Submission by the Office of the United Nations High Commissioner for Refugees in the case of *J. K. v. Switzerland* (Appl. No. 15500/18) before the European Court of Human Rights*

1. Introduction*

1.1. UNHCR has been entrusted by the United Nations General Assembly ('UNGA') with the mandate to provide international protection to refugees and to assist governments in seeking permanent solutions for them.[1] UNHCR delivers its international protection mandate, *inter alia*, by supervising the application of international conventions for the protection of refugees.[2] UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 7 May 2019.

1.2. In this submission, UNHCR outlines the restrictions in the legislative framework and practice governing family reunification of recognized Convention refugees in Switzerland (Part 2) and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law (Part 3).

2. Domestic legislation and practice regarding family reunification for refugees in Switzerland

2.1. The relevant domestic legislation

2.1.1. The *Swiss Asylum Act* ('AsylA') and *Swiss Federal Act on Foreign Nationals and Integration* ('FNIA') distinguish between refugees who have been granted asylum and refugees who are only provisionally admitted to Switzerland.[3] The former qualify for refugee status under the 1951 Convention relating to the Status of Refugees ('1951 Convention') and are granted asylum and a residence permit (B-permit) unless there are 'grounds for exclusion.'[4] The second category of persons, while recognized as refugees, are not granted asylum nor a B-permit because they fall under what the Swiss legislation categorizes as 'subjective post-flight grounds'[5]. They are instead granted provisional admission and issued an F-permit.

2.1.2. Provisional admission and an F-permit is also granted to persons who are not recognized as refugees but whose expulsion is not possible, not permitted or not reasonable.[6] The F- permit is considered not as a residence permit, but as a suspension from deportation.[7] It is issued for one year but can be extended. The

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

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

[2] *Ibid.*, Chapter II para. 8(a).

[3] *Asylum Act*, English version: https://www.admin.ch/opc/en/classified-compilation/19995092/index.html. Official version (French): https://www.admin.ch/opc/fr/classified-compilation/19995092/index.html; *Swiss Federal Act on Foreign Nationals and Integration*, English version: https://www.admin.ch/opc/en/classified-compilation/20020232/index.html. Official version (French): https://www.admin.ch/opc/fr/classified-compilation/20020232/index.html.

[4] Initially intended to transpose Article 1F of the 1951 Convention into the national asylum law, the exclusion grounds were in the course of the legislative process extended to include criminal acts beyond the scope of Article 1F of the 1951 Convention. See: Art. 53 AsylA which states: 'Refugees shall not be granted asylum if: a. they are unworthy of it due to serious misconduct; b. they have violated or endanger Switzerland's internal or external security; or c. they have been made subject to an expulsion order under Article 66*a* or 66*a*bis SCC [Swiss Criminal Code] or Article 49*a* or 49*a*bis MCC [Military Criminal Code].'

[5] According to Swiss law, refugee claims based on the person's own actions or conduct after fleeing their country are not considered valid grounds for the grant of asylum. Art. 54 AsylA: 'Refugees shall not be granted asylum if they became refugees in accordance with Article 3 only by leaving their native country or country of origin or due to their conduct after their departure.' Contrary to the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*: https://www.refworld.org/docid/4f33c8d92.html ('UNHCR Handbook'), Swiss legislation treats 'objective' *sur place* claims (for example, as a consequence of events which have occurred or are occurring in the applicant's country of origin since their departure) and 'subjective' *sur place* claims (such as expressing one's political views in their country of residence) differently. See: UNHCR Handbook paras 95-96.

[6] Art. 83 FNIA states: '(1) If the enforcement of removal or expulsion is not possible, not permitted or not reasonable, the SEM shall order provisional admission; (2) Enforcement is not possible if the foreign national is unable to travel or be brought either to their native country or to their country of origin or a third country; (3) Enforcement is not permitted if Switzerland's obligations under international law prevent the foreign national from making an onward journey to their native country, to their country of origin or to a third country; (4) Enforcement may be unreasonable for foreign nationals if they are specifically endangered by situations such as war, civil war, general violence and medical emergency in their native country or country of origin.' It should be noted that unlike most States in Europe, Switzerland has not introduced a subsidiary protection status.

[7] See: Articles 83-88a FNIA.

Canton of residence is responsible for its issuance. The State Secretariat for Migration (SEM) periodically assesses if the conditions for provisional admission are still being met and if not, it revokes the provisional admission and orders the enforcement of the removal. [8]

2.1.3. Refugees and other individuals with provisional admission enjoy lesser rights than refugees who have been granted asylum, particularly regarding family reunification.[9] For refugees with provisional admission, family reunification is discretionary,[10] and dependent on a series of cumulative criteria which need to be fulfilled (Art. 85(7) (a) – (e) FNIA). Before they can apply for family reunification, they must comply with a three-year waiting period[11] and prove: a) that the family will live together; b) that suitable housing is available; and c) that the family can live independently from social assistance.[12]

2.2. The relevant domestic practice

2.2.1. The restrictive legislative framework described above is further limited in practice by the authorities' interpretation and application of the relevant legal provisions.[13]

2.2.2. UNHCR and a variety of actors have repeatedly expressed concern about the overall restrictive interpretation of the refugee definition and the unreasonably high standards imposed on credibility assessments in Switzerland.[14] As a consequence, many persons whom UNHCR considers to be 1951 Convention refugees are not recognized as such, or are not granted asylum. Most refugees with provisional admission are precluded from asylum under Art. 54 AsylA[15], as owing to the exigent Swiss standards, their fear of persecution related to events before their flight is considered not to be credible. Refugee status is granted, nevertheless, in many of these cases because the applicant is found to have a well-founded fear of persecution. However, asylum and a B-permit is not granted by virtue of Article 54 AsylA, as the Swiss claim that this fear is only on account of their illegal departure from the country, which is considered a 'subjective post-flight ground.'

2.2.3. The Swiss authorities contend that the restrictions on the right to family reunification imposed on refugees admitted with an F-permit are justified as they represent only a small proportion of the F-permit holders.[16] This does not seem, however, to be reflected in the available statistics. From 2013 to 2018, the SEM granted 45,548 provisional admissions, 9,531 of which were to recognized refugees.[17] Refugees holding an F-permit, therefore, account for almost one quarter of the overall number of provisional admissions. In addition, the number of F-permit refugees corresponds to around 27.7 per cent of the overall number of refugees granted 1951 Convention status and reaches up to 90 per cent for some nationalities.[18]

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[8] Article 83 and 84 FNIA.

[9] Refugees with asylum have a right to family reunification without having to wait or meet financial requirement, 'provided there are no special circumstances that preclude this.' See Article 51(4) in conjunction with Article 51(1) AsylA.

[10] See Federal Administrative Tribunal (TAF), F-2186/2015, 6 December 2016: https://www.refworld.org/cases,CHE_TFS,58de4a654.html.

[11] See Article 74(2)-(3) Regulation on Admission, Residence and Employment of 24 October 2007. They are also subject to further time limits after the three-year waiting period is over, namely, the application for family reunification must be submitted within five years, and in cases of children over 12 years the time limit is twelve months (although in case of important family-related reasons, especially the best interest of the child, a later application is possible). Official French version: https://www.admin.ch/opc/fr/classified-compilation/20070993/index.html.

[12] As of 1 January 2019, two additional requirements were introduced: (d) the applicant must be able to communicate in the national language spoken at the place of residence; (e) and the applicant is not claiming annual supplementary benefits or be entitled to receive such benefits because of family reunification.

[13] CSDM, *Family Reunification for Refugees in Switzerland Legal Framework and Strategic Considerations*, October 2017: https://www.refworld.org/docid/5a0971d54.html.

[14] See for a recent example, SBAA, *La vraisemblance dans la procédure d'asile*, 2019: https://beobachtungsstelle.ch/fileadmin/Publikationen/2019/Bericht_Glaubhaftigkeit_BS_F.pdf.

[15] The number of persons excluded from asylum on the basis of Art. 53 AsylA is very small. Between 2013 and 2017 only 3% of the refugees provisionally admitted were excluded on this basis. See: https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20183280.

[16] See the judgement of the Swiss Asylum Appeal Commission (subsequently replaced by the Federal Administrative Tribunal), EMARK 2006/7 §7.3, referring to the *Report of the Federal Council on the revision of the Asylum Ordinance*, 1 July 1999, p. 20: http://www.ark-cra.ch/emark/2006/07.html.

[17] In 2013, 3,432 persons were granted provisional admission (PA), including 790 who were granted refugee status (RS). In 2014: 9,367 granted PA including 2,494 granted RS. 2015: 7,787 granted PA including 2,534 granted RS. 2016: 7,369 granted PA including 1,735 granted RS. 2017: 8,419 granted PA including 966 granted RS. 2018: 9,174 granted PA including 1,012 granted RS. See SEM, *Asylum Statistics*: https://www.sem.admin.ch/sem/fr/home/publiservice/statistik/asylstatistik/archiv.html.

[18] *Ibid*., SEM, *Asylum Statistics.*

2.2.4. Furthermore, in practice F-permit holders, including refugees, are particularly affected by the differential treatment under Swiss legislation, and as a result, are often unable to meet the legal requirements for family reunification. In particular, the provisional admission limits refugees' access to the labour market.[19] While there is no specific data relating to the unemployment rate among F-permit refugees, only 36.9 per cent of the overall number of provisionally admitted persons (24.6% of women) able to work were at least partially employed at the end of 2018[20] and the SEM has reported that between 70 and 80 per cent of F-permit refugees benefit from some form of social assistance.[21] F-permit refugees are also hindered in accessing the labour market by the perception of prospective employers that they are staying in the country without proper authorization and/or for a temporary period.[22] This further impedes their ability to access housing and to integrate into Swiss society.[23] Thus, many F-permit refugees are unable to meet the material conditions for family reunification, namely, independence from social benefits and suitable accommodation.

2.2.5. According to Swiss jurisprudence, Article 8 ECHR is only applicable for foreigners if they have a 'settled status' ('gefestigtes Aufenthaltsrecht'). F-permit holders are generally[24] not considered to have a settled status and thus, the difference in treatment between B and F-permit holders is considered justifiable.[25] However, in practice, this reasoning is questionable since most F-permit holders remain in Switzerland in the long term even if the F-permit is issued in one year increments.[26] The Federal Administrative Tribunal (TAF) has also held that the question of whether the three-year waiting period is compatible with Article 8 ECHR must be resolved on a case-by case basis, however, to date, no decisions are known to UNHCR in which the TAF has found the waiting period to be incompatible with Article 8 ECHR.[27] Lastly, in some recent cases where the TAF has conducted a thorough proportionality assessment under Article 8 ECHR, the economic interests of Switzerland, based on the assumption that the refugee would not be able to earn sufficient money and thus rely on social assistance after family reunification, was given more weight than the interest of the refugee to enjoy a family life.[28]

2.2.6. Refugee families, therefore, often try to obtain a humanitarian visa according to Art. 4 para. 2 VEV (visa regulation)[29] for their family members abroad to achieve family reunification. However, the issuance of such a visa is discretionary and is only issued if a person's physical safety is directly, seriously and tangibly threatened. The threshold applied is very high and only a very small number of humanitarian visas are currently

[19] UNHCR, *Arbeitsmarktintegration: Die Sicht der Flüchtlinge und vorläufig Aufgenommenen in der Schweiz*, December 2014: https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/UNHCR-Integrationsstudie_CH_web.pdf. In the past, provisionally admitted persons had to obtain a work permit from the cantonal authorities (the issuance of which was discretionary), and pay a special charge of 10% of their salary (up to CHF 15,000, in addition to the regular taxes). Only since 1 January 2018, the special charge no longer has to be paid and as of 1 January 2019, a simplified declaration procedure applies for work permits. Pursuant to Art. 85a FNIA, the employer only needs to report the start or end of employment to the cantonal authority responsible for the place of work in advance. While the law has changed, requirements are still stricter than for persons with asylum.

[20] SEM, *Asylum Statistics*: https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/asylstatistik/2018/stat-jahr-2018-kommentar-f.pdf, p. 7.

[21] This figure refers to the period 2012-2015.

[22] UNHCR, *Arbeitsmarktintegration*, note 19 above, p. 61ff.

[23] Ibid. See also, Swiss Federal Council, *Admission provisoire et personnes à protéger: analyse et possibilités d'action*, 12 October 2016: https://www.sem.admin.ch/dam/data/sem/aktuell/news/2016/2016-10-14/ber-va-f.pdf.

[24] Although in *F-2043/2016*, 26 July 2017, (para. 6.3) the TAF held that F-permit holders have a 'settled status' and can, therefore, in principle rely on Article 8 ECHR, it is not clear yet, whether this case establishes a general change in the jurisprudence. In addition, in those cases where the TAF found Art. 8 ECHR applicable it has almost never established a violation of Art. 8 ECHR, finding that refugees recognized on the basis of subjective post-flight grounds separated from their family voluntarily and therefore, the refusal of family reunification does not amount to a violation of Art. 8 ECHR. To date only one decision is known to UNHCR in which the TAF has found that the refusal of family reunification is incompatible with Art. 8 ECHR: see TAF, F-1822/2017, 21 March 2019. TAF decisions can be found at: https://www.bvger.ch/bvger/en/home/judgments/entscheiddatenbank-bvger.html.

[25] See, for example, TAF, F-2186/2015, 6 December 2016, para. 6.3.8.

[26] From 2009 to 2015, an average of 0.03% of persons with an F-permit had their provisional admission terminated with a view to their forcible removal to their country of origin. A further average of 3.84 per cent had left Switzerland voluntarily. In other words, more than 90% of persons with an F-permit remained in Switzerland. Swiss Federal Council, *Admission provisoire et personnes à protéger: analyse et possibilités d'action* : '[L]a plupart finiront par rester en Suisse. Les admission provisoire deviennent de longue duree.', p.11: https://www.sem.admin.ch/dam/data/sem/aktuell/news/2016/2016-10-14/ber-va-f.pdf. See also, CSDM, *Family Reunification for Refugees in Switzerland:* note 13 above.

[27] See TAF, F-2186/2015, 6 December 2015; TAF, F-8197/2015, 13 March 2017.

[28] See TAF, F-7893/2018, 16 July 2018, para. 7.5.

[29] Dir*ective: Visa humanitaire au sens de l'art. 4, al. 2, OEV, Official version (French):* https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/auslaender/einreise-ch/20180915-weis-visum-humanitaer-f.pdf.

being issued as a consequence. In UNHCR's view, this does not compensate for the excessively restrictive law and practice undermining family reunification for refugees with provisional admission and F-permits.

2.2.7. The differential treatment between refugees granted asylum and provisionally admitted refugees has been criticized by a wide range of international monitoring bodies and NGOs.[30] According to the Commissioner for Human Rights of the Council of Europe the difference in treatment between B-permit and F-permit holders is one of the main shortcomings of the Swiss system of refugee protection,[31] while the United Nations Committee on the Elimination of Racial Discrimination (CERD) noted that Swiss authorities have acknowledged the adverse consequences of provisional admission status on essential areas of life for this category of non-nationals.[32]

3. Principles of international refugee and human rights law regarding family life, non-discrimination and the best interests of the child

3.1. The principle of family unity under international refugee and human rights law

3.1.1. The right to family and private life is recognized as an essential right under international human rights law. Under Article 16(3) of the 1948 *Universal Declaration of Human Rights* (UDHR), the family is recognized as 'the natural and fundamental group unit of society and is entitled to protection by society and the State.'[33] This universal right is given binding effect by Article 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR) to which Switzerland and all other European States are parties.[34] Article 17 of the ICCPR further affirms that no one shall be subject to arbitrary or unlawful interference with his or her family and that everyone has the right to the protection of the law against such interference. This right is also expressed in similar language in Article 16 of the *Convention on the Rights of the Child* (CRC), which in its Preamble reiterates that the family is the fundamental group unit of society, which should be afforded 'necessary protection and assistance'.[35] The *International Covenant on Economic, Social and Cultural Rights* (ICESCR), goes even further in Article 10(1) by providing that the 'widest possible protection and assistance should be accorded to the family'[36] implying that the implementation of state obligations in relation to family life 'is not limited to formal recognition or non-interference, but also require positive measures.'[37]

3.1.2. While the 1951 Convention does not specifically refer to the right to family reunification, the Final Act of the Conference of Plenipotentiaries at which the Convention was adopted affirmed 'that the unity of the family [...] is an essential right of the refugee' and issued a specific and strongly worded recommendation that Governments 'take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained.'[38] UNHCR has consistently held that family reunification is essential for refugees to enjoy the fundamental right to family life.[39] 'When refugees are separated from

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[30] UNHCR Office for Switzerland and Liechtenstein, Fact Sheet, *Vorläufige Aufnahme ersetzen*, September 2017 (in German): https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/09/CH_Fact-Sheet-UNHCR-vorl%C3%A4ufige-Aufnahme.pdf; Swiss Refugee Council various statements: https://www.fluechtlingshilfe.ch/news/mediendossiers/vorlaeufige-aufnahme.html; Caritas, *Besserer Schutz durch mehr Rechte*, May 2015: http://www.caritas-solothurn.ch/cm_data/PP_Besserer_Schutz_d.pdf; Centre Suisse de Competence pour les Droits Humains , *Admission provisoire»: entre admission et exclusion, entre provisoire et indéfini État des lieux et examen de quelques aspects critiques dans une perspective des droits humains*, January 2015: https://www.skmr.ch/frz/domaines/migration/nouvelles/admission-provisoire.html.

[31] Council of Europe Commissioner for Human Rights, *Report on Switzerland*, 17 October 2017, para. 169: https://rm.coe.int/rapport-suite-a-la-visite-en-suisse-du-22-au-24-mai-2017-de-nils-muizn/168075e90c.

[32] CERD, *A.M.M. v. Switzerland*, Comm. No. 50/2012, 18 February 2014: http://www.ohchr.org/EN/HRBodies/CERD/Pages/Jurisprudence.aspx, paras 10-11.

[33] UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III): http://www.refworld.org/docid/3ae6b3712c.html.

[34] UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html. Switzerland acceded to the ICCPR on 18 June 1992.

[35] UNGA, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3: https://www.refworld.org/docid/3ae6b38f0.html. The CRC was ratified by Switzerland on 24 February 1997.

[36] UNGA, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3: https://www.refworld.org/docid/3ae6b36c0.html. The ICESCR was acceded to by Switzerland on 18 June 1992.

[37] UN Human Rights Council, *Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members*, Annual report of the UN High Commissioner for Human Rights, A/HRC/31/37, 15 January 2016, https://undocs.org/en/A/HRC/31/37.

[38] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1: http://www.refworld.org/docid/40a8a7394.html.

[39] UNHCR, *Refugee Family Reunification: UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the EU*, February 2012: https://www.refworld.org/docid/4f55e1cf2.html; UNHCR,

family members as a consequence of their flight, a prolonged separation can have devastating consequences on the wellbeing of the refugees and their families. The negative consequences of separation impact on the refugees' ability to integrate in their country of asylum, become active contributors to the society, and rebuild their lives.'[40] The restoration of the family unit can help to ease the sense of loss often experienced by persons in need of international protection who have had to abandon their countries of origin, communities and previous way of life. Therefore, finding and reuniting with family members is often one of the most pressing concerns of beneficiaries of international protection.

3.1.3. UNHCR's Executive Committee (ExCom) has repeatedly emphasized the 'fundamental importance' of family reunification[41] and has underlined the need to protect the unity of the refugee's family, *inter alia*, by 'measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight.'[42] ExCom has recommended that '[i]n application of the Principle of the unity of the family and for obvious humanitarian reasons, *every effort should be made* to ensure the reunification of separated refugee families', and that, '[f]or this purpose it is desirable that countries of asylum and countries of origin […] ensure that the reunification of separated refugee families takes place *with the least possible delay*.'[43] Hence, ExCom has highlighted that 'in appropriate cases family reunification should be facilitated by special measures of assistance to the head of family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members.'[44]

3.1.4. In its concluding observations on Switzerland, CERD expressed deep concern about the undue hardship faced by persons who are granted provisional admission. The CERD found that F-permit holders face restrictions in most areas of their lives, including by 'the lengthy waiting period of three years or more for family reunification, which also requires an adequate level of income and a suitable place of accommodation'.[45] The Committee urged Switzerland to eliminate any indirect discrimination and undue obstacles for persons granted provisional admission status, in particular those who have been in the State for a long time, to enjoy their basic human rights, including 'by facilitating the process of family unification'.[46]

3.2. The right to respect for private and family life as applied to persons in need of international protection under European human rights law

3.2.1. Under Article 8 of the ECHR, everyone has the right to respect for their private and family life. The ability of family members to mutually enjoy each other's company constitutes a fundamental element of family life and measures imposed by a state to prevent such may constitute an interference with the right to family life. Indeed, as this Court has found, the essential object of Article 8 ECHR is to protect the individual against arbitrary action by public authorities, as well as to require the state, in certain cases, to take positive action to effectively ensure family life.[47]

3.2.2. In the particular case of refugees, this Court has recognized that family unity is an essential right and that family reunification is a fundamental element in enabling persons who have fled persecution to resume a

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Families Together: Family Reunification for Refugees in the European Union, (*Families Together)* February 2019: https://www.unhcr.org/nl/wp-content/uploads/Familiestogether_20181203-FINAL.pdf.

[40] UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification*, 4 December 2017, para. 1: https://www.refworld.org/docid/5b18f5774.html. See also Miller A, Hess JM, Bybee D, Goodkind JR, *Understanding the mental health consequences of family separation for refugees:* American Journal of Orthopsychiatry, 2018, 88(1) 26.

[41] ExCom Conclusion No. 9. See also, Nos. 1, 22, 24, 84, 85, 88, and 104. *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR 1975 – 2017 (Conclusion No. 1 – 114)*: https://www.refworld.org/docid/5a2ead6b4.html. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee of UNHCR and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 102 States are Members of the Executive Committee, including Switzerland, which has been a member since 1951: https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html.

[42] ExCom Conclusion, *Protection of the Refugee's Family, No. 88 (L) – 1999*, para. (b)(i).

[43] ExCom Conclusion, *Family Reunification No. 24 (XXXII) - 1981*, 21 October 1981, paras 1-2 [emphasis added].

[44] *Ibid.*, para. 9.

[45] CERD, Concluding observations on Switzerland, 13 March 2014, p. 6: https://undocs.org/CERD/C/CHE/CO/7-9.

[46] *Ibid.*

[47] *Keegan v. Ireland*, Application no. 16/1993/411/490, ECtHR, 26 May 1994, para. 49: https://www.refworld.org/cases,ECHR,3ae6b6ff8.html. See also *Elsholz v. Germany*, Application no. 25735/94, ECtHR, 13 July 2000, para. 43: https://www.refworld.org/cases,ECHR,58a72da64.html.

normal life.[48] While Article 8 ECHR does not grant an absolute right to family reunification on the territory of the Contracting State,[49] and states have a certain margin of appreciation,[50] this Court has taken into account the particular situation of refugees as family separation, in their cases, does not occur due to voluntary actions but as a result of their flight.[51] To strike a 'fair balance […] between the competing interests of the individual and of the community as a whole' the Court requires States to weigh the 'particular circumstances of the persons involved and the general interest.'[52]

3.2.3. The Court has further recognized that the fact that a person has already obtained international protection is proof of his or her vulnerability.[53] Accordingly, in *Mugenzi v. France*, the Court underlined that there exists 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.[54] This is irrespective of the type of residence permit refugees may be granted[55] and is equally important for beneficiaries of temporary or subsidiary protection.[56] It is not the status of the applicant that is determinative, but whether there is an obstacle preventing the applicant from enjoying family life in their home country[57] or in a third country.[58] This Court has unequivocally held that in the case of recognized refugees, such obstacles to resuming family life elsewhere were 'insurmountable',[59] including where the applicants' family members are in a transit country.[60] This is particularly the case, if neither the family nor the applicant have the possibility of obtaining a residence permit in the transit country, nor access to the labour market or other fundamental rights.

3.2.4. Furthermore, Article 8 ECHR imposes a positive obligation to enable refugees to reunify with family members promptly.[61] For refugees, the prolongation of the family reunification procedure beyond three-and-a-half years has been found excessive.[62] To effectively enjoy the right to family life, it is important that family reunification mechanisms be swift and efficient so as to bring families together as early as possible.[63] Hence, a three-year ban to apply for family reunification resulting in delaying even further the completion of the procedure is problematic and excessive.

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[48] *Tanda-Muzinga v. France*, Application no. 2260/10, ECtHR, 10 July 2014, para. 75: https://www.refworld.org/cases,ECHR,53be80094.html; *Mugenzi v. France*, Application no. 52701/09, ECtHR, 10 July 2014, para. 54: https://www.refworld.org/cases,ECHR,53be81784.html.

[49] *Gül v. Switzerland*, Application no. 23218/94, ECtHR, 19 February 1996, para. 38: https://www.refworld.org/cases,ECHR,3ae6b6b20.html.

[50] *Tanda-Muzinga v. France*, para. 64. The UN Human Rights Committee (HRC) has also confirmed that while in principle, it is a matter for the State to decide who it will admit to its territory, there are certain circumstances in which 'an alien may enjoy the protection of the [ICCPR] Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.' UN HRC, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 5: https://www.refworld.org/docid/45139acfc.html.

[51] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, ECtHR, 12 October 2006, para. 75: https://www.refworld.org/cases,ECHR,45d5cef72.html; Tanda-Muzinga v. France, para. 74. See also, *El Ghatet v. Switzerland*, in which the Court indicated the need for a cautious approach on the question of whether separation was voluntary: Application no. 56971/10, ECtHR, 8 November 2016, para. 48: https://www.refworld.org/cases,ECHR,5836a1854.html.

[52] *Gül v. Switzerland*, para. 38.

[53] *Mugenzi v. France*, para. 54.

[54] *Ibid.*

[55] For example, in *Tuquabo-Tekle v. the Netherlands*, Application no. 60665/00, ECtHR, 1 December 2005, the Court found a violation of Article 8 despite the fact that the applicant did not have refugee status but humanitarian protection status: (para. 52), https://www.refworld.org/cases,ECHR,43a29e674.html. Several EU Member States accord refugees and beneficiaries of subsidiary and temporary protection access to family reunification on the same basis as refugee. See Frances Nicholson, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, January 2018, 2nd edition, p.147-148: https://www.refworld.org/docid/5a902a9b4.html.

[56] As Council of Europe Rapporteur Sandbæk observed: '[i]rrespective of the status granted, the protection needs and flight experiences of refugees and beneficiaries of subsidiary protection are very similar. [They] are temporarily unable to return to their countries of origin due to the risk of serious harm. There is therefore no reason to distinguish between the two statuses as regards their right to family life.' Council of Europe: Parliamentary Assembly, *Report on Family reunification of refugees and migrants in Council of Europe member States*, para. 28: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25058&lang=EN.

[57] *Gül v. Switzerland*, para. 42.

[58] *Mugenzi v. France*, para. 53.

[59] *Mugenzi v. France*, para 53; *Tanda-Muzinga v. France*, para. 74.

[60] *Tanda-Muzinga v. France*, para. 6.

[61] *Tanda-Muzinga v. France*, para. 68; *Mugenzi v. France*, para. 46.

[62] *Tanda-Muzinga v. France*, paras 55 and 58.

[63] UNHCR, *Refugee Family Reunification*, note 39 above, p. 3-4.

3.2.5. While the Court has not ruled out, in principle, the application of financial requirements to refugees, they were only found reasonable insofar as the level of income was equal to welfare benefits and were lifted after a period of three years if the person concerned had made serious but unsuccessful efforts to find gainful employment.[64] None of these criteria are met in the Swiss context since the income thresholds are fixed. UNHCR submits that the imposition of maintenance requirements on refugees and other beneficiaries of international protection has the effect of keeping families separate rather than reuniting families[65] and does not take into account the particular circumstances of persons who have been forced to flee.

3.2.6. The Council of Europe's Parliamentary Assembly in its recently adopted resolution emphasized 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 regretted that some States have high financial requirements or long waiting periods'[66] and underlined that 'family reunification should not be dependent on the financial situation of a parent who is a migrant or refugee.'[67] It further noted 'with concern' the refusal of visas to family members of those 'who have not been granted refugee status but have been given subsidiary or temporary protection on humanitarian grounds.' Importantly, it emphasized that 'such subsidiary or temporary protection status must not be considered as an "alternative refugee status" with fewer rights', and indicated that '[s]tates 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.'[68]

3.3. Principle of non-discrimination under international refugee and human rights law

3.3.1. The 1951 Convention is underpinned by a number of fundamental principles, including the principle of non-discrimination and explicitly states that it shall be applied without discrimination as to race, religion or country of origin.[69] As an overarching principle of international human rights law, the principle of non-discrimination is contained in virtually every major international human rights instrument, prohibiting discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[70]

3.3.2. The principle of non-discrimination requires that similarly situated individuals enjoy the same rights and receive similar treatment.[71] This includes measures impacting upon individuals' right to family life and family unity, regardless of their immigration or other status, except where such distinctions can be objectively justified.[72] Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This includes an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with human rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.[73]

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[64] *Haydarie v. the Netherlands*, ECtHR, 20 October 2005, p. 13: https://www.refworld.org/cases,ECHR,468cbc9fd.html.
[65] UNHCR, *Access to Family Reunification for Beneficiaries of International Protection in Central Europe*, December 2012, p. 12: http://www.refworld.org/docid/588b4f164.html.
[66] Council of Europe: Parliamentary Assembly, *Family Reunification of Refugees and Migrants in the Council of Europe Member States*, 11 October 2018, Resolution 2243, para. 7: https://www.refworld.org/docid/5c5981284.html.
[67] *Ibid*., para. 10.
[68] *Ibid*., para. 6.
[69] Article 3 of the 1951 Convention. According to Article 42, this article is one of the few against which reservations are not permitted.
[70] Article 1 of the UDHR states that '[a]ll human beings are born free and equal in dignity and rights.' Article 2 UDHR provides that every individual is 'entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 7 UDHR further provides that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.' The principle of non-discrimination is also found in Article 2 in each of the ICCPR, ICESCR, CRC, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
[71] UN HRC, *CCPR General Comment No. 18: Non-discrimination*: https://www.refworld.org/docid/453883fa8.html. This Court has held that 'the requirement to demonstrate an "analogous situation" does not require that the comparator groups be identical.' Instead, one must demonstrate that they have been in a 'relevantly similar situation to others treated differently.' *Hode and Abdi v. The United Kingdom*, Application no. 22341/09, ECtHR, 6 November 2012, para. 50: https://www.refworld.org/cases,ECHR,509b93792.html.
[72] Frances Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, January 2018, 2nd edition, section 2.1.2., p. 7: https://www.refworld.org/docid/5a9029f04.html.
[73] *Ibid*., p. 8.

3.3.3. UNHCR notes that there is no evidence that the protection needs of provisionally admitted persons are of a different nature or shorter duration than refugees granted asylum. In practice, as outlined above, provisionally admitted persons, in particular refugees, who are not granted asylum under Swiss law, are generally not able to return home earlier than refugees granted asylum.[74] The principles of equal treatment and non-discrimination[75] allow for a differentiated treatment according to immigration status only when the grounds thereof are objectively and reasonably justified. In UNHCR's view, such justification is not present in relation to F-permit refugees who frequently share the same experiences and protection needs as B-permit refugees.[76]

3.3.4. In particular, UNHCR has consistently underlined that the 1951 Convention does not make a distinction between persons who have fled their country for reasons of persecution and persons who become refugees at a later date (refugees '*sur place*').[77] To be a refugee, a person must satisfy the definition set in 1A (2) of the 1951 Convention, however, there is no hierarchy among refugees. Thus, in UNHCR's view, no objective criteria justifies a different status (both in nature and duration) to *sur place* refugees, or justify the provision of different rights or standards of treatment, including differences impeding their right to family unity.

3.4. The prohibition of discrimination in the context of family reunification under European human rights law

3.4.1. This Court has held that differences in treatment between persons who are similarly situated, such as refugees granted asylum and temporarily admitted refugees, can only be justified if they pursue a legitimate aim and there is a proportionate relationship between the aim and the means employed to realize it.[78]

3.4.2. This Court has held that differential treatment is restricted when discrimination is based on an immutable characteristic, as this does not entail an element of choice. Further, the Court has held that immutable characteristics include immigration status as well as international protection status, even though these are conferred by law.[79] For refugees, regardless of the ground on which they have been granted protection, a common characteristic is that they cannot resume family life elsewhere, hence it would arguably be discriminatory to differentiate the standard of treatment and rights accorded to refugees depending on the type of domestic residence status granted to them.[80]

3.4.3. Accordingly, this Court has held that the length of a residence permit is an improper criterion and provides insufficient justification for differential treatment because '[t]he fact that a person was in possession of a limited residence title did not form a sufficient basis to predict the duration of his or her stay' in the host country.[81] In other words, differentiation based solely on the length of one's residence permit was considered discriminatory, as it was not a proper indication of how long the person would *actually* reside in the country.

3.4.4. It is important to underline that refugee status, is also at its core a temporary status and subject to various cessation grounds, including if there is a fundamental change in circumstances in the country of origin. The 1951 Convention envisages refugee status as a temporary phenomenon which should last for as long as

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[74] See note 26 above, in particular, *Swiss Federal Council, Admission provisoire*, pp. 31-33.
[75] As found in Article 14 ECHR, Article 26 ICCPR and Article 21 EU Charter among others.
[76] UNHCR, *Families Together:* note 39 above, pages 29 - 30.
[77] UNHCR, *Handbook*, note 5 above, paras. 94-96. It would be contrary to the 1951 Convention to deprive one of international protection and return them to their country of origin if it is established that the return may result in persecution for one of the Convention reasons. "Under all circumstances, […] consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection.': UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims*, 28 April 2004, para. 36: https://www.refworld.org/docid/4090f9794.html.
[78] See *Niedzwiecki v. Germany*, Application no. 58453/00, ECtHR, 15 February 2006, para. 32: https://www.refworld.org/cases,ECHR,4406d6cc4.html, and *Okpisz v. Germany*, Application no. 59140/00, ECtHR, 25 October 2005, which states at para. 33, that '[the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.': http://www.unhcr.org/refworld/docid/4406d7ea4.html. See further, *AT and another* (Article 8 ECHR- Child Refugee – Family Reunification) Eritrea, UKUT, 2016, paras. 35 and 36, which held that the family's separation 'does not further any identifiable public interest', that '[o]n the contrary it is antithetical to strong and stable societies', and that 'reunification will promote, rather than undermine, the public interest ...' Cited in F. Nicholson, *The "Essential Right"*, note 55 above, at p. 191.
[79] *Bah v. United Kingdom*, Application no. 56328/07, ECtHR, 27 September 2011, paras. 45 - 47: https://www.refworld.org/cases,ECHR,4ee0fad32.html.
[80] See: Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, June 2017, p. 23: https://www.refworld.org/docid/5a0d5eae4.html.
[81] *Niedzwiecki v. Germany*, para. 24.

international protection is needed.[82] This was this Court's key consideration in *Hode and Abdi v. the United Kingdom*, which concerned the difference in treatment between beneficiaries of international protection who married post-flight and other migrants entitled to family reunification. In comparing the two groups, this Court held that they were similarly situated, since students and workers, (whose spouses were entitled to join them), were usually, equally granted leave to remain for a limited period. Thus, they were in an analogous position, and since the UK failed to demonstrate that the difference in treatment regarding family reunification pursued a legitimate aim, the Court found a violation of Article 14 ECHR read in conjunction with Article 8 ECHR.[83]

3.4.5. Similar reasoning was applied by the Court of Justice of the EU in *Ayubi*,[84] which held that the needs of protection holders are the same (for social security benefits, in that case), irrespective of the length of residence permits, and 'only objective differences in the situations of those two categories of persons may be relevant'.[85] In UNHCR's view, what is true for social benefits, must be *a fortiori* true for the right to family life.

3.5. The principle of the best interests of the child under international and European human rights law

3.5.1. A fundamental concept found in the *Convention on the Rights of the Child* is the right of the child to have her or his best interests taken as a primary consideration in all legislative, administrative or judicial actions or decisions affecting her or him, directly or indirectly.[86] ExCom has stressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity.[87] As the CRC Committee has stated:

> '[a]ssessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.'[88]

3.5.2. The best interests of the child aims to ensure 'both the full and effective enjoyment of all the rights recognized in the [CRC] and the holistic development of the child.'[89] It should be recalled that there is no hierarchy of rights in the CRC, all of which are in the best interests of the child.[90]

3.5.3. The importance of the family is reiterated and reinforced in the CRC as 'the fundamental group of society and the natural environment for the growth and well-being of (…) children.'[91] The CRC further sets out a number of principles regarding the protection of children which apply throughout all stages of displacement,[92] including in the context of family reunification. Children have the right to preserve their identity, including their family relations, and are protected against unlawful interference with their family.[93] Children are further

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[82] UNHCR, *Note on Cessation Clauses*, 30 May 1997, para. 39: https://www.refworld.org/docid/47fdfaf1d.html.
[83] *Hode and Abdi v. The United Kingdom*, paras 50, 55, 56.
[84] *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land*, C713/17, 21 November 2018, para. 31: http://curia.europa.eu/juris/document/document.jsf?text=&docid=207944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=158851.
[85] In that case, the two categories were refugees with temporary and refugees with permanent residence permits.
[86] Article 3(1) CRC. See further: UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC /C/GC/14: https://www.refworld.org/docid/51a84b5e4.html.
[87] ExCom Conclusion, *Refugee Children, No. 47 (XXXVIII) - 1987*, paras d and h(i).
[88] UN Committee on the Rights of the Child, *General comment No. 14 (2013)*, note 85 above, para. 6(c).
[89] *Ibid.* para. 4.
[90] *Ibid.* The CRC also makes explicit reference in Art. 22 to the right of refugee children to receive protection and humanitarian assistance in the enjoyment of the rights of the CRC and other applicable international human rights or humanitarian treaties, for which purpose states are required to cooperate with the UN and other competent inter-governmental or non-governmental bodies.
[91] CRC, Recital 5.
[92] UN Committee on the Rights of the Child, General Comment No. 6 (2005), *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 12-30: http://www.unhcr.org/refworld/docid/42dd174b4.html. This Court has regularly referred to the best interests of the child as a primary consideration in all actions concerning children. See: *Rahimi v. Greece*, Application no. 8687/08, ECtHR, 5 April 2011, para. 108: https://www.refworld.org/cases,ECHR,4d9c3e482.html; *Popov v. France*, Application nos. 39472/07 and 39474/07, ECtHR, 19 January 2012, para 140: https://www.refworld.org/cases,ECHR,58a72adf4.html. Moreover, in the latter, (para. 91) and in *Muskhadzhiyeva and Others v. Belgium*, Application no. 41442/07, ECtHR, 19 January 2010, (para. 62): https://www.refworld.org/cases,ECHR,4bd55f202.html, reference is made to the obligation to adopt appropriate measures to ensure that refugee and asylum-seeking children benefit from the protection and humanitarian assistance in line with Article 22 of the CRC.
[93] CRC Article 16. *Cf.* wording of Art 17 ICCPR.

protected from being separated from their parents against their will, except when such separation is in their best interests.[94] The Convention further specifies that children and parents separated from each other shall have their applications for family reunification dealt with 'in a positive, humane and expeditious manner.'[95]

3.5.4. In this regard, the UN Committee on the Rights of the Child, in its concluding observations on Switzerland, expressed concern that 'the right to family reunification for persons granted provisional admission is too restricted' and recommended that Switzerland '[r]eview its system for family reunification, in particular for persons granted provisional admission.'[96]

3.5.5. This Court has equally noted that 'in all decisions concerning children, their best interest must be paramount'[97] and has recognized the importance of the principle of the best interests of the child, including in the family reunification context. Although this Court has ruled that States are under an obligation to facilitate such reunification,[98] including potentially where the family is outside Europe, it has noted that the best interests of the child cannot override each and every consideration in favour of family reunification of a child with a family member in Europe. Nonetheless, it has affirmed that the domestic courts must place the best interest of the child 'at the heart of their considerations and attach crucial weight to it.'[99] In this regard, this Court has found a violation of Article 8 ECHR where domestic authorities have failed to undertake a 'thorough balancing of the interests in issue' that places the child's best interests 'sufficiently at the center of the balancing exercise and its reasoning [...]'[100] and that a child's best interest is of 'paramount importance' which must be afforded 'significant weight'.[101]

3.5.6. A similar observation was also applied by this Court in *El Ghatet v. Switzerland,* where the Swiss authorities refused to permit the family reunification of a son with his father. The Court found that no clear conclusion could be drawn whether or not the applicants' interest in family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory. Nonetheless, the Court found a violation of Article 8 ECHR by reason of the fact that the domestic court had merely examined the best interest of the child in a brief manner and put forward a rather summary reasoning.[102] As such the child's best interests had not sufficiently been placed at the center of its balancing exercise and reasoning, contrary to the ECHR, the CRC and the Constitution of the Swiss Confederation. [103]

4. Conclusion

4.1. UNHCR submits that Swiss legislation and practice is at variance with both international and European human rights law, as it undermines the fundamental right to family life for refugees and impacts certain groups in a disproportionate and discriminatory fashion, contrary to the requirements of Article 8 ECHR as well as Article 14 ECHR read in conjunction with Article 8 ECHR. This is all the more problematic where children are involved as the excessively long waiting period and the strict imposition of such requirements fail to take into account the child's best interests in the context of family reunification and undermine the essential right to family life of persons who are found to be in need of international protection.

[94] CRC, Article 9(1).
[95] CRC, Article 10.
[96] UN Committee on the Rights of the Child, 4 February 2015, para. 68, https://undocs.org/en/CRC/C/CHE/CO/2-4.
[97] *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, ECtHR, 6 July 2010, para.135: https://www.refworld.org/cases,ECHR,5183e05d4.html.
[98] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, para. 85.
[99] *El Ghatet v. Switzerland,* para. 46.
[100] *Ibid*., paras 46-52.
[101] *Jeunesse v. the Netherlands*, Application no. 12738/10, ECtHR, 3 October 2014: https://www.refworld.org/cases,ECHR,584a96604.html.
[102] *El Ghatet v. Switzerland,* paras 52-54.