Directive (OJ C 62 E, 27.2.2001, p. 99) contains the following comments from the Commission:

"One amendment [proposal for amendment by the European Parliament] restricts the scope of the directive. It excludes persons enjoying a subsidiary form of protection and calls for the adoption without delay of a proposal on their admission and residence. The Commission accepts this amendment and has changed the relevant articles accordingly. It considers that persons in this category must have the right to family reunification and need protection; however, it recognises that the absence of a harmonised concept of subsidiary protection at Community level constitutes an obstacle to their inclusion in the proposed directive. The Conclusions of the Tampere European Council of 15 and 16 October 1999 specify that "[refugee status] should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection". To that end, the Scoreboard presented by the Commission in March 2000 and endorsed by the Council envisages the adoption before 2004 of a proposal on the status of persons enjoying subsidiary forms of protection. The Commission intends to make such a proposal next year, which could also cover family reunification for this category of third-country nationals."

A Commission communication published in 2014 to provide guidance on the application of Directive 2003/86 stated as follows:

"The Commission considers that the humanitarian protection needs of persons benefitting from subsidiary protection do not differ from those of refugees, and encourages Member States to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection. The convergence of both statuses is also confirmed in the recast Qualification Directive 2011/95/EU. ... In any case, even when a situation is not covered by European Union law, Member States are obliged to respect Articles 8 and 14 ECHR" (para. 6.2 COM (2014) 210 final)."

48. As a result of the negotiations on the proposed Directive between the EU member States, the definition of the scope of the Directive was tightened so as to exclude persons having been granted subsidiary protection.

49. Thus, according to Article 3 § 2 of the Directive, it does not apply where the sponsor is authorised to reside in a member State on the basis of a

subsidiary form of protection in accordance with international obligations, national legislation or the practice of the member States, or the sponsor is applying for authorisation to reside on that basis and is awaiting a decision on his or her status.

50. In its judgment of 27 June 2006, in *European Parliament v. Council,* C-540/03, EU:C:2006:429, the Court of Justice of the European Union (CJEU) rejected the European Parliament's claim that the provisions of the final sub-paragraph of Article 4(1), Article 4(6) and Article 8 [concerning waiting periods] of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification should be annulled because they violated international law and, in particular, Article 8 of the Convention. In so far as relevant, the CJEU set out:

> "97. Like the other provisions contested in the present action, Article 8 of the Directive authorises the Member States to derogate from the rules governing family reunification laid down by the Directive. The first paragraph of Article 8 authorises the Member States to require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members. The second paragraph of Article 8 authorises Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members.
>
> 98. That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.
>
> 99. It should, however, be remembered that, as is apparent from Article 17 of the Directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors.
>
> 100. The same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article 17 of the Directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application.
>
> 101. When carrying out that analysis, the Member States must, as is pointed out in paragraph 63 of the present judgment, also have due regard to the best interests of minor children.
>
> 102. The coexistence of different situations, according to whether or not Member States choose to make use of the possibility of imposing a waiting period of two years,

or of three years where their legislation in force on the date of adoption of the Directive takes their reception capacity into account, merely reflects the difficulty of harmonising laws in a field which hitherto fell within the competence of the Member States alone. As the Parliament itself acknowledges, the Directive as a whole is important for applying the right to family reunification in a harmonised fashion. In the present instance, it does not appear that the Community legislature exceeded the limits imposed by fundamental rights in permitting Member States which had, or wished to adopt, specific legislation to adjust certain aspects of the right to reunification.

103. Consequently, Article 8 of the Directive cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

104. In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (see, to this effect, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22).

105. It should be remembered that, in accordance with settled case-law, the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 65; and, to this effect, *ERT*, paragraph 43).

106. Implementation of the Directive is subject to review by the national courts since, as provided in Article 18 thereof, 'the Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered'. If those courts encounter difficulties relating to the interpretation or validity of the Directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC.

107. So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987, the European Convention on the legal status of migrant workers of 24 November 1977 and bilateral and multilateral agreements between the Community or the Community and the Member States, on the one hand, and third countries, on the other.

108. Since the action is not well founded, there is no need to consider whether the contested provisions are severable from the rest of the Directive.

109. Consequently, the action must be dismissed."

C. The Recast Qualification Directive

51. In 2004, the EU legislative framework governing asylum and family reunification became supplemented by Council Directive 2004/83/EC (the Qualification Directive), later repealed and replaced by 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 (hereafter "the recast Qualification Directive").

52. According to Directive 2011/95/EU, a "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. According to EU law, such serious harm consists of death penalty or execution or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

53. The Directive does not use the terminology "temporary protection" or "permanent protection".

54. For the sake of the present case, however, it should be noted that the terminology "subsidiary protection" can include both "temporary protection" and "permanent protection" and "protection of a long-term character".

55. Recital 39 of the preamble to the recast Qualification Directive is worded as follows:

> "While responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with 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."

56. The relevant provisions of the recast Qualification Directive read as follows (and apply, according to Article 20(2) of the Directive, both to refugees and persons eligible for subsidiary protection unless otherwise indicated):

CHAPTER I
General provisions
Article 2

"Definitions

For the purposes of this Directive the following definitions shall apply:

...

(d) ‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(e) ‘refugee status’ means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) ‘person eligible for subsidiary protection’ means a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) ‘subsidiary protection status’ means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

...

(j) ‘family members’ means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,

the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried; ...”

CHAPTER VII
CONTENT OF INTERNATIONAL PROTECTION
Article 20
General rules

“1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.”

...

Article 23
Maintaining family unity

"1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member."

...

Article 24
Residence permits

"1. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than 3 years and renewable.

2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require."

D. The Temporary Protection Directive

57. Council Directive 2001/55/EC of 20 July 2001 provides minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member States in receiving such persons and bearing the consequences thereof (hereafter "the Temporary Protection Directive"). It was adopted against the backdrop, *inter alia*, of the large-scale movement of people fleeing the conflict in Kosovo and variations between national measures relating to the protection status and rights granted in the event of a mass influx. The Directive governs the obligations of EU member States relating to the conditions of reception and residence of persons enjoying temporary protection in the event of a mass influx. The Directive has not been applied in practice. Nonetheless, it reflects a relevant interpretation at international level of the right to family reunification (in the event of a mass influx) of beneficiaries of temporary protection.

Article 15

"1. For the purpose of this Article, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx, the following persons shall be considered to be part of a family:

(a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted;

(b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time.

2. In cases where the separate family members enjoy temporary protection in different Member States, Member States shall reunite family members where they are satisfied that the family members fall under the description of paragraph 1(a), taking into account the wish of the said family members. Member States may reunite family members where they are satisfied that the family members fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship they would face if the reunification did not take place.

3. Where the sponsor enjoys temporary protection in one Member State and one or some family members are not yet in a Member State, the Member State where the sponsor enjoys temporary protection shall reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(a). The Member State may reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place.

4. When applying this Article, the Member States shall take into consideration the best interests of the child.

5. The Member States concerned shall decide, taking account of Articles 25 and 26, in which Member State the reunification shall take place.

6. Reunited family members shall be granted residence permits under temporary protection. Documents or other equivalent evidence shall be issued for that purpose. Transfers of family members onto the territory of another Member State for the purposes of reunification under paragraph 2, shall result in the withdrawal of the residence permits issued, and the termination of the obligations towards the persons concerned relating to temporary protection, in the Member State of departure.

7. The practical implementation of this Article may involve cooperation with the international organisations concerned.

8. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person receiving temporary protection which is needed to process a matter under this Article."

58. The Commission's explanatory memorandum for the Council Directive (OJ C 311 E, 31.10.2000) contains the following general comments:

"2.4. The concept and legal framework for temporary protection in the event of a [mass influx] has been developed in recent history and varies between the European Union Member States. Most have provided in their legislation for the possibility of establishing temporary protection schemes either by statute or by subordinate instruments, circulars or ad hoc decisions. Certain of them do not have the expression

"temporary protection" as such, but in reality the residence documents that are issued and the link with the asylum system have the same practical effect. Systems also vary in terms of the maximum duration of temporary protection (ranging from six months to one, two, three, four or even five years maximum). Certain Member States provide for the possibility of suspending the examination of asylum requests during the temporary protection period; others do not. The chief differences lie in the welfare rights and benefits granted to persons enjoying temporary protection. Certain Member States allow the right to employment and family reunification; others do not. Certain Member States provide that the benefit of temporary protection may not be enjoyed at the same time by an asylum-seeker: applicants must opt for one or the other. Other Member States make no provision for such an incompatibility.

...

5.6. ... In its proposal on family reunification the Commission stated that the question of preserving family unity in the context of temporary protection would be addressed by a specific proposal rather than the general proposal. Given the limited predefined duration of temporary protection, the Commission feels it is necessary to concentrate on the family as already constituted in the country of origin but separated by the circumstances of the mass influx. A broad concept of the family can be posited. This corresponds to the Member States' practice in relation to the Kosovars. But the right provided for here is more limited than the right provided for by the family reunification Directive. Moreover, the Commission cannot deny that the political conditions for proposing a broader approach to family reunification for persons enjoying temporary protection than proposed here do not seem to be met. It would like to link recognition of a specific situation and the right to lead a normal family life that is secured by the European Human Rights Convention and is therefore available also to persons enjoying temporary protection, as indicated in the Council of Europe Recommendation adopted by the Committee of Ministers on 15 December 1999 on family reunification for refugees and other persons in need of international protection (R(99)23). ...".

59. The Commission's explanatory memorandum also contains the following comments on Article 13 of the proposal for a Council Directive (amended during the EU legislative procedure and replaced by Article 15 in the final Directive):

Article 13

"This Article lays down the conditions for maintaining the family unit for the duration of the temporary protection. It does not provide for a right to family reunification as defined in the Proposal for a Council Directive on the right to family reunification of 1 December 1999 (COM(1999) 638 final), as it is felt that the temporary nature of the situation does not allow for the exercise of this right in the same form. It is based on a humanitarian concept linked to the causes of the flight. The family circle is broader than in the Directive on family reunification but it covers the case of families already established in the country of origin and excludes the setting up of a family. Nor does it cover the reunification of a family member lawfully resident in a third country (where this country is not the country of origin) with members of the family enjoying temporary protection in one of the Member States**.** The individuals reunited are entitled to residence permits issued under the temporary protection regime. The Article applies, within the context of temporary protection, the right to respect for family life embodied in international law and in particular in the

European Convention for protection of human rights and fundamental freedoms while taking account of the special circumstances of temporary protection. ...”

E. Other European material

60. The Parliamentary Assembly of the Council of Europe (PACE) Resolution 2243 (2018), on Family reunification of refugees and migrants in the Council of Europe member States, adopted on 11 October 2018, read as follows:

“1. The Parliamentary Assembly is deeply concerned about growing political discourse and action against foreigners, which are a real threat to the protection of refugees and in particular their family life. Families must not be torn apart and should not be prevented from reuniting after an often dangerous and challenging departure from their country of origin, where their fundamental rights to safety and security were threatened.

2. Recalling that member States are committed to protecting the right to family life under Article 8 of the European Convention on Human Rights (ETS No. 5), the Assembly emphasises that this right applies to everyone, including refugees and migrants. Member States should provide for safe and regular means of family reunification, thus reducing the recourse to smugglers and mitigating the risks associated with irregular migration.

3. The Assembly points out that there is no common definition of family with respect to the right to family reunification. While member States may enjoy a broad margin of appreciation in matters concerning morals and religion, family rights require a higher level of protection under the European Convention on Human Rights. National authorities should therefore adopt an enabling approach to family reunification 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.

...

6. The Assembly notes with concern that national law often refuses the delivery of visas to family members of individuals who have not been granted refugee status but have been given subsidiary or temporary protection on humanitarian grounds. The protection of family life and the requirements of the best interest of the child under Article 10 of the United Nations Convention on the Rights of the Child necessitate, however, that such persons be able to maintain their family unity or to reunite with family members. Such subsidiary or temporary protection status must not be considered as an “alternative refugee status” with fewer rights. States should thus not substitute subsidiary or temporary protection status for refugee status, in order to limit family reunification due to the temporary and personal nature of this subsidiary status.

7. Regarding migrants, the Assembly emphasises that, in order to respect the protection of their family life and the best interest of the child, visa requirements for family members of migrants must not be a *de facto* obstacle to maintaining family unity. The Assembly particularly regrets that some States have high financial requirements or long waiting periods for migrants who wish to apply for visas for their family members. Where States are members of the European Union, European Union legislation on the freedom of movement of persons, including family members, must also be respected.

...

14. The Assembly calls on all member States to draw up and respect common guidelines for the implementation of the right to family reunification, in order to ensure that refugees and migrants are not forced to go to those countries where family reunification is easier. Hindrances to the protection of family life are not admissible under Article 8 of the European Convention on Human Rights to deter migrants or refugees and their family members".

61. Recommendation 2141 (2018) by the PACE on the same issue, also of 11 October 2018, stated the following:

"1. Referring to its Resolution 2243 (2018), the Parliamentary Assembly emphasises the importance of protecting family life under Article 8 of the European Convention on Human Rights (ETS No. 5) and recommends that the Committee of Ministers:

1.1. draw up guidelines for the application of the right to family reunification of refugees and migrants as well as for mutual legal assistance and administrative cooperation between member States and with third countries in this field;

1.2. invite member States to establish bilateral arrangements so they can represent each other when receiving visa applications and issuing visas;

1.3. invite the member States that have not yet done so to join, or co-operate with, the European Union Schengen Visa Information System with a view to exchanging the data necessary for enabling family reunification;

1.4. co-operate with the International Committee of the Red Cross in promoting mechanisms and action for finding missing family members of refugees, in co-operation with national Red Cross and Red Crescent societies and national parliaments;

1.5. reinforce Council of Europe action on combating trafficking of child refugees, ensuring that unaccompanied child refugees are reunited with their parents, unless this is against the best interests of a child, for example if parents have participated in the trafficking of this child."

62. In a paper entitled "Realising the right to family reunification of refugees in Europe", published in June 2017 by the Council of Europe Commissioner for Human Rights, the latter recommended, *inter alia:*

"Ensure that family reunification procedures for all refugees (broadly understood) are flexible, prompt and effective

1. Give effect to the Court's case-law and ensure that all refugee family reunification procedures are flexible, prompt and effective, in order to ensure protection for the right to respect for their family life.

2. Urgently review and revise relevant state policies if they discriminate between 1951 Convention refugees, subsidiary and other protection beneficiaries

...

Ensure that family reunification is granted to extended family members, at least when they are dependent on the refugee sponsor

11. Ensure that extended family members are also eligible for family reunification when they are dependent on the sponsor.

12. Ensure that the concept of dependency allows for a flexible assessment of the emotional, social, financial, and other ties and support between refugees and family

members. If those ties have been disrupted due to factors related to flight, they should not be taken to signal that dependency has ceased.

13. The criteria used to assess dependency should be in keeping with the legal concept developed in the Court's case-law and other legal guidance. They should be explained in clear and public guidelines or legal instruments, in order to enable refugees to tailor their applications accordingly.

...

Ensure that family reunification processes are not unduly delayed

15. Waiting periods for refugee family reunification should not interfere with the right to family life. Waiting periods of over one year are inappropriate for refugees and for their family members.

16. Waiting periods must be justified in the individual case and must be in accordance with law, pursue a legitimate aim and be necessary and proportionate in the circumstances. ...".

IV. STATISTICS

63. Annual public statistics concerning aliens in Denmark (*tal på udlændingeområdet*), issued by the Ministry for Aliens and Integration Affairs, show the following:

TABLE 1

Number of asylum applications 2011-2019 (distribution by year)									
Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Total	3.806	6.184	7.557	14.792	21.316	6.266	3.500	3.559	2.683

Figures from 2011-2018 are final, but the figures from 2019 are provisional as per 5 January 2020.

TABLE 2

Number of asylum-related residence permits (distribution by year and legal basis)									
Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Total asylum related residence permits	2.249	2.583	3.889	6.104	10.849	7.493	2.750	1.652	1.777
Hereof									
Section 7(1)	957	1.267	1.872	3.913	7.810	4.478	1.525	1.028	765
Section 7(2)	584	725	1.419	1.774	1.325	406	392	187	657
Section 7(3)					1.068	2.475	789	40	309
Subtotal	(1.541)	(1.992)	(3.291	(5.687)	(10.203)	(7.359)	(2.706)	(1.621)	(1.731)
Others	192	123	83	73	66	49	44	31	46

Figures from 2011-2018 are final, but the figures from 2019 are provisional as per 4 January 2020.

TABLE 3

Number of family reunification applications submitted before the expiry of the 3-year waiting period

(i.e. prior to 2 years, 9 months) after the granting of temporary protection status pursuant to section 7(3) (distribution by year and applicant's age upon application)			
Year	**Children**	**Adults**	**Total**
2015	187	135	322
2016	440	398	838
2017	262	249	511
2018	116	123	239
2019	17	26	43

Figures are provisional as per 17 January 2020.

TABLE 4

Number of family reunification permits granted, where the application was submitted before the expiry of the 3-year waiting period (prior to 2 years, 9 months) after the granting of temporary protection status pursuant to section 7(3) (distribution by year and applicant's age upon decision)			
Year	**Children**	**Adults**	**Total**
2015	9	4	13
2016	33	31	64
2017	35	39	74
2018	41	36	77
2019	19	20	39

Figures include spouses, cohabitants, minor children and other family. Due to systematic methods, figures do not include family reunification between minor siblings. Also excluded are children born in Denmark. Figures are provisional as per 17 January 2020.

64. The statistics set out in the preparatory notes to Act No. 562 of 29 May 2018 (see paragraph 34 above) showed that over the period from 20 February 2015 to 31 July 2017 there had been 1,420 requests for family reunification for spouses and children under section 9c(1) of the Aliens Act, before the expiry of the three-year waiting period after the granting of temporary protection status pursuant to section 7(3), of which the Immigration Board had examined 309 cases, and granted family reunification in 79 cases, that is to say in 25% of requests examined.

65. Annual public statistics concerning aliens in Denmark showed that the total number of family reunifications granted in Denmark was as follows:

2014: 5,727
2015: 11,645
2016: 7,679
2017: 7,015
2018: 4,601

66. From other sources (see, for example, Eurostat database, UNHCR Statistical Yearbook, and PEW Research Centre) it transpires that the total number of asylum-seekers in the EU was approximately as follows:

2013: 431,000
2014: 627,000
2015: 1,3 million

2016: 1,3 million
2017: 712,000
2018: 638,000

67. In 2015 the main destinations in Europe for persons seeking asylum were: Germany with 476,500; Hungary with 177,100; Sweden with 162,400; and France with 118,000 (numbers rounded off).

68. In 2015, the main destinations in Europe, for asylum-seekers per capita (per 100,000 people in the country's population) were (approximately): Hungary (1,770), Sweden (1,600), Austria (1,000), Norway (590), Finland (590), Germany (460), Luxembourg (420), Malta (390), and Denmark (370).

V. COMPARATIVE LAW MATERIAL

69. The information available to the Court concerning the right to family reunification of refugees and other persons in need of international protection and the conditions under which that right is granted, including compliance with a waiting period, included a comparative-law survey covering forty-four member States, among which twenty-five EU member States and nineteen non-EU member States (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Republic of Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom), from which the following could be observed:

Of the forty-two States which had included refugee status and the corresponding rights in their domestic legislation, two States did not grant a formal right to family reunification to 1951 Convention refugees (Azerbaijan and Russia). As for beneficiaries of subsidiary protection, thirty-two out of forty-two States granted a formal right to family reunification (twenty-one out of twenty-five EU member States, eleven out of seventeen non-EU member States), six States (Azerbaijan, Bosnia and Herzegovina, Cyprus, Greece, Malta and Russia) did not, and in four States (Germany, Liechtenstein, Switzerland, and Turkey) it was done on a discretionary basis.

As regards changes having occurred in the period from 2014 to 2016 (and afterwards), one State discontinued the right to family reunification for beneficiaries of subsidiary protection in 2014 (Cyprus) and two States extended the right to beneficiaries of subsidiary protection in a manner similar to refugees (Italy and Lithuania). Two States suspended family reunification for beneficiaries of subsidiary protection in 2016 for periods of

respectively two and three years, but have since either accorded the same rights to beneficiaries of subsidiary protection again (Sweden, which has, however, extended the suspension of family reunification in respect of "persons otherwise in need of protection" until 2021) or allowed for family reunification on a discretionary basis (Germany).

Of the thirty-six States that provided a right to family reunification to beneficiaries of subsidiary protection or allowed for it on a discretionary basis, three States had waiting periods which constituted less favourable treatment compared to refugees established prior to 2014, which have remained unchanged since (Latvia, Liechtenstein, and Switzerland). One State discontinued the less favourable treatment for beneficiaries of subsidiary protection in this respect in 2015 (Lithuania). Two States introduced waiting periods for such beneficiaries (Austria in 2016 and North Macedonia in 2018). It could be argued that the temporary suspension of family reunification for beneficiaries of subsidiary protection in two States from 2016 to 2018/2019 (Germany and Sweden) *de facto* amounted to a waiting period.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

70. The applicant complained that the decision of 16 September 2016 by the Danish immigration authorities to refuse temporarily to grant him family reunification with his wife on the grounds that he had not possessed a residence permit under section 7(3) of the Aliens Act for the last three years, was in breach of Article 8 of the Convention, which reads as follows:

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

A. Admissibility

71. The Court notes that it is not in dispute between the parties that Article 8 applies to the present case and the Court sees no reason to hold otherwise. The applicant and his wife were married in 1990 and there are no issues regarding the validity of the marriage (see, *a contrario*, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 94, §§ 59-65).

72. Since it has been established that the applicant enjoyed family life with his spouse within the meaning of Article 8, and the complaint is not

manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, or inadmissible on any other grounds, it must be declared admissible.

B. Merits

1. The parties

(a) The applicant

73. The applicant did not dispute that the interference with his right to respect for family life under Article 8 of the Convention was in accordance with the law and pursued the legitimate aim of ensuring immigration control and protecting the economic well-being of the country.

74. However, he maintained that the refusal to grant him family reunification with his wife had not been necessary in a democratic country.

75. The applicant found that a waiting period of one year would be reasonable. However, he did not find that a waiting period of three years was reasonable or proportionate.

76. He recalled that according to the preparatory notes the legislature had admitted that there would be a certain risk that the Court would overrule the three-year waiting period as being non-compliant with Article 8. Moreover, at the relevant time UNHCR, the United Nations Human Rights Committee and the Commissioner for Human Rights had expressed concern as to the extension by Denmark of the required period of residence from one year to three years. The applicant agreed with the Commissioner's recommendation that waiting periods of more than one year should be considered inappropriate.

77. It was true that family reunification could be granted under section 9c if international obligations would make it appropriate, but in his view the said provision was applied very strictly and in an inappropriate manner. In his case section 9c(1) of the Aliens Act had thus not been applied, because the authorities had failed to balance the competing interests and to consider the particular circumstances of the case. In his case, no proper regard had been had to the fact that his marriage had taken place pre-flight, that it had been long-standing, and that he could be considered vulnerable in view of his need for international protection. He noted that the authorities had also failed to consider whether Denmark's reception capacity at the time of his application had been limited in terms of quantity.

78. The applicant pointed out that having been married to his wife for twenty-five years, with two children being born to them, the strength of the ties between the spouses could not be called into question. He also noted that in its judgment of 6 November 2017 the Supreme Court had acknowledged that owing to the civil war insurmountable obstacles had prevented him from returning to Syria and enjoying family life with his wife

there. In such a situation, the applicant submitted, the State was under an obligation to allow family reunification regardless of residence status.

79. Moreover, the applicant contended, there had never been any evidence to justify the temporary nature of his protection, which had also been the case when the law suspending his right for three years was adopted by the Danish Parliament in 2016.

80. He pointed out that the separation of the family would be longer *de facto* than the three-year waiting period, since it had previously taken some time to process the request for protection, and it had since taken further time to process the request for family unification. In total he had thus been separated from his wife for four years and two months, since he had entered Denmark in April 2015 and family reunification had been granted in June 2019.

81. He reiterated that Convention rights ought to be secured by the member States in a manner such as to render the rights practical and effective, not theoretical or illusory. A statutory suspension of the applicant's right to family reunification for several years would, in his view, render his right to family life theoretical and illusory.

82. The applicant also submitted that international consensus and relevant comparable case-law by the Court supported the view that he and others in need of subsidiary protection were entitled to more preferential treatment in respect of family reunification than could be derived from the ordinary principles relating to Article 8. He referred, *inter alia*, to *Tanda-Muzinga v. France* (no. 2260/10, 10 July 2014) and *Mugenzi v. France*, (no. 52701/09, 10 July 2014). In the former judgment (§ 75), the Court confirmed that "family unity was an essential right of refugees" and that "family reunification was an essential element in enabling persons who had fled persecution to resume a normal life". This was true not only for refugees covered by the UN Convention, but also for persons in need of other types of international protection on humanitarian grounds.

83. The need for family unity should not be dependent on a person's status, but on the gravity of the obstacles preventing that person from enjoying family life in his or her country of origin. Furthermore, family reunification was important for successful integration and for the mental health of people who had fled their country in order to seek international protection. The applicant had limited contact with his wife through phone calls and text messages. He suffered serious depression due to his separation from his family, his worries about his family's well-being and the uncertainty as to when and whether he would be reunited with them.

84. The applicant also referred to *Mengesha Kimfe v. Switzerland* (no. 24404/05, 29 July 2010), concerning a married couple who had been placed in different cantons after having been denied asylum. Although that situation could be seen merely as a temporary measure until the deportation could be effected, and although the applicants were not legally residing in

Switzerland, the Court found that the separation had breached their right to respect for family life.

85. Finally, he maintained that the Government had not pointed to any case-law where protection of the economic well-being of a country had carried significant weight due to the reception of a high number of asylum-seekers (see, *inter alia*, *M.S.S v. Belgium and Greece*, no. 30696/09, 21 January 2011 and *Khlaifia and Others v. Italy*, no. 16483/12, 15 December 2016). It should be noted that in 2016 Denmark had received only 6,266 asylum-seekers out of the anticipated 37,000. Only a few of these had been granted temporary protection status, showing that this category of asylum-seekers did not in fact place a major burden on the economic well-being of Denmark. Thus, when the Immigration Appeals Board took its decision of 16 September 2016 it was already evident that Denmark did not receive the expected numbers of asylum-seekers. That was even more evident at the time when the Supreme Court delivered its judgment of 6 November 2017.

(b) The Government

86. The Government observed from the outset that the refusal to grant the applicant family reunification with his wife had been merely temporary.

87. They submitted that there was no Article 8 case-law relating to a waiting period for family reunification of beneficiaries of temporary protection due to a general risk in their home country.

88. In *Tanda-Muzinga* v. *France* (cited above, § 75) and *Mugenzi v. France,* (cited above, § 54), the Court had held "that family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life [and] had noted that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that provided for other aliens".

89. However, the applicants in those judgments had been refugees recognised under the UN Convention, who had held permanent residence permits. The cases concerned procedural matters relating to the length of time taken to issue visas, rather than a decision to postpone the granting of family reunification to someone only in temporary need of protection.

90. In *Senigo Longue and Others* v. *France* (no. 19113/09, 10 July 2014), the applicant held a permanent residence permit, after having been granted family reunification with her spouse in France. The case did not concern the eighteen months that she had to wait under French law before being able to apply for family reunification with her children but the lengthy processing time following the lodging of the application.

91. Accordingly, the Government took the view that the ordinary principles governing family reunification as set out in *Jeunesse v. the*

Netherlands ([GC], no. 12738/10, § 107, 3 October 2014) should apply to the present case.

92. They did not contest the fact that the Immigration Appeals Board decision of 16 September 2016 to refuse to grant the applicant's wife a residence permit had entailed an interference with the applicant's right to respect for family life under Article 8 § 1. In their view, however, the refusal was justified under Article 8 § 2.

93. In this regard, the Government maintained that the refusal had been in accordance with the law, namely section 9(l)(i)(d) of the Aliens Act, because the applicant had not had a residence permit under section 7(3) for the last three years as required by law and because there were no exceptional reasons, including regard for the unity of the family, to justify family reunification under section 9c(l) of the Aliens Act.

94. Moreover, the decision had pursued the legitimate aim of protecting "the economic well-being of the country". The statutory waiting period of three years had been introduced due to concern about the mass influx of asylum-seekers emanating from the conflict in Syria, and in order to ensure that their integration could be successful. They pointed out that "ensuring the effective implementation of immigration control" could be a legitimate aim in terms of preserving the economic well-being of a country, which could justify an interference with family life (see, *inter alia, Berrehab* v. *the Netherlands,* no. 10730/84, § 26, 21 June 1988; *Nacic and Others* v. *Sweden,* no. 16567/10, § 79, 15 May 2012; and *J.M. v. Sweden,* no. 47509/13, § 40, 8 April 2014).

95. Finally, the Government maintained that the decision had been necessary in a democratic society. They referred to the Supreme Court's reasoning in its judgment of 6 November 2017, and highlighted the fact that the main reason for the amendment of section 9(l)(i)(d) had been the sudden influx of asylum-seekers in the relevant years (7,557 in 2013, 14,792 in 2014, and 21,316 in 2015), which had made it necessary to strike a proper balance, to ensure effective integration, and to maintain a good and safe society.

96. The applicant had been in Denmark for one year and three months when the Immigration Service refused his application. Again it should be stressed that the restriction on his right to exercise family life with his wife was only temporary. Should the general situation in his home country not improve, he would be eligible for family reunification after three years.

97. Moreover, by virtue of section 9c(1) of the Aliens Act, in the event of exceptional circumstances, such as serious illness, family reunification could have been granted earlier. During the period from 20 February 2015 to 31 July 2017 the Immigration Board had granted family reunification under section 9c(1) to spouses and children in seventy-nine cases, totalling 25% of the requests examined (see paragraph 64 above).

98. The Government also emphasised that the applicant had been granted temporary protection in Denmark on account of the general situation in his home country, which could change quite quickly (see for example, *Sufi and Elmi* v. *the United Kingdom,* nos. 8319/07 and 11449/07, 28 June 2011, and *K.A.B.* v. *Sweden,* no. 886/11, 5 September 2013, as regards the situation in Mogadishu, Somalia).

99. The Government added in this connection that on 11 December 2018 UNHCR had briefed that during the same year 37,000 refugees had returned to Syria, and that they had forecast that around 250,000 would return in 2019. Moreover, to the UNHCR Operational Portal on Syria Regional Refugee Response, Durable Solutions indicates a tentative number of 87,858 voluntary Syrian refugee returns in 2019 from the regional neighbouring countries. The Government also submitted that in February 2019, the Danish Immigration Service and the Danish Refugee Council had published the report "Syria, Security Situation in Damascus Province and Issues regarding Return to Syria", concluding that the general security situation in government controlled areas in Syria, particularly in Damascus Province, had improved.

100. The Government observed that in the relevant years, similar measures providing for waiting periods for family reunification had been provided for under international and European Union law, and had been introduced by other countries in respect of beneficiaries of subsidiary and temporary protection, notably in Germany, Sweden, Austria, Switzerland, Latvia and Norway. Moreover, a number of EU member States, including the Czech Republic, Hungary, Slovakia, Cyprus, Malta, Greece and Finland, had introduced legislation which distinguished between UN Convention refugees and beneficiaries of subsidiary protection.

101. In conclusion, the Government submitted that in the applicant's case a fair balance had been struck within the margin of appreciation that the State enjoyed in cases concerning family reunification under Article 8 of the Convention.

2. Third-party interveners

(a) Council of Europe Commissioner for Human Rights

102. The Council of Europe Commissioner for Human Rights found it important for all those granted international protection to benefit from family reunification, be it UN Convention refugees or refugees with another status.

103. She submitted that long-term family separation had major negative consequences for the beneficiary of protection and for the family members left behind, as well as for the objective of successful integration and the avoidance of dangerous irregular migration to Europe. The consequences

could be exacerbated, for example, where the person fleeing was the main provider for a family.

104. The Commissioner also noted the importance of family reunification as a safe and legal route for family members to travel to Council of Europe member States, thus reducing recourse to smugglers and mitigating the risks associated with irregular migration.

105. The Commissioner had called on the member States of the Council of Europe to ensure that persons under subsidiary or temporary protection would be granted the same family reunification rights as UN Convention refugees, and she had set out recommendations with a view to ensuring that effect was given to the Court's case-law to the effect that all refugee family reunification procedures should be flexible, prompt and effective, in order to ensure protection for the right to respect for family life. Specifically, the Commissioner had recommended that waiting times of more than one year should be considered inappropriate.

106. By letter of January 2016 to the Danish Minister for Immigration, Integration and Housing, the Commissioner had expressed concern about the extension to three years of the waiting period for family reunification in respect of beneficiaries of temporary protection under section 7(3) of the Aliens Act. In particular, this measure raised issues of compatibility with Article 8 of the Convention.

107. The Commissioner maintained that the three-year waiting period applied in Denmark significantly overran what she considered appropriate and that it could be compared to the period which was considered excessive by the Court in *Tanda-Muzinga* (cited above).

(b) United Nations High Commissioner for Refugees

108. UNHCR addressed the domestic legislative framework and practice applicable to beneficiaries of temporary protection status applying for family reunification in Denmark and provided its interpretation of the relevant principles of international refugee and human rights law.

109. UNHCR found that the requirement for persons with temporary protection status to have resided in Denmark for a three-year period before becoming eligible to apply for family reunification, was at variance with both international and European human rights law, as it undermined the fundamental right to family life for persons in need of international protection and excluded certain groups in a disproportionate and discriminatory fashion, contrary to what was required under Article 8 read alone and in conjunction with Article 14.

110. UNCHR noted that the United Nations Human Rights Committee, in its concluding observations on the sixth periodic report of Denmark, 15 August 2016, had expressed concern about the application of the three-year waiting period for holders of temporary protection status. The Committee recommended that Denmark "should consider reducing the

duration of residence required of persons under temporary protection status in order for them to obtain family reunification, in compliance with the Covenant on Civil and Political Rights".

111. UNHCR referred to its statement in its 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, that "when refugees were separated from family members as a consequence of their flight, a prolonged separation could have devastating consequences on the well-being of the refugees and their families".

112. Furthermore, UNHCR held that family reunification was essential for refugees to enjoy the fundamental right to family life and that there was no reason to distinguish between refugees and subsidiary protection beneficiaries in this regard. Observing that the Court has recognised that the fact that a person has already obtained international protection was proof of his or her vulnerability, and that there existed a broad consensus at the international and European level on the need for refugees to benefit from a more favourable family reunification regime than other foreigners, UNHCR maintained that this was equally important for other beneficiaries of subsidiary or temporary protection.

113. UNHCR underlined that distinctions between beneficiaries of international protection were often neither necessary nor objectively justified in terms of flight experience and protection needs. UNHCR maintained that there was no evidence that the protection needs of subsidiary protection beneficiaries (status 2 and 3 in the Danish context) would, in all or most cases, be of a different nature or shorter duration than the need for protection as refugees (status 1). In practice, beneficiaries of subsidiary protection were generally not able to return home earlier than refugees.

114. Finally, UNHCR endorsed a resolution by the Parliamentary Assembly of the Council of Europe, adopted in 2018, which emphasised that subsidiary or temporary protection status must not be considered as an "alternative refugee status with fewer rights", and indicated that States should not substitute subsidiary or temporary protection status for refugee status, in order to limit family reunification due to the temporary and personal nature of this subsidiary status (see paragraph 60 above).

(c) The Government of Norway

115. The Government of Norway submitted that neither Article 8 nor Article 14 taken in conjunction with Article 8 prohibited member States from requiring an alien, whose residence status was temporary and subsidiary, to fulfil economic, temporal or other requirements before claiming family reunification.

116. They recalled that the right of States to admit and exclude aliens from their territory was one of the fundamental components of the principle of State sovereignty. Moreover, it was paramount that deference be shown to Contracting States and their democratic legislatures in this area, to allow political leeway in responding to shifting patterns of migration and situations of mass influx.

117. A temporary refusal to grant family reunification with a sponsor whose residence in a Contracting State was itself temporary and based on subsidiary protection did not amount to an interference with protected family rights and did not flout any positive obligations under Article 8. It was therefore questionable whether the temporary refusal to grant a residence permit to the applicant's wife fell within the ambit of interests protected by Article 8.

118. The Court had always distinguished between, on the one hand, "settled migrants" and, on the other hand, "aliens seeking admission" and "aliens holding temporary permits", as the latter two groups held a "precarious immigration status". A call for such a distinction transpired from the *travaux préparatoires* of the Convention, where the Contracting States, when opting for a jurisdictional clause in Article 1 which would include everyone within a Contracting State's territory, specified that "certain of the rights enumerated under Article 2 [later Article 1] cannot be guaranteed to aliens without any restrictions, particularly the rights contained in paragraphs [sic] 6, 7, 8 and 9".

119. In this respect, the Government of Norway also referred to a judgment of 8 November 2018 by the Supreme Court of Norway (case HR-2018-2133-A) concerning the withdrawal of a three-year temporary residence permit from a refugee and her daughter because the circumstances for which the mother had been granted asylum (lack of male support) had changed when her husband applied for asylum in Norway. The Supreme Court held that the withdrawal did not concern an interference with family life under Article 8 § 1, as mother and daughter were not settled migrants and had not established a private life protected against removal. Consequently, no question arose under Article 8 § 2 as to whether an interference could be justified.

120. They also maintained that, whilst there might at present be insurmountable obstacles to pursuing family life in a country of origin, to which the sponsor was temporarily protected from return, the situation might change. In any event, requirements for family reunification that could be fulfilled, such as temporal or financial requirements, would interrupt family ties only temporarily and not definitively.

(d) The Government of Switzerland

121. The Government of Switzerland gave an overview of the right to family reunification under its immigration and asylum law. Family

reunification in Swiss law was regulated by a relatively complex set of provisions which distinguished between different groups based on the type of permit, the question of whether family ties were formed pre- or post-flight, and whether family members applying for family reunification with their refugee family member in Switzerland were already in Switzerland or were abroad at the time of the application. Briefly, in so far as relevant to the present case, Swiss law distinguished between so-called B-permits, held by individuals who had been granted asylum, and F-permits, held by individuals who were only temporarily admitted to Switzerland, including persons fleeing war, civil war or general violence. Their family reunification rights differed in several respects. Article 85 (7) of the Foreign Nationals Act provided that F-permit holders could not apply for family reunification before the expiry of a three-year period after the grant of their temporary admission.

122. The Government of Switzerland fully accepted that there could be positive obligations for persons admitted temporarily, but reiterated that according to established case-law, a fair balance should be struck between the competing interests of the individual and of the community as a whole, and that in both contexts the State enjoyed a certain margin of appreciation. Thus, if the Court were to deny the member States the possibility of imposing conditions for granting family reunification, including introducing a waiting period, the obligations under Article 8 would become far too extensive, to the detriment of the public interest in ensuring effective immigration control and integration.

(e) The Danish Institute for Human Rights

123. The submissions by the Danish Institute for Human Rights mainly contained information on international human rights standards, national laws within European Union countries and other Contracting States, on Danish law and its application, as well as an update on the developments in legislation and practice in 2019. The latter included various decisions by the Refugee Appeals Board and examples of alignments in treatment of persons in need of protection, including in the area of temporary residence. The Institute submitted that in February 2019 the Danish Parliament had adopted a bill which introduced a new way of describing the residence permits for all refugees (see paragraph 27 above). Thus, residence permits granted to refugees and their family members had been changed from being granted with "the possibility of permanent residence" to "for the purpose of temporary residence", stating that all refugees were granted protection in Denmark only until they no longer needed protection. The Institute also provided statistical information.

3. The Court

(a) Preliminary remarks

124. The Court notes from the outset that the applicant's complaint relates to his 4 November 2015 application for family reunification with his wife. At that time he had held a residence permit under section 7(3) of the Aliens Act for five months (since 8 June 2015).

125. The Immigration Service refused his request on 5 July 2016 on the grounds that he had not held a residence permit under section 7(3) for at least the last three years as required by section 9(1)(i)(d) of the Act, and that there were no exceptional reasons, including concern for the unity of the family, to justify family reunification under section 9c(1) of the Act (see paragraph 18 above). On 16 September 2016 the decision was upheld, on appeal, by the Immigration Appeals Board. At that time he had held a residence permit under section 7(3) for one year and three months.

126. Before the domestic courts the applicant complained that the final refusal by the Immigration Appeals Board of 16 September 2016 had been in breach of Article 8.

127. On 26 April 2018, having resided in Denmark for two years, ten months and two weeks, the applicant re-applied for family reunification with his wife. After he had supplemented his application, it was granted on 24 June 2019. The applicant did not challenge those administrative proceedings before the national courts or in his application lodged with Court. They are therefore not part of the subject of his case before the Court.

128. Against this background, the Court will confine its examination to the question whether the refusal of 16 September 2016 to grant the applicant family reunification with his wife owing to the three-year waiting period applicable to beneficiaries of temporary protection entailed a violation of Article 8 of the Convention. Nor is the Court called upon to assess whether the State may impose other conditions, material or economic, for granting family reunification, as this is not at issue in the present case.

129. It should be noted that the applicant did not call into question that a waiting period of one year was "reasonable" (see paragraph 75 above). Moreover, it was undisputed that the applicant had been entitled to submit a request for family reunification two months before the expiry of the three-year time-limit.

(b) General principles on the extent of the State's obligations to admit to its territory relatives of persons residing there

130. The Court has not previously been called on to consider whether, and to what extent, the imposition of a statutory waiting period for granting family reunification to persons who benefit from subsidiary or temporary protection status is compatible with Article 8 of the Convention. It is nonetheless instructive for the purposes of its examination of the present

case to reiterate the general principles on family reunification developed in its case-law relating to other types of situations raising issues on the extent of the State's obligations to admit to its territory relatives of persons residing there, most recently summarised in *Jeunesse v. the Netherlands* (cited above).

131. In the first place it should be reiterated that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country (ibid., § 100).

132. Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest and is subject to a fair balance that has to be struck between the competing interests involved. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (ibid., § 107).

133. Finally, there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight (ibid., § 109).

(c) Case-law on the substantive requirements regarding family reunification

134. In general, in line with the above-mentioned principles, the Court has been reluctant to find that there was a positive obligation on the part of the member State to grant family reunification, when one or several of the following circumstances, not all of which are relevant to the present case, were present:

i. Family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. In such a situation, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see, among many others, *Jeunesse*, cited above, § 108; *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* cited

above; *Bouchelkia v. France*, judgment of 29 January 1997, Reports 1997-I; *Baghli v. France*, no. 34374/97, ECHR 1999-VIII; *Konstatinov v. the Netherlands,* no. 16351/03, 26 April 2007; *Darren Omoregie and Others v. Norway*, no. 265/07, 31 July 2008; *Antwi and Others v. Norway,* no. 26940/10, 14 February 2012; and *Priya v. Denmark* (dec.) no. 3594/03, 6 July 2016).

ii. The person requesting family reunification had limited ties to the host country, which by implication was usually the case, when he or she had only stayed there for a short time, or stayed there illegally (see, *a contrario, Jeunesse*, cited above). So far there have been no cases in which the Court has found an obligation on the part of the member State to grant family reunification to an alien, who had only been granted a short-term residence or a temporary residence permit, with a family member, who had not entered the host country.

iii. There were no insurmountable obstacles in the way of the family living in the country of origin of the person requesting family reunification (see, for example, *Gül v. Switzerland,* no. 23218/94, 19 February 1996; *Ahmut v. Netherlands*, no. 21702/93, 28 November 1996; *Chandra and Others v. Netherlands* no. 53102/99, 13 May 2003; *Berisha v. Switzerland,* no. 948/12, 30 July 2013; *Nacic and Others v. Sweden*, cited above; and *I.A.A. v. the United Kingdom* (dec.), no. 25960/13, 8 March 2016).

iv. The person requesting family reunification (the sponsor) could not demonstrate that he/she had sufficient independent and lasting income, not being welfare benefits, to provide for the basic cost of subsistence of his or her family members (see, notably, *Haydarie v. Netherlands* (dec.), no. 8876/04, 20 October 2005; *Konstatinov v. the Netherlands*, cited above, § 50; and *Hasanbasic v. Switzerland*, no. 52166/09, § 59, 11 June 2013).

135. On the other hand, the Court has generally been prepared to find that there was a positive obligation on the part of the member State to grant family reunification when several of the following circumstances, not all of which are relevant to the present case, were cumulatively present:

i. The person requesting family reunification had achieved a settled status in the host country or had strong ties with that country (see, *inter alia*, *Tuquabo-Tekle and Others v. Netherlands,*

no. 60665/00, § 47, 1 December 2005 and *Butt v. Norway*, no. 47017/09, §§ 76 and 87, 4 December 2012).

ii. Family life was already created, when the requesting person achieved settled status in the host country (see, among others, *Berrehab v. the Netherlands,* cited above, § 29 and *Tuquabo-Tekle and Others v. Netherlands,* cited above, § 44).

iii. Both the person requesting family reunification, and the family member concerned, were already staying in the host country (see, *inter alia*, *Berrehab v. the Netherlands*, cited above, § 29).

iv. Children were involved, since their interests must be afforded significant weight (see, for example, *Jeunesse,* cited above, §§ 119-120; *Berrehab v. the Netherlands*, cited above, § 29; *Tuquabo-Tekle and Others v. Netherlands*, cited above, § 47; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 44, ECHR 2006-I; and *Nunez v. Norway*, no. 55597/09, § 84, 28 June 2011).

v. There were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting family reunification (see, *inter alia*, *Sen v. the Netherlands, no*. 31465/96, § 40, 21 December 2001; *Tuquabo-Tekle and Others v. Netherlands,* cited above, § 48; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cited above, § 41; and *Ghatet v. Switzerland,* no. 56971/10, § 49, 8 November 2016).

136. However, as indicated previously, existing case-law concerned the more general question whether a refusal to grant family reunification in a given case was in compliance with the requirements of Article 8 of the Convention. The particular immigration status of the persons requesting it – in particular their rights as beneficiaries of subsidiary protection – and the temporary nature of any refusal due to the existence of a statutory waiting period of a given length, were not at issue.

(d) Case-law on the procedural requirements for processing requests for family reunification

137. In addition to asserting substantive requirements regarding family reunification under Article 8 as set out above, the Court has also affirmed certain procedural requirements pertaining to the processing of such requests.

138. In *Tanda-Muzinga* and *Mugenzi* (cited above) the applicants had been granted residence in France as refugees under the UN Refugee Convention. Subsequently, they were granted family reunification with their

family members who had been residing abroad. However, the issuing of visas was not automatic. Thus, the applicants had to obtain the visas themselves. In *Tanda-Muzinga* it took three years and five months, and in *Mugenzi*, this process lasted for six years. The Court found a violation on the grounds that the national decision-making process did not offer the guarantees of flexibility, promptness and effectiveness required in order to secure the right to respect for family life under Article 8. The Court reiterated "that the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life" and "that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens" (see *Tanda-Muzinga*, § 75*)*.

139. Similarly, in *Senigo Longue and Others v. France* (cited above) the applicant had lived lawfully in France since October 2005 as a result of family reunification with her spouse. In May 2007 she had requested family reunification with her two children who had remained in Cameroon. In connection with the examination of an application for family reunification, for more than four years the French authorities had doubted the applicant's maternal relationship with the two children. The Court found such a period "far too long, particularly considering the best interests of the children" and that "the decision-making process did not sufficiently safeguard the flexibility, speed and efficiency required to observe the applicants' right to respect for family life under Article 8 of the Convention."

(e) Scope of the margin of the appreciation

140. The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 211, 10 September 2019). Since the Court has not previously been called on to consider whether, and to what extent, the imposition of a statutory waiting period for granting family reunification to beneficiaries of subsidiary and temporary protection is compatible with Article 8, the Court finds it pertinent, from the outset, to consider the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue. A series of factors come into play.

(i) The Convention and existing case-law

141. In this regard, the Court observes that several arguments drawn from the Convention and the existing case-law militate in favour of according the States a wide margin of appreciation.

142. Firstly, there are no absolute rights under Article 8. Notably, where immigration is concerned, the said provision cannot be considered to

impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory (see paragraph 132 above). The Court has on numerous occasions recognised that immigration control is a legitimate aim for the State to interfere with the right to respect for family life within the meaning of Article 8 of the Convention. The same applies with regard to positive obligations (see, for example, *Haydarie v. the Netherlands*, cited above; *Konstatinov v. the Netherlands*, cited above, § 50; and *Hasanbasic v. Switzerland*, cited above, §§ 57-67).

143. Secondly, the Court has acknowledged that immigration control serves the general interests of the economic well-being of a country in respect of which a wide margin is usually allowed to the State (see, for example, *Biao v. Denmark* [GC], no. 38590/10, § 117, 24 May 2016).

144. However, there are also a number of arguments based on the Convention and the case-law for circumscribing the said margin of appreciation. It should be reiterated that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X).

145. The situation of general violence in a country may be so intense as to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his or her presence there. The absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests. Accordingly, an increased influx of migrants cannot absolve a State of its obligation under that provision (see, for example, *Khlaifia and Others v. Italy,* cited above, § 114). In principle, this factor may also reduce the latitude enjoyed by States in striking a fair balance between the competing interests of family reunification and immigration control under Article 8, albeit that, during periods of mass influx of asylum-seekers and substantial resource constraints, recipient States should be entitled to consider that it falls within their margin of appreciation to prioritise the provision of Article 3 protection to a greater number of such persons over the Article 8 interest of family reunification of some.

146. Furthermore, in the Court's view, the considerations stated in paragraphs 137 and 138 above in regard to the procedural requirements under Article 8 for the processing of family reunion requests of refugees should apply equally to beneficiaries of subsidiary protection, including to persons who are at a risk of ill-treatment falling under Article 3 due to the general situation in their home country and where the risk is not temporary but appears to be of a permanent or long-lasting character.

(ii) The quality of the parliamentary and judicial review

147. Another factor, which has an impact on the scope of the margin of appreciation, is the Court's subsidiary role in the Convention protection system. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, *inter alia*, *Lekić v. Slovenia* [GC], no. 36480/07, § 108, 11 December 2018).

148. Where the legislature enjoys a margin of appreciation, the latter in principle extends both to its decision to intervene in a given subject area and, once having intervened, to the detailed rules it lays down in order to ensure that the legislation is Convention compliant and achieves a balance between any competing public and private interests. However, the Court has repeatedly held that the choices made by the legislature are not beyond its scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure. It has considered it relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has also been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013, with further references). It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by the legislative choices (compare *Correia de Matos v. Portugal* [GC], no. 56402/12, § 129, 4 April 2018).

149. In this respect the Court also recalls that the domestic courts must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention (see, for instance, *I.M. v. Switzerland*, no. 23887/16, § 72, 9 April 2019). Where, on the other hand, the domestic courts have carefully examined the facts, applied the relevant

human rights standards consistently with the Convention and its case-law, and adequately balanced the individual interests against the public interest in a case, the Court would require strong reasons to substitute its view for that of the domestic courts (see recent case-law on Article 8 in relation to the expulsion of settled migrants, for example, *Levakovic v. Denmark*, no. 7841/14, § 45, 23 October 2018, and its reference to *Ndidi v. the United Kingdom*, no. 41215/14, § 76, 14 September 2017).

150. The Court also notes that Protocol No. 15 amending the Convention, including by emphasising the principle of subsidiarity and the doctrine of the margin of appreciation, enters into force on 1 August 2021.

(iii) The degree of consensus at national, international and European levels of relevance to the present case

151. A further factor of relevance to the scope of the margin of appreciation is the existence or not of common ground between the national laws of the Contracting States. According to the comparative-law survey (see paragraph 69 above), thirty-two out of forty-two States granted a formal right to family reunification to beneficiaries of "subsidiary protection". However, any comparison in this area should be made with a measure of caution since under Danish legislation "subsidiary protection" covered both the "protection status" granted under section 7(2) and the "temporary protection status" granted under section 7(3), and it was only in relation to the latter that the waiting period was introduced. It should also be borne in mind that not all forty-four member States were equally concerned by the influx of displaced persons from Syria in 2015 and 2016 (see paragraphs 67 and 68 above). Whilst some States were exposed to a high influx, other States were not concerned to any appreciable degree. In so far as any guidance may be drawn from the comparative national laws in this area, it is very limited and must necessarily be treated with circumspection; a consensus does not seem to emerge in one direction or other.

152. When seen in this light, it cannot be ignored that there were strong social and economic aspects at stake for the Contracting States concerned and that the nature of the issue was politically sensitive. The Court does not underestimate the fact that a number of States may have experienced considerable difficulties in coping with such a situation (see, *inter alia*, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 122, ECHR 2012; *Khlaifia and Others v. Italy,* cited above, §§ 185 and 241; and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 155 and 213, 21 November 2019). The Court observes that some States, being particularly concerned in 2015 and 2016 by the increase of displaced persons seeking protection from Syria, in terms of numbers, and per capita, therefore gave priority to granting protection over the right to family reunification.

153. The Court reiterates its findings in *Tanda-Muzinga*, cited above, § 75 "that there exists a consensus at international and European level on

the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union ....” (emphasis added here; see paragraph 137 above). However, the position is not quite the same for beneficiaries of subsidiary protection as for refugees.

154. In this respect the Court first observes that the general practice of introducing waiting periods, at least those of more than one year, for persons granted subsidiary protection, and the specific three-year waiting period introduced by Denmark for persons granted “temporary protection” under section 7(3) of the Danish Aliens Act, gave rise to concern and criticism by, *inter alia*, the United Nations Human Rights Committee and the Commissioner for Human Rights, in August 2016 and June 2017 respectively (see paragraphs 40 and 62 above), and that in December 2017 UNHCR emphasised that “when refugees are separated from family members as a consequence of their flight, a prolonged separation can have devastating consequences on the well-being of the refugees and their families” (see paragraph 111 above). Moreover, on 11 October 2018 PACE adopted Resolution 2243 (2018), on Family reunification of refugees and migrants in the Council of Europe member States, (see paragraph 60 above) in which it found that “hindrances to the protection of family life are not admissible under Article 8 of the European Convention on Human Rights to deter migrants or refugees and their family members”.

155. At the same time the Court notes that while Denmark was not bound by the common European asylum and immigration policies set out in the Treaty on the Functioning of the European Union, nor of any measures adopted pursuant to those policies (see paragraph 42 above) it is clear that within the EU an extensive margin of discretion was left to the member States when it came to granting family reunification for persons under subsidiary protection and introducing waiting periods for family reunification.

156. Thus, the Family Reunification Directive (see paragraphs 45-50 above) did not apply to subsidiary protection (see Article 3 of the Directive). For other categories of aliens, Article 8 provided for an opportunity for the member States to postpone the right to family reunification by two years, or three years by way of derogation, except where the alien was a 1951 Convention refugee (see Article 12 of the Directive).

157. It will also be recalled that by judgment of 27 June 2006, in case C-540/03, *European Parliament v. Council* [2006] ECR I-5769, the CJEU rejected the European Parliament’s claim that Article 8 of the Family Reunification Directive concerning waiting periods should be annulled because they violated international law. Thus, relevantly to the present case,

the CJEU found (see paragraph 98 of the judgment quoted in paragraph 50 above):

> "That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights".

158. Furthermore, although the Recast Qualification Directive (see paragraphs 51-56 above) applied both to refugees and persons eligible for subsidiary protection, the obligation to ensure that family unity be maintained concerned only family members who were present in the same Member State (see Articles 2 (j) and 23 of the Directive Article).

159. It is also significant that the Temporary Protection Directive (see paragraphs 57-59 above) was never implemented. Already when proposing that directive, the Commission had acknowledged that the political conditions for proposing a broader approach to family reunification for persons enjoying temporary protection were not met.

160. Against this background the Court does not discern any common ground at the national, international and European levels in regard to the length of waiting periods.

(iv) Concluding general remarks on the scope of the margin of appreciation

161. Having regard to all the elements above, the Court considers that the member States should be accorded a wide margin of appreciation in deciding whether to impose a waiting period for family reunification requested by persons who have not been granted refugee status but who enjoy subsidiary protection or, like the applicant, temporary protection.

162. Nevertheless, the discretion enjoyed by the States in this field cannot be unlimited and falls to be examined in the light of the proportionality of the measure. While the Court sees no reason to question the rationale of a waiting period of two years as that underlying Article 8 of the EU Family Reunification Directive (three years being accepted only by way of derogation, see paragraphs 46, 156 and 157 above), it is of the view that beyond such duration the insurmountable obstacles to enjoying family life in the country of origin progressively assume more importance in the fair balance assessment. Although Article 8 of the Convention cannot be considered to impose on a State a general obligation to authorise family reunification on its territory (see paragraph 142 above), the object and purpose of the Convention call for an understanding and application of its

provisions such as to render its requirements practical and effective, not theoretical and illusory in their application to the particular case. This principle of effectiveness is a general principle of interpretation extending to all the provisions of the Convention and the Protocols thereto (see, for example, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 122, 15 October 2020).

163. Furthermore, the said fair-balance assessment should form part of a decision-making process that sufficiently safeguards the flexibility, speed and efficiency required to comply with the applicant's right to respect for family life under Article 8 of the Convention (see paragraphs 137 to 139 above).

(f) Application of the above-mentioned principles and considerations to the present case

164. The present case concerns the deferral for three years of the applicant's right to be granted family reunification with his wife in Syria. She had not previously resided in Denmark. Therefore, this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with its positive obligations under Article 8 of the Convention (see, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cited above, § 67; *Gül v. Switzerland*, cited above, § 38; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cited above, § 38, *Jeunesse v. the Netherlands*, cited above, §§ 100-105, and *Paposhvili v. Belgium* [GC], no. 41738/10, § 221, 13 December 2016).

165. Thus, the crux of the matter is whether the Danish authorities, on 16 September 2016, when refusing the applicant's request for family reunion, owing to the three-year waiting period, struck a fair balance between the competing interests of the individual and of the community as a whole. The applicant had an interest in being reunited with his wife as soon as possible, whereas the Danish State had an interest in controlling immigration as a means of serving the general interests of the economic wellbeing of the country, and of ensuring the effective integration of those granted protection with a view to preserving social cohesion. However, on the latter point, it should be borne in mind that family reunification may also favour preserving social cohesion and facilitate integration. The Court also notes that the granting of family reunification does not in itself change the nature and legal basis of the stay in Denmark for beneficiaries of temporary protection, which still remains temporary.

(i) The legislative and policy framework

166. In 2015 the Danish legislature amended the Aliens Act (Act No. 153 of 18 February 2015) by introducing "temporary protection status" under section 7(3) of the Aliens Act, and simultaneously imposing limitations on the right to family reunification for this group of persons by

inserting into section 9(1)(i)(d) of the Act a provision requiring a waiting period of initially one year.

167. No such waiting period was required for persons granted protection under section 7(1) or section (2) of the Aliens Act.

168. As to the legislative choices underlying the introduction of sections 7(3) and 9(1)(i)(d) of the Aliens Act, it follows from the preparatory notes to the 2015 Act (see paragraph 31 above) that the amendments were deemed necessary on account of the "dramatic increase in the number of asylum-seekers arriving in Denmark", that "the Government wants to meet its international obligations and offer this group of asylum-seekers protection for as long as they need it. At the same time, the Government wanted to make sure that those aliens, whose need for protection [was] temporary, could be returned as soon as the situation in their country of origin makes it possible". Moreover, "owing to the temporary nature of the protection status, it [was] further proposed that, in the absence of exceptional circumstances, an alien granted temporary protection should not be eligible for family reunification unless the temporary residence permit [was] renewed after one year".

169. In 2016 the Aliens Act was amended anew (Act No. 102 of 3 February 2016) extending the waiting period set out in section 9(1)(i)(d) to three years.

170. Similar considerations as mentioned above may be found in the preparatory notes to the 2016 Act, (see paragraph 33 above), which in addition stated:

> "Europe currently receives a high number of refugees. This *inter alia* puts pressure on all countries, including Denmark. And the pressure grows day by day. We assume a shared responsibility, but in the opinion of the Danish Government, we should not accept so many refugees that it will threaten the social cohesion in our own country. Because the number of newcomers has an impact on the subsequent success of integration. It is necessary to strike the right balance to maintain a good and safe community ...".

171. In this connection, the Court notes that, owing, in particular, to developments in Syria, the number of persons requesting protection in Europe increased from approximately 431,000 in 2013 to 627,000 in 2014 and to 1.3 million in 2015 (see paragraph 66 above).

172. In Denmark, the number of asylum applications increased from 7,557 in 2013 to 14,792 in 2014 and to 21,316 in 2015 (see paragraph 63, table 1, above).

173. In addition to the drastic increase in the number of asylum-seekers, which gives a clear illustration of the challenges to immigration control in the respondent State (see paragraphs 63-65 above), it should also be borne in mind that pursuant to domestic law local authorities were under an obligation to provide social benefits and allowances, as well as housing,

language training and employment initiatives, for all persons granted international protection in Denmark (see paragraph 35 above).

174. Long sections of the preparatory notes relating to the 2015 and 2016 amendments were devoted to an examination of whether the introduction of a waiting period would comply with Denmark's international obligations, in particular under Article 8 of the Convention.

175. In the preparatory notes to the 2015 amendments, it was considered that the fact that the aliens had stayed in Denmark for only a short period of time, on a temporary residence permit, and that the scheme merely postponed family reunification and did not permanently prevent aliens from reuniting with their family members, would carry significant weight in the assessment of eligibility for family reunification under Article 8 of the Convention.

176. Likewise, in the preparatory notes to the 2016 amendments it was considered whether the extension of the waiting period to three years would be incompatible with Article 8 of the Convention. Again it was found that there were weighty arguments to suggest that the proposed scheme would be compliant with Article 8. The notes pointed in particular to the expected temporary nature of the need for protection combined with the one-year duration of the residence permits, and to the fact that the scheme would only temporarily postpone family reunification. Reference was also made to the relatively wide margin of appreciation and the absence of Convention case-law in that sphere. Moreover, aliens could be granted family reunification within the first three years under section 9c(1) of the Aliens Act if that were required under Denmark's international obligations, including Article 8 of the Convention. The scope of section 9c(1) was intended to be limited in that "[i]n a few cases it will be necessary to make a specific assessment to determine whether a right to family reunification exists as only in specific situations will family unity considerations carry more weight .... for example if the person resident in Denmark cared for a disabled spouse in the country of origin before leaving that country ... or if the person resident in Denmark has seriously ill minor children [there]" or "situations where the UN Convention on the Rights of Child, including its Article 3(1), on the best interests of the child, may affect the decision on whether to grant family reunification". From the statistics (see paragraph 63, table 3, and paragraph 64 above), it appears that in a number of requests submitted for family reunification under this provision, an exception was effectively made from the three-year waiting period in order to expedite family reunification.

177. The Court finds no reason to question the distinction made by the Danish legislature in respect of persons granted protection due to an individualised threat, namely refugee status under the UN Refugee Convention covered by section 7(1) of the Aliens Act or "protection status" covered by section 7(2) of the Act, on the one hand, and persons granted

protection due to a generalised threat, the so-called "temporary protection status" covered by section 7(3) of the Act, on the other hand.

178. The Court also finds that the general justification for the amendments in section 7(3) and 9(1)(i)(d) was based on a need to control immigration, which served the general interests of the economic well-being of the country, and the need to ensure effective integration of those granted protection with a view to preserving social cohesion (see paragraph 166 above). Moreover, when introducing the three-year waiting period in February 2016, the Danish legislature did not have the benefit of any clear guidance being given in the existing case-law on whether, and to what extent, the imposition of such a statutory waiting period would be compatible with Article 8 of the Convention (see paragraph 136 above).

179. In the Court's view, however, a waiting period of three years, although temporary, is by any standard a long time to be separated from one's family, when the family member left behind remains in a country characterised by arbitrary violent attacks and ill-treatment of civilians and when insurmountable obstacles to reunification there have been recognised. Moreover, the actual separation period would inevitably be even longer than the waiting period and would exacerbate the disruption of family life and, as in this case, the mutual enjoyment of matrimonial cohabitation, which is the essence of married life (see, among others, *Abdulaziz, Cabales and Balkandali,* cited above, § 62 and *Mehemi v. France (no. 2)*, no. 53470/99, § 45, ECHR 2003-IV). The family members would also be separated during the period of flight, during the initial period after arrival in the host country pending the immigration authorities' processing of the asylum application, and for some time after the three-year waiting period (or two months before, see paragraph 128) pending their decision.

180. Moreover, although the "revision clause" (which had been inserted in the 2015 Act) had been maintained in the 2016 Act so that the three-year waiting period could be reviewed during the 2017/2018 parliamentary year at the latest (see Act No. 562 of 29 May 2018 in paragraphs 30 and 34 above), it does not appear that the sharp fall in the number of asylum-seekers in 2016 and 2017 prompted any reconsideration of the three-year rule.

(ii) The applicant's individual case

181. As to the particular circumstances of the persons involved, it can be observed that the applicant was fifty-six years old and in good health when he applied for family reunification with his wife in November 2015. His wife was forty-eight years old at the time. She declared that she did not suffer from any serious illness or disability. It is evident that they had a longstanding family life, since the spouses had been married for twenty-five years. Their two children were adults and not part of the present case. In

Syria the applicant had worked as a medical doctor and his wife as a media consultant.

182. In January 2015 the applicant fled Syria owing to the arbitrary violent attacks and ill-treatment of civilians. He left his wife behind, according to the applicant, in order to spare her from the hardship of travelling, and in the hope that she would be able to join him in a host country as soon as he had obtained settled status there. On 8 June 2015 he was granted temporary protection status in Denmark under section 7(3) of the Aliens Act.

183. As to the extent of their ties to the respondent State, it can be observed that the applicant had been residing in Denmark for five months when he applied for family reunification in June 2015, and for one year and three months when his request was refused in September 2016. Thus, at the relevant time, the applicant had limited ties with Denmark and his wife had no ties to the country. It is also to be noted that the present case did not involve any instances of breaches of immigration law or considerations of public order (see, for example, *Nunez v. Norway*, cited above, § 70).

184. It is not in dispute that in September 2016, owing to the general situation in Syria, there were "insurmountable obstacles" to the spouses enjoying their family life there (see, *a contrario*, for example, *Abdulaziz, Cabales and Balkandali,* cited above, § 68). On the other hand, it appears that they had the possibility of maintaining contact, *inter alia*, via phone calls and text messages (see paragraph 83 above and also, *inter alia*, *Salem v. Denmark*, no. 77036/11, § 81, 1 December 2016).

185. The Danish authorities' final refusal on 16 September 2016 to grant the applicant family reunification with his wife had been taken on the grounds that he had not been in possession of a residence permit under section 7(3) of the Aliens Act for the last three years as required under section 9(1)(i)(d) of the Act and because there were no exceptional reasons, including concern for the unity of the family, to justify family reunification under section 9c(1) of the Act. The refusal was reviewed and upheld by the High Court and the Supreme Court on 19 May 2017 and 6 November 2017 respectively. The latter noted that according to Article 63 of the Constitution, judicial review of the Immigration Appeals Board's decision had to be based on the circumstances at the time when it had been taken.

186. In its judgment, the Supreme Court (see paragraph 22 above) had regard to the applicable principles under Article 8 of the Convention and the relevant case-law on family reunification. It noted that a number of other member States had similar rules stipulating that persons who were granted protection status without being UN Convention refugees could only be granted family reunification after the expiry of a certain period, and that the Court had not yet considered to what extent such statutory waiting periods would be compatible with Article 8.

187. The Supreme Court also had regard to the preparatory notes to the legislative amendments leading to the three-year waiting period and noted the background of the amendment, including the fact "that the Danish Government was ready to assume joint responsibility and safeguard the protection of this group of asylum-seekers for as long as they needed protection, but that Denmark was not to accept so many refugees that it would threaten national cohesion. Moreover, it was important to ensure a successful integration and necessary to strike the right balance to maintain a good and safe society".

188. In examining the specific circumstances of the applicant's case, the Supreme Court "accepted" that the spouses faced insurmountable obstacles to cohabiting in Syria, but emphasised that the obstacle to their exercise of family life together was only temporary (see paragraph 22 above). It observed that from the decision of the Refugee Appeals Board of 9 December 2015 it followed that the applicant had not placed himself in an adversarial position to the Syrian authorities or to the opposition to the regime due to his specific and personal circumstances such as to risk persecution or ill-treatment falling within section 7(1) or section 7(2) of the Aliens Act, and that he had not attracted the attention of the Syrian authorities or others so as to fall within those provisions. Therefore, he could return to Syria when the general situation in the country improved. If there was no such improvement within three years from the date on which he was granted residence in Denmark, he would normally be eligible for family reunification with his spouse. Should exceptional circumstances emerge before the expiry of the three-year period, such as serious illness, which would make the separation from his spouse particularly harsh, he could be granted family reunification under section 9c(1) of the Aliens Act.

189. Against this background, the Supreme Court found that the three-year waiting period fell within the margin of appreciation enjoyed by the State when balancing the interests in respect for the applicant's family life and those of the community under Article 8.

190. Finally, the Supreme Court held that the decrease in the number of asylum-seekers in 2016 and 2017 (from 21,316 in 2015 to 6,266 in 2016, and to 3,500 in 2017) could not change the conclusion on whether the decision taken by the Immigration Appeals Board had been justified in September 2016. In this respect it observed that the "revision clause" (that had been inserted into the 2015 Act) had been maintained in the 2016 Act so that the three-year waiting period could be reviewed during the Parliament year 2017/2018 at the latest (see Act No. 562 of 29 May 2018 in paragraphs 30 and 34 above).

191. The Court observes, though, as mentioned above (see paragraph 180) that the sharp fall in the number of asylum seekers in 2016 and 2017 did not prompt Parliament to avail itself of the possibility under the said clause to review the duration of the waiting period.

192. Whilst acknowledging the absence of guidance in its case-law as it stood at the time and reiterating that it sees no reason for questioning the rationale of a waiting period of *two years* (see paragraph 162 above), the Court cannot but note that the 2016 amendments to the Aliens Act, extended the statutory waiting period from one to *three years* to persons who, like the applicant, had been granted "temporary protection" under section 7(3) of the Act. As amended, the 2016 Act did not allow for an individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned beyond the very limited exceptions falling under section 9c(1) of the Act (see paragraph 176 above). Nor did it provide for a review of the situation in the country of origin with a view to determine the actual prospect of return or obstacles thereto.

193. Thus, for the applicant, the statutory framework and the three-year waiting period operated as a strict requirement for him to endure a prolonged separation from his wife, irrespective of considerations of family unity in the light of the likely duration of the obstacles. In these circumstances, it cannot be said that the applicant was afforded a real possibility under the applicable law of the respondent State of having an individualised assessment of whether a shorter waiting period than three years was warranted by considerations of family unity. The union of the applicant and his wife had been established some 25 years before the applicant obtained protection status in Denmark and it was accepted that there were insurmountable obstacles in the way of the couples' enjoyment of family life in their country of origin. As the Court has held above (see paragraph 162), beyond two years the insurmountable obstacles to enjoying family life in the country of origin progressively assume more importance in the fair balance assessment. Whilst Article 8 of the Convention does not impose a general obligation on a State to authorise family reunification on its territory, the right to respect for family life as guaranteed by this provision must, like all other rights and freedoms guaranteed by the Convention and its protocols, be secured by the Contracting States in a manner that makes it practical and effective, not theoretical and illusory (see paragraphs 142 and 162 above).

(iii) Overall conclusion

194. Having regard to all the above considerations, the Court is not satisfied, notwithstanding their margin of appreciation, that the authorities of the respondent State, when subjecting the applicant to a three-year waiting period before he could apply for family reunification with his wife, struck a fair balance between, on the one hand, the applicant's interest in being reunited with his wife in Denmark and, on the other, the interest of the community as a whole to control immigration with a view to protect the economic well-being of the country, to ensure the effective integration of

those granted protection and to preserve social cohesion (see paragraph 165 above).

195. It follows that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

196. The applicant also complained that the decision of 16 September 2016 by the Danish immigration authorities to refuse to grant him family reunification was in breach of Article 14 read in conjunction with Article 8 of the Convention. The former provision reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

197. Having regard to its finding under Article 8 (see paragraph 197 above), the Court concludes that there is no need for it to examine separately the applicant's complaint under Article 14 read in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

198. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

199. The applicant claimed 75,000 Danish Kroner (DKK) (equal to approximately 10,000 Euros (EUR)) in compensation for non-pecuniary damage.

200. The Government did not make any comment in this respect.

201. The Court considers it undeniable that the applicant sustained non-pecuniary damage on account of the violation of Article 8 of the Convention. Making its assessment on an equitable basis as required by Article 41 of the Convention, it awards EUR 10,000 under this head (see, *inter alia*, *Jeunesse* § 132, *Hode and Abdi v. the United Kingdom*, no. 22341/09, § 66, 6 November 2012 and *Biao*, § 147).

B. Costs and expenses

202. The applicant also claimed costs and expenses incurred in the Convention proceedings in the amount of DKK 100,000 including VAT corresponding to legal fees, and DKK 6,000 for estimated travel expenses related to the proceedings before the Court. He has not submitted any invoices or documents in support of these claims.

203. The Government did not make any comment in this regard.

204. It is unknown whether the applicant has applied for legal aid under the Danish Legal Aid Act *(Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettighedskonventioner*), according to which applicants may be granted free legal aid for the purpose of lodging complaints and for the procedure before international institutions under human rights conventions (see, for example, *Biao*, § 148).

205. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, for example, *Dudgeon v. the United Kingdom* (Article 50), 24 February 1983, § 22, Series A no. 59). In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see, for example, *A, B and C v. Ireland* [GC], no. 25579/05, § 281, ECHR 2010 and *Strand Lobben*, cited above, § 234).

206. In the present case, having failed to provide any bills or vouchers in support of his claim, the Court rejects the applicant's claim for costs and expenses (see, among others, *A, B and C*, § 283 and *Cudak v. Lithuania* [GC], no. 15869/02, § 82, ECHR 2010).

C. Default interest

207. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint under Article 8 admissible;

2. *Holds*, by sixteen votes to one, that there has been a violation of Article 8 of the Convention;

3. *Holds*, unanimously, that there is no need to examine separately the applicant's complaint under Article 14 read in conjunction with Article 8 of the Convention;

4. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a hearing on 9 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Søren Prebensen	Robert Spano
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Mourou-Vikström is annexed to this judgment.

R.S.O.
S.C.P.

DISSENTING OPINION OF JUDGE MOUROU-VIKSTROM

1. I cannot agree with the finding of a violation of Article 8 reached by the majority of the Grand Chamber.

2. This case requires the Grand Chamber to pen a whole new body of case-law. Indeed, while the Court has already established the general principles of family reunification, particularly from the angle of the States' positive obligations, never before has it had to address the specific issue of the waiting period for reunion. This is a highly targeted issue. The judgment will undoubtedly be significant in scope, even if, in my view, the issue remains fairly simple from the strictly legal point of view. It is a case of assessing the compatibility with the Convention of the three-year waiting period required under Danish law to authorise the applicant's wife to join him in the context of family reunification.

3. This case also requires us to adjudicate on the scope of the margin of appreciation and the extent of the subsidiarity of regulations on the entry and residence of aliens in the specific, tense context of a "migration crisis" combined with a situation of war.

4. What limits or obligations can be imposed on States concerning the manner in which they seek to treat persons fleeing their countries of origin and requesting the right to reside legally on their territory? What kind of distinctions can be made between the various categories of refugees under the Convention? In the instant case, did the Danish Parliament contravene Article 8 of the Convention by imposing stricter conditions on persons eligible for temporary protection? Were the distinctions set out in legislation artificial, and did they only correspond to a desire to restrict the number of persons eligible for legal residence on their territory? Should they be condemned by our Court, or did they fall within the right of every State to decide freely on the scope and content of its own legislation?

5. Those were the questions facing the Grand Chamber. It chose, "almost" unanimously, to find against the State, holding that family reunification, and the more specific methods of organising it, should be scrutinised, evaluated and *in fine* declared contrary to the Article protecting private and family life.

6. I take the view, however, that the finding of a violation reached by the majority corresponds to a highly directive, indeed almost prescriptive, conception of States' migration policies which runs counter to the broader principle that each individual State must have sole responsibility for the manner in which immigration into its territory is controlled.

I. THE APPLICANT'S LEGAL STATUS VIS-À-VIS HIS MIGRATION SITUATION

A. The applicant came under the temporary protection system

7. It should be remembered that the Danish migration authorities had not considered the applicant eligible for refugee status under the Geneva Convention.

8. Danish legislation provides for two different types of protection, that is, "protection" status and "temporary protection", which is akin to the subsidiary protection laid down in European Union law.

9. In its decision of 9 December 2015, the Refugees Court of Appeal, which, it might be remembered, is an independent organ presided over by a judge and can therefore be considered as a tribunal, clearly explained that the applicant had not been personally and individually targeted by the Syrian authorities. The risk which he incurred in his country was very real, but was no greater than the unfortunately widespread risk of inhuman treatment facing any civilian population in a war-torn State. In fact, the Refugees Court of Appeal noted that the applicant had been stopped twice at a checkpoint because he was a doctor, but that he had not been further bothered by the authorities and had been permitted to continue. It has therefore not been demonstrated that he risked persecution or ill-treatment as an identified wanted person. It was primarily on that basis that the applicant was denied the benefit of the regimes laid down in sections 7 (1) and 7 (2) of the Law.

B. Consequences of the applicant's status for the waiting period stipulated for family reunification

10. Law No. 102 of 3 February 2016 amended section 9 (1) (i) (d) laying down a three-year waiting period for a temporarily protected person to be eligible for family reunification. Thus, whereas the applicant's wife, left behind in Syria, could have joined him immediately if he had been granted refugee status under section 7 (1) (Geneva Convention) or section 7 (2) (subsidiary protection) of the Law, the applicant, whose case fell under section 7 (3), had to wait for three years in order to be legally entitled to bring his wife to Denmark for the purpose of family reunification.

11. In that legislative amendment, which was undisputedly linked to the prevailing state of affairs in the country, lies the core issue facing the Grand Chamber.

12. In order to determine whether such a waiting period is acceptable under the Convention, regard must be had to the criteria established in order to grant the applicant that status, which affords a lesser degree of protection of family life.

13. Such a distinction between the general and the specific, which entitles the migrant to different regimes, of a permanent or temporary nature, can be drawn without prejudice to any argument put forward under Article 14. The Court's case-law had already drawn a distinction between the general and the specific type of risk as regards the application of Articles 2 and 3 of the Convention (see *F.G. v. Sweden*, §§114-115 et seq., and *J.K. v. Sweden*, §§108 et seq.). The receiving State can reasonably and legitimately choose to provide a refugee with enhanced protection and fast-track his reunion with his close family where he is being directly targeted by his national authorities. In the event of a general danger, the receiving State can place conditions on family reunification in order to ward off an influx of asylum-seekers whom it does not consider that it can receive under proper and decent conditions. The idea is that the situation can improve in the State of origin and that "permanent exile" far from one's roots, social ties and personal history, is unlikely to be the optimum solution. Moreover, an improvement in the situation is not just theoretical, as witness the situation in Somalia (see *Sufi and Elmi v. the UK*, nos. 8319/07 and 11449/07, 28 June 2011, and *K.A.B. v. Sweden*, no. 886/11, 5 September 2013)

14. Article 8 cannot be construed as requiring an alignment of all refugee statuses, whether under the "primary" head of migration or the "subsidiary" head of family reunification.

II. THE LEGISLATIVE PROCESS LEADING UP TO THE LAW OF 3 FEBRUARY 2016

15. The issue of the legislative procedure which resulted in the establishment of a three-year period is particularly significant, calling for an analysis of the concepts having guided the formulation of the Law.

A. The text of the Law

16. Clearly, the distinction drawn in section 7 (3) and the lengthening of the requisite waiting period for family reunification have the result of restricting the numbers of migrants arriving and requesting asylum. It had therefore been a regulatory measure adopted under the souverain right of the State, which is beset placed to know its capacities for receiving foreign population groups and understand the climate prevailing in the country as regards incoming aliens. Is it necessary to point out that a State's capacity to take in foreigners is measured in the light not only of budgetary indicators, statistics and economic trends but also of societal issues?

17. Moreover, Parliament had emphasised the need to ensure proper integration of all refugees and to protect Danish social cohesion.

B. The spirit of the Law

18. In order to understand the "spirit" of the Law, reference must be made to the preparatory work on the text, and this is especially important in such a sensitive sphere. It transpires clearly from that work that the three-year period corresponds to the principal refugee's situation, which, in principle, should not be permanent. According to the actual terms of the preparatory work for the 3 February 2016 Law, "the residence permit issued under section 7 (3) is 'so uncertain' and 'so limited' in nature that the asylum-seeker's family should not be eligible for residence in Denmark until he himself has resided there for at least three years". It should be noted that the text provides for slight adaptations in so-called "exceptional" cases where the spouse is disabled or the children are seriously ill. Furthermore, residence permits renewable for one-year periods are a reflection of the insecure status of the refugee category to which the applicant belongs. There is a whole paragraph in the preparatory work on Article 8 of the Convention, discussing, precisely, whether extending the period to three years would be compatible with Article 8. Contrary to the majority's position (§180), the three-year period is neither "inflexible" nor non-derogable, since the statistics show that between February 2015 and July 2017, 25% of all applications for family reunification before the three-year period were allowed under section 9 (c) (1). In all cases, therefore, the assessment was therefore necessarily carried out on an individual basis.

19. It cannot therefore be maintained that Parliament failed to balance the competing interests.

III. SUPERVISION BY THE DOMESTIC AUTHORITIES

A. Margin of appreciation

20. The question whether or not there is a consensus is of cardinal importance in assessing the margin of appreciation. It is undeniable that there is a consensus within the States of the Council of Europe in favour of granting the right to family reunification to persons holding subsidiary protection status. Conversely, as regards the waiting period for granting such right to spouses who have remained in the country of origin, there is no identifiable consensus. So we must, at the outset, note the specificity of the Danish system. Subsidiary protection refers not only to protection status but also to "temporary protection status".

21. Supervision of immigration is a legitimate aim justifying interference with the right to family life. There is no such thing as a right for a couple leaving their country to choose which State they wish to settle in

and obtain protected status, particularly where, as in the present case, there is no previous link with the country they have chosen as their haven.

22. The margin of appreciation must be broad as regards the reception of migrants. That enables the authorities to protect the country's economic well-being and accommodation capacities under satisfactory conditions, as well as, and above all, social cohesion. What is at stake is the public interest and the societal balance of the country.

23. Denmark amended its legislation in 2016 in the light of its assessment of the social, and no doubt the political, climate, as well as the number of asylum-seekers submitting applications and the available statistics.

24. This migration policy choice was made after all the competing interests had been weighed up. In contrast with the majority's approaches, I consider that Denmark alone should have remained in charge of the decisive choices to preserve a balance in the various spheres of national life.

B. Expression of subsidiarity

25. The appeal lodged with the Danish Supreme Court on 6 November 2017 was a practical example of subsidiarity.

26. The Supreme Court's judgment is exemplary in many ways. The highest Danish court displayed its in-depth knowledge of the Court's case-law with its expert analysis of the requirements of the Convention in the light of the situation in Syria, which it described as being torn by widespread violence and the inhuman treatment of the civilian population. It unequivocally and objectively noted that the couple had been prevented by insuperable obstacles from living together in Syria. However, the Supreme Court quite rightly noted that the dismissal of the applicant's appeal had only temporarily interfered with his right to be reunited with his wife. Moreover, it conducted a personalised assessment of the applicant's situation, which situation did not involve any specific conflict with a given individual in his country of origin and did not place him at any risk of personal persecution.

27. Telling a State that establishing a mandatory three-year waiting period for reuniting a couple in the framework of family reunification is contrary to the European Convention on Human Rights amounts to preventing it from managing its own migration policy. Moderation is of the essence.

28. It should be remembered that Denmark adopted a firm, unequivocal political stance by refusing to take part in the common European asylum and immigration policy. Nor should we forget that as regards waiting periods, the Court has acknowledged that there is no consensus at the national, European or international levels, and that as a consequence of that lack of harmonisation the beneficiaries of subsidiary protection are excluded

from the scope of the European Directive. Furthermore, Article 8 of that Directive (which is not binding on Denmark), which does not apply to subsidiary protection, authorises a two-year waiting period which can be increased to three years by way of derogation. On a strict construction of the principles, and even though no transposition is possible, we can only deduce that a three-year waiting period for family reunification is authorised by the texts regulating European migration law. Finally, in the absence of any binding instrument or of any consensus on the part of the States, and in view of the margin of appreciation, to which the Court is very attached, Danish law cannot reasonably be deemed to have violated Article 8 of the Convention.

29. The central argument put forward by the majority in support of finding a violation is that no individualised approach was adopted to the applicant's situation, and that the domestic courts never considered the possibility of applying a shorter waiting period, for example a two-year period, to his case. In my view, such a requirement would necessitate a purely theoretical and principle analysis by the national authorities, who would be unable to put forward any more incisive arguments than those already developed.

30. In the final analysis, the issue at stake is a waiting period varying between two and three years, one of which is Convention-compatible and the other is not.

31. This is the kind of issue that should be left to the domestic supervisory authorities to resolve.

By maintaining that a waiting period of two years was acceptable, but that a period of three years should be examined and condemned by the Court, the majority is establishing benchmarks which I consider overly prescriptive within the domestic system.

32. I fully understand that no decision in connection with family reunification should evade the Court's scrutiny. The time factor is fundamental as regards the quality of family life and the preservation of family ties. Thus, the waiting periods laid down for reuniting families forced apart by migration consequent upon war should clearly be well regulated. A total ban on family reunification or a manifestly excessive period would obviously be unacceptable in the light of Convention principles. In my view, however, the three-year period implemented in the present case, which, we might remember, does not involve children, remains acceptable and should not induce the Court to find a violation.