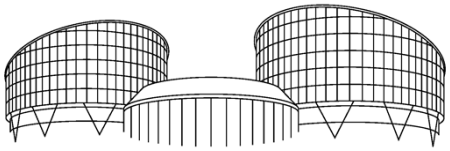

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.T. AND OTHERS v. SWEDEN

(Application no. 22105/18)

JUDGMENT

Art 8 • Positive obligations • Family life • Justified temporary statutory three-year suspension period for family reunification of persons with subsidiary protection status, gradually reduced and allowing individualised assessment • Applicants only *de facto* covered by suspension for less than a year and a half • Suspension of family reunification in circumstances not exacerbating disruption of an essential cohabitation • Fair balance struck between competing interests at stake
Art 14 (+ Art 8) • Discrimination • Family life • Differential treatment by applying temporary statutory three-year suspension period for family reunification to persons with subsidiary protection status in contrast to persons with refugee status • Absence of European and international consensus • Assessment of "analogous or relevantly similar situation" to be made in the light of specific case circumstances and particular right invoked • Impugned difference in treatment reasonably and objectively justified and proportionate

STRASBOURG

20 October 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.T. and Others v. Sweden,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President,*
Krzysztof Wojtyczek,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Ioannis Ktistakis,
Davor Derenčinović, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 22105/18) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 14 May 2018 by three Syrian nationals, Ms M.T. (the first applicant), Mr A.A.K. (the second applicant) and Mr M.A.K. (the third applicant);

the decision to give notice to the Swedish Government ("the Government") of the complaints concerning the refusal to grant the first and third applicants residence permits in Sweden based on family reunification with the second applicant;

the decision not to have the applicants' names disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the Danish Government and the VU Migration Law Clinic, which had been granted leave to intervene by the President of the Section;

Having deliberated in private on 20 September 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the Swedish authorities' refusal to grant residence permits to a mother and her son, who were in Syria, on the basis of their family ties with another son/brother who had been granted subsidiary protection in Sweden. The applicants complained that the Law on temporary restrictions on the possibility of being granted a residence permit in Sweden (which had entered into force on 20 July 2016 and had remained in force until 19 July 2019) had suspended their right to family reunification in breach of Article 8 of the Convention, and that the difference in treatment, with regard to family reunification, of persons granted refugee status and of persons (such as the second applicant) who had been granted subsidiary protection status, had constituted discrimination contrary to Article 14 of the Convention in conjunction with Article 8.

THE FACTS

2. The first applicant was born in Saudi Arabia in 1967. The second and third applicants were born in Syria in 2000 and 2003 respectively. The first and the third applicants live in Syria. The second applicant lives in Stockholm. The applicants were represented by Ms Sofia Rönnow Pessah, a lawyer practising in Stockholm.

3. The Government were represented by their Agent, Mrs Helen Lindquist, of the Ministry for Foreign Affairs.

4. The facts of the case, as set out by the parties, may be summarised as follows.

5. The first applicant is the mother of the second and third applicants. She is married. Her husband moved to Saudi Arabia in 2012, to join his mother and brothers, and a daughter from another relationship. It appears that the spouses have nine children together, born between 1992 and 2003. One son disappeared in Syria, one son lived in Turkey, one daughter lived in Germany, and two sons (twins, born in 1996) have lived in Sweden since 2014.

6. Having travelled with family members to Germany (where some of them have remained), the second applicant travelled on to Sweden, arriving on 5 March 2016; he applied for asylum four days later. A legal-aid lawyer was appointed for him. As he was a minor (aged fifteen at the time) a special representative was also appointed for him under the Act on Special Representatives for Unaccompanied Minors (*Lag om god man för ensamkommande barn,* 2005:429). Moreover, during the proceedings, the Migration Agency (*Migrationsverket*) carried out an assessment of the second applicant's best interests as a child.

7. On 31 October 2016, the second applicant was heard by the Migration Agency. He stated, among other things, that he had grown up in Al-Tall, where he had attended school for six years. His father lived in Saudi Arabia, as did his paternal grandmother, two paternal uncles and a maternal uncle. He had two brothers and a cousin in Sweden. His mother [the first applicant] and his younger brother [the third applicant] were still living in Syria. He left Syria because of the security situation there, and since then he had been unable to continue his studies. He stated that he had repeatedly asked his mother if he could go to Sweden to study, like his two older brothers. Since his brother-in-law's brothers intended to travel from Turkey to join their brother in Germany, it was decided that he would travel with them.

8. On 4 November 2016, owing to the prevailing security situation in Syria, the second applicant was granted a temporary residence permit in Sweden, valid for thirteen months (until 4 December 2017), as a person eligible for subsidiary protection under Chapter 4, section 2, subsection 1(1) of the Aliens Act (*Utlänningslagen*, 2005:716) and section 5 of the Law on temporary restrictions on the possibility of being granted a residence permit in Sweden (*Lag om tillfälliga begränsningar av möjligheten att få*

uppehållstillstånd i Sverige, 2016:752 –"the Temporary Act") (see paragraphs 28-36 below). The Migration Agency found that there were no individual reasons justifying the granting of refugee status to him under Chapter 4, section 1 of the Aliens Act.

9. At the second applicant's request, on 27 October 2017, his residence permit was prolonged by two years (until 5 December 2019), by virtue of section 5 of the Temporary Act.

10. In the meantime, on 17 February 2017, at the Embassy of Sweden in Khartoum, the first and third applicants applied for residence permits for Sweden, citing their family ties with the second applicant. The third applicant added that he wanted to seek medical care for an eye injury, to study and to be united with his brothers in Sweden. He also stated that his father had sent money to the first applicant in Syria.

11. On 24 August 2017 the Migration Agency dismissed their applications. It stated that under Chapter 5, section 3(4) of the Aliens Act, a residence permit could be granted to an alien who was a parent of an unmarried alien child, if that child was a refugee or a person otherwise in need of protection, in the event that that child arrived in Sweden separately from both parents. However, under section 7 of the Temporary Act, that no longer applied if the person in Sweden to whom the alien cited family ties had been granted a temporary residence permit under section 5 of the Temporary Act, and had applied for a residence permit after 24 November 2015. Thus, as regards the first applicant, the Migration Agency found:

> "You cannot receive a residence permit on the basis of your connection to [the second applicant] because [the second applicant] submitted his application for a residence permit in Sweden after 24 November 2015, and since he has been granted a temporary residence permit in Sweden as a person otherwise in need of protection under section 5 of the Temporary Act.
>
> There is no other reason on which to grant you a residence permit and it is not in breach of any Swedish convention commitment to refuse you a residence permit in Sweden.
>
> The Migration Agency therefore rejects your application for residence permit".

Moreover, the third applicant's application was rejected because his mother's application had been rejected and since the Migration Agency found that no other grounds had emerged for granting him a residence permit and that the refusal to grant such a permit was not contrary to Sweden's commitments under any international conventions.

12. The applicants appealed against the decision to the Migration Court (*Migrationsdomstolen*). They submitted that although the second applicant lived with his two adult brothers, and was by then 17 years old, he was still in need of his mother to support him with his studies and future life in Sweden. On 16 October 2017 the Migration Court upheld the refusal to grant residence permits to the first and third applicants for the same reasons as those cited by the Migration Agency.

13. The applicants lodged an application for leave to appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*). They relied specifically on Article 8 of the Convention, both alone and read in conjunction with Article 14. Their application was dismissed on 22 November 2017.

14. The second applicant turned eighteen years old in August 2018. In general, a person coming of age is no longer considered eligible for family reunification with his parents and siblings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE ALIENS ACT

A. Children

15. Chapter 1, section 2 of the Aliens Act states that a "child", as referred to within the wording of that Act, means a person under eighteen years of age.

16. Under Chapter 1, section 10, in cases involving a child, particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general.

17. Chapter 1, section 11 states that, in assessing questions of permits under this Act when a child will be affected by a decision in the case in question, the child must be heard, unless this is inappropriate. Account must be taken of what the child has said, to the extent warranted by the age and maturity of the child.

B. Refugees and persons in need of protection

18. Chapter 1, section 1a of the Aliens Act states that if there are provisions in the Temporary Act that deviate from this Act, those provisions shall apply.

19. Chapter 1, section 3 of the Aliens Act states that "asylum", as referred to within the wording of that Act, means a residence permit granted to an alien because he or she is a refugee or a person eligible for subsidiary protection.

20. Under Chapter 4, section 1 of the Aliens Act a "refugee" means an alien who is outside the country of his or her nationality because he or she feels a well-founded fear of persecution on the grounds of race, nationality, religious or political belief, or on the grounds of his or her gender, sexual orientation or membership of some other particular social group and is unable (or because of his or her fear is unwilling) to avail himself or herself of the protection of that country. This applies irrespective of whether it is the authorities of the country that are responsible for the alien risking being

subjected to persecution or whether the alien risks being subjected to persecution from private individuals, and it cannot be assumed that the alien will be offered effective protection that is not of a temporary nature. When making an assessment of whether protection is being offered, only protection that is provided by the State or by parties or organisations that control all or a significant part of the State's territory is taken into account.

21. Chapter 4, section 2 states that a "person eligible for subsidiary protection" under the Aliens Act is an alien who, in cases other than those referred to in Chapter 4, section 1, is outside the country of the alien's nationality because there are substantial grounds for assuming that the alien, upon return to his or her country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict. It is also required that the alien be unable, or, because of a risk referred to above, be unwilling to avail himself or herself of the protection of his or her country of origin. This applies irrespective of whether it is the authorities of the country that are responsible for the alien running a risk referred to there or whether the alien runs such a risk through the actions of private individuals, and it cannot be assumed that the alien will be offered effective protection that is not of a temporary nature. When making the assessment of whether protection is being offered, only protection that is provided by the State or by parties or organisations that control all or a significant part of the State's territory is taken into account.

C. Residence permits for refugees and persons in need of protection

22. Chapter 5, section 1(1) states that refugees, persons eligible for subsidiary protection and persons otherwise in need of protection who are in Sweden are entitled to a residence permit.

23. Under Chapter 5, section 1(2), a refugee may be refused a residence permit if he or she has shown, by committing an exceptionally gross criminal offence, that public order and security would be seriously endangered by allowing him or her to remain in Sweden, or if the refugee has conducted activities that have endangered national security and there is reason to assume that he or she would continue to conduct such activities here.

24. Under Chapter 5, section 1(3), a residence permit granted under the first paragraph of Chapter 5, section 1 shall be permanent or valid for at least three years. If a new temporary residence permit is granted to an alien who has been granted a temporary residence permit under that first paragraph, the new permit shall be valid for at least two years. However, the first and second sentences do not apply if compelling considerations of national security or

public order require a shorter period of validity. However, the period of validity may not be shorter than one year.

25. Chapter 5, section 1(4), read in conjunction with section 4 of the Temporary Act, states that Chapter 5, section 1(1) does not apply to persons otherwise in need of protection during the period 20 July 2016 until 19 July 2019.

D. Residence permits on account of family ties

26. Under Chapter 5, section 3 of the Aliens Act, a residence permit is, unless otherwise provided in sections 17-17b, to be granted to a child who is an alien, is unmarried and has a parent who is resident in or has been granted a residence permit to settle in Sweden (subsection 2) and an alien who is a parent of an unmarried alien child who is a refugee or a person otherwise in need of protection, if that child arrived in Sweden separately from both parents or from another adult person who may be regarded as having taken the place of the parents, or if the child has been left alone after arrival (subsection 4).

27. Under Chapter 5, section 3a of the Aliens Act, a residence permit may, unless otherwise provided in sections 17, subsection 2, be granted to an alien who in some way other than those referred to in section 3 or in section 5 is a close relative of someone who is resident in or who has been granted a residence permit to settle in Sweden, if he or she has been a member of the same household as that person and there exists a special relationship of dependence between the relatives that already existed in the country of origin.

II. THE TEMPORARY ACT

28. During 2015 Sweden experienced a record increase in asylum-seekers amounting to almost 163,000 (see paragraphs 41 and 45 below). Consequently, the Aliens Act was amended by means of enacting the Temporary Act, in force from 20 July 2016 to 19 July 2019. The Temporary Act adjusted the validity of residence permits to the minimum level provided by the Recast Qualification Directive (Council Directive 2004/83/EC – later repealed and replaced by Directive 2011/95/EU) and adjusted the possible grounds for family reunification to the minimum level provided by the Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003). The Temporary Act also limited the right to family reunification for both refugees and persons benefitting from subsidiary protection. Essentially, the right to family reunification for refugees was limited to the nuclear family, and the right to family reunification for persons benefitting from subsidiary protection was suspended during the period from 20 July 2016 until 19 July 2019.

29. According to the preparatory works to the Temporary Act (proposal to temporarily restrict the possibility of being granted a residence permit in Sweden**,** prop. 2015/16:174), Sweden had to temporarily alter its migration-related legislation in order to reduce the number of people seeking asylum there, while at the same time improving the capacity of reception and integration arrangements. By means of the Temporary Act it was therefore brought in line with the minimum level stipulated under EU law and international conventions. As regards persons benefitting from subsidiary protection, the preparatory works stated that the EU Family Reunification Directive was not applicable to them. The restriction of the right to family reunification for persons benefitting from subsidiary protection was also considered compatible with Article 8 of the Convention. It was held that the Temporary Act would only apply for three years, and that in the light of the considerable strain on the Swedish asylum system and other essential societal functions resulting from the large number of asylum-seekers, postponing family reunification during this period was compatible with the Convention. Moreover, noting that the limitations on the right to family reunification introduced by the Temporary Act were more far-reaching for persons benefitting from subsidiary protection compared to refugees, the preparatory notes stated that the Act was to be considered compatible with Article 14 of the Convention. It was held that refugees generally have grounds for protection that last longer than those in respect of persons benefitting from subsidiary protection, since refugees have individual grounds for protection. The proposed amendments were therefore not considered to be discriminatory. Lastly, since it could not be excluded that there could be exceptional cases in which the postponement of the right to family reunification would be contrary to Sweden's international obligations, a safety provision was introduced by section 13 of the Temporary Act. As a consequence (according to the preparatory works to the Temporary Act), an individual assessment of the right to family reunification was to be carried out in each particular case. It was stated that it was mainly the European Convention on Human Rights that would be at issue when applying this provision.

A. Residence permits for refugees and persons in need of protection under the Temporary Act

30. Unless otherwise stated in section 18 of the Temporary Act, under section 5(1) of the Act, a residence permit granted to a refugee or a person eligible for subsidiary protection under Chapter 5, section 1 of the Aliens Act shall (contrary to the third paragraph of that section) be temporary.

31. Under section 5(2), a residence permit shall be valid for three years if the alien is a refugee, unless otherwise stated in section 16a or unless compelling considerations of national security or public order require a

shorter period of validity. However, the period of validity may not be shorter than one year. If a new residence permit is granted, the new permit shall also be temporary, unless otherwise provided in section 17 or 18. The period of the validity of the new permit shall be determined in accordance with the rules set out in section 5(2).

32. Section 5(3) of the Temporary Act states that if the alien in question is a person eligible for subsidiary protection then the residence permit shall be valid for thirteen months, unless otherwise provided in section 16a. If a new residence permit is granted to a person eligible for subsidiary protection who has been granted a temporary residence permit under the first paragraph, the new permit shall also be temporary, unless otherwise provided in section 17 or 18. The new permit shall be valid for two years, unless otherwise stated in section 16a or unless compelling considerations of national security or public order require a shorter period of validity. However, the period of validity must not be shorter than one year.

B. Residence permits on account of family ties granted under the Temporary Act

33. Under section 7 of the Temporary Act, a residence permit shall not be granted under Chapter 5, section 3, subsection 1, points 1-4, or section 3a of the Aliens Act if the person to whom the alien cites family ties is a person eligible for subsidiary protection who has been granted a temporary residence permit under section 5 or section 16a. However, if the person to whom the alien cites family ties has had their application for a residence permit registered with the Swedish Migration Agency, with a registration date of 24 November 2015 or earlier, a residence permit shall be granted (1) under Chapter 5, section 3, subsection 1, point 4 of the Aliens Act and (2) to the same extent as would be the case in respect of a residence permit granted under section 6(1) to a person who cites family ties to a refugee.

C. Sweden's commitments to international conventions under the Temporary Act

34. Section 13 of the Temporary Act states that if an application for a residence permit on the grounds of family ties is dismissed and cannot be granted on other grounds, such a permit shall nevertheless be granted to an alien who is not in Sweden if a decision to refuse to grant a residence permit would be contrary to a Swedish commitment under an international convention.

35. Section 13 of the Temporary Act was applied in a leading judgment by the Migration Court of Appeal (MIG 2018:20). A father, mother and their children had applied for a residence permit on account of their family ties to their eight-year-old son/brother, who had arrived in Sweden with other

relatives and had been granted a temporary residence permit as a person eligible for subsidiary protection. The restriction of the right to respect for family life that a refusal of residence permits to his parents and siblings would entail under the provisions of the Temporary Act was deemed to be not reasonably proportionate to the government's stated purpose of temporarily reducing immigration. Particular weight was attached to the fact that the principle that the best interests of a child had to be given priority in any examination of whether a restriction of the right to respect for family life under Article 8 of the Convention is proportionate. Since it would be contrary to Swedish commitments under a convention not to allow family reunification in that particular situation, residence permits were granted.

D. Prolongation of the Temporary Act

36. The Temporary Act was prolonged by two more years up to and including 19 July 2021. However, as of 20 July 2019 the Act reintroduced the same possibility (that is to say, the same possibility of being granted family reunification) to refugees and persons eligible for subsidiary protection. In the preparatory works to the Temporary Act the government stated that it found the reintroduction of that possibility to be desirable both from a humanitarian perspective and by way of a measure to facilitate integration, and that it wanted to ensure Sweden's compliance with international conventions – in particular, the European Convention on Humans Rights (prolongation of the law on temporary restrictions on the possibility of being granted residence permit in Sweden, prop. 2018/2019:128).

III. INTERNATIONAL LAW AND MATERIAL

37. The relevant international law and material was recently set out in *M.A. v. Denmark* [GC], no. 6697/18, §§ 36-41, 9 July 2021.

38. In addition, in respect of Sweden, in March 2016 the United Nations High Commissioner for Refugees (UNHCR) made observations on the draft version of the Temporary Act, and stated, among other things:

> "Denying beneficiaries of alternative status the right to family unity and family reunification
>
> 49.UNHCR is aware that according to Article 3(2)(c) of the Family Reunification Directive, beneficiaries of subsidiary (i.e., alternative) protection are not included in the scope of the Directive. UNHCR, however, considers that the humanitarian needs of individuals granted subsidiary protection are not different from those of refugees, and that differences in entitlements are therefore not justified in terms of the individual's flight experience and protection needs. There is also no reason to distinguish between the two as regards their right to family life and access to family reunification.
>
> 50.The European Commission also considers that the humanitarian protection needs of persons benefiting 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 subsidiary protection. This is justified by the fact that the convergence of both protection statuses is also confirmed in the recast Qualification Directive.

51.Furthermore, the Court of Justice of the European Union (hereafter "CJEU") has held that the duration of residence in the EU Member States is only one of the factors that must be taken into account when considering an application for family reunification, and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.

52.The ECtHR has also concluded in several cases that since national authorities had not given due consideration to the applicants' specific circumstances, the family reunification procedure had not offered the requisite guarantees of flexibility, promptness and effectiveness to ensure compliance with their right to respect for their family life. For that reason, the State had not struck a fair balance between the applicants' interests on the one hand, and its own interest in controlling immigration on the other, in violation of Article 8. More generally, the ECtHR has concluded that preventing a temporary residence permit holder of five years from family reunification was in breach of Articles 8 and 14 of the ECHR.

53.Moreover, UNHCR wishes to refer to the ECtHR, which, as stated above in paragraph 27, has held that a difference of treatment in "analogous, or relevantly similar, situations", is discriminatory if it has no objective and reasonable justification. The Council of Europe Committee of Ministers have also adopted a Recommendation on family reunion, which equally applies to refugees and "other persons in need of international protection".

54.When the Family Reunification Directive was introduced, UNHCR welcomed the adoption of more favourable rules for family reunification in the Directive and has called on all Member States not to apply time limits to the more favourable conditions granted to refugees.

... "

39. Moreover, a report by the Council of Europe Commissioner for Human Rights, following his visit to Sweden from 2 until 6 October 2017 (DH(2018)4), stated, *inter alia*:

"1.2 RIGHT TO FAMILY REUNIFICATION

21. A number of limitations to the right to family reunification have been introduced through the law on temporary restrictions to obtaining a residence permit in Sweden, which entered into force on 20 July 2016 for a three-year period.

...

24. The Commissioner is concerned that the temporary law makes it more difficult to be reunited with family members, especially for beneficiaries of subsidiary protection and those recognised as refugees under the Geneva Convention whose family members do not apply for reunification within the three-month deadline. Several interlocutors of the Commissioner have also drawn attention to several practical obstacles to family reunification, in addition to the legal impediments, such as a strict ID/passport requirement to prove identity, difficulties in reaching a Swedish embassy or consulate to participate in an interview, and long processing times, with a 21-month waiting period on average.

25. The Commissioner also shares the concern expressed by UNHCR that, given that applicants fleeing conflict situations in most cases receive subsidiary protection rather

than refugee status under the Geneva Convention, the temporary law will significantly hamper for example Syrian applicants' access to family reunification."

IV. EU LAW AND OTHER EUROPEAN MATERIAL

40. The relevant EU law and other European material was set out in *M.A. v. Denmark* (cited above, §§ 42-62).

V. STATISTICS

41. Annual public statistics concerning the number of aliens in Sweden, issued by the Migration Agency, show that the total number of asylum seekers in Sweden was as follows:

2015: 162,877 (including 51,338 Syrians)
2016: 28,939 (including 5,457 Syrians)
2017: 25,666 (including 4,718 Syrians)

42. The number of persons granted asylum (including subsidiary protection – see brackets) was as follows:

2015: 36,630 (18,456)
2016: 71,562 (48,355)
2017: 36,607 (13,804)
2018: 25,377 (4,978)

43. The number of residence permits granted on the basis of family reunification with a person already granted asylum or subsidiary protection was as follows:

2015: 16,251
2016: 15,149
2017: 19,129
2018: 16,637

44. According to figures cited in *M.A. v. Denmark* (cited above, §§ 66-68), 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

45. Moreover, in 2015 the main destinations in Europe for persons seeking asylum were: Germany with 476,500; Hungary with 177,100; Sweden with 162,900; and France with 118,000 (numbers rounded off). The Swedish Government submitted that in 2015 Sweden received 12.5% of all asylum-seekers coming to the EU that year.

46. Lastly, in 2015, the main destinations in Europe, for asylum-seekers per capita (that is to say per 100,000 of 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).

VI. COMPARATIVE LAW MATERIAL

47. The relevant comparative law material was set out in *M.A. v. Denmark* (cited above, § 69).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The applicants complained that the Swedish authorities' refusal of 24 August 2017, owing to the suspension introduced by the Temporary Act, to grant the first and third applicants residence permits on the basis of their family ties with the second applicant had been 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

49. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties

50. The applicants maintained that the domestic authorities had failed to engage in a thorough balancing test of the interests at stake, notably the interests of the child, and that they had not relied on relevant and sufficient reasons for refusing to grant the first and third applicants residence permits that would have enabled their family reunification with the second applicant.

51. They submitted that the authorities had not, during the domestic proceedings, enquired about or referred to the applicants' relationship with their husband/father in Saudi Arabia. Accordingly, it had not come to light that he only had a visa to visit the husband of his daughter (from another relationship), but that he was not in possession of a residence permit (which

would have allowed the applicants to request family reunification with him). In any event, it would have been inappropriate to apply the approach that the family could have been reunited elsewhere since they were all persons with protection status.

52. The applicants pointed out that although the Temporary Act was supposed to postpone the applicant's right to family reunification only for three years, in the present case it had had an indefinite effect, since the second applicant had in the meantime reached the age of eighteen years.

53. The Government maintained that the refusal had been in accordance with the law and had pursued the legitimate aim of protecting the economic well-being of the country by regulating immigration, and that a fair balance had been struck between the various interests at stake.

54. In respect of the interest of the State, they reiterated that the Temporary Act had been introduced owing to a major increase in the level of immigration to Sweden in 2015: in that year close to 163,000 people had sought asylum in Sweden – 12.5% of all asylum-seekers in the EU that year. Hence the strain on the Swedish asylum system had been very palpable, and still was. The aim of the Act had been to reduce the number of asylum-seekers, while improving the capacity of reception and integration arrangements. The Act had been aimed at merely temporarily enabling Sweden to grant residence permits based on family reunification only to the minimum number of applicants provided by EU law and international conventions.

55. In respect of the applicants' interests, while acknowledging that living apart must have caused the family difficulties, the Government noted that the family had made some voluntary choices in this respect. The first applicant's husband, the father of the second and third applicant, had been residing in Saudi Arabia since 2012, and there were no indications as to why the first applicant could not join him there, where she had been born, and where she had a brother and where her husband's family were living. Moreover, several of their adult children already lived in various other countries. In respect of the second applicant, who is now an adult, it had been taken into account that he was seventeen years old, and thus a minor, when the application for family reunification had been lodged. Accordingly, it had been assessed whether there was a relationship of dependency between him and the first applicant. It had also been noted that he had asked his mother to let him go to Sweden to live with his brothers and to study. As regard the third applicant, his father was in Saudi Arabia and his mother in Syria, and there was no indication that his ties to the second applicant (his brother) was any stronger than his ties to his parents, or that a family reunification with the second applicant would be in his best interests.

2. Third-party interveners

56. The Danish Government submitted in particular that it was important, when assessing the compatibility with Article 8 of a temporary suspension in respect of family reunification, to take into account the law in other European countries as well as international law (including EU law). In 2015 and 2016 there had been an urgent need for some member States to be able to introduce different legislation in respect of family reunification for beneficiaries of subsidiary protection in order to cope with the influx of persons in need of such protection and to ensure effective integration.

57. The VU Migration Law Clinic did not address the Article 8 issue.

3. The Court's assessment

(a) General principles

58. The Court reiterates that recently it found that a refusal to grant family reunification to a long-term married couple owing to a three-year waiting period applicable to beneficiaries of temporary protection had entailed a violation of Article 8 (see *M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021). In that case the Court examined: the extent of the State's obligations to admit to its territory relatives of persons residing there (ibid., §§ 130-33); case-law regarding the substantive requirements regarding family reunification (ibid., §§ 134-36); case-law regarding the procedural requirements for processing applications for family reunification (ibid., §§ 137-39); and the scope of the State's margin of appreciation (ibid., §§ 140-63). In respect of the latter the Court concluded as follows:

> "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 [bold added].** 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)."

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

59. Applying the principles set out in the above-mentioned case, the Court notes from the outset that the present case concerns the suspension of the second applicant's right to be granted family reunification with his mother and brother, who had not previously resided in Sweden. 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*, M.A. v. Denmark*, cited above, §§ 164-65 and the references cited therein). Thus, the crux of the matter is whether the Swedish authorities, on 24 August 2017 – when refusing the applicants' application for family reunion owing to the above-noted temporary suspension – struck a fair balance between the competing interests of the individual and of the community as a whole. The applicants had an interest in being reunited, whereas the Swedish State had an interest in serving the general interests of the economic well-being of the country by regulating immigration and controlling public expenditure. The Court also notes that from the date on which the second applicant turned eighteen years old on 8 August 2018 he was in principle no longer eligible to seek family reunification. Thus, even if the right to apply for family reunification had been reintroduced after 19 July 2019, that right would not have applied to the second applicant. The refusal of 24 August 2017 therefore became final.

(i) The legislative and policy framework

60. In 2016, the Swedish legislature amended the Aliens Act by introducing the Temporary Act, which was originally intended to be in force only from 20 July 2016 until 19 July 2019 (see paragraph 28 above). The amendments were set out notably in section 5(1) of the Temporary Act, and provided that all residence permits granted after 20 July 2016 (both to refugees and to persons eligible for subsidiary protection) were to be only temporary and valid for three years if the alien was a refugee (section 5(2)) and for thirteen months if the alien was a person eligible for subsidiary protection (section 5(3)). Moreover, by virtue of section 7 of the Temporary Act, persons eligible for subsidiary protection who had had their application for a residence permit registered with the Swedish Migration Agency after 24 November 2015 could not be granted family reunification while the Act was in force, unless under section 13 such a refusal would be contrary to a Swedish commitment under international conventions, including the European Convention on Human Rights.

61. As to the legislative choices underlying the Temporary Act the preparatory works stated that the amendments were deemed necessary in the light of the significant increase in asylum-seekers in Sweden in 2015 (see paragraph 29 above) in order to reduce the number of asylum-seekers, while improving the capacity of reception and integration arrangements. The legislature thus wanted temporarily to bring the Swedish migration legislation into line with the minimum level stipulated mainly in EU law. The preparatory works stated that the temporary restrictions on the right to family reunification were compatible with the Convention. Moreover, section 13 was included in the Act as a "safety valve". The said provision was applied, for example, in a judgment by the Migration Court of Appeal (see paragraph 35 above) in a case where parents and siblings had applied for a residence permit on account of family ties to their eight-year-old son/brother.

62. The Court notes that owing, in particular, to developments in Syria, the number of persons applying for protection in Europe increased from approximately 431,000 in 2013 to 627,000 in 2014 and to 1.3 million in 2015 (see paragraph 44 above).

63. It has not been disputed that Sweden received close to 163,000 asylum-seekers in 2015, which constituted 12.5% of all asylum-seekers coming to the EU that year (see paragraphs 41 and 45 above).

64. 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, it must also be assumed that the Swedish government experienced a significant increase in expenditures relating to social benefits and allowances, housing, language training and employment initiatives for those granted international protection in Sweden (see, for example *M.A. v Denmark*, cited above, § 173).

65. The Court finds no reason to question the distinction made by the Swedish legislature in respect of persons granted protection owing to an individualised threat (namely, those qualifying for refugee status under the UN Refugee Convention under section 5(2) of the Temporary Act) and persons granted protection owing to a generalised threat (namely, persons eligible for subsidiary protection under section 5(3) of the Temporary Act).

66. The Court also finds that the general justification for the amendments, including section 7 of the Temporary Act, was based on needs, which served the general interests of the economic well-being of the country (see paragraphs 29 and 54 above).

67. However, as stated in *M.A. v Denmark*, in the Court's view, a suspension for three years, albeit only temporary, amounts to, 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. 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 expiry of the suspension period (see *M.A. v Denmark*, cited above, § 179).

68. The Court notes, however, that the Temporary Act, in force from 20 July 2016 to 19 July 2019, did not impose a three-year waiting period for the granting of family reunification similar to that provided by the Danish legislation cited in the case of *M.A. v Denmark* (cited above).

69. The Danish legislation required that a person had to have held a residence permit (under section 7 (3) of the Aliens Act) for at least three years (see section 9(1)(i)(d) of the Act) before he or she could become eligible for family reunification, unless there were exceptional reasons (see *M.A. v Denmark*, cited above, §§ 24-35).

70. The Swedish legislation resulted in a three-year suspension period only for those who applied for family reunification on 20 July 2016. Thereafter, the waiting period was gradually reduced; for those who applied after 20 July 2017 it was two years or less.

71. Moreover, when the Temporary Act was prolonged for two years, as of 20 July 2019, the right to apply for family reunification for persons who had been granted subsidiary protection, and who had applied for a residence permit after 24 November 2015, was restored (contrast *M.A. v Denmark*, cited above, §§ 180 and 191).

(ii) The applicants' individual case

72. As to the particular circumstances of the persons involved and their ties to the respondent State it can be observed that the second applicant applied for asylum in Sweden on 9 March 2016 (that is to say after 24 November 2015). On 4 November 2016 he was temporarily granted subsidiary protection.

73. On 17 February 2017, when the first and third applicants lodged an application for family reunification owing to their ties with the second applicant in Sweden, the latter was sixteen and a half years old. He had been in Sweden since 5 March 2015 – that is to say for almost two years. He was studying and living with his adult twin brothers, who had come to Sweden in 2014. He had family in various countries – his father in Saudi Arabia (since 2012), his mother and a brother in Syria, a brother in Turkey and a sister in Germany. Moreover, his paternal grandmother, two paternal uncles and a maternal uncle lived in Saudi Arabia. When the second applicant left Syria, he travelled with family members to Germany, and continued alone to Sweden. He left Syria because of the security situation there. He also submitted that he had repeatedly asked his mother if he could go to Sweden to study, like his two older brothers. The Court therefore notes that the second

applicant had limited ties with Sweden, and that he showed no indication of any vulnerability or dependence on the first applicant.

74. On 17 February 2017, the first and the third applicants were aged forty-nine and thirteen, respectively. They had never been to Sweden. In their application for family reunification, apart from referring to their family ties with the second applicant, the third applicant added that he wanted to seek medical care for an eye injury, to study and to be united with his brothers in Sweden. He also stated that his father sent money to the first applicant in Syria. The Court therefore notes that they had no ties to the country, besides from the second applicant (and his twin brothers) being allowed on Swedish territory. Moreover, they showed no indication of any vulnerability or dependence on the second applicant.

75. When the applicants applied for family reunification, the Temporary Act was in force, and they were therefore covered by the suspension, which in their case, formally lasted from 17 February 2017 until 19 July 2019 (a period of two years and five months). It is, however, reiterated that the second applicant would come of age on 8 August 2018, and that thereafter any family reunification would in principle be excluded. Therefore, the applicants in the present case were *de facto* covered by the suspension from 17 February 2017 until 8 August 2018 – a period of less than one year and a half.

76. In respect of the applicants' argument that they were thereafter excluded from applying for family reunification, the Court reiterates that while in some cases it has held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence, in a number of other cases it has not insisted on such further elements of dependence with respect to young adults who were still living with their parents and had not yet started a family of their own (see, for example, *Savran v. Denmark* [GC], no. 57467/15, § 174, 7 December 2021, albeit concerning expulsion, and the case-law cited therein).

77. It is not in dispute that on 24 August 2017, when the Migration Agency refused the applicants' application for family reunification, owing to the general situation in Syria, there were "insurmountable obstacles" to the applicants enjoying their family life there (contrast, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 68, Series A no. 94). On the other hand, it appears that they had the possibility of maintaining contact via, *inter alia*, phone calls and text messages (see *M.A. v. Denmark*, cited above, § 184).

78. The Migration Agency's refusal of 24 August 2017 was taken on the grounds that the second applicant had been granted a temporary residence permit under section 5 of the Temporary Act and had applied for a residence permit after 24 November 2015. Accordingly, by virtue of section 7 of the Temporary Act, the first applicant did not fulfil the requirements to be granted family reunification with her minor son, the second applicant. The third

applicant's application was rejected since his mother's application had itself been rejected. The Migration Agency found that no other grounds had emerged for granting them a residence permit and that the rejection of the third applicant's application would not be contrary to Sweden's commitments under any international conventions. The rejection of the third applicant's application was reviewed and upheld by the Migration Court on 16 October 2017 for the same reasons as those cited by the Migration Agency. Leave to appeal to the Migration Court of Appeal was refused (by the same court) on 22 November 2017.

79. The Court observes that before the Migration Agency and the Migration Court the applicants did not specifically rely on section 13 of the temporary Act nor on Article 8 or other provisions of the Convention. They only relied on Article 8 in their application for leave to appeal to the Migration Court of Appeal.

80. Therefore, although the refusal by the Migration Agency and the Migration Court mainly referred in abstract terms to the relevant provisions of the Temporary Act and to international conventions, given the circumstances of the present case, the Court is satisfied that the authorities assessed whether the applicants' individual circumstances, their interests and dependence on each other (or lack thereof) fell under section 13 of the Temporary Act, and whether the refusal to grant the first and third applicants a residence permit would be contrary to Sweden's commitments under the Convention. The Court finds that their reasoning was sufficiently specific to enable the Court to carry out the supervision entrusted to it (see, *inter alia*, *El Ghatet v. Switzerland*, no. 56971/10, § 47, 8 November 2016).

81. Moreover, the family reunification in the present case concerned a mother and her son, who was sixteen and a half years old at the time of the application. Admittedly, he was still a minor, but at that time he had managed well on his own in Sweden for almost two years, living with his adult twin brothers, and studying (see paragraph 12 above). In the Court's view the suspension of their family reunification would therefore not "exacerbate the disruption of an essential cohabitation", as was the case in *M.A. v. Denmark*, in which the family reunification concerned a long-term married couple for whom the mutual enjoyment of matrimonial cohabitation constituted the essence of married life (see *M.A. v Denmark*, cited above, § 179).

82. In addition, the applicants have not pointed to any particular dependence on each other or difficulties that might have arisen from their living apart from each other (see paragraphs 12, 55, 73 and 74 above). The Court also observes that the best interests of a child, of whatever age, cannot constitute a "trump card" that requires the admission of all children who would be better off living in a Contracting State (see, *inter alia*, *El Ghatet*, cited above, § 46; *Berisha v. Switzerland*, no. 948/12, §§ 60-61, 30 July 2013; and *I.A.A. and Others v. the United Kingdom* (dec.), 25960/13, § 46, 8 March 2016).

83. There is no concrete information about the number of cases in which section 13 of the Temporary Act was applied during the suspension period. The relevant statistics show, however, a significant number of residence permits granted on the basis of family reunification with a person already granted asylum or subsidiary protection (see paragraph 43 above). Moreover, the Government have pointed to a case in which parents and siblings were granted family reunification with their eight-year-old son/brother, who had been granted subsidiary protection in Sweden. The Court has therefore no basis for concluding that only very limited exceptions fell under the said provision (contrast *M.A v. Denmark*, cited above, § 192).

(iii) Overall conclusion

84. The Court reiterates that it sees no reason for questioning the rationale for a waiting period of two years (see paragraph 58 above) and that the applicants in the present case were *de facto* covered by the suspension only from 17 February 2017 until 8 August 2018 – a period of less than two years. Moreover, there is no indication that the Temporary Act did not allow for an individualised assessment of the interests of family unity in the light of the concrete situation of the persons concerned under section 13 of the Act, or that such an assessment was not carried out in the applicants' case. Given these circumstances, the Court is satisfied, having regard also to their margin of appreciation, that the authorities of the respondent State, when suspending the applicants' right to apply for family reunification, struck a fair balance between, on the one hand, the applicants' interest in being reunited in Sweden and, on the other, the interest of the community as a whole in protecting the economic well-being of the country by regulating immigration and controlling public expenditure.

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

85. The applicants also complained that the Swedish authorities' decision of 24 August 2017 to refuse to grant them family reunification had been 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."

A. Admissibility

86. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties

87. The applicants maintained that they had been in a comparable situation to that of those who had been granted asylum/refugee status under Chapter 4, section 1 of the Aliens Act, and that there was no support for the Government's assertion that refugees generally have a need for longer-lasting protection than persons eligible for subsidiary protection.

88. Moreover, there was no objective and reasonable justification for the difference in treatment. They adhered to the arguments submitted by, *inter alia*, the UNHCR and the Commissioner for Human Rights (see paragraphs 38-39 above, and M.A. v. Denmark, cited above, §§ 36 to 41 and 60 to 62).

89. In the Government's view, the second applicant, being eligible for subsidiary protection under Chapter 4, section 2 of the Aliens Act, was not in a situation analogous or relevantly similar to that of persons who had been granted refugee protection under Chapter 4, section 1 of the Aliens Act. Refugees had suffered personal persecution, and generally needed protection for a longer time than persons granted subsidiary protection, who had not been subjected to personal persecution but had fled because of the general situation in their country of origin. They also reiterated that Council Directive 2003/86/EC of 22/09/2003 on the right to family reunification applied to refugees recognised under the UN Convention, but not to persons under subsidiary or temporary protection. Accordingly, there had thus been no difference in treatment.

90. In any event, the Government submitted, the difference in the right to family reunification was based on objective and fair reasons falling within the margin of appreciation enjoyed by the State in a case concerning differential treatment based on a person's immigration status. The temporary suspension for a limited period on the granting of family reunification had been introduced under the Temporary Act in the light of the record increase in asylum applications in Sweden in 2015, which had placed a great strain on the Swedish immigration authorities and other central functions in society. The measure had thus pursued the legitimate aim of protecting the "economic well-being of the country", which was a legitimate aim in terms of reducing immigration, improving reception and integration capacity, and ensuring the effective implementation of immigration control. It should also be reiterated that exceptions could be and had been granted under section 13 of the Act in

the event that a refusal to allow family reunification would have contravened Sweden's obligations under international conventions, including Article 8 of the Convention.

2. Third party interveners

91. In general, the Danish Government submitted that the difference in treatment was reasonably and objectively justified and proportionate to the legitimate aim pursued. The VU Migration Law Clinic maintained that there was no objective and reasonable justification for treating persons eligible for subsidiary protection any different than refugees.

3. The Court's assessment

(a) General principles

92. The Court has summarised the general principles in its case-law (see, for example, *Fábián v. Hungary* [GC], no. 78117/13, §§ 112-16, 5 September 2017, and *Molla Sali v. Greece* [GC], no. 20452/14, §§ 123 and 133-36, 19 December 2018).

93. As regards the scope of the State's margin of appreciation, the Court will, in addition to what is stated in *Fábián* (cited above, §§ 114-15), also have regard to the considerations noted in paragraph 58 above.

94. In cases arising from individual petitions the Court's task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it (see, for example, *Taxquet* v. *Belgium* [GC], no. 926/05, § 83 *in fine*, ECHR 2010; *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 69-70, 20 October 2011; and *Donohoe* v. *Ireland,* no. 19165/08, § 73, 12 December 2013).

(b) Application of these principles to the present case

95. A difference in treatment may raise an issue from the point of view of the prohibition of discrimination, as provided by Article 14 of the Convention, only if the persons subjected to different treatment are in a relevantly similar situation, taking into account the elements that characterise their circumstances in the particular context. The Court notes that the elements that characterise different situations, and determine their comparability, must be assessed in the light of the subject matter and purpose of the measure that makes the distinction in question (see, *inter alia*, *Fábián*, cited above, § 121).

96. In some cases, the Court has recognised that "immigration status" may amount to "other status" within the meaning of Article 14 (see, for example, *Hode and Abdi v. the United Kingdom*, no. 22341/09, §§ 46-48, 6 November

2012; *Bah v. the United Kingdom*, no. 56328/07, §§ 38-52, ECHR 2011; and *Okpisz v. Germany*, no. 59140/00, §§ 32-34, 25 October 2005).

97. The Court will proceed to assess the elements that characterise the different situations in the present case. It will determine their comparability, in the light of the subject matter and the purpose of the measure that makes the distinction in question – namely the introduction of the temporary suspension, in the period from 20 July 2016 until 19 July 2019, on the granting of family reunification to persons who had been granted subsidiary protection under Chapter 4, section 2 of the Aliens Act, and who had applied for protection after 24 November 2015 – in order to reduce immigration, improve reception and integration capacity, and ensure the effective implementation of immigration control.

98. As to the question of whether the second applicant, who had been granted subsidiary protection under Chapter 4, section 2 of the Aliens Act and section 5(3) of the Temporary Act, owing to the general situation in Syria, can claim to be in a situation analogous or relevantly similar to that of persons who have been granted refugee status under Chapter 4, section 1 of the Aliens Act and section 5(2) of the Temporary Act, the Court observes that some historical events do support the argument that persons who flee a general situation may generally have a more "temporary" need for protection – such as (i) the situation in Mogadishu, Somalia, which changed rather quickly, as illustrated by the judgments delivered by the Court on 28 June 2011 in the case of *Sufi and Elmi v. the United Kingdom* (nos. 8319/07 and 11449/07, 28 June 2011), and on 5 September 2013 in *K.A.B. v. Sweden* (no. 886/11), or (ii) the situation in Sri Lanka, which was addressed in the cases of *NA. v. the United Kingdom* (application no. 25904/07, 17 July 2008), and *E.G. v. the United Kingdom* (no. 41178/08, 31 May 2011).

99. The Court also notes that another difference between asylum-seekers who rely on their own specific situation and asylum-seekers who rely on a general situation seems to be the number of persons fleeing. When a general situation arises, owing to a civil war or indiscriminate violence, the number of persons fleeing is usually very high within a short period of time – sometimes to the extent that the situation is described as a "mass influx" (see, for example, the European Commission's Temporary Protection Directive, which was adopted in the light of the crisis in Kosovo).

100. Likewise, in the present case, owing to the situation in Syria, the number of persons fleeing increased significantly during the period 2014-2015. Within the EU the number of people fleeing Syria increased from 431,000 in 2013, to 627,000 in 2014, and to 1.3 million in 2015. In 2015 Sweden received almost 163,000 asylum-seekers (which amounted to 12.5% of all asylum-seekers entering the EU that year). These figures illustrate that when a general crisis occurs, host countries are suddenly faced with a significant number of asylum-seekers within a short period of time.

101. Yet another difference between asylum-seekers who rely on a general situation and those who rely own their own specific situation seems to be the procedure for granting protection: within the Swedish context, under the procedure for dealing with an application for protection under Chapter 4, section 2 of the Aliens Act it sufficed for the person concerned to refer to the general situation in the home country, whereas under the procedure under Chapter 4, section 1 of the Aliens Act the person concerned had to substantiate (often after several interviews with the authorities responsible for aliens affairs) that upon return to his or her country of origin he or she would be at a real and personal risk of suffering treatment contrary to Article 3 on the basis of his or her individual circumstances.

102. Moreover, having regard to the relevant EU law, the Court reiterates that the Chapter of the Family Reunification Directive (2003/86/EC of 22/09/2003) concerning refugees' right to family reunification only applies to refugees recognised under the UN Convention, not to persons under subsidiary protection.

103. The Court also notes that the Recast Qualification Directive distinguished between "refugee status" and "subsidiary protection status" (see the definitions given by Article 2 of the Directive). According to Article 20(2) of the Directive, its Chapter VII on the "content of international protection" applied both to refugees and persons eligible for subsidiary protection, but Article 23 of the Directive (Maintaining family unity) only applied to "family members" who were present in the same member State in relation to an application for international protection.

104. Furthermore, when proposing a Directive on Temporary Protection, the Commission, in its explanatory memorandum, stated as follows: "Given the limited pre-defined duration of temporary protection, the Commission feels it necessary to concentrate on the family as already constituted in the country of origin but separated by the circumstances of the mass influx ... the right [to family reunification for persons with temporary protection] is more limited than the right provided for by the Family Reunification Directive (which only concerned refugees under the UN Refugee Convention, and excluded persons having been granted subsidiary protection). 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."

105. Having regard to the above, the Court acknowledges that there are both factual and legal arguments in favour of saying that persons fleeing a general situation in their country of origin are not in a situation that is analogous or relevantly similar to that of persons who have fled their home country owing to an individualised risk of persecution or ill-treatment as regards the need for protection and also as regards the need for family reunification.

106. At the same time, however, the Court takes note of the views expressed by various international bodies and organisations (notably the UNHCR, the United Nations Human Rights Committee and the Commissioner for Human Rights (see *M.A. v Denmark*, cited above, §§ 40, 62, and 102-14), according to which persons who have fled their country of origin owing to a general situation have a similar need for protection and for family reunification as that of persons who have fled their home country owing to an individualised risk of persecution or ill-treatment, the essential factor being that there was an obstacle preventing them and their family from enjoying family life in their country of origin for as long as the risk was present.

107. The Court also reiterates that there was a lack of consensus at national, international and European levels on whether or not, in respect of the right to family reunification, it was necessary or appropriate to distinguish between refugees, on the one hand, and persons under subsidiary protection (including persons granted temporary protection), on the other hand (see *M.A. v. Denmark*, cited above, §§ 150-59).

108. In the view of the Court, the question of whether the applicant, having been granted subsidiary protection under Chapter 4, section 2 of the Aliens Act, was in a situation that was analogous or relevantly similar to that of persons granted "refugee status" under Chapter 4, section 1 of the Aliens Act cannot be answered in the abstract or in general, but has to be assessed on the basis of the specific circumstances of the case and in particular with regard to the right invoked – in this case, the right to family reunification.

109. In other words, persons with "subsidiary protection status" may in some respects be in a different situation and in other respects in a similar situation to persons with "refugee status", depending on the specific circumstances and in particular the rights or the situation in question. They may, for example, arguably be in a similar situation in respect of the need for accommodation, shelter, basic necessities and medical care.

110. Furthermore, the Court is of the view that the question cannot be answered in general in respect of the right to family reunification. If the Court were to find in general that persons with "subsidiary protection" were not in an analogous or relevantly similar situation to that of persons with "refugee status" with respect to family reunification, that would not take sufficient account of the duration of an imposed suspension period.

111. Therefore, in order for the protection of the Convention to be practical and effective and not theoretical and illusory (see, for example, *Muhammad and Muhammad*, cited above, § 122), the Court is for the purpose of the present case – where the core of the issue is not the imposition of a suspension as such, but the length of the suspension period imposed on persons with "subsidiary protection status", as opposed to persons with "refugee status" – willing to proceed on the basis of the assumption that the second applicant in respect of the right invoked (namely, family

reunification), was in an analogous or relevantly similar situation to that of persons granted refugee status, thus leaving the assessment of the duration of the suspension period imposed to be assessed in terms of its proportionality.

112. In that respect the Court observes that in 2015 and over the following years (see paragraphs 41 to 46) Sweden granted protection to a significant number of asylum-seekers, whether to refugees or persons eligible for subsidiary protection. Furthermore, as noted in the preparatory works to the Temporary Act (see paragraph 29 above) and in the Government's submissions (see paragraph 90 above), the record high number of asylum-seekers in 2015 placed a great strain on the Swedish immigration authorities and other central functions in society. Consequently, the Swedish migration legislation had to be temporarily changed in order to reduce the number of asylum-seekers, while improving the capacity of reception and integration arrangements and ensuring the effective implementation of immigration control. The legislation was accordingly brought into line with the minimum level stipulated by EU law and international conventions.

113. It should also be reiterated, (as noted in paragraph 75 above), that although the applicants were formally covered by the suspension on family reunification that lasted from 17 February 2017 until 19 July 2019, they were *de facto* only covered by the suspension for less than one year and a half (namely from 17 February 2017 until 8 August 2018), since the second applicant reached his majority on the latter date. Lastly, they could have applied for family reunification under section 13 of the Temporary Act, had exceptional circumstances emerged.

114. The Court is aware that the UNHCR expressed concern that States might choose to grant subsidiary or temporary protection status instead of UN refugee status in order to limit family reunification rights. In the present case, however, it is clear that the Migration Agency carefully examined whether the second applicant was entitled to protection under Chapter 4, section 1, but found that he was not (see paragraph 8 above).

115. Furthermore, as stated above (see paragraph 107), there was a lack of consensus at national, international and European levels as to whether or not, in respect of the right to family reunification, it was necessary or appropriate to treat persons under subsidiary protection on an equal footing with refugees. It is also a fact that similar legislative measures have been introduced by other countries in respect of beneficiaries of subsidiary and temporary protection (see *M.A. v Denmark*, cited above, § 69).

116. Moreover, as stated above, after examining the complaint under Article 8, the Court is satisfied that the Swedish authorities struck a fair balance between, on the one hand, the applicants' interest in being reunited in Sweden and, on the other, the respondent State's need to control immigration in the general interest of the economic well-being of the country (see paragraph 84 above).

117. Having regard to all the above considerations, the Court finds that the Government have convincingly shown that the differential treatment of the applicants was reasonably and objectively justified by the need to ensure the effective implementation of immigration control and to protect the "economic well-being of the country", and that the effect of the differential treatment was not disproportionate to the legitimate aim pursued.

118. It follows that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by 6 votes to 1, that there has been no violation of Article 8 of the Convention;

3. *Holds*, by 6 votes to 1, that there has been no violation of Article 14 taken in conjunction with Article 8.

Done in English, and notified in writing on 20 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Marko Bošnjak
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 Ktistakis is annexed to this judgment.

M.B.
R.D.

DISSENTING OPINION OF JUDGE KTISTAKIS

1. I regret that I am unable to agree with the majority in the Chamber that the Swedish authorities' refusal to grant family reunification to the applicants was compatible with Article 8 of the Convention and Article 14 of the Convention in conjunction with Article 8, for the reasons stated below.

2. The Act on Temporary Restrictions on the Possibility of Obtaining Residence Permits in Sweden (the "Temporary Act"), effective for a three-year period between 20 July 2016 and 19 July 2019, suspended the right to family reunification for beneficiaries of subsidiary protection who applied for asylum after 24 November 2015. The measure left the right to family reunification intact for other relevant groups. Thus, on the basis of exclusively random temporal criteria, the second applicant was treated differently from other beneficiaries of subsidiary protection who were not subject to the Temporary Act, for example, beneficiaries of subsidiary protection who had applied before 24 November 2015.

3. According to the relevant (very recent) Grand Chamber judgment in *M.A. v. Denmark* ([GC], no. 6697/18, 9 July 2021), in such a case, under Article 8 of the Convention, when the enjoyment of family unity depends on exclusively random temporal criteria, the national authorities are obliged to guarantee an individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned (see paragraph 58 of the present judgment). In my view, the requisite individualised assessment was not made by the Swedish authorities in the present case. The entire refusal by the Migration Agency is set out below, even though it is already included in paragraph 11 of the present judgment, because it is so short that it reveals, even by its very brief nature and standardised format, the absence of any individualised assessment:

> "You cannot receive a residence permit on the basis of your connection to [the second applicant] because [the second applicant] submitted his application for a residence permit in Sweden after 24 November 2015, and since he has been granted a temporary residence permit in Sweden as a person otherwise in need of protection under section 5 of the Temporary Act.
>
> There is no other reason on which to grant you a residence permit and it is not in breach of any Swedish convention commitment to refuse you a residence permit in Sweden.
>
> The Migration Agency therefore rejects your application for a residence permit".

It is obvious that the reasoning did not contain any details relating to the applicants' individual circumstances, or to their interests and dependence on each other (or lack thereof), and nor did it address any specific provisions or issues under the Convention. It is also characteristic that none of the arguments put forward by the respondent government before the Court had previously been examined, in any form, by the Sweden migration authorities during their own "assessment".

It is, moreover, very significant that even the majority have recognised that "the refusal by the Migration Agency and the Migration Court mainly referred in abstract terms to the relevant provisions of the Temporary Act and to international conventions", while concluding that "given the circumstances of the present case, the Court is satisfied that the authorities assessed ..." (see paragraph 80 of the present judgment). But, in reality, which are the "circumstances of the present case" that were not included in the refusal that, by their own admission, was made "in abstract terms"? And how could these unknown circumstances remedy the clear absence of an individualised assessment?

On this point (see paragraph 80 *in fine* of the present judgment), the majority felt the need to refer to another recent judgment, *El Ghatet v. Switzerland* (no. 56971/10, 8 November 2016), which, however, does not confirm but rather refutes the majority's reasoning. I quote the relevant paragraph 47 to which the majority refer, because it is very supportive of my own conclusion:

> "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 (ibid.; see also, *mutatis mutandis*, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 65, 21 June 2012). In such a scenario, the domestic courts, in the Court's opinion, failed to demonstrate convincingly that the respective interference with a right under the Convention was proportionate to the aim pursued and thus met a "pressing social need" (*Schweizerische Radio- und Fernsehgesellschaft SRG*, cited above, § 65)."

Thus, since an individualised assessment of the interests of family unity in the light of the concrete situation of the persons concerned under section 13 of the Temporary Act was not carried out in the applicants' case, the respondent State has violated its positive obligations under Article 8 of the Convention.

4. Concerning the second applicant's complaint based on Article 14, read in conjunction with Article 8 of the Convention, I do not find a difference between the beneficiaries of subsidiary protection who applied for asylum before 24 November 2015 and the beneficiaries who applied after this date. In reality, there is only one group of foreigners, having exactly the same immigration status and having leave to remain in Sweden for a limited period of time, who are divided by the exclusively random (i.e. arbitrary) introduction of an immigration measure. In other words, the second applicant was unfortunate: he would have enjoyed his right to family unity if he had, simply, applied for asylum five months earlier. In addition, any beneficiary of subsidiary protection is in a relevantly similar situation to that of a refugee since both have been forced to leave their own country, are separated from their family members, and can only continue their family life in the host country (Sweden) and, of course, both enjoy a form of international protection status. Nevertheless, the Temporary Act distinguished between

them on the basis of the same random temporal criterion: the beneficiaries were only subjected to the Temporary Act and only deprived of their right to family unity between 24 November 2015 and 19 July 2019.

It is true that contracting States enjoy a margin of appreciation in assessing whether differences in otherwise similar situations justify differential treatment, as in the present case. It is also true that, as the respondent Government argued, this margin of appreciation is wider when it comes to immigration measures. Nevertheless, the second applicant was claiming his right to family unity (he was already a beneficiary of subsidiary protection) under very particular circumstances: he was a victim of forced migration because of the war in Syria and he was a child. It is to be noted that according to our leading Grand Chamber judgment, *Biao v. Denmark* ([GC], no. 38590/14, § 114, 24 May 2016), which unfortunately has not been taken into any consideration by the majority (see paragraphs 92-94 of the present judgment), such preferential treatment requires very weighty reasons on the respondent's part in order to be justified.

It is also true that the majority examine the respondent's two basic arguments in paragraphs 112-116 of the present judgment, "on the basis of the assumption that the second applicant ... was in an analogous or relevantly similar situation to that of persons granted refugee status" (see paragraph 111). Nevertheless, and this is the crux of my disagreement, these arguments are either irrelevant or baseless. The question raised in the present case cannot be general, i.e. how many asylum-seekers have been granted protection by Sweden (see paragraph 112 of the present judgment) but whether the Temporary Law significantly hampered access by Syrian beneficiaries of subsidiarity protection to family reunification, as the Council of Europe Commissioner for Human Rights and UNHCR have expressly indicated, following their respective visits to Sweden in 2016 and 2017 (see paragraphs 38-39 of the present judgment). Moreover, according to the same official source, only 5% of applicants from Syria were recognised in 2016 as refugees under the UN Refugee Convention, while 85% received subsidiary protection or other forms of protection (see CommDH(2018)4, Report of the Council of Europe Commissioner of Human Rights following his visit to Sweden from 2 to 6 October 2017, 16 February 2018, § 25). Thus the equation is as follows: the Temporary Act affected exclusively the right to family reunification of Syrians, since – at the relevant time – they made up the vast majority of beneficiaries of subsidiary protection (41,102 (85%) of the total 48,355), while on the other hand only 5% of the recognised refugees (1,160 of the total 23,207), who were not subjected to any limitation of their right to family reunification, were Syrians (see paragraph 42 of the present judgment). Concerning the next question, whether the migration authorities " struck a fair balance between, on the one hand, the [second] applicant's interest in being reunited [with his family] in Sweden and, on the other, the respondent State's need to control immigration" (see paragraph 116 of the

present judgment), as I emphasised before, the refusal of family reunification was based on a summary and abstract decision, which certainly does not comply with ECHR standards.

5. In conclusion, I argue that the reasoning of the present judgment is not in accordance with our case-law on family reunification, as it has been developed in the above-cited Grand Chamber judgments, *M.A. v. Denmark* (9 July 2021) and *Biao v. Denmark* (24 May 2016), concerning Articles 8 and 14 respectively.