

# The Protection of Family Unity in Dublin Procedures

Towards a Protection-Oriented Implementation Practice

Francesco Maiani, University of Lausanne

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Case postale 171  
CH 1211 Genève 8  
Tél : 022 807 07 14  
Fax : 022 807 07 01  
[info@centre-csdm.org](mailto:info@centre-csdm.org)  
[www.centre-csdm.org](http://www.centre-csdm.org)



**CSDM**  
Centre Suisse pour la Défense  
des Droits des Migrants

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## TABLE OF CONTENTS

<b><u>Executive Summary</u></b> .....	<b>5</b>
<b><u>1. Introduction</u></b> .....	<b>10</b>
<b><u>2. The Dublin System: institutional and interpretive elements</u></b> .....	<b>13</b>
2.1. Asylum sharing arrangements and family unity: general considerations .....	13
2.2. The Dublin system: institutional aspects .....	15
2.3 The Dublin system: general interpretive considerations .....	17
2.4 The Dublin rules and process in outline .....	20
2.5 Summary of main points .....	21
<b><u>3. Protecting family life in the interpretation and application of the Dublin criteria</u></b> .....	<b>22</b>
3.1 Overview of the family criteria and definitions laid down in the Regulation .....	22
3.2 The “family member” definitions of the Regulation: interpretive issues.....	23
3.2.1 The requirement to interpret the definitions broadly and flexibly .....	23
3.2.2 The requirement to apply the family provisions without discrimination .....	25
3.3 The “family member” definitions of the Regulation: evidentiary issues .....	27
3.3.1 Means of proof and evidentiary requirements.....	27
3.3.2 The administration’s duties to proactively establish family ties .....	30
3.3.3 Issues of timeliness in producing evidence of family ties.....	31
3.4 Interpretive issues relating to individual criteria.....	32
3.4.1 The criteria relating to children and issues pertaining to age assessment.....	32
3.4.2 The “ordinary” family criteria of Articles 9-11 .....	35
3.4.3 Dependent persons under Article 16.....	36
3.5 Summary of main points .....	39
<b><u>4. Protecting family life through the discretionary clauses</u></b> .....	<b>40</b>
4.1 Introduction .....	40
4.2 Should the discretionary clauses be applied restrictively? .....	43
4.3 Applying the discretionary clauses in order to respect human rights obligations...	45
4.3.1 The applicability of Article 8 ECHR in a Dublin context .....	45
4.3.2 Striking a fair balance under Article 8 ECHR: general aspects .....	47
4.3.3 Striking a fair balance under Article 8 ECHR: Dublin-specific aspects.....	49
4.3.4 Special considerations applying in situations of dependency and vulnerability.....	53
4.3.5 The equal enjoyment of family life under the Dublin Regulation.....	56
4.4 Humanitarian and compassionate reasons for applying the discretionary clauses..	56
4.4.1 Humanitarian grounds under the Dublin Regulation: on the continuing relevance of the <i>K</i> judgment.....	57
4.4.2 Humanitarian reasons under Article 29a of Ordinance 1 on Asylum.....	58
4.5 Options to prevent or end the separation of family members under the discretionary clauses.....	59
4.6 Summary of main points .....	60
<b><u>5. Concluding remarks and notes on legal protection</u></b> .....	<b>62</b>

## List of abbreviations

AAD	Agreement associating Switzerland to the Dublin system (CH)
AG	Advocate general (EU)
ATAF	Decisions of the Swiss Federal Administrative Court
CAT	UN Committee Against Torture
CFR	Charter of Fundamental Rights (EU)
CH	Switzerland
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child (UN)
CSDM	Centre Suisse pour la Défense des Droits des Migrants
DR II	Dublin Regulation II (EU)
DR III	Dublin Regulation III (EU)
DRC	Danish Refugee Council
EASO	European Asylum Support Office (EU)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EMN	European Migration Network
EP	European Parliament
EU	European Union
ExCom	UNHCR Executive Committee
FAC	Swiss Federal Administrative Court
HEKS/EPER	<i>Entraide Protestante Suisse</i> (Swiss Church Aid)
ICCPR	International Covenant on Civil and Political Rights (UN)
ICFi	ICF International
IJRL	<i>International Journal of Refugee Law</i>
IR	Implementing Rules (EU)
LIBE Committee	Civil Liberties, Justice and Home Affairs Committee (EU)
NGO	Non-governmental organisation
OA1	Ordinance 1 on Asylum (CH)
ODM	<i>Office fédéral des migrations</i> (CH)
OSAR	Swiss Refugee Council
OUP	Oxford University Press
SEM	State Secretariat for Migration (CH)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees

## Executive Summary

There is considerable tension, in practice, between the operation of the Dublin system and the protection of family unity. However, if properly interpreted and applied, the Dublin III Regulation could afford comprehensive protection to the families of those to whom it applies.

In keeping with the principle of homogeneous interpretation of the Dublin *acquis*, Swiss authorities should take into account the case-law of the CJEU. They must also respect at all times the relevant international standards including the Geneva Convention, the CAT, the CRC and the ECHR, in light of the case-law of the respective monitoring bodies.

In keeping with the preamble of the Dublin III Regulation, and as attested by the case-law of the CJEU since the *Ghezelbash* judgment, human rights should be mainstreamed fully in Dublin practice. Recital 14 DR III specifically requires that respect for family life be a “primary consideration”. This implies that:

- Family-related provisions of the Regulation should be interpreted as broadly as possible, without undue formalism;
- In all the situations where the interest in family unity is balanced against competing interests, considerable weight should be afforded to it;
- The decision-making process should include an evaluation of the impact of prospective decisions on family life.

Under the Regulation and other applicable standards, family-related aspects must be examined at all the stages of the Dublin process. In take charge procedures, the family criteria must be examined first and their applicability must be positively excluded before lower-ranking criteria are even considered. Furthermore, whenever the application of the criteria or any other action under the Regulation (e.g. take back transfer) would negatively affect family life, the question of whether a derogation is called for is to be examined in light of the relevant human rights standards – especially Article 8 ECHR – as well as of humanitarian and compassionate reasons.

As the European Commission has recommended, “Member States [...] should [...] proactively and consistently apply the clauses related to family reunification”.<sup>1</sup> The family definitions given by the Regulation should be read and applied in a broad and flexible manner. For marital and parental relationships, in particular, Article 2(g) DR III sets no requirement as to factual intensity or stability, requiring only that the alleged family tie exist at the relevant time. The “validity” of marital unions should also be assessed in a non-formalistic manner.

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<sup>1</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, 13 May 2015, COM(2015) 240, available at: <https://www.refworld.org/docid/555c861f4.html>, p. 13.

In conformity with Article 14 ECHR, the family definitions laid down in the Regulation may not be applied in a manner that entails unjustified differences of treatment. In particular, the “pre-flight requirement” of Article 2(g) DR III should be applied as an anti-abuse clause so it does not exceed what is necessary to achieve its aim. For the same reason, the family definitions given in some provisions call for an extensive interpretation: thus Article 16 DR III should be applied so as to include the spouse, and children born “post-flight” should be included in the scope of Article 20 DR III.

Regarding the proof of family ties, the Regulation lays down a number of important principles. First, responsibility determination must involve as few requirements of proof as possible. Second, proof of family ties (e.g. an extract from registers) is sufficient and may only be set aside if contrary proof is produced – not on the basis of generic suspicions. Third, responsibility may be established *inter alia* by “verifiable information from the applicant”, as well as “statements by the family members concerned”. Such circumstantial evidence must be seriously examined and accepted as sufficient whenever it is coherent, verifiable and sufficiently detailed. Fourth, in assessing evidence, Member States must take into account the particular difficulties that protection seekers face in obtaining formal proof. Fifth, DNA testing may only be used as an *ultima ratio*. Sixth, in case of uncertainty the applicants should be given the benefit of the doubt.

In the application of these rules and principles, the inquisitorial maxim is of paramount importance. Once the applicant’s duty to cooperate has been discharged, it is up to the SEM to establish the facts. Such duties are enhanced when it comes to the application of the criteria applicable to unaccompanied children, particularly in light of the tracing obligation set out in Article 6(4) DR III. As a matter of good practice, it is recommended that SEM apply the latter provisions also to other categories of applicants. Lastly, under Article 7(3) DR III, which on a correct reading applies to all the family criteria including Articles 9 and 11 DR III, national authorities are required to accept evidence of family ties produced before the acceptance of a request.

Age assessment should be carried out in conformity with the recommendations of the UN Committee on the Rights of the Child. In particular, a qualified representative should be appointed already during age assessment; identity documents should only be set aside if proven false; absent such documents, age assessment should be carried by qualified experts in the framework of a holistic evaluation; the State should refrain from using medical methods based on bone and dental examination; and the benefit of the doubt should be given to the person concerned.

Concerning the interpretation of individual criteria, the following points have special importance:

- As affirmed in national case-law, the notion of “international protection” under Article 9 DR III includes provisional admission granted on grounds comparable to those set out in Article 15 of the Qualification Directive. When a beneficiary of protection has his or her provisional admission replaced with an ordinary residence document, Article 9 DR III remains applicable. Logically, the same principle should apply in case of naturalization.

- According to its aims, Article 11 DR III should be applied whenever it is technically possible to run a joint Dublin procedure for the family members. In this perspective, the fact that the Dublin procedures are not “at the same stage”, or that Switzerland has implicitly accepted responsibility for certain family members without formally engaging the Dublin process, should not rule out the application of that provision.
- Article 16 DR III on dependent persons is not subject to the “freezing rule” of Article 7(2) DR III. Like the other criteria, it should be applied broadly in all its elements. The demonstration of a “particular dependency” or “intensive dependency” between the persons concerned is not required for its application. On the contrary, in keeping with the indications of the CJEU, Article 16 DR III should apply whenever one of the listed situations of vulnerability is established, the requisite family tie and “legal residence” are proven, the person supposed to provide assistance is in a position to do so, and the persons concerned give their consent. Once these conditions are met, the persons concerned should be brought or kept together subject only to the exceptions foreseen in Article 16(2) DR III.

The application of the discretionary clauses of Article 17 DR III may prevent the negative impact on family unity that could potentially result from the application of the criteria. This is, indeed, one of their chief purposes. As the Council of the EU noted, they aim *inter alia* “at avoiding situations where family members would be separated due to the strict application of the Dublin criteria”.<sup>2</sup> Their application is mandatory whenever this is necessary to guarantee respect for Switzerland’s international obligations, including those that protect family life. Compelling humanitarian grounds may also make it mandatory to apply them.

Contrary to what has been held in some leading judgments of the FAC, nothing in the Dublin Regulation requires or encourages a restrictive approach in applying the discretionary clauses. On the contrary: in light of the stated intentions of the legislator, as expressed in particular in the Preamble of the Regulation, the clauses should receive a broad and systematic application whenever family life is at stake.

Article 8 ECHR is one of the central provisions in this context. Its application comes into play whenever actions or omissions taken under the Dublin Regulation may affect “family life” within its meaning. According to the case-law of the ECtHR, “settled status” of the family member of the applicant is not a condition for the applicability of Article 8 ECHR.

Marital relations constitute “family life” under Article 8 ECHR even if not yet fully established in fact. Likewise, the relations between parents and minor children constitute *ipso jure* “family life”. Denying the existence or stability of “family life” between the applicants and members of the nuclear family simply by referring to periods of separation – which may be and often are wholly involuntary – runs counter to that provision. In appraising whether other family ties constitute “family life”, the existence in practice of close personal ties is the controlling factor. Like the Dublin Regulation, the ECHR requires that in assessing the existence of “family life”, the administration adopt a non-formalistic, flexible approach, respect its inquisitorial duties and afford protection seekers the benefit

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<sup>2</sup> Council of the EU, doc. No. 12364/09, below fn. 101, p. 35.

of the doubt in view of their particular situation. As the applicable principles are to a great extent convergent, and as a matter of good practice, the first instance authority should ascertain in a holistic manner, at the outset of the Dublin procedure, the family situation from the standpoint of both the Dublin Regulation and the ECHR, taking full advantage of the procedural infrastructure provided by the Dublin Regulation (e.g. the right to an interview and family tracing).

The finding that Article 8 ECHR applies triggers a number of obligations: ensuring that the decision-making process is “fair and such as to afford due respect to the interests safeguarded by Article 8”; striking a “fair balance between the competing interests of the individual and of society”; guaranteeing an effective remedy against alleged violations as well as non-discrimination in the enjoyment of family life.

Whenever private and public interests are balanced against each other pursuant to Article 8 ECHR in a Dublin context, the following aspects should be taken into consideration:

- The possibility of establishing and enjoying family life elsewhere without undue obstacles may not be assumed. On the contrary, the starting assumption should be that the possibilities of enjoying family life “elsewhere” in the Dublin area are severely restricted. Even when such a possibility exists, it must be ascertained whether the sacrifice imposed on the persons already present in Switzerland would be proportionate.
- The potentially “temporary” character of the separation entailed by a Dublin transfer may be taken into account, but it must be borne in mind that separation could in fact last for a considerable time, and that even relatively short periods of separation may infringe Article 8 ECHR, e.g. in cases involving children.
- Asylum seekers are a vulnerable group entitled to particular protection.
- When assessing the compatibility with Article 8 ECHR of measures adopted under the Dublin Regulation, it is important to accurately identify and assess the public interest at stake. In Dublin cases, the intensity of the public order interests of “[...] controlling immigration” is arguably less pronounced than in ordinary family reunification cases. The public interest is further diminished where the applicant manifestly fulfils the conditions to benefit from family reunification in Switzerland, including asylum granted to family members (*Familienasyl*).
- As already noted, Recital 14 of the Preamble requires that additional weight be afforded to the interest in family unity than would normally be the case under Article 8 ECHR alone.

Globally speaking, in a system where the protection of family life is a “primary consideration”, preserving or promoting family unity should be the norm rather than the exception.

The obligations flowing from Article 8 ECHR are especially strong when it comes to particularly vulnerable persons. In cases where such persons, including children, are transferred with their family, the case-law of the ECtHR requires that appropriate guarantees be in place so that family unity will be ensured upon reception. Accordingly,



when the transfer is cancelled on account of the vulnerability of the person concerned, the rest of the family should also not be transferred so as to maintain family unity. In line with the *A.N.*, decision of the UN Committee Against Torture, the transfer to another Member State of a torture victim separating her from a supportive family environment is as a rule prohibited. Under the ECHR and other international standards, this reasoning should be extended to other categories of particularly vulnerable persons. This is the case, in particular, of children falling under the scope of Article 39 CRC.

Under Article 14 ECHR, borderline cases – i.e. cases that fall just outside the scope of application of the family-based responsibility criteria – must be subjected to careful scrutiny, including an analysis of the comparability of the situations involved, of the objective reasons capable of justifying a disparity in treatment, and of the observance of the principle of proportionality.

As noted, humanitarian considerations may mandate the use of the discretionary clauses even in the absence of human rights obligations. In the cases formerly covered by Article 15(2) DR II and now falling outside the scope of Article 16 DR III – e.g. dependency between mother-in-law and daughter-in-law – “keeping or bringing together” the relatives concerned remains a qualified obligation in line with the *K* judgment of the CJEU. Article 29a(3) OA1 must also be considered. It is a “may” provision (*Kann-Vorschrift*) and vests broad discretion in the SEM. This notwithstanding, under the case-law of the FAC, the SEM has the duty to examine in each case whether that provision should be applied, to establish all the relevant facts and to take them into account in its decision. The decision itself must be taken on the basis of transparent, reasonable criteria including in particular the vulnerabilities of the persons concerned, the best interests of the child and considerations pertaining to family unity. When on the basis of cumulative grounds it appears that a transfer would be problematic from a humanitarian standpoint, the application of that provision must be considered. Finally, the SEM is subject to an enhanced duty to state reasons.

Whenever human rights law or compelling humanitarian considerations require that family unity be maintained or reconstituted, this may imply, as the case may be, a duty to apply (or to refrain from applying) the sovereignty clause, or a duty to send or accept requests under the humanitarian clause.

The procedural guarantees established or implied by the Regulation and by applicable EU and international standards – e.g. the right to information, to an interview, to a representative for unaccompanied or separated children, and to a legal remedy – must be observed throughout the Dublin process. In particular, comprehensive legal protection must be afforded. While Article 27 DR III only foresees a right to appeal against transfer decisions, an effective remedy must be available against any decision affecting the rights that applicants derive from EU law (Article 47 CFR) and from the ECHR (Article 13 ECHR), including the right to family unity. The possibilities offered by international complaint procedures also have to be considered. In this perspective, it may be fruitful to subject the same national practice to the scrutiny of several international bodies – particularly the ECtHR, the UN Committee Against Torture and the Committee on the Rights of the Child.

## 1. Introduction

The right to enjoy family life without undue interference is recognized as one of the most basic human rights. Accordingly, the family is protected as the “natural and fundamental group unit of society” in universal and regional human rights instruments.<sup>3</sup> While the 1951 Convention on the Status of Refugees includes no provisions on the issue, the Conference of Plenipotentiaries that adopted it noted that family unity is an “essential right of the refugee”, and that such unity is “constantly threatened”. In consideration of this, it recommended that Governments take the necessary protective measures.<sup>4</sup> International policy documents adopted since regularly stress the importance of ensuring family unity for refugees and persons in refugee-like situations.<sup>5</sup>

These legal and policy developments mirror pressing personal and social needs. As aptly stated in the Summary Conclusions adopted by a UNHCR Expert Roundtable in December 2017,<sup>6</sup>

[w]hen refugees are separated from family members as a consequence of their flight, a prolonged separation can have devastating consequences on the wellbeing of the refugees and their families. The negative consequences impact on the refugees’ ability to integrate in their country of asylum, become active contributors to the society, and rebuild their lives. Finding and being reunited with family members is often one of the most pressing concerns for asylum-seekers and refugees.

As evinced by the last phrase, these considerations fully apply to “protection seekers”, i.e. persons who affirm themselves to be refugees or persons otherwise in need of protection, but whose claim still has to be determined. Indeed, in the case of protection seekers the

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<sup>3</sup> See in particular UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (hereafter “ICCPR”), Article 23 (1); Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> (hereafter “ECHR”), Article 8; UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> (hereafter “CRC”), Article 10.

<sup>4</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.refworld.org/docid/40a8a7394.html>, Recommendation B.

<sup>5</sup> See in particular UNHCR ExCom, *Conclusions on Family Reunion*, No. 9 (XXVIII), 1977 and No. 24 (XXXII), 1981; UNHCR ExCom, *Conclusion on Refugee Children and Adolescents*, No. 84 (XLVIII), 1997; UNHCR ExCom, *Conclusion on the Protection of the Refugee’s Family*, No. 88 (L), 1999; and UNHCR ExCom, *Conclusion on Local Integration*, No. 104 (LVI), para (n), on the importance of family reunification in promoting integration. All ExCom Conclusions are compiled in UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 –2017* (Conclusion No. 1–114), October 2017, HCR/IP/3/Eng/REV. 2017, available at: <http://www.refworld.org/docid/5a2ead6b4.html>. See also UNGA, *New York Declaration for Refugees and Migrants: Resolution adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html>, para 79 and Annex 1, para 14(a).

<sup>6</sup> UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection*, 4 December 2017, Expert Roundtable, available at: <https://www.refworld.org/docid/5b18f5774.html>, para 1.

promotion of family unity presents special opportunities and challenges. Arrival and first reception are oftentimes moments of great instability and vulnerability. Family support – be it from family members in flight with the applicant, or from relatives that are already present in the host State – may prove crucially important materially and emotionally, especially for particularly vulnerable persons such as unaccompanied children or torture victims.

At the same time, promoting family unity for protection seekers presents distinct advantages for the host State. As protection seekers are often *de jure* or *de facto* excluded from the labour market pending the examination of their application, the support of established relatives may reduce the financial costs of reception incurred by the State. Furthermore, the processing together of the applications lodged by members of the same family is conducive to the efficiency and thoroughness of the fact-finding process, and helps in preventing the adoption of contradictory decisions.<sup>7</sup> Last but not least, generous and inclusive provisions favouring the family unity of protection seekers are liable to reduce the incentives for irregular onward movement (called “secondary movements” in EU policy and legal documents).<sup>8</sup>

Unfortunately, such advantages are often overlooked and many factors end up playing against reunification. Indeed, for all its benefits family unity is far from being a given for protection seekers. Their residence status is provisional, and rarely if ever does it encompass a right to join family members who are already present in a potential host State, or to be joined by family members who find themselves elsewhere – including when they were separated *en route*. Indeed, the practical situation may be such that the applicant is unable to locate his or her family members.

In this context, inter-State arrangements to apportion responsibility in asylum matters – “asylum sharing arrangements” as they have also been called<sup>9</sup> – constitute both a threat and an opportunity. If designed around rules aiming to reunite families in flight, or to bring protection seekers together with settled relatives, they may be of great help. Conversely, if drafted or implemented with a predominant focus on different policy priorities – e.g. responsabilizing “safe third countries” or “first asylum countries” – they risk exacerbating the challenges faced by refugee families.

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<sup>7</sup> Council of the European Union (EU), *Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, OJ L 2013 180/31, available at: <http://www.refworld.org/docid/51d298f04.html>, (hereafter “Dublin III Regulation” or “DR III”), recital 15.

<sup>8</sup> See European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 3 December 2008, COM(2008) 820 final, (hereafter: European Commission, *Proposal for a Regulation establishing the criteria for determining the responsible Member State*), available at: <https://www.refworld.org/docid/493e8e3a2.html>, p. 13: “[Additional safeguards for family unity] will not only provide for an increased standard of protection for asylum-seekers but will also contribute to reduce the level of secondary movements”.

<sup>9</sup> T. Clark, F. Crépeau, “Human Rights in Asylum Sharing and Other Human Transfer Agreements”, *Netherlands Quarterly of Human Rights*, vol. 22, no. 2 (2004), pp. 217-240.

The Dublin system, which is the foremost example of a multilateral asylum sharing scheme and the focus of the present study, constitutes an in-between case. The EU legislation on which the system is based has progressively incorporated family-related concerns and the latest version – the “Dublin III Regulation” – has the *potential* for offering comprehensive protection to families in flight. Yet the implementation of the Dublin system has traditionally been driven by other considerations so that on the whole the system has impacted family unity negatively.

The present study analyses the various legal issues arising before Swiss authorities in this area, and proposes possible ways to address them. Given that the policies published by the Swiss first instance authority, the State Secretariat for Migration (SEM), lack detail,<sup>10</sup> the primary source used to reconstruct Swiss practice are the judgments of the second and last instance body, the Swiss Federal Administrative Court (FAC). Reports published by civil society organizations and international organizations are also referenced. Lastly, in order to confirm, contextualize and complete the insights gained through documentary sources, the author has conducted a series of interviews with stakeholders from national and international NGOs.<sup>11</sup>

While it is focused on Swiss practice, the study provides insights that may be useful in other “Dublin Member States” as well. Indeed, to a large extent it addresses problems observed across the “Dublin area”<sup>12</sup> as documented *inter alia* in the *Left in Limbo* study published by UNHCR in 2017,<sup>13</sup> and proceeds on the basis of standards that are applicable throughout it.

As a first step, the study will present the Dublin system in outline and, in doing so, recall key institutional and interpretive elements that decision-makers have to take into account when applying it (section 2). Secondly, the study will address the family-related Dublin criteria, the hermeneutical and applicative challenges they pose, and principled solutions that can be derived from applicable EU and international standards (section 3). Following this, the study will consider in the same manner the rules and principles structuring the use of discretion by national administrations under the Regulation (section 4). The concluding remarks will summarize the main findings and further comment on the national and international appeal rights through which protection seekers may vindicate their rights (section 5).

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<sup>10</sup> See SEM, *Manuel asile et retour*, 2019 edition, available at: <https://www.sem.admin.ch/sem/fr/home/asyl/asylverfahren/nationale-verfahren/handbuch-asyl-rueckkehr.html>, section C3.

<sup>11</sup> For the insights provided the author wishes to thank, in alphabetical order, Karine Povlakic (Service d’aide juridique aux exilé·e·s, SAJE/EPER), Valerio Prato (International Social Service Switzerland), Gabriella Tau (Caritas Suisse and Centre suisse de défense des droits des migrants, CSDM) and Muriel Trummer (Amnesty International Switzerland). The responsibility for any inaccuracies in the analysis rests solely with the author.

<sup>12</sup> I.e. the sum total of the States applying the Dublin system: the EU-28 and EFTA-4.

<sup>13</sup> UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at: <http://www.refworld.org/docid/59d5dcb64.html>.

The present study is a companion to the study authored by Dr. Stephanie Motz for the CSDM and UNHCR, entitled “Family reunification for refugees in Switzerland”.<sup>14</sup>

## 2. The Dublin System: institutional and interpretive elements

### 2.1. Asylum sharing arrangements and family unity: general considerations

To the extent that the apportionment of asylum responsibilities among States entails physically “distributing” protection seekers among their territories, asylum sharing agreements unavoidably impact family unity, which is predicated on family members being allowed to be present in the same place simultaneously. This impact, as noted, may be positive or negative depending on how the agreement is designed and implemented.

The very first blueprint was put forward in 1979 by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR). In its *Conclusions on Refugees without an Asylum Country*, the Committee suggested that an international responsibility-allocation system be established in order to prevent ‘refugee-in-orbit’ situations.<sup>15</sup> As for the principles that should inform such a system, the Executive Committee recommended *inter alia* that “the intentions of the asylum-seeker” be taken into account “as far as possible”, and that applicants be called upon to submit their request to another State only if justified by a previous “connection or close links”, and only “if [...] fair and possible”. According to UNHCR, the notion of “connection or close links” includes family ties with persons that are present in a State, alongside cultural connections and previous abode.<sup>16</sup> UNHCR also emphasized that any responsibility-allocation system would need to have as its central consideration “[t]he interest of the refugee to have his/her claim determined fairly and promptly, in an environment supportive of his/her psychological and social needs”.<sup>17</sup> All in all, ExCom and UNHCR documents militate for the widest possible application of the principle of family unity, combined with due consideration for the individual aspirations of protection seekers.

In line with the ExCom Conclusions, the Dublin system seeks to prevent orbit situations and to ensure access to asylum procedures. However, it was initially conceived as a “flanking measure” to the abolition of border controls within the EU and is inspired by different priorities:<sup>18</sup> preventing the examination of multiple applications, denying applicants the choice of the State responsible for their application, and discouraging secondary movements. Pursuant to the latter policy objectives, the “intentions” of the

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<sup>14</sup> S. Motz, *Family Reunification for Refugees in Switzerland - Legal Framework and Strategic Considerations*, CSDM October 2017, available at: <https://www.refworld.org/docid/5a0971d54.html>.

<sup>15</sup> UNHCR ExCom, *Conclusions on Refugees without an Asylum Country*, No. 15 (XXX), 1979, available at: <https://www.refworld.org/docid/3ae68c960.html>. On the broader context see A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, OUP, 2009, pp. 17-30. On refugees in orbit see G. Melander, “Refugees in Orbit”, *AWR Bulletin*, Vol. 16 (1978), pp. 59-75.

<sup>16</sup> UNHCR, *Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper*, 19 January 2001, available at: <https://www.refworld.org/docid/3ae6b34c0.html>, p. 5.

<sup>17</sup> *Ibidem*, p. 1 f.

<sup>18</sup> For a historical reconstruction, see D. Joly, “The Porous Dam: European Harmonization on Asylum In The Nineties”, *IJRL*, Vol. 6, no. 2, (1994), pp. 159-193.

protection-seeker are not taken into consideration for the purpose of responsibility determination. Instead, the Member States apply “objective”, politically agreed criteria.<sup>19</sup> Furthermore, such criteria are not all based on the applicant’s “close links” with particular Member States. Instead, they reflect primarily political considerations linked to the “progressive creation of an area without internal frontiers” (Recital 25 DR III). In the words of the Commission, the Dublin system is based on the principle that

responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant’s entry into or residence on the territories of the Member States, subject to *exceptions* designed to protect family unity (emphasis added).<sup>20</sup>

Such a strong emphasis on State responsibility for entry or stay is rather inimical to a full and inclusive protection of family unity. The problem is exacerbated by the fact that the Dublin process is traditionally permeated by considerations of celerity which may end up conflicting with a thorough assessment of individual circumstances.<sup>21</sup> Largely because of these factors, there is in practice a strong tension between the Dublin system and the protection of family unity.

Still, it is worth stressing that even a system primarily pursuing migration management objectives could afford comprehensive protection for family unity. After all, it is a matter of how wide the “exceptions designated to protect family life” are cast, and how broadly they are applied. For instance, the US-Canada “Safe Third Country Agreement” of 2002 includes an extremely broad “family exception” to its basic “country of last presence” rule: pursuant to Article 1(1b) and 4(2a-b), responsibility for examining the applicant’s claim falls to the State where family members broadly defined (including e.g. aunts and nieces) are legally staying other than as visitors, or are present and eligible to file a refugee claim.<sup>22</sup>

The family clauses included in the Dublin system have never been quite as broad. Still, as will be explained below, progress since the drafting of the 1990 Schengen and Dublin Conventions has been considerable, and family unity has risen to first rank among the

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<sup>19</sup> The consent of the persons concerned is however required for the application of the criteria based on family ties, examined below in section 3.

<sup>20</sup> European Commission, *Proposal for a Regulation establishing the criteria for determining the responsible Member State*, above fn. 8, p. 5 f.

<sup>21</sup> According to Recital 5 DR III, responsibility determination must be “rapid” and must not “compromise the objective of the rapid processing of applications for international protection”. More generally, the CJEU has observed that the Dublin system has been adopted “in order to rationalise the treatment of asylum claims [...] it being the principal objective [...] to speed up the handling of claims in the interests both of asylum seekers and the participating Member States” (*N. S. v. Secretary of State for the Home Department*, Case C-411/10, CJEU, 21 December 2011, available at: <https://www.refworld.org/cases/ECJ/4ef1ed702.html>, para 79).

<sup>22</sup> See the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries* (Safe Third Country Agreement), 5 December 2002, available at: <https://www.refworld.org/pdfid/42d7b9944.pdf>. For practical difficulties in the implementation of the clause, see however E. Arbel, “Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States”, *IJLR*, vol. 25, no. 1 (2013), pp. 65-86, at p. 69.

considerations that should inform the interpretation and implementation of the Regulation.

## 2.2. The Dublin system: institutional aspects

As noted, the Dublin system was first established under the 1990 Schengen and Dublin Conventions. Following the Treaty of Amsterdam (in force since May 1999), the Dublin Convention was transformed into a piece of EU legislation with the 2003 “Dublin II Regulation” (DR II),<sup>23</sup> then recast in 2013 as the “Dublin III Regulation” (DR III) currently in force.<sup>24</sup>

As part of EU secondary legislation, the Dublin Regulation is subject to – and must be interpreted and applied in conformity with – EU “primary law”. This includes the Charter of Fundamental Rights (CFR)<sup>25</sup> and, *via* Article 78(1) of the Treaty on the Functioning of the European Union (TFEU),<sup>26</sup> the Geneva Convention and “other relevant Treaties”.<sup>27</sup> The last word on the validity and meaning of the provisions of the Regulation belongs to the European Court of Justice (CJEU: see Article 19 of the Treaty on the European Union, TEU).<sup>28</sup>

In this last regard, the position is slightly different for the four EFTA States, including Switzerland. These States are not EU members and, accordingly, they are not directly bound by the judgments of the CJEU. Still, the Agreements associating them to the implementation of the Dublin system postulate legal homogeneity across the whole “Dublin area”.<sup>29</sup> More particularly, they declare the Parties’ common goal of “ensuring the most uniform possible application” of the Dublin *acquis* and foresee special procedures to prevent or suppress “substantial divergences”.<sup>30</sup> Accordingly, while stressing that CJEU case-law is not *stricto sensu* binding on it, the FAC has constantly held that it

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<sup>23</sup> Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, OJ L 2003 50/1, available at: <https://www.refworld.org/docid/3e5cf1c24.html> (hereafter “Dublin II Regulation” or “DR II”).

<sup>24</sup> For an in-depth analysis, see C. Filzwieser, A. Sprung, *Dublin III-Verordnung - das europäische Asylzuständigkeitssystem: Kommentar*, Neuer Wissenschaftlicher Verlag, 2014; C. Hruschka, F. Maiani, “Dublin III Regulation (EU) No 604/2013”, in Hailbronner and Thym (Eds.), *EU Immigration and Asylum Law: A Commentary*, Beck, 2016, pp. 1478-1604.

<sup>25</sup> European Union, *Charter of Fundamental Rights of the European Union*, OJ 2012 C 326/02, available at: <https://www.refworld.org/docid/3ae6b3b70.html>.

<sup>26</sup> EU, *Consolidated version of the Treaty on the Functioning of the European Union*, OJ 2016 C 202/47 (hereafter “TFEU”).

<sup>27</sup> See among many *N. S.*, Case C-411/10, above fn. 21, paras 64 ff and 75.

<sup>28</sup> EU, *Consolidated version of the Treaty on European Union*, OJ 2016 C 202/13 (hereafter “TEU”).

<sup>29</sup> See the Agreement associating Switzerland to the Dublin system (Accord du 26 octobre 2004 entre la Communauté européenne et la Confédération suisse relatif aux critères et aux mécanismes permettant de déterminer l’Etat responsable de l’examen d’une demande d’asile introduite dans un Etat membre ou en Suisse, RS 0.142.392.68, hereafter “AAD”), Articles 5-7.

<sup>30</sup> *Ibidem*. A. Cornu, “Les aspects institutionnels des Accords d’association de la Suisse à Schengen et à Dublin”, in C. Kaddous, M. Jametti Greiner (Eds.), *Accords bilatéraux II Suisse-UE et autres Accords récents*, Helbing & Lichtenhahn, 2006, pp. 207-244.

“must contribute to a uniform application by taking into account the case-law of the CJEU, and does not deviate from it without serious reasons”.<sup>31</sup>

It is also important to note that, as Recital 32 DR III recalls, the Regulation leaves the international human rights obligations of the Member States unaffected, as also the competence of the relevant monitoring bodies.<sup>32</sup> Therefore the case-law of, e.g., the European Court of Human Rights is as authoritative for national administrations as that of the CJEU in everything concerning the ECHR-conformity of measures taken under the Dublin system.

It follows from the above that national authorities applying the Dublin Regulation must at all times be mindful of the obligations flowing from the human rights instruments to which they are parties and from EU primary law as interpreted by the CJEU. It is worth recalling already in general terms the obligations that are most directly relevant to our study:

- Whenever proposed (in-)action under the Regulation may affect “family life” within the meaning of Article 8 ECHR, a concept independent from and broader than that of “family” under the Regulation,<sup>33</sup> the proceeding authorities are under the general obligation to “strike a fair balance between the competing interests of the individual and of society as a whole”.<sup>34</sup> This obligation also has a procedural dimension to it: the decision-making process leading to measures affecting family life must be “fair and such as to afford due respect to the interests safeguarded by Article 8”.<sup>35</sup> Thus, national authorities must assess specifically, in light of all the individual circumstances, the consequences of their (in-)action on the family life of the persons concerned.<sup>36</sup> This presupposes, in the first place, that they acquaint themselves fully with the relevant facts.
- Any (in-)action affecting “family life” must be amenable to review before an independent and duly empowered national authority in the context of an “effective remedy” within the meaning of Article 13 ECHR.
- The protection of family life must be guaranteed without unjustified distinctions. Thus, rules and decisions that are *per se* in conformity with Article 8 ECHR may

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<sup>31</sup> ATAF (published ruling of the FAC) 2017 VI/9, § 5.3.1 (free translation). See also ATAF 2010/27, 2014/1, 2015/19. Judgments of the FAC may be found at <https://www.bvger.ch/bvger/en/home/judgments/entscheiddatenbank-bvger.html> by searching for the judgment reference number.

<sup>32</sup> In particular, the so-called *Bosphorus* presumption of compliance with the ECHR does not apply to measures taken under the Dublin Regulation: see *M.S.S. v. Belgium and Greece*, Application no. 30696/09, ECtHR, 21 January 2011, available at: <https://www.refworld.org/cases,ECHR,4d39bc7f2.html>, para 338 f.

<sup>33</sup> See below sections 3.3.1 and 4.3.1.

<sup>34</sup> See e.g. *L.H. et V.S. contre la Belgique*, Application no. 67429/10, ECtHR, 7 May 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-120614>, paras 72–74; *Paposhvili v. Belgium*, Application no. 41738/10, ECtHR, 13 December 2016, available at: <https://www.refworld.org/cases,ECHR,5859459b4.html>, para 221.

<sup>35</sup> *Tanda-Muzinga c. France*, Application no. 2260/10, ECtHR, 10 July 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-145653>, para 68.

<sup>36</sup> *Paposhvili v. Belgium*, above fn. 34, para 222 ff.



still fall foul of the Convention if they are discriminatory within the meaning of Article 14 ECHR.<sup>37</sup>

- Whenever children are involved, be they accompanied or unaccompanied, their best interest must be a primary consideration in line with the UN Convention on the Rights of the Child and with Article 24 CFR. This obligation also impacts the way in which the ECHR-derived rights and principles mentioned above are to be interpreted and applied with respect to children.<sup>38</sup>

The published guidelines of the SEM only mention human rights obligations as the basis for “exceptions” to the normal operation of the Dublin system.<sup>39</sup> While it is correct that human rights may mandate the use of discretionary derogations under the Regulation, restricting their relevance to this aspect is not in line with the legislative concept underlying the Regulation. As will be shown immediately below, the protection and active promotion of human rights is one of the overarching aims of the Dublin Regulation. Accordingly, based on the expressed intention of the legislator, human rights should not only be respected – if need be through case-by-case derogations – but fully mainstreamed in the interpretation and application of the Dublin Regulation.

### 2.3 The Dublin system: general interpretive considerations

Since the inception of the Dublin system in 1990, its basic functions and principles have remained unchanged despite continuous criticism and suggestions for change.<sup>40</sup> Thus, the EU legislator has twice “confirm[ed] the principles underlying” the system “while making the necessary improvements in the light of experience” (see Recitals 5 DR II and 9 DR III).

Article 3(1) DR III summarizes such “underlying principles”:

1. Every application lodged by a third-country national in the “Dublin area” must be examined by one of the Member States. This reflects the “main

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<sup>37</sup> See e.g. *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application no. 9214/80, 9473/81 and 9474/81, ECtHR, 28 May 1985, available at: <https://www.refworld.org/cases,ECHR,3ae6b6fc18.html>; *Hode and Abdi v. The United Kingdom*, Application no. 22341/09, ECtHR, 6 November 2012, available at: <https://www.refworld.org/cases,ECHR,509b93792.html>, paras 42 ff.

<sup>38</sup> See below section 4.3.2.

<sup>39</sup> SEM, above fn. 10, p. 8.

<sup>40</sup> See e.g. E. Guild *et al.*, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, 2014, Study for the European Parliament (EP), available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU\(2014\)509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf); E. Guild *et al.*, *Enhancing the Common European Asylum System and Alternatives to Dublin*, 2015, Study for the EP, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf); F. Maiani, *The Reform of the Dublin III Regulation*, 2016, Study for the EP, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL\\_STU\(2016\)571360\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf); M. Di Filippo, “The Allocation of Competence in Asylum Procedures under EU law: The Need to Take the Dublin Bull by the Horns”, *Revista de Derecho Comunitario Europeo*, vol. 59, 2018, pp. 41-95.

objective” of the system according to the CJEU: “to guarantee effective access to an assessment of the applicant’s [protection needs]”.<sup>41</sup>

2. Each application must, in principle, be examined “by a single Member State”.
3. The responsible State “shall be the one which the criteria set out [in the Regulation] indicate is responsible”. Such criteria, as noted above, are “objective” (Recital 4 DR III) in that they apply independently of the applicant’s consent or preferences.<sup>42</sup>

Beyond these aspects, the story of the Dublin system is one of constant evolution. This is particularly true with respect to the protection of human rights and family life. Recital 9 of the new Regulation states that the aim of the 2013 recast was to strengthen “the effectiveness of the Dublin system *and the protection granted to applicants*” (emphasis added). Thirteen more recitals elaborate further on this aspect. Here are the ones most relevant to our subject:

- While the legislator of 2003 maintained that family unity “should be preserved in so far as this is compatible with the other objectives pursued” by the Dublin system (Recital 6 DR II), the legislator of 2013 stressed that the best interests of the child and respect for family life within the meaning of the ECHR and of the CFR must be “primary considerations” when applying the Regulation (Recitals 13 and 14 DR III; see below).
- While the legislator of 2003 justified processing together the applications of members of the same family purely on efficiency grounds (Recital 7 DR II), the legislator of 2013 also emphasizes that this allows members of the same family not to be separated (Recital 15 DR III).
- Recital 17 now recommends applying the discretionary clauses, examined in section 4, “in particular on humanitarian and compassionate grounds”.

Under the hermeneutical principles prevailing under EU Law, these recitals – as well as the others that attest to the central place assigned by the legislator to the rights and welfare of applicants (see Recitals 18 to 21, 24 and 27 DR III) – are highly relevant to the interpretation of the Regulation.<sup>43</sup> Accordingly, the new “spirit” of the Regulation, as reflected in the Preamble, has had a profound impact on the way in which the CJEU itself reads the text as a whole. Under the old Regulation, the Court described the Dublin system as a set of “organisational rules governing the relations between the Member States”, and

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<sup>41</sup> *MA and Others v. Secretary of State for the Home Department*, C-648/11, CJEU, 6 June 2013, available at: <https://www.refworld.org/cases,ECJ,51b0785e4.html>, para 54.

<sup>42</sup> Only the application of the criteria and clauses based on family ties is conditional upon the consent of the concerned persons: see Articles 9, 10, 16 and 17(2) DR III.

<sup>43</sup> “The operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption” (*TWD Textilwerke v. Commission*, C-355/95 P, CJEU, 15 May 1997, para 21).

interpreted it with a strong emphasis on efficiency – at times, to the detriment of full legal protection.<sup>44</sup>

Starting with the *Ghezelbash* judgment, the Court has revised its position, judging e.g. that previous restrictions to the applicants' rights of appeal were to be considered as lifted. Key in this reversal was not only the wording of the directly relevant provisions and Recitals, but also the “general thrust” of the changes brought by the recast Regulation. In this regard, the Court observed that the array of new or enhanced rights made applicants into actors of the system, which could no longer be considered as simply a set of inter-State rules, and stressed the firm intention of the legislator to introduce better protection of the applicant.<sup>45</sup> This new orientation of the case-law applies to all aspects of the Dublin III Regulation<sup>46</sup> and applies in particular to family unity.<sup>47</sup>

In view of the object of this paper, it is worth giving Recital 14 closer consideration. To quote it in full, the Recital states that “[i]n accordance with [the ECHR and with the Charter], respect for family life should be a primary consideration of Member States when applying [the] Regulation”. It is submitted that this wording cannot be interpreted as meaning simply that the right to respect of family life must be respected,<sup>48</sup> as such an interpretation would make it redundant (see Recitals 32 and 39 DR III). Rather, Recital 14 should be read as reflecting the “mainstreaming” intent of the legislator:

- By citing respect for “family life” in the preamble as a “primary consideration” for enforcing authorities, the legislator indicates that the Regulation as a whole ought to be read and applied in light of this concept. Accordingly, the competent authorities should not only avoid violations of Article 8 ECHR, but also interpret the provisions of the Regulation drawing on the methodologies and concepts developed under this provision. In particular, in line with the case-law of the ECtHR, they should avoid mechanical and overly formalistic interpretations of the relevant provisions.<sup>49</sup>
- Furthermore, a plain reading of the statement that family life must be a “primary consideration” is that in all the situations where the interest in family unity is

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<sup>44</sup> *Shamso Abdullahi v. Bundesasylamt*, C-394/12, CJEU, 10 December 2013, available at: <https://www.refworld.org/cases,ECJ,52d7ba9b4.html>, paras 56 ff.

<sup>45</sup> *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C-63/15, CJEU, 7 June 2016, available at: <https://www.refworld.org/cases,ECJ,575ae1ec4.html>, paras 45 ff.

<sup>46</sup> See e.g. *Al Chodor*, C-528/15, CJEU, 15 March 2017, available at: <https://www.refworld.org/cases,ECJ,58d545f44.html>, paras 33 ff; *Tsegezab Mengesteab v Bundesrepublik Deutschland*, C-670/16, CJEU, 26 July 2017, available at: <https://www.refworld.org/cases,ECJ,598dd0804.html>, paras 45 ff.

<sup>47</sup> For an example, see *Staatssecretaris van Veiligheid en Justitie v H. and R.*, Joined Cases C-582/17 and C-583/17, CJEU, 2 April 2019, paras 81 ff.

<sup>48</sup> See e.g. FAC, E-2700/2015, p. 6. Judgments of the FAC may be found at <https://www.bvger.ch/bvger/en/home/judgments/entscheidatenbank-bvger.html> by searching for the judgment reference number.

<sup>49</sup> See e.g. *Abdulaziz, Cabales and Balkandali*, above fn. 37. On avoidance of excessive formalism under Article 8 ECHR generally see *Rodzevillo v. Ukraine*, Application no. 38771/05, ECtHR, 14 January 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-159791>, para 85; *Penchevi v. Bulgaria*, Application no. 77818/12, ECtHR, 10 February 2015, available at: <http://hudoc.echr.coe.int/eng?i=001-150999>, paras 57 and 71.

balanced against competing interests, considerable weight must be afforded to it (see below, section 4).

- Lastly, it is interesting to note that Recital 14 uses an expression drawn from Article 3 CRC and essentially foreign to the jurisprudence relating to Article 8 ECHR. This choice of words, which cannot be coincidental (see Recital 13) but is left unexplained in the *travaux*, arguably indicates the intention of the legislator to transpose to family matters the “best interest” approach developed under the CRC. On this reading, respect for family life should be treated as a “threefold concept” when interpreting and applying the Regulation: (a) as a substantive right in the sense just described – i.e. the right to have family life assessed and taken as a “primary consideration” by the competent authorities; (b) as an interpretive legal principle commanding that legal provisions open to more than one interpretation be read in the sense that most effectively serves the protection of family life; (c) as a rule of procedure requiring that the decision-making process include an evaluation of the impact of prospective decisions on family life – and before that, requiring that family life be correctly identified by the authorities.<sup>50</sup>

## 2.4 The Dublin rules and process in outline

The Dublin Regulation establishes the rules for determining which State is responsible for an applicant, defines the content and extent of said responsibility – including the obligations to “take charge” of applicants and to “take” them “back” should they move to another Member State – and lays down the attendant evidentiary and procedural rules. Providing a detailed description of the Dublin Regulation and procedure is beyond the scope of this study.<sup>51</sup> What follows is rather a reminder of the key points, whereas the next sections are devoted to a detailed analysis of family-related provisions and the interpretive and applicative issues they give rise to.

The first step in the Dublin process, whether Switzerland is determining responsibility or whether it is the recipient of a “take charge” request, is to examine the responsibility criteria.<sup>52</sup> Most of these are found in Chapter III of the Regulation. “Chapter III criteria” apply on the basis of the factual situation existing at the date when the first application for protection is lodged with a Member State (“freezing” or “petrification” clause: Article 7(2) DR III). They are hierarchically ranked and must in principle be applied in the order in which they are set out (Article 7(1) DR III). Thus, the proceeding authority must

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<sup>50</sup> See *mutatis mutandis* 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 (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html>. Note that this threefold obligation can to a large extent be derived directly from Article 8 ECHR (see above section 2.2).

<sup>51</sup> For a full analysis see C. Filzwieser, A. Sprung, above fn. 24; C. Hruschka, F. Maiani, above fn. 24. For a comprehensive analysis of Swiss jurisprudence under the Dublin system, see J.-P. Monnet, “La jurisprudence du Tribunal fédéral en matière de transferts Dublin”, in S. Breitenmoser, S. Gless, O. Lagodny, *Schengen und Dublin in die Praxis – Aktuelle Fragen*, Dike/Nomos, 2015, pp. 359-439.

<sup>52</sup> In “take back” procedures, the criteria play only a marginal role: see *H. and R.*, Joined Cases C-582/17 and C-583/17, above fn. 47, paras 80 ff.

examine the higher-ranking criteria, and come to the conclusion that they are not applicable, before even considering lower-ranking criteria.

In this regard, it is worth pointing out that the criteria based on family ties (hereafter “family criteria”) are placed at the top of the hierarchy and must be examined before the criteria based on documentation, entry or stay. It follows that the proceeding authority may not send out “take charge” requests based on lower-ranking criteria upon finding relevant evidence (e.g. a Eurodac “hit” indicating irregular entry from another Member State) before seeking and considering evidence that could make the family criteria applicable. Such a course would be in clear violation of the Regulation and would undermine the legislative choice of giving priority to family unity.<sup>53</sup> Responsibility allocation may also occur based on criteria placed outside of Chapter III: Article 16 DR III on “Dependent persons”, based on family ties, and Article 3(2) DR III, which lays down the criterion that applies by default when all the others are inapplicable. Article 22 DR III lays down the relevant evidentiary standards.

All these aspects are examined in section 3, to the extent that they concern family unity.

Examination of the criteria does not conclude the process or responsibility determination. Indeed, the “discretionary clauses” of Article 17 DR III make it possible for Member States to derogate from the criteria and other rules laid down by the Regulation. Whenever the application of the criteria would negatively affect family life, the question of whether a derogation is called for must be examined in light of the relevant human rights standards as well as of humanitarian and compassionate reasons.<sup>54</sup> The question, it should be noted, may arise at any stage of the Dublin process and not only at “take charge” stage. These aspects are analysed in section 4.

Throughout the procedure, the applicants enjoy a whole range of procedural guarantees: the right to be informed, including on the possibility of submitting family-related information and requests (Article 4 DR III); the right to a personal interview, which may only be omitted in exceptional circumstances (Article 5 DR III); the right to a suspensive judicial remedy against transfer decisions, covering all issues of law arising under the Regulation or human rights standards as well as issues of fact (Articles 26 and 27 DR III); the right to legal and linguistic assistance (Article 27(5) and (6) DR III).

Unaccompanied and/or separated children must also be given a qualified representative, and benefit from family tracing (Article 6 DR III). These matters are not considered in depth in the present study. However, section 5 includes some observations on the national and international remedies available to protection seekers.

## 2.5 Summary of main points

Swiss authorities must interpret the Dublin Regulation in conformity with the EU Charter of Fundamental Rights and relevant international instruments including the Geneva

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<sup>53</sup> See UNHCR, *Left in Limbo*, above fn. 13, p. 43. See also FAC, D-2987/2019.

<sup>54</sup> J.-P. Monnet, above fn. 51, p. 429 f.

Convention, the CAT, the CRC and the ECHR. They must duly take into account the case-law of the CJEU, of the ECtHR, and of other relevant monitoring bodies.

Human rights should be mainstreamed in every aspect of the interpretation and application of the Dublin Regulation. In particular, Recital 14 DR III specifically requires that respect for family life be a “primary consideration”. This implies that:

- Family-related provisions of the Regulation should be interpreted and applied without undue formalism, and in the way that best serves family unity;
- In all the situations where the interest to family unity is balanced against competing interests, considerable weight must be afforded to it;
- The decision-making process should include an evaluation of the impact of prospective decisions on family life.

Family-related aspects must be examined at all the stages of the Dublin process. In take charge procedures, the family criteria must be examined first and their applicability must be positively excluded before lower-ranking criteria are even considered. Furthermore, whenever the application of the criteria or any other action under the Regulation (e.g. take back transfer) would negatively affect family life, the question of whether a derogation is called for must be examined in light of the relevant human rights standards – especially Article 8 ECHR – as well as of humanitarian and compassionate reasons. The procedural guarantees established or implied by the Regulation – e.g. the right to information, to an interview, to a representative for unaccompanied or separated children, and to a legal remedy – must be observed throughout.

### **3. Protecting family life in the interpretation and application of the Dublin criteria**

#### **3.1 Overview of the family criteria and definitions laid down in the Regulation**

Articles 8-11, 16 and 20(3) DR III assign responsibility to Member States based on the presence, on their territory, of family relations of the applicant. The scope of these criteria is variously circumscribed by reference to (a) the nature of the family ties considered; (b) the moment when the tie was formed; (c) the status of the applicant’s family relation at the relevant time. The “freezing clause”, examined above, can also act as an important limitation as it prevents the authorities from taking into account situations arising after the first application is lodged with a Member State – including the creation of family ties, or the acquisition of the “right” status by the family member.<sup>55</sup>

Article 2(g) DR III gives the basic definition of “family members” applicable under the Regulation. This definition includes the spouse or unmarried partner of the applicant,<sup>56</sup> unmarried minor children and, if the applicant is an unmarried minor, the father, mother,

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<sup>55</sup> See e.g. ATAF 2013/24, § 4.3; J.-P. Monnet, above fn. 51, p. 431-432.

<sup>56</sup> The partner is included only if in a “stable relation”, and if national laws or practices concerning third country nationals treat unmarried couples comparably to married couples.

or other adult responsible. Such family links are covered only “insofar as the family already existed in the country of origin” (hereafter, “pre-flight requirement”).

The basic definition is variously modified or complemented by the individual criteria, which also provide for the status limitations referred to above. Thus Article 8 DR III foresees that unaccompanied child applicants are to be assigned to the Member State where “family members”,<sup>57</sup> siblings or “relatives”<sup>58</sup> are “legally present”. Article 9 DR III foresees the reuniting of the applicant with family members who are beneficiaries of international protection in a Member State, “regardless of whether the family was previously formed in the country of origin”. Article 10 DR III – the only provision to apply the definition of Article 2(g) DR III without any alterations – foresees the reuniting of the applicant and “family members” who are themselves applicants waiting for the first decision concerning the substance of their claim. Article 11 DR III provides for “family members” or minor unmarried siblings applying at or nearly at the same time in the same State to be kept together. Article 20(3) DR III prescribes that the situation of applicants and children accompanying them shall be indissociable, provided they are “family members” or the child is born after the applicant arrives in a Member State. Lastly, Article 16 DR III relies on an entirely different definition of family as it foresees keeping or bringing together the applicant and his child (regardless of age), sibling or parent that is “legally resident” in a Member State, when there is a link of dependency for a number of specified causes, and provided that the family already existed in the country of origin.

In keeping with the interpretive principles outlined in section 2, the criteria should be applied broadly. As the Commission itself recommended, “Member States [...] should [...] *proactively* and consistently apply the clauses related to family reunification” (emphasis added).<sup>59</sup>

In practice, the biggest challenge confronting applicants invoking the family criteria before Swiss authorities is that of having their family ties recognized as relevant. The main obstacles in this regard are a rigid interpretation of the relevant family definitions (section 3.2) and the tendency of the administration to disregard or deny the existence of family ties on evidentiary grounds (section 3.3). Further issues arise in the interpretation of the individual criteria, and are examined below in section 3.4.

## 3.2 The “family member” definitions of the Regulation: interpretive issues

### 3.2.1 The requirement to interpret the definitions broadly and flexibly

The multiple relations between the definitions of “family” given by the Regulation and the notion of “family life” under Article 8 ECHR are an important factor to be considered when interpreting and applying the Regulation.

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<sup>57</sup> Note that the rule applies also to the mother, father, adult responsible, or sibling of a married child whose spouse is not legally present in a Member State.

<sup>58</sup> I.e. adult aunts, uncles or grandparents. Article 8 DR III adds the condition that such relatives must be capable of “tak[ing] care of [the] applicant”.

<sup>59</sup> European Commission, *A European Agenda on Migration*, above fn. 1, p. 13.

- First, there is considerable overlap. “Family life” readily includes all the family ties covered by Article 2(g) DR III. Depending on the circumstances, it may also encompass the extended family ties considered elsewhere in the Regulation.<sup>60</sup> In practice, one should start from the assumption that “family life” exists in all the situations covered by the definitions and criteria. This has important consequences on the interpretation and application of the definition that are further spelled out below.
- *Per* Recital 14 of the Preamble, respect for family life must be a “primary consideration”. As mentioned, this rules out formalism and calls for a wide, flexible interpretation of the concepts of the Regulation (see above, section 2.3).
- At the same time, the definitions of “family” laid down in the Regulation are legally autonomous from that of “family life” under Article 8 ECHR, and *vice versa*. Thus, conditions relating to the existence of “family life” (e.g. an appraisal of its factual intensity) should not be superimposed mechanically on the definition of family in the Regulation.

The SEM tends in practice to disregard these hermeneutical principles and to favour a restrictive reading of the family definitions, setting a high threshold both substantively and formally:

- On the one hand, it has the practice of adding to the conditions set out in Article 2(g) DR III by requiring proof that a marital or parental relationship is stable and factually existent (*tatsächlich gelebte und dauerhafte Beziehung*).<sup>61</sup> However, when the Regulation imposes factual conditions of this kind, it provides explicitly for them (see in particular Article 2(g), first indent, and 8(2) DR III). In all the other cases, as the FAC has held consistently in its case-law, the only relevant question is whether the relevant family tie exists (e.g. marriage or filiation) without its factual intensity playing any role.<sup>62</sup> Quite tellingly, in such cases, extracts from public registers are sufficient proof by express provision (see also below, 3.3.1).<sup>63</sup>
- On the other hand, marriages that for one reason or another do not fulfil all the conditions for recognition in Switzerland tend to be excluded from the definition of Article 2(g) DR III.<sup>64</sup> While it is natural for national authorities to refer to such criteria when judging the “validity” of marriage, utmost care should be taken to avoid an overly rigid application. Article 2(g) DR III only refers to the law and

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<sup>60</sup> See ECtHR, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life*, 31 December 2016, available at: <https://www.refworld.org/docid/5a016ebe4.html>, paras 235 ff and 245 ff.

<sup>61</sup> See e.g. ATAF 2017 VI/1. See also ATAF 2013/24, § 4.2 and 5.3; FAC, D-4248/2015, § 6.4; FAC, D-840/2017, § C and D; FAC, D-2137/2017, § I; FAC, D-2987/2019, § 7.1.

<sup>62</sup> See ATAF 2013/24, § 5.3; ATAF 2015/41 and ATAF 2017 VI/1, § 4.2.

<sup>63</sup> See European Commission, *Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (hereafter “Implementing Rules” or “IR”), OJ L 2014 39/1, Annex I.

<sup>64</sup> See e.g. FAC, D-4424/2016, p. 9; FAC, E-4791/2017, p. 5.



practice of the host State(s) for determining (a) whether unmarried couples are to be treated in a way comparable to married couples,<sup>65</sup> and (b) whether an adult other than the father and mother can be regarded as “responsible” for a child. In all other cases, no such reference is made and criteria drawn from national law e.g. on the validity of marriages may not be mechanically applied. Indeed, absent any indication to the contrary, the notion of “family member” is an autonomous notion of EU Law<sup>66</sup> which, as stated, should be interpreted widely and flexibly *per* Recital 14 DR III. Furthermore, “recognizing” a marriage for the purposes of the Dublin Regulation is entirely distinct from recognizing it for civil purposes and has the sole objective of determining which State is best placed to receive the applicant for the duration of the asylum procedure. In keeping with the principle of non-formalism derived from ECHR law, even if the formal validity of marriage is not fully established, the authorities should be satisfied of the latter’s existence for the purpose of Article 2(g) DR III whenever the applicant and his or her spouse “believe themselves to be married and [...] genuinely [wish] to cohabit”.<sup>67</sup> Of course, in cases where the marriage openly violates the *ordre public* of the host State, the question may arise of whether any legal effect should be derived from it, including under Dublin.<sup>68</sup> It is submitted, however, that even in such cases the *ordre public* criterion should be applied with care. In the case of marriages involving children, in particular, the outright exclusion of the family tie from the protective scope of Article 2(g) DR III may be too blunt, and an individualized “best interests” assessment as foreseen by Article 8 DR III may be the best approach.<sup>69</sup>

Similar care in appraising the reality of family relations, and flexibility in the interpretation of the Regulation, should be exercised when applying Article 2(g) DR III to the other family relations it encompasses.

### 3.2.2 The requirement to apply the family provisions without discrimination

The family provisions of the Regulation establish distinctions that may result in stark inequalities of treatment. This may be problematic under the ECHR. As noted above, whenever it is established that a family tie considered in the Regulation exists, one may assume that Article 8 ECHR is also applicable, and this entails the applicability of Article 14 ECHR also. Therefore, discrimination in the enjoyment of family life resulting from the application of the criteria is forbidden and must be avoided.

Here are a few examples of the inequalities of treatment flowing from the Regulation:

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<sup>65</sup> On relations between non-married partners according to Swiss law, see ATAF 2012/5, § 3.3.2; FAC, E-747/2015, § 2.4.

<sup>66</sup> See *mutatis mutandis* *D.M. Levin v Staatssecretaris van Justitie*, Case 53/81, CJEU, 23 March 1982.

<sup>67</sup> *Abdulaziz, Cabales and Balkandali*, above fn. 37, para 63. See also ATAF 2013/24, § 4.3.2 *in fine*.

<sup>68</sup> See e.g. FAC, D-7084/2016.

<sup>69</sup> In the (different) context of Article 8 ECHR, see *Z.H. and R.H. v Switzerland*, Application no. 60119/12, ECtHR, 8 December 2015, available at: <https://www.refworld.org/cases/ECHR.566843824.html>, para 44. Note that in this judgment the Court eventually left the question of the existence of “family life” open (para 45 f), and that as pointed out by Judge Nicolaou in his Concurring Opinion there was little doubt that the two applicants did enjoy on a factual level “family life”. See also below section 4.

- Whereas the circumstances of family formation and separation may legitimately be taken into account – including from the standpoint of Article 8 ECHR<sup>70</sup> – a stark distinction between families formed “pre-flight” and “post-flight” is not permissible as it leads to differential treatment of situations that may, in fact, be perfectly comparable.<sup>71</sup> The fact that the Regulation applies this “pre-flight” condition intermittently – e.g. not in the cases foreseen by Article 9 DR III, nor for the extended family ties added in individual clauses (e.g. “relatives” and “siblings” under Article 8 DR III) – adds to the overall incoherence and may result in further unjustified distinctions. Under a purely textual reading of Articles 2(g) and 8 DR III, for instance, the “pre-flight” conditions should apply to the relationship between an unmarried child and her mother, while it would be inapplicable to the relationship between that same child and her uncle.
- As noted, Article 20 DR III makes the position of an adult applicant and of a child accompanying him or her indissociable, so long as they are “family members” or if the child is born to the applicant after the arrival in the Union. Children born in a country of transit fall between two stools, unless it can be demonstrated that the family tie was formed in *their* country of origin and this is accepted as sufficient under Article 2(g) DR III.
- The special definition of family contained in Article 16 DR III includes the “child, sibling or parent” of the applicant, but excludes the spouse, and no justification for this is apparent or has been provided in the *travaux*.<sup>72</sup> Particularly in the cases contemplated there, where the situation is one of mutual dependency, this exclusion is problematic: is it permissible to foresee the reunion of a pregnant woman with her “legally resident” sister, or elderly father, but *not* with her “legally resident” husband and father of the child-to-be?
- Beyond family definitions *stricto sensu*, many provisions of the Regulation create stark threshold effects. Consider, e.g., the case of an applicant whose spouse has enjoyed refugee status for a long time, but is naturalized hours before the applicant – unbeknownst to him or the naturalization authorities – lodges her claim in another State. In such a situation, Article 9 DR III is strictly speaking inapplicable – but is it acceptable that family unity be made dependent on such trivial factual differences?

The traditional remedy for these various insufficiencies and inconsistencies of the letter of the Dublin Regulation is the use of the discretionary clauses, addressed below (section 4). It is however submitted that in at least some of the cases described above, it is not so much a matter of making derogations from those provisions for certain classes of cases, but rather of interpreting them in light of the objectives, scheme and principles of the Regulation.

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<sup>70</sup> See below, section 4.3.3, in reference to family ties formed during periods of “tolerated” stay.

<sup>71</sup> *Hode and Abdi*, above fn. 37.

<sup>72</sup> C. Filzwieser, A. Sprung, above fn. 24, Article 16, K1, call this omission “surprising”.

For instance, it is widely accepted that the “pre-flight” condition is intended to prevent abuse perpetrated by the applicants to manipulate the application of the criteria.<sup>73</sup> If this is true, the condition should *not* be interpreted as automatically excluding all family relations formed “post-flight”, as this exceeds its objective, but rather as excluding family ties formed outside of the country of origin *and* for which elements suggesting abusive intent are available.<sup>74</sup> Such a teleological reduction, perfectly acceptable from a methodological standpoint,<sup>75</sup> is needed in order to bring the pre-flight condition in line with the proportionality principle implied by Article 14 ECHR.

Other inconsistencies could be eliminated through a wide or analogical interpretation.<sup>76</sup> For instance, rather than proceeding directly to the discretionary clauses, it should be carefully considered whether the exclusion of the spouse from the scope of Article 16 DR III, or the exclusion of children born in transit from the scope of Article 20 DR III, were intended by the legislator or should rather be considered as *lacunæ* in the body of the Regulation. Similarly, the naturalized refugee could (or, depending on the circumstances of the case, should) be treated as a refugee for the purpose of Article 9 DR III,<sup>77</sup> very much in the same way as the FAC includes in the scope of this provision former beneficiaries of international protection now enjoying “ordinary” migrant status (see below, section 3.4).

### 3.3 The “family member” definitions of the Regulation: evidentiary issues

#### 3.3.1 Means of proof and evidentiary requirements

Another significant obstacle confronting applicants who invoke family criteria before Swiss authorities is establishing the existence of the alleged family ties.<sup>78</sup>

The Dublin Regulation and Implementing Rules (IR) lay down two important principles in the matter.<sup>79</sup>

- First of all, States must “check *exhaustively and objectively*, on the basis of all information *directly and indirectly available* [...], whether [their] responsibility [...] is established” under the criteria (see Article 3(2) IR, emphasis added). This principle underscores the objective, as opposed to adversarial, nature of Dublin

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<sup>73</sup> C. Filzwieser, A. Sprung, above fn. 24, Article 2, K26.

<sup>74</sup> For a fuller formulation of the argument, see C. Hruschka, F. Maiani, above fn. 24. See also, *mutatis mutandis*, *Staatssecretaris van Veiligheid en Justitie v H. and R.*, Joined Cases C-582/17 and C-583/17, CJEU, Opinion of Advocate General Sharpston, 29 November 2018, paras 67 ff.

<sup>75</sup> K. Lenaerts, J. Gutierrez-Fons, *To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice* (2013), Academy of European Law Distinguished Lectures AEL 2013/9, available at: <https://cadmus.eui.eu/handle/1814/28339>, p. 28 f.

<sup>76</sup> On analogical reasoning in EU Law, see e.g. K. Langenbucher, “Argument by Analogy in European Law”, *Cambridge Law Journal*, 1998, vol. 57, no. 3, pp. 481-521, especially at p. 510 ff.

<sup>77</sup> For a similar example, in which however national authorities have opted for the serial application of the discretionary clauses, see European Council on Refugees and Exiles (ECRE), *Dublin II Regulation – Lives on Hold*, February 2013, available at: <https://www.refworld.org/pdfid/513ef9632.pdf>, p. 35.

<sup>78</sup> See e.g. ATAF 2013/24, § 4.2, 4.3.2 and 5.3; ATAF 2015/41, § 7.1. See also FAC, E-747/2015.

<sup>79</sup> Both principles are formally addressed to the “requested Member State”, but as the FAC has determined, they are fully applicable also in situations when a State examines its own responsibility: ATAF 2015/41, § 7.3 *in fine*.

proceedings and the inquisitorial duties of the administration (see also below, section 3.3.2). In practice, whenever the SEM receives or possesses *ex officio* information on the existence of family ties (e.g. through applicants' statements), it may not disregard it but should on the contrary follow it through, including when it tends to indicate that Switzerland would become the responsible State.<sup>80</sup>

- Article 22(4) DR III further stipulates that “the requirements for proof should not exceed what is necessary for the proper application of [the] Regulation”. The very object of the procedure – determining responsibility as opposed to granting long-term family reunification – as well as the considerations of celerity underpinning the Regulation<sup>81</sup> both entail a reduced evidentiary standard. Indeed, as the FAC has confirmed, “responsibility for processing an asylum application should in principle be determined on the basis of as few requirements of proof as possible”.<sup>82</sup> This is, in fact, a longstanding principle agreed upon by the Member States in Decision 1/97 of the “Article 18 Committee”, a body established under the 1990 Dublin Convention. Decision 1/97, which was *inter alia* quoted with approval in the Commission proposal for the Dublin II Regulation, continues as follows: “A Member State should be prepared to assume responsibility on the basis of indicative evidence for examining an asylum application once it emerges from an overall examination of the asylum applicant’s situation that, in all probability, responsibility lies with the Member State in question”.<sup>83</sup> This has found expression in the text of the Regulation itself (see Article 22(5) DR III, discussed below) and it prohibits, in particular, insistence on proof positive of family relations.

Beyond these general principles, Article 22 DR III distinguishes between “proof” and “circumstantial evidence” – the former being sufficient to establish responsibility in the absence of contrary proof, the latter being capable of doing so if “coherent, verifiable and sufficiently detailed” (see Article 22(3) and (5) DR III).<sup>84</sup> Annex II, List A of the Implementing Rules, which enumerates the elements of proof, includes among others “extracts from registers” as well as the open-ended indication: “evidence that the persons are related” (List A). As the FAC has confirmed, proof of this kind must be accepted as sufficient to establish the existence of the family tie except where additional factual circumstances have to be proven (see above, section 3.2.1). Furthermore, doubts as to the authenticity of the documents and evidence produced are not enough to set them aside. In order to do that, the administration must bring contrary proof, i.e. prove the lack of

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<sup>80</sup> See FAC, D-2987/2019, especially at 8.3 f. See also C. Filzwieser, A. Sprung, above fn. 22, Article 7, K6.

<sup>81</sup> See Recital 5 DR III and *N. S.*, Case C-411/10, above fn. 19.

<sup>82</sup> See ATAF 2015/41, § 7.2 (own translation, based on the original English text of European Union, *Decision No 1/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention*, 14 October 1997, OJ L 281/1-281/25).

<sup>83</sup> European Commission, *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 26 July 2001, COM(2001) 447 final, available at: <https://www.refworld.org/docid/47fdfb2ed.html>, p. 18.

<sup>84</sup> See also ATAF 2015/18, § 4.1.4, where the FAC sets out the evidentiary standard to be satisfied as involving proof or a “*faisceau d’indices cohérents, vérifiables et suffisamment détaillés*” of the existence of a family relation.

authenticity.<sup>85</sup> Lastly, *per* the clear letter of the Implementing Rules (*ibidem*), DNA testing can only be requested “failing” other forms of proof and “if necessary”, and must therefore be considered as an *ultima ratio* – not as a form of proof that can be routinely requested.<sup>86</sup>

“[V]erifiable information from the applicant”, as well as the “statements by the family members concerned”, are listed as circumstantial evidence in the IR (List B), alongside reports or confirmation by international organisations such as UNHCR. As noted above, such circumstantial evidence may not be disregarded and should on the contrary be seriously examined and accepted as sufficient whenever it possesses the qualities described in Article 22(5) DR III.<sup>87</sup> Furthermore, as the CJEU has affirmed in a comparable legal context, when judging on the absence of documentary proof of family ties, and assessing the circumstantial evidence offered, Member States must take into account the specific situations of protection seekers, the difficulties they are facing in providing evidence, as well as the best interests of any children involved.<sup>88</sup>

These evidentiary principles dovetail with those that the ECtHR has established in relation to Article 8 ECHR.<sup>89</sup> In *Tanda-Muzinga*, the Court posited that proceedings impacting family life must “offer guarantees of *flexibility*, promptness and effectiveness” (emphasis added).<sup>90</sup> It also emphasized the need for the decision-makers to take into account sources of evidence other than formal proof, including the statements of family members and information from international organizations. With respect to the particular difficulties confronting asylum seekers, it finally recalled that it is “appropriate in numerous cases to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof”.<sup>91</sup>

To conclude on this point: all the applicable rules point to the need for national authorities to adopt a flexible, constructive, proportionate approach in assessing evidence of family ties. The Regulation and its Implementing Rules make any formal proof that the applicants may produce conclusive, subject only to contrary proof. They also give applicants the right to rely on a broad range of evidentiary materials including their own verifiable

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<sup>85</sup> See ATAF 2013/24, § 5.3; ATAF 2015/41, § 7.1 and 7.3.

<sup>86</sup> European Commission, *Commission Staff Working Document: Accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system*, 6 June 2007, SEC(2007) 742, available at: <https://www.refworld.org/docid/47fdfb080.html>, p. 24. See also UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <http://www.refworld.org/docid/48620c2d2.html>, p. 4.

<sup>87</sup> For a positive example of Swiss practice in this regard, see ATAF 2013/24, § 4.3.2.

<sup>88</sup> *E. v Staatssecretaris van Veiligheid en Justitie*, C-635/17, CJEU, 13 March 2019, available at: <https://www.refworld.org/cases.ECJ.5c8bb6324.html>, paras 65 and 76 ff. The legal framework described in the judgment – that of *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, OJ L 2003 251/12, available at: <https://www.refworld.org/docid/3f8bb4a10.html> – is comparable in many ways to that of the Dublin Regulation. The evidentiary rules of the Directive, while less specific, also require that evidence other than documentary proof of family ties be taken into account, bearing in mind the best interests of the child and the right to respect for family life: see *ibidem*, paras 7 ff.

<sup>89</sup> Such principles are applicable because of the linkages between Article 8 ECHR and the family definitions of the Regulation pointed out above in section 3.2.1.

<sup>90</sup> *Tanda-Muzinga*, above fn. 35, para 82.

<sup>91</sup> *Ibidem*, paras 69 and 79.

statements. Lastly, the Regulation lays down reduced evidentiary standards – a point reinforced by the “benefit of the doubt” principle that can be derived from Article 8 ECHR.

### 3.3.2 The administration’s duties to proactively establish family ties

The authorities conducting the Dublin procedure should not only be open to the evidentiary materials offered by the applicant, but also proactively help in establishing the existence of family ties. This also results unambiguously from a plurality of sources.

Under Swiss Law, the Dublin procedure is inquisitorial rather than adversarial (*Untersuchungsgrundsatz, maxime inquisitoire*). It is therefore the duty of the SEM to establish *ex officio* all the relevant facts, including those that relate to the family situation of the applicant. This duty is tempered by, and has its counterpart in, the applicant’s duty to cooperate, as well as her right to participate in the procedure *inter alia* through an interview (see Articles 4 and 5 DR III). In particular, the applicant bears a particular responsibility in helping to establish her personal circumstances. Still, the administration is not entitled to place the burden of proof of family ties on the applicant: once the applicant’s duty to cooperate has been discharged, and there are still points in need of clarification, it is up to the SEM to inquire until the evidentiary standard set out previously is satisfied.<sup>92</sup>

This principle of Swiss Public Law is in line with the stipulations of the Dublin Regulation and of its Implementing Rules, which also foresee an active role for the authority conducting the procedure (see above, section 3.3.1).

The requirements for the administration to take a proactive stance are enhanced when it comes to the application of the criteria listed in Article 8 DR III concerning unaccompanied children. On the one hand, Article 6(4) DR III requires the Member States to “take appropriate action to identify the family members [...] on the territory of Member States while protecting the best interests of the child” as soon as possible. In discharging this tracing obligation, the Member States may call on the assistance of relevant organizations (e.g. the Red Cross). On the other hand, Article 12(4) IR requires the determining Member State to engage with the other Member States whenever it “is in possession of information that makes it possible to start identifying and/or locating a member of the family”. Crucially, such steps ought to be undertaken *ex officio* as soon as possible after the lodging of the application, even when the child has no information to offer on the whereabouts of his or her family.<sup>93</sup>

The stipulations of Article 6(4) DR III and 12(4) IR should inspire State practice beyond their formal scope of application. Indeed, tracing family members with the assistance of relevant international organizations, and engaging with other Member States when there

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<sup>92</sup> For the enunciation of the inquisitorial maxim and its relation to the applicant’s duty to cooperate, see e.g. ATAF 2015/4, § 3.2. For a concrete application, see e.g. FAC, D-5170/2018, p. 5 ff.

<sup>93</sup> See UNHCR, *Left in Limbo*, above fn. 13, p. 75 ff; ICFI, *Evaluation of the Implementation of the Dublin III Regulation – Final Report, Study for the European Commission*, March 2016, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_implementation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf), p. 17 f.

are indications that family relations are present there, may be regarded as ways of discharging the general inquisitorial duties of the administration outlined above. As a matter of good practice, the SEM should apply those provisions systematically also for applicants other than unaccompanied children, especially if the applicant is an otherwise vulnerable person.

### 3.3.3 Issues of timeliness in producing evidence of family ties

For the purposes of three family-related criteria – Articles 8, 10 and 16 DR III – Article 7(3) DR III requires Member States to take into consideration any available evidence of the presence of a family member or relative in a Member State, on condition that such evidence is produced before the acceptance of a take charge or take back request,<sup>94</sup> and that a first decision on the substance has not yet been taken.<sup>95</sup> An important implication of this rule is that national authorities may not disregard evidence of family ties on the pretext that a take charge or take back request has already been sent, and therefore the procedure is so to speak “closed” from their perspective.<sup>96</sup>

It is unclear why the remaining family-related criteria – Articles 9 and 11 DR III – are excluded from the scope of Article 7(3) DR III,<sup>97</sup> and whether such exclusion should be taken literally and applied strictly<sup>98</sup> or not.<sup>99</sup> The *travaux préparatoires* suggest a drafting mistake. The rule originally proposed by the Commission was a derogation to the “freezing clause” of Article 7(2) DR III that would be applicable to all the family criteria.<sup>100</sup> In Council, concern was expressed that such a derogation might encourage applicants to conclude marriages of convenience to trigger Article 9 DR III, which as seen applies to family ties formed “post-flight”.<sup>101</sup> Accordingly, the Presidency proposed a compromise text excluding Article 9 DR III from the scope of Article 7(3) DR III. Current Article 11 DR III, which presents no such risk, was also targeted without any explanation and possibly by oversight.<sup>102</sup> Later on, Article 7(3) DR III was transformed from a derogation to the

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<sup>94</sup> On the limited relevance the family criteria may have in take back procedures, see *H. and R.*, Joined Cases C-582/17 and C-583/17, above fn. 47, paras 80 ff. For an interpretation reading Article 7(3) DR III as a more general exception to the rule that responsibility criteria are not applied in take back procedures, see ATAF 2017 VI/5, § 6.2 ff and 8.2 ff.

<sup>95</sup> On the notion of “first decision on the merits”, see below, section 3.4.2.

<sup>96</sup> C. Filzwieser, A. Sprung, above fn. 24, Article 7, K7.

<sup>97</sup> *Ibidem*, K8.

<sup>98</sup> See e.g. FAC, E-6932/2016, § 6.3.

<sup>99</sup> See implicitly FAC, D-2359/2014.

<sup>100</sup> See European Commission, *Proposal for a Regulation establishing the criteria for determining the responsible Member State*, above fn. 8, Article 7(3).

<sup>101</sup> Council of the EU, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, doc. No. 12364/09, 27 July 2009, available at: <http://data.consilium.europa.eu/doc/document/ST-12364-2009-INIT/en/pdf>, p. 37 f.

<sup>102</sup> Council of the EU, *Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, doc. No. 12328/09, 29 July 2009, available at: <https://data.consilium.europa.eu/doc/document/ST-12328-2009-INIT/en/pdf>, Article 7(3).

“freezing clause” into a purely evidentiary rule,<sup>103</sup> thus eliminating any risk that “post-application” marriages could be used to trigger Article 9 DR III. This change made the exclusion of Article 9 pointless, but this was seemingly lost on the drafters.<sup>104</sup> There is, in conclusion, no objective reason to exclude Articles 9 and 11 DR III from the scope of Article 7(3) DR III. Furthermore, the exclusion generates uncertainty as to what deadline should apply for producing evidence under these two criteria. The most reasonable solution is to interpret Article 7(3) DR III as applicable to all family criteria. Alternatively, as proposed by AG Sharpston, since the exclusion was originally inspired by fear of abuse, it should then be applied only in cases where there is some evidence thereof.<sup>105</sup>

Before concluding on this point, it is important to stress that Article 7(3) DR III only imposes a minimal obligation for the purposes of the application of the criteria: it does not *prohibit* Member States from taking into account evidence produced later in time. Furthermore, Article 7(3) DR III is not applicable when it comes to proving the existence of “family life” under Article 8 ECHR (see below section 4).<sup>106</sup>

### 3.4 Interpretive issues relating to individual criteria

#### 3.4.1 The criteria relating to children and issues pertaining to age assessment

Article 8 DR III comes first in the hierarchy and lays down a self-contained set of criteria applicable to unaccompanied child applicants.<sup>107</sup> Under Article 8(1) DR III, responsibility is to be assigned to the Member State where “family members” or siblings are legally present. Paragraph 2 assigns responsibility to the State where “relatives” who can “take care of the minor” are legally present. Should there be no family connection, the responsible State is the one where the child has lodged his application and is present.<sup>108</sup>

Contrary to what the “hierarchy rule” of Article 7(1) DR III would suggest, there is no pre-determined order of application for the criteria of Article 8 DR III. The selection of the applicable paragraph, and the choice of the responsible State in cases where family relations are present in more than one, must be made in light of an individualized best

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<sup>103</sup> See S. Peers *et al.*, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 3: EU Asylum Law*, Brill/Nijhoff, 2015, p. 357. Still postulating that Article 7(3) derogates from 7(2) DR III, see C. Filzwieser, A. Sprung, above fn. 24, Article 7, K9.

<sup>104</sup> See Council of the EU, *Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, doc. No. 17167/09, 16 December 2009, available at: <https://data.consilium.europa.eu/doc/document/ST-17167-2009-INIT/en/pdf>, p. 17, and Council of the EU, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, doc. No. 9191/11, 26 April 2011, available at: <https://data.consilium.europa.eu/doc/document/ST-9191-2011-INIT/en/pdf>, p. 34.

<sup>105</sup> *H. and R.*, Joined Cases C-582/17 and C-583/17, AG Sharpston, above fn. 74, paras 67 ff.

<sup>106</sup> See similarly C. Filzwieser, A. Sprung, above fn. 24, Article 7, K10.

<sup>107</sup> Of all the other criteria, only Article 11 applies by its express provisions to unaccompanied child applicants (see below, section 3.4.2).

<sup>108</sup> See *MA and Others*, C-648/11, above fn. 41.



interests assessment (see Articles 8(3) and 6(1) DR III). Furthermore, both the letter of Article 8 DR III, the best interests principle that governs it and its underlying objective – providing “particularly vulnerable”<sup>109</sup> applicants with the greatest possibilities of enjoying the care of their family relations – indicates that the terms “legal presence” should be interpreted widely as encompassing any form of lawful presence on the territory of a Member State.<sup>110</sup>

Under Article 20(3) DR III the position of children who accompany an adult is indissociable from that of the latter, provided that they are “family members” and that this is in the best interests of the child. The clause has the purpose of preventing separation, and thus completes Article 8 DR III, which aims to remedy it. As it has been argued above, Article 20(3) should be applied broadly in order to cover situations that would otherwise escape its scope because of the “pre-flight” requirement.

As the benefit of these criteria and their broad “family reunion” clauses are reserved for children, age assessment is a crucial and often contentious step. In May 2019, the UN Committee on the Rights of the Child (CRC) summarized the applicable principles in Views adopted following individual complaints against Spain.<sup>111</sup> These deserve to be summarized here, and put in relation with the corresponding Swiss practice.

First of all, a person alleging minor age must “be given the benefit of the doubt and treated as a child” during the age assessment process itself. Thus the “best interests” principle must be observed throughout, and “a qualified legal representative, with the necessary linguistic skills” must be appointed already at this stage.<sup>112</sup> It is not clear that the latter guarantee is fully and systematically respected under Swiss law and practice.<sup>113</sup>

As for the means and standards of proof, the CRC has made the following points:

- Just as is the case under the Regulation, identity documents produced by the person concerned must be considered authentic until they are proven false.<sup>114</sup> This standard is not satisfied when official documents are set aside based on the generic

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<sup>109</sup> See *mutatis mutandis* MA and Others, C-648/11, above fn. 41, paras 54 ff.

<sup>110</sup> See in this sense ATAF 2016/1, § 4.2.

<sup>111</sup> UN Committee on the Rights of the Child (CRC), *A.L. v. Spain*, communication no. 16/2017, 10 July 2019, CRC/C/81/D/16/2017, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%252FC%252F81%252FD%252F16%252F2017&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%252FC%252F81%252FD%252F16%252F2017&Lang=en); UN Committee on the Rights of the Child (CRC), *J.A.B. v. Spain*, communication no. 22/2017, 9 July 2019, CRC/C/81/D/22/2017, available only in Spanish at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%252FC%252F81%252FD%252F22%252F2017&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%252FC%252F81%252FD%252F22%252F2017&Lang=en).

<sup>112</sup> CRC, *A.L. v. Spain*, above fn. 111, paras 12.3 and 12.8.

<sup>113</sup> See European Asylum Support Office (EASO), *EASO Practical Guide on age assessment, Second edition*, 2018, available at: <https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf>, p. 107; FAC, E-7333/2018, § 2.3.

<sup>114</sup> CRC, *A.L. v. Spain*, above fn. 111, para 12.4 (birth certificate); CRC, *J.A.B. v. Spain*, above fn. 111, para 13.4 (passport).

assumption that false documents may be obtained in the applicant's country of origin.<sup>115</sup>

- Refusal to undergo medical age testing cannot be taken as conclusive of majority.<sup>116</sup>
- Absent identity documents or other appropriate evidence, States must make a “comprehensive assessment of the child’s physical and psychological development conducted by specialist paediatricians or other [qualified] professionals.” Physical appearance can never be taken as conclusive since “age assessment must not only take into account the physical appearance [...] but also [...] psychological maturity”.<sup>117</sup> The assessment must be “carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews [...] in a language that the child understands”. In this context, “statements by children must be considered”.<sup>118</sup> Importantly, the requirement that a “comprehensive assessment” be carried out in every case rules out automatic reliance on explicit or implicit age assessments or age registrations made in other Member States.<sup>119</sup>

While, subject to some points, FAC case-law appears to correspond to the above principles, Swiss practice is characterized by increasing reliance on medical methods based on bone and dental examination. Both the CRC and the FAC have pointed out that radiology of the hand, combined with the Greulich and Pyle atlas, is not sufficiently reliable.<sup>120</sup> The FAC appears however to assign high probative value to more sophisticated bone and dental testing techniques, at the expense of the holistic assessment required by the CRC.<sup>121</sup> This should be reconsidered in light of the clear view of the CRC that “States should refrain from using medical methods based on bone and dental examination, which may be inaccurate [...] and can also be traumatic and lead to unnecessary legal procedures”.<sup>122</sup>

As an important last point, the CRC has stressed that when the authorities are unable to reach a firm conclusion on the age of the person concerned, “it is crucial that the benefit of the doubt should be given” to him or her.<sup>123</sup> From this standpoint, the reasoning adopted in some judgments of the FAC is not entirely satisfactory.<sup>124</sup>

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<sup>115</sup> See FAC, D-5795/2015, § 3.5 (unpublished passage of ATAF 2016/1); see however, for an example of the reasoning criticised in the text, ATAF 2018 VI/3, § 5.2.

<sup>116</sup> CRC, *J.A.B. v. Spain*, above fn. 111, para 13.4.

<sup>117</sup> CRC, *A.L. v. Spain*, above fn. 111, para 12.7. See also in this sense FAC, E-7333/2018, § 2.3.

<sup>118</sup> CRC, *A.L. v. Spain*, above fn. 111, para 12.4.

<sup>119</sup> See in this sense FAC, D-5795/2015, § 3.6 (unpublished passage of ATAF 2016/1).

<sup>120</sup> CRC, *A.L. v. Spain*, above fn. 111, para 12.6; FAC, D-5795/2015, § 3.3.1 f. (unpublished passage of ATAF 2016/1); FAC, E-7333/2018, § 2.3. It is a matter of concern that the SEM has adopted this methodology, combined with subjective impressions of the applicant’s appearance, even in recent decisions: see FAC, D-5795/2015, *loc. cit.* and more recently FAC, E-7333/2018, § D.

<sup>121</sup> See in particular ATAF 2018 VI/3, notably § 4.2.2 and 4.4.

<sup>122</sup> CRC, *A.L. v. Spain*, above fn. 111, para 12.4.

<sup>123</sup> *Ibidem.*

<sup>124</sup> See e.g. ATAF 2018 VI/3, § 6.

### 3.4.2 The “ordinary” family criteria of Articles 9-11

Articles 9-15 DR III list the criteria applicable to applicants who are not unaccompanied children. Articles 12-15 DR III, which lay down criteria based on documentation, entry and stay, are not examined here.

Under Article 9 DR III, the responsible State is the one where a family member of the applicant is staying as a “beneficiary of international protection”, i.e. as a recognized refugee or beneficiary of “subsidiary protection”. The latter status is based on EU Law<sup>125</sup> and is unknown to Swiss asylum law, which instead includes a functionally similar and partially overlapping status of “provisional admission”.<sup>126</sup> According to the FAC, in order to ascertain whether Article 9 DR III applies when the applicant has a “provisionally admitted” family member in Switzerland, it must be examined on a case-by-case basis whether the grounds on which provisional admission was granted fall within the scope of Article 15 of the Qualification Directive as interpreted by the CJEU. A restrictive interpretation based on notions of Swiss law is specifically excluded, while in case of doubt the administration may apply Article 9 DR III widely.<sup>127</sup> The FAC has further clarified that when a beneficiary of protection has his or her provisional admission replaced with an ordinary residence document (*in casu*: Permis B), Article 9 DR III remains applicable so long as the grounds for protection still exist – a circumstance which must be presumed.<sup>128</sup> The same principle should apply, logically, when the beneficiary of protection has been naturalized (see also above section 3.2.2).

Article 10 DR III assigns responsibility to the State where a “family member” is present as an applicant for protection, and her application has not yet been the subject of a first decision “regarding the substance” – a notion that excludes inadmissibility or procedural decisions. The subsequent criterion, laid down in Article 11 DR III, is linked to Article 10. Whereas the latter seeks to reunite families of protection seekers that have arrived in different States, Article 11 seeks to prevent their separation. Again, this Article includes its own special family definition, including “family members” and child unmarried siblings. When persons so defined lodge their application in the same State, or at dates sufficiently close that it is possible to conduct a joint Dublin procedure, the rule is that the same Member State must be responsible for all of them: unless the same State is responsible for the whole group under the ordinary criteria, Article 11 indicates supplementary criteria, i.e. that the State responsible for the whole family is the one responsible for the largest number or, failing this, for the oldest applicant. The key interpretive problem is the proviso that the applications must be “close enough”. In line with the objective of the provision, and with the legislator’s intention that family unity be a primary consideration, the application of Article 11 should not be refused on pure grounds of administrative expediency (e.g. because a first take charge has been sent) but

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<sup>125</sup> Council of the EU, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (Qualification Directive)*, OJ L 2011 337/9, available at: <https://www.refworld.org/docid/4f197df02.html>.

<sup>126</sup> See S. Motz, above fn. 14, p. 8.

<sup>127</sup> ATAF 2015/18, § 3.7 and 3.8.

<sup>128</sup> ATAF 2018 VI/1.

only when it is impossible to run a joint Dublin procedure, e.g. because this would not be compatible with the deadlines set in Article 21.

From this perspective, the criterion sometimes applied by the FAC – namely, that Dublin procedures are “at the same stage” – seems questionable.<sup>129</sup> Nor is it persuasive to hold, as the FAC has done, that when Switzerland’s responsibility for some family members has been established “without a responsibility procedure being necessary”, then Article 11 DR III is inapplicable when it comes to determining responsibility for a family relation.<sup>130</sup> As the CJEU has clarified, the Dublin Regulation is applicable to *every* application made by a third-country national in a Member State. Thus, when a Member State implicitly acknowledges its responsibility for an applicant or a group of applicants, it should be deemed to have carried out a Dublin procedure whether special steps in this regard were taken or not.<sup>131</sup> In such cases, to the extent that it is still possible to determine afresh the responsibility for these applicants, and a family member or sibling applies in Switzerland, Article 11 DR III should be applied.

### 3.4.3 Dependent persons under Article 16

Article 16 DR III instructs Member States to “normally keep or bring together” the applicant and “legally staying” family relations<sup>132</sup> where one is dependent on the other on enumerated grounds.<sup>133</sup> While the wording and positioning of the provision outside of Chapter III of the Regulation might give rise to doubts, the preamble clarifies that it indeed lays down a “binding responsibility criterion” (see Recital 16),<sup>134</sup> as distinct from the previous Article 15(2) DR II which laid down a discretionary clause.

Because it is located outside of Chapter III, Article 16 DR III is subject neither to the “freezing clause” nor to the rule whereby hierarchical rank is dependent on position. Accordingly, the criterion applies even if its conditions are fulfilled after the applicant has lodged her first application with a Member State, e.g. if she becomes pregnant, or falls ill, at a later time. According to Article 7(3) DR III, which unlike Article 7(2) is explicitly applicable to Article 16, the relevant evidence must however be produced before a Member State accepts to take charge of or to take back the applicant, or a first decision on the substance of the application is delivered. Furthermore, in keeping with its aim and *effet utile*, Article 16 takes precedence over any other applicable criterion that would lead to separation, provided of course that the persons concerned consent thereto (see Article 16(1) DR III *in fine*).

The phrase “shall *normally* keep or bring together” means that when the conditions laid down in Article 16 are fulfilled, family unity must as a rule be ensured and exceptions are

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<sup>129</sup> FAC, E-2794/2018, § 5.2.

<sup>130</sup> *Ibidem*.

<sup>131</sup> *Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite*, Case C-56/17, CJEU, 4 October 2018, paras 44 ff.

<sup>132</sup> Child, sibling or parent, provided that family ties existed in the country of origin. See the arguments developed above in section 3.2.2 for the inclusion of the spouse.

<sup>133</sup> Pregnancy, a new-born child, serious illness, severe disability or old age.

<sup>134</sup> ATAF 2017 VI/5, § 8.3.2.

only permitted in particular cases. Under the old Regulation, interpreting identical wording, the Court held that Member States could only separate or keep apart family relations in “exceptional situations”.<sup>135</sup> Based on the textual similarity, the FAC follows the same interpretation with respect to Article 16(1) DR III.<sup>136</sup> This is of course a tenable interpretation. However, it nullifies the legislative intention of transforming old Article 15(2) DR II into a binding criterion, i.e. in a provision establishing firmer obligations. In this perspective, it seems preferable to interpret the new provision as implying that only *explicit* exceptions are permitted, i.e. that family relations may only be kept apart in the cases of prolonged inability to travel that are explicitly foreseen by paragraph 2.<sup>137</sup>

The scope of Article 16 is delimited by many cumulative conditions, some of which have already been recalled: (a) one of the enumerated family ties must exist; (b) the family tie must have existed in the country of origin; (c) the applicant’s relative must be “legally resident” in a Member State; (d) on account of enumerated circumstances (e.g. pregnancy), one person must be “dependant on the assistance” of the other; (e) the other person must be “able to take care of the dependent person” and (f) the persons concerned must express their desire to be kept or brought together in writing.<sup>138</sup> Due to a strict application of these conditions, Article 16 DR III has unfortunately failed to gain traction so far in practice, and has therefore been deprived of much of its *effet utile*.<sup>139</sup>

However, the preamble of the Regulation and the humanitarian character of the provision rather call for a *broad* interpretation. As has been argued above in section 3.2.2, the definition of “family” given by Article 16 DR III should be read extensively, in such a way as to also encompass the spouse. In parallel, the “pre-flight” condition should not be applied mechanically, but rather as an “anti-abuse” clause in conformity with its aims. “Legal residence” should be interpreted simply as excluding situations of irregular stay.<sup>140</sup> The enumeration of Article 16 DR III – pregnancy, a new-born child, serious illness, severe disability or old age – is not an exclusionary list. On the contrary, it aims to capture the “essential life-events that make a person vulnerable in such a way that the reunion with certain reference persons becomes a humanitarian obligation”.<sup>141</sup> And while illness must be “serious” to qualify,<sup>142</sup> and disability “severe”, pregnancy, a new-born child and old-age suffice in and of themselves to trigger this provision.

The application of Article 16 DR III is often denied by the SEM with the argument that the applicant cannot show the existence of a “particular dependency” (*besonderes Abhängigkeitsverhältnis*) or an “intensive dependency” (*intensives Abhängigkeitsverhältnis*).<sup>143</sup> This happened, for instance, to a single mother with two children, having undergone the oncological removal of her uterus and still suffering from serious physical

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<sup>135</sup> *K. v. Bundesasylamt*, C-245/11, CJEU, 6 November 2012, available at: <https://www.refworld.org/cases/E CJ,50a0cd8e2.html>, para 46.

<sup>136</sup> ATAF 2017 VI/5, § 8.3.3.

<sup>137</sup> In the same sense, C. Filzwieser, A. Sprung, above fn. 24, Article 16, para K4.

<sup>138</sup> See also FAC, E-7488/2014, § 6.2.2.

<sup>139</sup> See UNHCR, *Left in Limbo*, above fn. 13, p. 109 ff.

<sup>140</sup> FAC, E-4303/2014.

<sup>141</sup> FAC, E-7488/2014, § 6.2.1.

<sup>142</sup> See FAC, F-6844/2017, § 3.3.2.2.

<sup>143</sup> See e.g. the position of the SEM in FAC, D-3794/2014, § 3.3 and in FAC, D-2069/2016, § 5.2.

and psychological problems, who relied on the help of her older sister in Switzerland. It was undisputed that she had a close relation with her sister, that she was seriously ill, and that her sister was providing her and her family with much-needed support – still, the SEM held that this was not a “*besonderes Abhängigkeitsverhältnis*”.<sup>144</sup>

Of course this raises the question of what a “*besonderes Abhängigkeitsverhältnis*” is, but in reality the question is not relevant. As the text of the Regulation and of the IR suggest, and as the case-law of the CJEU and of the FAC confirm, the whole line of argument is conceptually flawed because “dependency” is not a separate condition under Article 16 DR III. This provision merely requires that person A is (e.g.) seriously ill, and that “on account” of this she is “dependent on the assistance” of person B, who happens to be a family relation meeting the criteria of Article 16 DR III and who is willing and able to assist. “Dependency” is a by-product of the condition of person A and of her relation to person B, not an independent condition. Coherently with this premise, Article 11 IR does not require the applicant to show a “particular dependency” such as long cohabitation, emotional ties going beyond what is normal among family relations, etc. Instead, it demands that “the situations of dependency” be assessed, as far as possible, “on the basis of objective criteria such as *medical certificates*” (emphasis added). Thus, all that has to be proven is that person A finds herself in one of the situations of vulnerability envisaged by Article 16 DR III, and that person B possesses the requisite qualities.

The one leading judgment of the CJEU on the matter, *K*, confirms this interpretation in full. In laying down the test to be applied, the Court merely states: “Where family ties existed in the country of origin, it is necessary to establish that the asylum seeker or the person with whom he has family ties actually requires assistance and, as the case may be, that the person who must provide the other person with assistance is in a position to do so”.<sup>145</sup> In that case, the daughter-in-law of the applicant was indisputably in a difficult situation<sup>146</sup> and the applicant was providing her with the requisite support – and this sufficed. The facts of the case did not disclose anything in the way of a “particular dependency” beyond these circumstances. Quite on the contrary, the applicant had merely become the daughter-in-law’s “confidante and closest friend” in the few weeks between her arrival in Austria and the lodging of her request, after “several years” of not living together.<sup>147</sup> Be it noted in passing that this last point defeats the recurrent argument of the SEM that there cannot be a “dependency” situation if the two persons have lived apart for a long time.<sup>148</sup>

Although it has sometimes employed language that might be taken to unduly restrict the scope of Article 16 DR III by requiring a “particular dependency”,<sup>149</sup> the FAC has on the whole adhered to the position just argued.

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<sup>144</sup> FAC, D-2069/2016, *passim*.

<sup>145</sup> *K*, C-245/11, above fn. 135, para 42. See also ATAF 2017 VI/5, § 8.3.3.

<sup>146</sup> *K. v. Bundesasylamt*, C-245/11, CJEU, Opinion of Advocate General Trstenjak, 27 June 2012, available at: <https://www.refworld.org/cases/EJL.500d54432.html>, para 9 ff.

<sup>147</sup> *Ibidem*, para 7 ff.

<sup>148</sup> See e.g. FAC, E-7488/2014, § 6.2.3; FAC, D-3794/2014, § 3.3.

<sup>149</sup> See e.g. ATAF 2017 VI/5, § 8.3.5 (“*une assistance immédiate et importante [...] que seul le requérant serait à même d’offrir*”); FAC, F-6844/2017, §3.3.2.3 (“*une relation de dépendance telle que seule la présence du recourant serait à même de répondre aux besoins spécifiques [...]*”). The idea that the assistance offered by the applicant must somehow be singular and irreplaceable by another similarly situated family member is foreign to the wording, purpose and aim of Article 16 DR III.

To conclude on this point: while blood ties and ties of affection are in themselves not enough to trigger the application of Article 16 DR III,<sup>150</sup> the provision should be applied, and family unity preserved subject to paragraph 2 only, whenever a situation of vulnerability as described in Article 16 DR III is established, a family relation “legally residing” in one of the Member States possesses the requisite characteristics, and both persons consent.

### 3.5 Summary of main points

As the European Commission has recommended, “Member States [...] should [...] proactively and consistently apply the clauses related to family reunification”.<sup>151</sup> The family definitions given by the Regulation should be read and applied in a broad and flexible manner. For marital and parental relationships, in particular, Article 2(g) DR III sets no requirement as to factual intensity or stability, requiring only that they exist at the relevant time. The “validity” of marital unions should be assessed in a non-formalistic manner. The family definitions laid down in the Regulation must also be applied in a manner that entails no unjustified differences in treatment. In order to avoid discrimination, the “pre-flight requirement” should be applied as an anti-abuse clause in conformity with its aim. For the same reason, the family definitions given in some provisions require an extensive interpretation: thus Article 16 DR III should be applied as including the spouse, and children born “post-flight” should be included in the scope of Article 20 DR III.

Regarding proof of family ties, several principles must be observed. First, responsibility determination must involve as few requirements of proof as possible. Second, proof of family ties (e.g. an extract from registers) may only be set aside if contrary proof is produced. Third, responsibility may be established *inter alia* by “verifiable information from the applicant”, as well as the “statements by the family members concerned”. Such circumstantial evidence must be seriously examined and accepted as sufficient whenever it is coherent, verifiable and sufficiently detailed. In assessing such evidence, Member States must take into account the particular difficulties that protection seekers face in obtaining formal proof. Fifth, DNA testing may only be used as an *ultima ratio*. Sixth, in case of uncertainty the applicants should be given the benefit of the doubt. In the application of these rules and principles, the inquisitorial maxim must be borne in mind. Once the applicant’s duty to cooperate has been discharged, it is up to the SEM to clarify any remaining issues. Such duties are enhanced when it comes to the application of the criteria applicable to unaccompanied children, particularly in light of the tracing obligation set out in Article 6(4) DR III. As a matter of good practice, the SEM should apply the latter provisions also for other categories of applicants. Under Article 7(3) DR III, which should be applied to all the family criteria including Articles 9 and 11 DR III, national authorities must accept evidence of family ties produced before the acceptance of a request.

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<sup>150</sup> ATAF 2017 VI/5, § 8.3.5.

<sup>151</sup> European Commission, *A European Agenda on Migration*, above fn. 1, p. 13.

Age assessment should be carried out in conformity with the recommendations of the UN Committee on the Rights of the Child. In particular, a qualified representative should be appointed already during age-assessment; identity documents should only be set aside if proven false; absent such documents, age assessment should be carried by qualified experts in the framework of a holistic evaluation; the State should refrain from using medical methods based on bone and dental examination; the benefit of the doubt should be given to the person concerned.

Concerning the interpretation of individual criteria, the following points must be made:

- The notion of “international protection” under Article 9 DR III includes provisional admission granted on grounds comparable to those set out in Article 15 of the Qualification Directive. When a beneficiary of protection has his or her provisional admission replaced with an ordinary residence document, Article 9 DR III remains applicable. The same principle should apply in case of naturalization.
- Article 11 DR III should be applied whenever it is technically possible to run a joint Dublin procedure for the family members. The fact that the Dublin procedures are not “at the same stage”, or the fact that Switzerland has implicitly accepted responsibility for certain family members without formally engaging the Dublin process, should not be decisive.
- Article 16 DR III on dependent persons is not subject to Article 7(2) DR III. Like the other criteria, it should be applied broadly in all its elements. The demonstration of a “particular dependency” or “intensive dependency” between the persons concerned is not required for its application. On the contrary, Article 16 DR III should apply whenever one of the listed situations of vulnerability is established, the requisite family tie and “legal residence” are proven, the person supposed to provide assistance is in a position to do so, and the persons concerned give their consent. Once these conditions are met, the persons concerned should be brought or kept together subject only to Article 16(2) DR III.

## **4. Protecting family life through the discretionary clauses**

### **4.1 Introduction**

If applied broadly and purposively, as detailed in the previous section, the family criteria laid down in the Regulation can go a long way in protecting the families of applicants.

Still, even under the best interpretation, the criteria alone are insufficient to afford comprehensive protection to family unity.

In addition to the inherent limitations of the criteria taken singly – consider the case whereby an applicant is critically ill and depends on the assistance of a cousin or aunt – the choice of identifying several fragmentary “criteria” with inconsistent family definitions instead of one holistic family criterion as the US-Canada agreement does (see above section 2.1) creates loopholes. Let us imagine the plight of Senait, a 17-year-old girl, and Mariam, her mother. If they arrive together in the EU, Article 20 DR III should



guarantee that they will be kept together. Not so, however, if poor Senait has been forced to marry – quite possibly the very thing that caused the two to flee. In such a case, paradoxically, it might have been better to have been separated in flight. Indeed: if Mariam secures legal presence in a Member State before Senait applies for asylum, their reunion is guaranteed by Article 8(1) DR III. Unfortunately, if not, Articles 9-11 DR III will be inapplicable because of Senait’s married status. As one can see, the protection afforded by the criteria is patchy, and it takes an effort on the part of the competent authorities to make it comprehensive.

The interplay between the freezing clause and the criteria is also a common cause for family separation. In a case decided by the FAC, an Afghan mother and her two children fled their country of origin together. The eldest son became separated *en route* and arrived in Switzerland while the mother and the younger brother were left behind in Bulgaria. By the time they located him, he had obtained protection status. Article 9 DR III would have been applicable, but they did not think of applying in Bulgaria and “freeze” the situation at that moment. When they made it to Switzerland and applied, triggering the “freezing clause”, the eldest son had just turned 18 and none of the criteria was applicable any longer. In spite of the mother’s desperate efforts, she and her younger son were transferred back to Bulgaria while her older son – from whom it was never intended that they should part – remained in Switzerland.<sup>152</sup>

In these as in many other constellations, the criteria allow families to be kept apart or separated because of coincidental circumstances, or because of actions whose consequences have not been – and in all fairness could not be expected to be – foreseen by them. In a system predicated on family life being a “primary consideration” and on the prohibition of unjustified differences of treatment, this is hardly satisfactory.

This is where discretion enters the picture. Article 17 DR III includes two “discretionary clauses” authorizing Member States to derogate from the ordinary criteria as well as from the “one-chance-only” rule set out in Article 3(1) DR III. Such discretion has always been a vital part of the Dublin scheme, including for the protection of family life. Indeed, as Recital 17 of the Regulation states, the clauses are to be applied “in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations [...]”. Or as the Council has put it, the discretionary clauses aim *inter alia* “at avoiding situations where family members would be separated due to the strict application of the Dublin criteria”.<sup>153</sup> Indeed, through the two clauses the authorities have the opportunity to reconsider the interests at stake, forego a blind application of the criteria and close the gaps and loopholes present in the Dublin criteria.

Article 17(1) DR III, the “sovereignty clause”, authorizes any Member State with which an application has been lodged to examine it, and thus become the responsible State. Article 17(2) DR III, the “humanitarian clause”, authorizes the determining State or the State responsible to request another Member State to assume responsibility. Such a request must intervene before a first decision is taken on the substance of the application, and must aim at bringing together any “family relations” – an undefined and open-ended

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<sup>152</sup> See FAC, D-3794/2014.

<sup>153</sup> Council of the EU, doc. No. 12364/09, above fn. 101, p. 35.

expression<sup>154</sup> – on humanitarian grounds based in particular on family or cultural considerations. The reference to “cultural considerations” implies that Member States should appraise the existence of family ties in a culturally sensitive manner. The requested State must reply within two months of the request, and the persons concerned must consent to the assumption of responsibility.

As a rule, the application of the clauses is optional. In particular, the sovereignty clause allows “each Member State to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to agree to examine an asylum application”.<sup>155</sup> However, according to the well-established case-law of the FAC, the application of the clauses becomes mandatory whenever this is necessary to guarantee respect for Switzerland’s international obligations, including those that protect family life.<sup>156</sup> The European Court of Justice has not subscribed to this line of argument in the interpretation of the Regulation.<sup>157</sup> Still, Member States are entitled to define for themselves the cases in which they intend to apply the discretionary clause, and the case-law of the FAC does just that. Furthermore, even if it follows a different argumentative path, the case-law of the CJEU converges on the key point, i.e. that transfers violating relevant international and EU standards may not be carried out,<sup>158</sup> and more generally that the Regulation must be applied in such a way that human rights are at all times respected.<sup>159</sup>

The application of the discretionary clauses in light of the right to respect for family life and other fundamental rights is considered below in section 4.3. Beyond international obligations, the discretionary clauses may (and should) also be applied on humanitarian and compassionate grounds. Indeed, under Swiss Law this is the only other permissible ground for a derogation to ordinary Dublin rules.<sup>160</sup> In section 4.4, the principles applying in this regard will be reviewed.

Before turning to these aspects, it is necessary to critically scrutinize the argument – recurring in Swiss practice, and informing a restrictive approach to the protection of

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<sup>154</sup> See *mutatis mutandis* *K*, C-245/11, above fn. 135, para 40. Note that, in distinction to Articles 2(g) and 16 DR III, the terms “family relation” are not qualified by a pre-flight condition.

<sup>155</sup> See among others *M.A. and Others v. The International Protection Appeals Tribunal and Others*, C-661/17, CJEU, 23 January 2019, para 58.

<sup>156</sup> Concerning the sovereignty clause, see e.g. ATAF 2013/24, § 5.1; ATAF 2017 VI/5, § 8.5.2. In this perspective, the FAC has also pointed out that while the sovereignty clause vests in the State a discretionary power and may not be invoked *per se* by applicants, it may be invoked in conjunction with international or domestic provisions protecting the applicant (see ATAF 2010/45, § 5). The case-law is less developed in respect of the humanitarian clause, but the same *ratio decidendi* applies to it. Indeed, Member States must at all times respect human rights in applying the Dublin Regulation, and must therefore apply any provisions that make this possible in the given circumstances – including sending or accepting a request under Article 17(2) DR III if necessary.

<sup>157</sup> See in particular *Bundesrepublik Deutschland v. Kaveh Puid*, C-4/11, CJEU, 14 November 2013, available at: <https://www.refworld.org/cases/E CJ,52d7bb664.html>, para 24 ff; *M.A. and Others*, C-661/17, above fn. 155, para 71 f.

<sup>158</sup> See e.g. *C. K., H. F., A. S. v Republika Slovenija*, C-578/16, CJEU, 16 February 2017, available at: <https://www.refworld.org/cases/E CJ,598b18334.html>, especially at para 65.

<sup>159</sup> See in particular *N. S.*, Case C-411/10, above fn. 21, para 77.

<sup>160</sup> See Ordonnance 1 du 11 août 1999 sur l’asile relative à la procédure (hereafter: “Ordonnance 1 on Asylum” or “OA1”), RS 142.311, Article 29a(3); J.-P. Monnet, above fn. 51, p. 407.

family unity *via* the discretionary clauses – that derogations to the ordinary Dublin rules should only be made sparingly (section 4.2).

## 4.2 Should the discretionary clauses be applied restrictively?

As just observed, a concept recurring in the case-law of the FAC in the literature is that the use of the discretionary clauses should not be too broad in order not to undermine the *effet utile* of the Dublin system.<sup>161</sup> This line of argument, however, does not sit well with the provisions and preamble of the Regulation.

To begin with, the text of Article 17 DR III in no way suggests that the clauses should be used “exceptionally”. Indeed, the CJEU has many times confirmed that the application of the sovereignty clause “is not subject to any particular condition”.<sup>162</sup> As for the humanitarian clause, Article 17(2) DR III does establish some conditions (e.g. time-related) but nothing that would suggest a restrictive interpretation. This is confirmed by the fact that, on the only occasion where it interpreted the humanitarian clause (*recte* Article 15(2) of the Dublin II Regulation), the CJEU opted for a broad interpretation and rejected the various restrictive interpretations that were submitted to it.<sup>163</sup>

Coming to the *effet utile* of the Regulation, it must be recalled that its “principal objective” is to “speed up the handling of claims in the interests both of asylum seekers and the participating Member States”<sup>164</sup> by determining swiftly which Member State is responsible. Applying the sovereignty clause is arguably the swiftest and most direct way to achieve this objective. Much the same can be said of the humanitarian clause, whose application leads either to a consensual transfer – by definition swifter and easier to execute than a coercive one – or to examining the application where the applicant is present. As noted in the introduction, broad use of the discretionary clauses in the interest of family unity also has the potential of reducing incentives for irregular onward (“secondary”) movements<sup>165</sup> – another objective often associated to the Dublin Regulation.

Last but not least, the unambiguously expressed aim of the legislator is that the Regulation, including the discretionary clauses, be applied: (a) with family life and the best interests of the child in mind as “primary considerations” (see above section 2.3);

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<sup>161</sup> ATAF 2015/9, § 7.2. See also C. Filzwieser, A. Sprung, above fn. 24, Article 17, K2, and *mutatis mutandis* ATAF 2011/9, § 8.1.

<sup>162</sup> *Zuheyra Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, C-528/11, CJEU, 30 May 2013, available at: <https://www.refworld.org/cases/ECJ/51a85c224.html>, para 36; *M.A. and Others*, C-661/17, above fn. 155, para 58 f.

<sup>163</sup> *K*, C-245/11, above fn. 135, paras 29 ff.

<sup>164</sup> *N. S.*, Case C-411/10, above fn. 21, para 79.

<sup>165</sup> European Commission, *Commission Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, Impact Assessment, 3 December 2008, SEC(2008) 2962, available at: <https://www.refworld.org/docid/49997ad90.html>, p. 20; Council of the EU, doc. no. 12364/09, above fn. 101, p. 35.

(b) with derogations being made in particular on “humanitarian and compassionate grounds, in order to bring together family members”; and (c) in full respect of human rights. Far from encouraging a restrictive application of the clauses, the preamble rather unambiguously suggests the opposite: that the legislator intends the discretionary clauses to be used systematically to guarantee family life and the best interests of the child whenever the ordinary criteria fall short. In line with this understanding, the Commission has over the years invited Member States to make “broader and regular use of the discretionary clauses”, not to show restraint in their application.<sup>166</sup>

To conclude on this point, the Dublin Regulation neither requires nor encourages a restrictive approach in applying the discretionary clauses. The opposite is true: in light of the aims and principles of the Regulation, as expressed in particular by the preamble, the clauses should receive a broad and systematic application whenever family life is at stake.

A similar but conceptually distinct argument is that the cases where the discretionary clauses must be applied to protect family life under Article 8 ECHR should be “exceptional” because it was the legislator’s intention that the criteria should cover most of the situations where Article 8 ECHR mandates family unity.<sup>167</sup> Certainly, such a line of argument can be used in support of a broad interpretation of the criteria (see above, section 3). Conversely, it is questionable whether it could be used in support of a restrictive application of the discretionary clauses.

In the first place, the assessment of whether the ECHR requires that family unity be maintained in a given case must be done on the terms of the ECHR itself, not of an *a priori* legislative intention that such cases should be “exceptional”. In other words, even if it were true that the legislator has deemed the criteria sufficient to ensure ECHR-conforming results in “most” cases, it would be methodologically wrong to let this colour

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<sup>166</sup> European Commission, *A European Agenda on Migration*, above fn. 59, p. 13. See also European Commission, *Report From the Commission to the European Parliament and the Council on the Evaluation of the Dublin System*, 6 June 2007, COM(2007) 299 final, available at: <https://www.refworld.org/docid/466e5a082.html>, p. 7. *De lege ferenda*, the Commission has argued the opposite position and proposed to restrict the use of the sovereignty clause (see European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 4 May 2016, COM(2016) 270, Recital 21 and Article 19). This is however irrelevant to the interpretation of the Dublin III Regulation. Furthermore, the only branch of the legislature that has expressed itself on the Dublin IV proposal so far has roundly rejected the position of the Commission (European Parliament, *Report on the proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 6 November 2017, doc. A8-0345/2017, Amendments 11 and 125-129; the Report has been endorsed by the plenary: European Parliament, *Decision to enter into interinstitutional negotiations: Establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 16 November 2017, PV 16/11/2017 – 7.4, available at: [http://www.europarl.europa.eu/doceo/document/PV-8-2017-11-16-ITM-007-04\\_EN.html](http://www.europarl.europa.eu/doceo/document/PV-8-2017-11-16-ITM-007-04_EN.html)). Therefore, should one want to take the methodologically incorrect option of interpreting the Dublin III Regulation in light of the *travaux* relating to its successor, the weightier position would still be the one favouring a broad application of the discretionary clauses.

<sup>167</sup> *Ibidem*.

an assessment that is to be carried out on the basis of the criteria identified by the ECtHR in its case-law (see below, 4.3 and 4.4).

Secondly, as section 4.1 above makes abundantly clear, the criteria fall short of providing comprehensive protection to family life in the ECHR sense.<sup>168</sup> The EU legislator was acutely aware of this even during the last recast of the Dublin system. To reiterate, the clauses have been knowingly maintained in the current Regulation in order to cater for the situations in which “the strict application of the binding criteria will lead to a separation of family members or of other relatives”.<sup>169</sup>

Thus, the argument that the criteria should as a rule be enough to ensure ECHR-conform results, and that therefore the use of the clauses for the purpose of family reunification should be exceptional, is also devoid of merit.

### 4.3 Applying the discretionary clauses in order to respect human rights obligations

#### 4.3.1 The applicability of Article 8 ECHR in a Dublin context

As we have seen, there are circumstances where the application of the Dublin system may lead to the separation of family relations or prevent their reunion. The applicant may find herself in a State where family relations live, but fall under the responsibility of another State. In some cases, the application of the criteria may result in the separation of families of applicants because only a part of them is to be transferred, or because they are to be transferred to different States.<sup>170</sup> Or else a State where the applicant’s family relations are present may refuse to accept responsibility for her, or the transfer may fail on other grounds.

Article 8 ECHR comes into play whenever actions or omissions taken under the Dublin Regulation affect “family life”. According to the case-law of the Swiss Supreme Court, intermittently applied by the FAC in the Dublin context,<sup>171</sup> an additional condition should be fulfilled for Article 8 ECHR to apply: the family relation present on national territory should have settled status (“*droit de présence assuré*”).<sup>172</sup> This is not in line with the case-law of the ECtHR. Several judgments demonstrate that while the status of the persons concerned may have considerable importance when balancing private and public interests against each other (see below, 4.3.1), it is not a condition for the applicability of

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<sup>168</sup> See also J.-P. Monnet, above fn. 51, p. 430.

<sup>169</sup> See European Commission, *Proposal for a Regulation establishing the criteria for determining the responsible Member State*, above fn. 8, p. 9. See also Council of the EU, doc. no. 12364/09, above fn. 101, p. 35.

<sup>170</sup> See e.g. FAC, joined cases D-3153/2014 and D-3154/2014.

<sup>171</sup> See e.g. ATAF 2012/4, § 4.3 and 4.4 (condition recalled but set aside); ATAF 2013/24, § 5.2 and FAC, joined cases D-3153/2014 and D-3154/2014, § 9.7, as well as FAC, E-7670/2016 (condition applied). For an examination of the issue, concluding that in any case the condition was fulfilled in the case of a person having enjoyed provisional admission status for a long period, see FAC, F-762/2019, § 6.2 and 7.1.

<sup>172</sup> For discussion, see J.-P. Monnet, above fn. 51, p. 432 f.

Article 8 ECHR.<sup>173</sup> As mentioned, the only relevant question at this stage is whether “family life is affected”.

According to the ECtHR “family life” has no fixed definition. Rather, its existence is “essentially a question of fact depending upon the real existence in practice of close personal ties”.<sup>174</sup> This passage can be misunderstood, however. *Bona fide* marital relations, whose existence should be appreciated in a non-formalistic manner (see above *mutatis mutandis* section 3.2.1), constitute “family life” even if not yet fully established in fact.<sup>175</sup> Likewise, the relations between parents and minor children constitute *ipso jure* “family life”, and lack of close personal ties may only exceptionally be invoked to deny the protection of Article 8 ECHR.<sup>176</sup> These points are worth stressing because of the tendency of the SEM to deny the existence or stability of “family life” between the applicants and even their closest family members by referring to periods of separation.<sup>177</sup> This runs counter to Article 8 ECHR, especially in regard to families of refugees and protection seekers, who may experience even prolonged separation due to circumstances that are not imputable to them.

For other types of family ties, factual aspects play a greater role under Article 8 ECHR. In the case of unmarried partners, both the ECtHR and the FAC give weight to cohabitation, the birth of common children and, more generally, circumstances attesting to the fact that a relation is stable even in the absence of marriage.<sup>178</sup> Relations between siblings, between parents and adult children, and between members of the extended family constitute “family life” when they are real and effective, and are characterized by additional elements of dependency (see also below, section 4.4).<sup>179</sup>

The applicable principles from an evidentiary point of view have been outlined above in section 3.3: non-formalism in appreciating the existence of family ties, flexibility in assessing the evidence put forward and, in the case of asylum seekers, the principle of the benefit of the doubt. The inquisitorial maxim and the duty of the administration to establish the relevant facts in cooperation with the applicant also apply. By contrast, the evidentiary rules and principles laid down by the Article 7(3) DR III, 22 DR III and the Implementing Rules are not formally applicable. Still, in practice, there is considerable

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<sup>173</sup> See e.g. *Mengesha Kimfe c. Suisse*, Application no. 24404/05, ECtHR, 29 July 2010, available only in French at: <https://www.refworld.org/cases,ECHR,4c56cc952.html>, paras 55 and 61; *Agraw c. Suisse*, Application no. 3295/06, ECtHR, 29 July 2010, available only in French at: <https://www.refworld.org/cases,ECHR,4c56caa92.html>, para 44; *M.P.E.V. and Others v. Switzerland*, Application no. 3910/13, ECtHR, 8 July 2014, available at: <https://www.refworld.org/cases,ECHR,53bd356f4.html>, paras 24, 33, 45 and 51 ff. See also *Z.H. and R.H.*, above fn. 69, paras 44 ff; S. Besson, E. Kleber, “Commentaire des Articles 3, 5, 8, 12, 13, 14 et 16 CEDH et du Protocole No 7, CEDH”, in M.S. Nguyen, C. Amarelle (Eds.), *Code annoté de droit des migrations : Droits humains*, Vol. 1, Stämpfli, 2014, pp. 1-72, p. 40 f.

<sup>174</sup> *K. and T. v. Finland*, Application no. 25702/94, ECtHR, 12 July 2001, available at: <http://hudoc.echr.coe.int/eng?i=001-58576>, para 150.

<sup>175</sup> *Abdulaziz, Cabales and Balkandali*, above fn. 37, para 62 f.

<sup>176</sup> See S. Besson, E. Kleber, above fn. 173, p. 31. See also ATAF 2017 VI/5, § 8.5.4.1. For the shocking argument that relations between a father and a very young child were “too recent” to amount to “close relations”, see FAC, F-762/2019, § 5.

<sup>177</sup> See e.g. the position of the Federal Office for Migration in ATAF 2013/24, § 5.1.

<sup>178</sup> See ATAF 2012/4, § 3.3.3.

<sup>179</sup> See S. Besson, E. Kleber, above fn. 173, p. 31; *M.P.E.V. and Others*, above fn. 173, para 31.

overlap between the evidentiary issues arising under Article 8 ECHR and those arising under the Dublin Regulation, as well as considerable overlap in the applicable rules. As a matter of good practice, the first instance authority should ascertain in a holistic manner, at the outset of the Dublin procedure, the family situation from the standpoint of both the Dublin Regulation and the ECHR, taking full advantage of the procedural infrastructure provided by the Dublin Regulation (e.g. the right to an interview and family tracing).

The finding that Article 8 ECHR applies triggers in itself a number of obligations, already highlighted above in section 2.2: ensuring that the decision-making process is fair and such as to afford due respect to the interests safeguarded by Article 8; striking a fair balance between the competing interests of the individual and of society; guaranteeing an effective remedy against alleged violations as well as non-discrimination in the enjoyment of family life.

As an application of the general obligation to “strike a fair balance”, and depending on the circumstances of the case, Article 8 ECHR may require the State to ensure that family members are not separated or that they are brought together in the application of the Dublin Regulation.

#### 4.3.2 Striking a fair balance under Article 8 ECHR: general aspects

Article 8 ECHR does not guarantee *per se* the right of foreigners to enter or reside in a particular country.<sup>180</sup> Nor does it entail a “general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country”.<sup>181</sup> Still, whenever migration controls have an impact on family life, a careful assessment is called for in compliance with the obligations just recalled.

In the case of “settled migrants” – i.e. foreigners who have already been authorized to reside – a proposed or actual removal entailing a separation from family members constitutes an interference that is prohibited, unless it can be justified under Article 8(2) ECHR. In the case of foreigners seeking admission – a notion including protection seekers awaiting a decision on their application – the question is “whether, having regard to the circumstances as a whole, the [authorities of the host State are] under a duty pursuant to Article 8 to grant [...] a residence permit, thus enabling [the persons concerned] to exercise family life on [its] territory”.<sup>182</sup> As persons subject to a Dublin procedure do not as a rule possess a residence document, Dublin cases usually fall into the latter category.<sup>183</sup>

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<sup>180</sup> *Jeunesse v. the Netherlands*, Application no. 12738/10, ECtHR, 3 October 2014, available at: <https://www.refworld.org/cases,ECHR,584a96604.html>, para 100.

<sup>181</sup> *Abdulaziz, Cabales and Balkandali*, above fn. 37, para 68.

<sup>182</sup> *Jeunesse*, above fn. 180, paras 104 ff. See also *Jihana Ali and Others v. Switzerland and Italy*, Application no. 30474/14, ECtHR, 4 October 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-168401>, paras 42 ff.

<sup>183</sup> See e.g. *Z.H. and R.H.*, above fn. 69, paras 39 ff. Indeed, protection seekers possessing a residence document issued by the State conducting responsibility determination fall under the latter’s responsibility and are therefore not liable to being transferred, unless they agree to the application of higher-ranking family criteria. See Articles 12 and 19 DR III.

While the case-law relating to “settled migrants” differs from that relating to “admission cases” in the reasoning structure and arguably in the level of protection afforded,<sup>184</sup> the applicable principles are similar: “in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation”.<sup>185</sup> In carrying out this balancing exercise, the factors to be taken into account – as codified by the Court itself – are “the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control”.<sup>186</sup> Another factor that is not explicitly cited in this passage, but that is extremely important, is the nature and intensity of the family relation – in other words, the family situation of the persons concerned.<sup>187</sup> In this regard, it is important to note that the authorities must not only consider the position and interests of the applicant but also those of his family members.<sup>188</sup> Whenever children are affected in one way or another, their best interests must be “paramount” and be placed at the “heart” of the authorities’ considerations.<sup>189</sup>

Overall, the Strasbourg Court tends to show deference to State Parties’ right to control the entry and stay of foreigners, and to derive positive admission obligations from Article 8 ECHR only in especially poignant cases.<sup>190</sup> This seems true also of the handful of judgments and decisions rendered so far on Article 8 ECHR in a Dublin context.<sup>191</sup> These are examined below. As a preliminary observation, it is worth pointing out that caution is required in handling them as precedent-setting decisions. Firstly, their continuing relevance needs to be reassessed in light of more recent developments in the practice of other international bodies (see below section 4.3.4). Secondly, the case-law is as yet scarce, and largely dependent on the idiosyncratic facts of each case.<sup>192</sup> Thirdly, as

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<sup>184</sup> For an in-depth analysis, see F. Maiani, *L’unité familiale et le système de Dublin - Entre gestion des flux migratoires et respect des droits fondamentaux*, Helbing & Lichtenhahn, 2006, Chap. VI, especially at paras 106 ff.

<sup>185</sup> See e.g. *El Ghatet v. Switzerland*, Application no. 56971/10, ECtHR, 8 November 2016, available at: <https://www.refworld.org/cases,ECHR,5836a1854.html>, para 43. See also *Tanda-Muzinga*, above fn. 35, para 64.

<sup>186</sup> *Tanda-Muzinga*, above fn. 35, para 66; *Jeunesse*, above fn. 180, para 107. See also *A.S. v. Switzerland*, Application no. 39350/13, ECtHR, 30 June 2015, available at: <https://www.refworld.org/cases,ECHR,5592b8064.html>, para 47 and *Z.H. and R.H.*, above fn. 69, para 41.

<sup>187</sup> See e.g. *Haliti c. Suisse*, Application no. 14015/02, ECtHR, 1 March 2005, available at: <https://www.refworld.org/cases,ECHR,42d3ea164.html>; *Boultif v. Switzerland*, Application no. 54273/00, ECtHR, 2 August 2001, available at: <https://www.refworld.org/cases,ECHR,468cbc9e12.html>.

<sup>188</sup> See in this regard *Jeunesse*, above fn. 180, para 117.

<sup>189</sup> See e.g. *Tanda-Muzinga*, above fn. 35, para 67 and *El Ghatet*, above fn. 185, para 46.

<sup>190</sup> For a compelling global analysis and particularly critical appraisal, see M.-B. Dembour, *When Humans Become Migrants*, OUP, 2015, Chapter 4.

<sup>191</sup> *A.S.*, above fn. 186; *A.M. v. Switzerland*, Application no. 37466/13, ECtHR, 3 November 2015, available at: <http://hudoc.echr.coe.int/fre?i=001-158985>; *Z.H. and R.H.*, above fn. 69; *Jihana Ali*, above fn. 182.

<sup>192</sup> See e.g. *Z.H. and R.H.*, above fn. 69, especially paras 43-45 and the Concurring Opinion of Judge Nicolaou, pointing out the uncertainties relating to the existence of “family life” and the extremely short duration of the separation. As a further example, in *Jihana Ali*, the case for family unity was especially weak, and



detailed below in section 4.3.3, the reasoning of the Court in these decisions is still far from being fully developed.

For its part, the FAC has devoted two leading judgments to the issue and a very substantial number of “unpublished” judgments – many of which have a rather casuistic character. It would be beyond the scope of this paper to attempt even a cursory description of this abundant case-law. Rather, the following section concentrates on arguments that often prove decisive – or should prove decisive – in a Dublin context. Particular considerations arising out of situations of vulnerability are discussed further below in section 4.3.4.

### 4.3.3 Striking a fair balance under Article 8 ECHR: Dublin-specific aspects

Whenever private and public interests are balanced against each other in the context of Article 8 ECHR, the possibility of establishing and enjoying family life elsewhere without undue obstacles is a critically important element of the assessment.

Unfortunately, in the context of the Dublin system, the existence of such a possibility tends to be assumed too lightly. Thus, in ATAF 2012/4, the FAC noted that it could not be “ruled out” that the applicant – whose application for asylum had been rejected in France – could access a family reunification procedure there.<sup>193</sup> In a similar vein, in *Z.H. and R.H.*, the ECtHR dismissed the claim that Article 8 ECHR had been violated by noting *inter alia* that “it had not been argued” that the applicant’s wife – a protection seeker herself, enjoying no right to free movement – “was ever prevented from joining the second applicant after the latter had been expelled to Italy”.<sup>194</sup>

Such speculative assumptions are problematic because they might lead the authorities to decline an Article 8 ECHR claim when, in fact, *no* realistic possibility exists to reunite elsewhere. Indeed, in a Dublin context, the starting assumption should be that the possibilities of enjoying family life elsewhere are severely restricted. First, so long as the asylum application is pending, return of the family to the State of origin of the applicant in order to enjoy family life there is ruled out. Second, unless the family members are EU or EFTA citizens, EU legislation does not give them the right to follow the applicant to the responsible State – especially not if they are protection seekers.<sup>195</sup> Third, such a right *might* accrue later, if and when the applicant obtains refugee status.<sup>196</sup> However, should the applicant obtain subsidiary protection or “humanitarian” protection status, he or she will not benefit from an EU-wide right to family reunification, and the possibilities of

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further undermined by the violent resistance opposed by the first applicant to her and her son’s transfer.

<sup>193</sup> See e.g. ATAF 2012/4, § 4.4.4.

<sup>194</sup> *Z.H. and R.H.*, above fn. 69, para 45.

<sup>195</sup> Third-country nationals holding a Swiss residence document enjoy no form of free movement of persons other than for short stays under the Schengen borders code (Council of the EU, *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, OJ L 2006 105/1, available at: <https://www.refworld.org/docid/47dfb0525.html>).

<sup>196</sup> See Council of the EU, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, OJ L 2003 251/12, available at: <https://www.refworld.org/docid/3f8bb4a10.html>, Articles 9 ff.

reunification will depend on national legislation and national policy.<sup>197</sup> Nor will his or her residence document, issued in another Member State, automatically entail the right to settle with the family in Switzerland at a later stage – indeed, Switzerland is not even bound to recognize the limited rights of free movement that beneficiaries of protection may theoretically derive from the Directive on the Status of Long-Term Residents.<sup>198</sup> Fourth, the *ersatz* forms of contact afforded by modern means of communication<sup>199</sup> are not comparable to “enjoying each other’s company”, which is the core of the right to respect to family life.<sup>200</sup>

In short: the possibility of re-establishing family life after a Dublin transfer may exist under very specific circumstances but cannot be assumed and, if at all considered, should be the object of a careful and realistic prognosis.<sup>201</sup> Thus the authorities should not dismiss Article 8 ECHR claims made in a Dublin context based on the generic assumption that such a possibility cannot be excluded.

As a further observation on this point, even when it is *stricto sensu* possible for the persons concerned to establish family life elsewhere, it must still be ascertained whether the sacrifice imposed on the persons already present in Switzerland would be proportionate.<sup>202</sup> In this regard Swiss authorities examine whether the family as a whole has closer ties with Switzerland or with the other Member State where reunification might occur.<sup>203</sup> This is *per se* unobjectionable. Again, however, care should be applied to take into account concretely and holistically the position all of the persons concerned (including their migration status), rather than isolated circumstances such as e.g. the presumable length of presence on the territory of a State.<sup>204</sup>

Another recurring argument opposed to persons invoking Article 8 ECHR against a Dublin transfer is that separation must be accepted as it will only be “temporary”. The argument appears, in particular, in a published judgment of the FAC from 2012.<sup>205</sup> As a matter of principle, the reasoning is sound: the length of separation certainly is a relevant factor in

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<sup>197</sup> See EMN, *Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, April 2017, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_family\\_reunification\\_synthesis\\_report\\_final\\_en\\_print\\_ready\\_0.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_family_reunification_synthesis_report_final_en_print_ready_0.pdf), especially at p. 12, 15 and 20. The legislation of the State that granted status might also constitute an obstacle to travel: see FAC, F-762/2019, § 7.4.

<sup>198</sup> Council of the EU, *Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23 January 2004, OJ L. 16-44, available at: <https://www.refworld.org/docid/4156e6bd4.html>.

<sup>199</sup> See e.g. FAC, D-4424/2016, p. 11; FAC, F-6/2019, p. 9.

<sup>200</sup> *Olsson v. Sweden No. 1*, Application no. 10465/83, ECtHR, 24 March 1988, available at: <http://hudoc.echr.coe.int/eng?i=001-57548>, para 59. See also FAC, F-762/2019, § 7.4.

<sup>201</sup> See for instance ATAF 2013/24, § 5.1 *in fine*.

<sup>202</sup> See *Sen c. Pays-Bas*, Application no. 31465/96, ECtHR, 21 December 2001, available at: <https://www.refworld.org/cases,ECHR,402a26b74.html>, paras 38-41; *Tuquabo-Tekle and Others v. the Netherlands*, Application no. 60665/00, ECtHR, 1 December 2005, available at: <https://www.refworld.org/cases,ECHR,43a29e674.html>, paras 47 ff; *Jeunesse*, above fn. 180, paras 120 ff.

<sup>203</sup> J.-P. Monnet, above fn. 51, p. 435 and references given.

<sup>204</sup> Compare ATAF 2012/4, § 4.4.4 and ATAF 2013/24, § 5.1.

<sup>205</sup> See, again, ATAF 2012/4, § 4.4.4.

assessing the compatibility of a State measure with Article 8 ECHR<sup>206</sup> – including in a Dublin context.<sup>207</sup> However, because of the legal framework regulating intra-EU mobility of third country nationals described above, and because of the varying duration of asylum procedures in the Dublin States, it will usually be difficult to make a reliable prognosis on this point, and “temporary” may very well mean that the separation will last for a considerable amount of time. Furthermore, as the FAC itself has rightly pointed out in ATAF 2013/24, depending on the facts of the case, even relatively short separations may infringe Article 8 ECHR.<sup>208</sup> This will be the case, particularly, when the separation of children from one of their parents is involved<sup>209</sup> or, by analogy, of dependent persons from those giving them emotional and practical support.

Whereas the points above have been rather intensively discussed in Dublin litigation, other aspects that would deserve at least as much attention have been hitherto largely ignored both by the ECtHR and the FAC:

- First, as the ECtHR has reiterated on many occasions, asylum seekers and refugees are a vulnerable group entitled to particular protection.<sup>210</sup> This aspect, which dominates discussions around the compatibility of transfers with Article 3 ECHR,<sup>211</sup> is often left unaddressed in “family” cases. *A.S.*, discussed below in the following section, provides an egregious example. Even in *Z.H. and R.H.* the Strasbourg Court has failed to take into consideration the intense anguish caused to the young bride by the transfer of her husband.<sup>212</sup> The special vulnerability (and the special position) of protection seekers and refugees should be taken into account particularly when it comes to adjudicating on the circumstances of family formation and family separation. True, it is settled case-law, applicable also to protection seekers, that family ties formed during periods of temporarily “tolerated” stay will not as a rule entail an obligation of admission for the host State.<sup>213</sup> Conversely, however, in regard to family ties formed previously the circumstances of separation will oftentimes be involuntary and should weigh decisively in favour of the applicant’s interests.<sup>214</sup> Similarly, as recalled above in section 4.3.1, it is improper to impugn the effectiveness of family ties because of periods of involuntary separation caused by the circumstances of flight and onward travel.

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<sup>206</sup> See e.g. *Gül v. Switzerland*, Application no. 23218/94, ECtHR, 19 February 1996, available at: <https://www.refworld.org/cases,ECHR,3ae6b6b20.html>, para 36; *Yilmaz c. Allemagne*, Application no. 52853/99, ECtHR, 17 April 2003, available at: <https://www.refworld.org/cases,ECHR,3f264a480.html>, para 48.

<sup>207</sup> *Z.H. and R.H.*, above fn. 69, para 45 and Concurring Opinion of Judge Nicolaou *in fine*.

<sup>208</sup> See ATAF 2013/24, § 5.1.

<sup>209</sup> On the time factor in general family reunification procedures, see *Tanda-Muzinga*, above fn. 35, para 80.

<sup>210</sup> See e.g. *M.S.S.*, above fn. 32, para 251; *Tarakhel v. Switzerland*, Application no. 29217/12, ECtHR, 4 November 2014, available at: <https://www.refworld.org/cases,ECHR,5458abfd4.html>, paras 118 ff.

<sup>211</sup> See e.g. *M.S.S.*, above fn. 32.

<sup>212</sup> *Z.H. and R.H.*, above fn. 69, Concurring Opinion of Judge Nicolaou, p. 13.

<sup>213</sup> See in particular *Jeunesse*, above fn. 180, para 103 f as well as *A.S.*, above fn. 186, para 44 and *Z.H. and R.H.*, above fn. 69, para 38. In Swiss practice, see ATAF 2012/4, § 4.4.3 f.

<sup>214</sup> See *Tanda-Muzinga*, above fn. 35, paras 74 ff.

- When assessing the compatibility with Article 8 ECHR of a transfer, or any other measure adopted under the Dublin Regulation, it is important to accurately identify and assess the public interest at stake.
  - Assuming that there are no special circumstances, the interest served by a Dublin transfer is – in the taxonomy of Article 8 ECHR – “the public order interests of the respondent Government in controlling immigration”.<sup>215</sup> While this is indisputably a legitimate public interest, decision-makers often fail to appreciate that its intensity is far less pronounced than in criminal cases. Arguably, the public interest in controlling immigration is also less pronounced in Dublin cases, which concern a form of temporary admission that may or may not become more stable, than in ordinary family reunification cases, where the question is immediately whether a foreigner should be authorized to *settle* in the country.<sup>216</sup>
  - As Jean-Pierre Monnet has argued, the public interest in transferring the applicant is further diminished where the applicant manifestly fulfils the conditions to benefit from family reunification in Switzerland at a later stage – particularly so when he or she has the right to benefit from “family asylum” within the meaning of Article 51 of the Swiss Asylum Act.<sup>217</sup> In such cases, the transfer to another Member State would not serve any discernible public interest and should therefore as a rule be renounced in favour of the application of the sovereignty clause.
  - The public interest is also *a priori* insufficient to justify an interference with family life when the administration decides, for “practical considerations”, to assume responsibility under the sovereignty clause and thus prevents the application of the family-based criteria.<sup>218</sup> In such cases, the application of the sovereignty clause should arguably be treated as an interference in the right to respect for family life, and in our view none of the interests listed in Article 8(2) ECHR may cover reasons of pure administrative convenience.

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<sup>215</sup> See e.g. *Jeunesse*, above fn. 180, para 121; *Z.H. and R.H.*, above fn. 69, para 46.

<sup>216</sup> Along similar lines, see J.-P. Monnet, above fn. 51, p. 433. For its part, the ECtHR has not yet made such fine distinctions: see *A.S.*, above fn. 186, para 46; *Z.H. and R.H.*, above fn. 69, para 40. This, of course, does not exclude that in particular cases, characterized by a clear attempt to circumvent the ordinary rules on family reunification, the public interest in controlling immigration may be especially pronounced: see FAC, F-762/2019, § 7.2.1.

<sup>217</sup> Loi sur l’asile du 26 juin 1998 (Asylum Act), RS 142.31, English translation available at: <https://www.admin.ch/opc/en/classified-compilation/19995092/index.html>. J.-P. Monnet, above fn. 51, p. 433. On the scope of application of Article 51, see ATAF 2017 VI/4 as well as FAC, E-5669/2016 and FAC, E-1721/2019. On Article 51(4) and the conditions of pre-flight family formation, see FAC, D-3664/2016.

<sup>218</sup> *M.A. and Others*, C-661/17, above fn. 155, para 58. For examples, see UNHCR, *Left in Limbo*, above fn. 13, p. 126. Such a situation should in theory not occur in Switzerland, as the only legal grounds for derogating from the ordinary criteria are, in addition to respecting international obligations, humanitarian reasons. Still, it may not be entirely excluded as a matter of practice: see J.-P. Monnet, above fn. 51, p. 409.

- As a matter not of ECHR law, but of “Dublin Law”, when balancing the interests at stake against each other regard should be had to Recital 14 DR III, which mentions “respect for family life” as a “*primary* consideration” for the authorities implementing the Dublin Regulation (emphasis added). As it has been argued above in section 2.3, and by analogy with the principle of the best interests of the child, this implies that additional weight must be given to the interest in family unity in the implementation of the Dublin system.

These arguments weigh strongly in favour of maintaining or reconstituting family unity in the Dublin context, and further buttress the conclusion exposed above in section 4.1 that the cases where Article 8 ECHR requires this should not be regarded as “exceptional”. Indeed, in a system where the protection of family life is a “primary consideration”, preserving or promoting family unity should be the norm rather than the exception. This conclusion is valid *a fortiori* in situations characterized by particular vulnerabilities, examined below.

#### 4.3.4 Special considerations applying in situations of dependency and vulnerability

While protection seekers in general are a “vulnerable group”, the application of the Dublin Regulation may impact persons finding themselves in situations of particular vulnerability and dependency (e.g. ill persons, elderly persons, children, pregnant women, mothers with young children). Because of limitations in its scope of application, Article 16 DR III does not provide comprehensive protection to these persons against the rigours of the Dublin process. The application of the discretionary clauses may therefore become necessary.

From the standpoint of human rights law, the vulnerability of an applicant may give rise to several questions.

To begin with, the person’s state of health may be *per se* incompatible with a transfer,<sup>219</sup> or else there may be doubts as to the availability of appropriate reception facilities or health care in the responsible State. Such issues – which are usually analysed under the angle of the prohibition of inhuman or degrading treatment – do not necessarily relate to family unity,<sup>220</sup> and do not form *per se* the object of the present study. Still, it must be emphasized that in the cases described above appropriate guarantees have to be in place that family unity will be maintained:

- As explicitly affirmed in the *Tarakhel* judgment of the ECtHR, the transferring State has the obligation to obtain guarantees from the responsible State that families with children will not be separated once they are taken charge of or taken back.<sup>221</sup> The FAC has denied that such an obligation applies to other categories of

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<sup>219</sup> See e.g. *C. K.*, C-578/16, above fn. 158.

<sup>220</sup> See e.g. UN Committee Against Torture (CAT), *Adam Harun v. Switzerland*, communication no. 758/2016, 8 February 2019, available at: <https://www.refworld.org/pdfid/5c5ab4bc4.pdf>.

<sup>221</sup> *Tarakhel*, above fn. 210, para 120. In practice, problems are still observed: see OSAR/DRC, *Is mutual trust enough?*, 9 February 2017, available at: <https://www.osar.ch/assets/news/2017/drc-osar-drmp-report-090217.pdf>, p. 13, 17; OSAR/DRC, *Mutual trust enough is still not enough*, 12 December 2018, available at: <https://drc.ngo/media/5015811/mutual-trust.pdf>, p. 22.

vulnerable persons.<sup>222</sup> However, the *A.S.* judgment of the ECtHR clearly implies that the principles affirmed in *Tarakhel*, including the principle of family unity, apply at the very least with respect to “critically ill” transferees.<sup>223</sup> Furthermore the UN Committee Against Torture has more recently affirmed the applicability of duties comparable to those stemming from *Tarakhel* to torture victims.<sup>224</sup>

- As a corollary of the principle of family unity affirmed in *Tarakhel*, when the transfer is cancelled for some members of the family on account of their vulnerability, utmost care should be taken not to separate them from the rest of their family by transferring the latter.<sup>225</sup>

Dublin transfer involving situations of particular vulnerability may also more directly raise issues of family unity. This will be the case when the transferee is a particularly vulnerable person, and the transfer would deprive her of family support available in the transferring State – or *vice versa*, when the transfer would make it impossible for the transferee to provide care and support to a vulnerable member of her family.

Such a case has been examined under the standpoint of both Articles 3 and 8 ECHR by the ECtHR in *A.S. vs Switzerland*. In this case, a torture victim suffering from severe post-traumatic stress disorder, and benefiting from the support of his sisters in Geneva, was to be transferred to Italy. Let it be noted that, under the interpretation proposed above in section 3.4.3, Article 16 DR III should have been applied and the issue should not have been examined under the standpoint of the discretionary clauses.

Before the ECtHR, the applicant referred to both the inadequate conditions awaiting him in Italy and to the detrimental effects that he would suffer if deprived of family support. The Court rejected both claims. First, it applied the restrictive *N vs the United Kingdom* test to the question of whether the applicant’s illness raised an issue under Article 3 ECHR, and concluded in the negative.<sup>226</sup> This part of the judgment is no longer good law. On the one hand, the Court itself has revised the applicable test.<sup>227</sup> On the other hand, and more importantly, the European Court of Justice has defined a more lenient test applicable in the Dublin context.<sup>228</sup> Secondly, concerning Article 8 ECHR, the Court merely repeated standard language of dubious relevance to the facts of the case,<sup>229</sup> and noted that the applicant could not during his short stay in Switzerland have “establish[ed] and

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<sup>222</sup> See ATAF 2017 VI/10, § 5.3 ff.

<sup>223</sup> *A.S.*, above fn. 186, para 36.

<sup>224</sup> See in particular CAT, *A.N. v. Switzerland*, communication no. 742/2016, 3 August 2018, available at: <https://www.refworld.org/cases,CAT,5b964c664.html>, paras 8.6 and 8.8. See also CAT, *Adam Harun v Switzerland*, above fn. 220.

<sup>225</sup> As an example of how purely administrative accidents may result in separation of this kind, see *Z.H. and R.H.*, above fn. 69.

<sup>226</sup> *A.S.*, above fn. 186, paras 31-38.

<sup>227</sup> *Paposhvili v. Belgium*, above fn. 34, paras 181 ff. See also ATAF 2017 VI/7, § 6.2.

<sup>228</sup> *C. K.*, C-578/16, above fn. 158, para 74. Under this case-law, transfers resulting in a “real and proven risk of a significant and permanent deterioration” of the applicant’s state of health constitute inhuman and degrading treatment. See also ATAF 2017 VI/10, § 6.4 ff.

<sup>229</sup> E.g. *A.S.*, above fn. 186, para 44 on confronting the State authorities with family life as a *fait accompli*, where in fact it was not seriously contested that the relation between the applicant and the sisters already existed in their country of origin.

develop[ed] strong family ties” with his sisters.<sup>230</sup> This last argument, however, was beside the point raised by the applicant. As far as family unity is concerned, the applicant argued that (a) he was demonstrably dependent, as a torture victim, on his sisters’ support, and (b) the proposed transfer would deprive him of that support. The Court failed entirely to address these points, be it from the standpoint of Article 3 ECHR or Article 8 ECHR.<sup>231</sup>

This unfortunate judgment has apparently encouraged the SEM to follow a restrictive course.<sup>232</sup> This practice needs to be revised in light of the recent pronouncements of the UN Committee Against Torture. In *A.N.*, a case factually indistinguishable from *A.S.* and raising the issue of whether the transfer to Italy of a torture victim would be compatible with the CAT, the Committee gave considerable weight to the fact that such a course of action would deprive the applicant of the support of his extended family (*in casu* the brother) and thus compromise his rehabilitation.<sup>233</sup> The Committee concluded that a transfer would be incompatible with the CAT.

It would be mistaken to treat *A.N.* as an isolated decision. On the contrary, *A.N.* addresses a general issue and sets an important precedent. Torture victims often seek refuge in a country where their family members are present because family support is essential to the reconstruction of their lives in a new and unfamiliar environment. In recognition of this, the Committee has clarified that since torture victims have a right to medical and social rehabilitation under Art. 14 CAT, depriving them of family support by removing them to another State will normally contravene this provision.

*A.N.* should also lead to a reconsideration of *A.S.* from the standpoint of Art. 8 ECHR. Based on what has just been said concerning the importance of family support for the rehabilitation of torture victims, and of the exceptional vulnerability of the latter, special elements of dependence for the purpose of Article 8 ECHR should be considered to be present by definition.

In conclusion, whenever they are confronted with a situation similar to that of *A.S.* and *A.N.*, the authorities should start from the presumption that the transfer to another Member State is impermissible, and that the sovereignty clause should be applied instead. Given that this reasoning is to a large extent based on the vulnerability of the persons concerned, there is a strong case for applying the *A.N.* precedent not just to torture victims but to other categories of particularly vulnerable persons who benefit from family support in Switzerland and, for one reason or another, do not come under the scope of Article 16 DR III or the other family criteria.

This is true, in particular, of children who are victims of “any form of neglect, exploitation, or abuse; torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflict”. Under Art. 39 CRC, States must take all appropriate measures to

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<sup>230</sup> *Ibidem*, para 49.

<sup>231</sup> *Ibidem*, paras 20 and 41. See also S. Nicolosi, R. Delbaere, *A.S. v. Switzerland: missed opportunity to explain different degrees of vulnerability in asylum cases*, 16 July 2015, available at: <https://strasbourgobservers.com/2015/07/16>.

<sup>232</sup> See e.g. FAC, D-7674/2015; FAC, D-6273/2017; FAC, D-2069/2016.

<sup>233</sup> CAT, *A.N. v Switzerland*, above fn. 224, particularly paras 8.7 and 8.10.

promote the physical and psychological recovery and social reintegration of these children, in an environment that fosters their “health, self-respect and dignity”. As a rule, this should bar transferring the child away from a supportive family environment.

#### 4.3.5 The equal enjoyment of family life under the Dublin Regulation

In applying the Dublin Regulation, as in any other legal field, the Member States must ensure under Article 14 ECHR the equal enjoyment of family life (see particularly recital 32 DR III). This implies that unjustified differences of treatment must be avoided. In a similar vein, the FAC has cited the principle of equality as one of the principles that may be invoked by applicants in conjunction with the sovereignty clause.

The gaps and inconsistencies of the family-related provisions of the Dublin Regulation have been highlighted above in sections 3.2.2 and 4.1. In section 3.2.2, it has been argued that careful use of teleological and analogical interpretation should be made in order to systematically eliminate any unjustified distinctions that might derive from them. From a methodological standpoint, the alternative is to make systematic use of the discretionary clauses.<sup>234</sup> As concerns the ECHR, it does not matter which legal method is employed so long as no discrimination is committed.

Applied in the perspective of non-discrimination, the discretionary clauses will have to be used particularly in order to “round off the edges” of the responsibility criteria,<sup>235</sup> and to avoid that – as the FAC has put it – some applicants fall between two stools (*zwischen Stuhl und Bank*).<sup>236</sup> Thus in borderline cases – i.e. cases that fall just outside the scope of application of the family-based responsibility criteria – careful scrutiny under the standpoint of non-discrimination is required, including an analysis of the comparability of the situations involved, of the objective reasons capable of justifying a disparity of treatment, and of the observance of the principle of proportionality.

#### 4.4 Humanitarian and compassionate reasons for applying the discretionary clauses

Beyond international obligations, humanitarian considerations may be strong enough to warrant the use of discretion in favour of family unity. On the one hand, the CJEU judgment in *K* is arguably still applicable in the context of Article 17 DR III for the situations that are not covered by Article 16 DR III. On the other hand, first-instance decision-makers must take into account the principles established by the FAC in respect of Article 29a(3) of Ordinance 1 on Asylum.<sup>237</sup>

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<sup>234</sup> See e.g. C. Filzwieser, A. Sprung, above fn. 24, Article 16, K1, on remedying in this way the defective formulation of Article 16 on dependency.

<sup>235</sup> See for an example of this reasoning J.-P. Monnet, above fn. 51, p. 431.

<sup>236</sup> FAC, D-3794/2014, § 7.6. Unfortunately, in that case the FAC did not examine whether the principle of equality of treatment commanded an extensive application of Article 9 DR III *via* the discretionary clauses.

<sup>237</sup> Ordinance 1 on Asylum, above fn. 160.



#### 4.4.1 Humanitarian grounds under the Dublin Regulation: on the continuing relevance of the *K* judgment

Under old Article 15(2) DR II, dependent relatives had to be “normally” kept or brought together, provided that family ties had existed in the country of origin. In the *K* case, the CJEU made it clear that the notion of “relative” should be interpreted broadly and in a manner inclusive e.g. of the daughter-in-law and grandchildren of the asylum seeker.<sup>238</sup> Furthermore, the Court interpreted Article 15(2) DR II as meaning that States should maintain or reconstitute family unity save in “exceptional circumstances”.<sup>239</sup>

The old provision has been replaced by Article 16 DR III, which is a mandatory criterion and imposes a firmer obligation, but has a significantly narrower scope (see above section 3.4.3). In view of its wording, and even making allowance for an extensive interpretation as proposed above, Article 16 can hardly be read as laying down an obligation to “keep or bring together” applicants and “relatives” broadly defined such as cousins or in-laws.<sup>240</sup> Therefore, all the situations of dependency that were formerly covered by the *K* case-law, and do not fall under Article 16 DR III, must be examined in light of the “general” discretionary clauses of Article 17 DR III. The question is whether in such situations the qualified duty affirmed in *K* still applies, despite the changed legal landscape.

The issue appears not to have been addressed in the case-law of the FAC, which seemingly refers to the *K* case only in the context of Article 16 DR III.<sup>241</sup> Still, there are weighty arguments in favour of a continued application of *K* beyond the confines of that provision. First, as evinced by the *travaux préparatoires*, the restrictive wording chosen for Article 16 DR III was a response to the proposed transformation of old Article 15(2) DR II from a “semi-binding” to a fully binding criterion,<sup>242</sup> but cannot be interpreted as a rejection of the *K* judgment by the legislator.<sup>243</sup> In the second place, an interpretation accepting that – beyond the scope of Article 16 DR III – the obligations affirmed in *K*

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<sup>238</sup> *K*, C-245/11, above fn. 135, para 38.

<sup>239</sup> *K*, C-245/11, above fn. 135.

<sup>240</sup> See C. Filzwieser, A. Sprung, above fn. 24, Article 16 MN K1. For the contrary position that Article 16 DR III must still be interpreted in light of the *K* judgment, see ECRE, *ECRE Comments on Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, March 2015, available at: <https://www.refworld.org/docid/552254094.html>, p. 21. It is worth noting that in *K*, the Court relied on now repealed wording of old Article 15(2) DR II: see *K*, C-245/11, above fn. 135, paras 38-41.

<sup>241</sup> See in particular ATAF 2017 VI/5, § 8.3.3. See also FAC, D-3566/2018; FAC, D-5090/2017.

<sup>242</sup> Note that the characterization of Article 15(2) DR II as semi-binding or implicitly binding predates the *K* judgment: see Council of the EU, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) - Certain issues*, doc. no. 14950/10, 15 October 2010, available at: <https://data.consilium.europa.eu/doc/document/ST-14950-2010-INIT/en/pdf>, p. 2.

<sup>243</sup> Negotiations on the provision were in essence finalized months before the CJEU gave its judgment: see Council of the EU, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, doc. no. 12746/2/12, 27 July 2012, available at: <https://data.consilium.europa.eu/doc/document/ST-12746-2012-REV-2/en/pdf>.

disappear under the new Regulation would contradict the stated aim of the Dublin III Regulation of “making [...] improvements [...] to [...] the protection granted to applicants” (Recital 9). Thirdly and lastly, the interpretation proposed here would not make Article 16 redundant. As it has been argued above, this provision identifies a narrow subset of dependency situations and places them under a firmer obligation to “keep or bring together” (see above, section 3.4.3). For all the other cases formerly covered by Article 15(2) of the Dublin II Regulation and now covered by Article 17 DR III – e.g. dependency between mother-in-law and daughter-in-law – “keeping or bringing together” remains a more qualified obligation in line with the *K* judgment.<sup>244</sup>

#### 4.4.2 Humanitarian reasons under Article 29a of Ordinance 1 on Asylum

Article 29a(3) of Ordinance 1 on Asylum (OA1) authorizes the SEM to examine an asylum application that would fall under the responsibility of another Member State for “humanitarian reasons”. As noted already, apart from the cases where the clauses are applied to fulfil the international obligations of Switzerland, this is the only legally permissible ground for the SEM to apply the sovereignty clause.<sup>245</sup>

Article 29a(3) OA1 is a “may” provision (*Kann-Vorschrift*) and vests broad discretion in the SEM. Therefore the latter’s decisions can only be reviewed to verify whether such discretion has been used in a law-abiding manner. This does not mean that the discretion of the SEM is unfettered. First of all, the SEM has the duty to positively examine whether Article 29a OA1 should be applied in a given case. To this effect, it must establish correctly and exhaustively all the relevant facts and take them into account in its decision.<sup>246</sup> The decision itself must be taken on the basis of transparent, reasonable criteria including the following:<sup>247</sup>

- Particular vulnerabilities of the persons concerned;
- The best interests of the child;
- Traumatic experiences, especially in the State to which a transfer is proposed;
- Considerations pertaining to family unity;
- The duration of the Dublin procedure or of the presence in Switzerland of the person concerned.

Taken individually, factors of this kind are as a rule not sufficient for the application of Article 29a OA1. However, when on the basis of cumulative grounds it appears that a transfer would be problematic from a humanitarian standpoint, the application of that

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<sup>244</sup> In the same sense, see also U. Brandl, “Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?” in: V. Chetail, P. De Bruycker, F. Maiani (Eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Brill/Nijhoff, 2016, pp. 143-158, at p. 153.

<sup>245</sup> Article 29a(3) OA1 constitutes the “concretization” in domestic law of the sovereignty clause: see ATAF 2010/45, § 8.2.1; ATAF 2015/9, § 7.5.

<sup>246</sup> ATAF 2015/9, § 8.1.

<sup>247</sup> See ATAF 2015/9, § 8.1; ATAF 2017 VI/10, § 6; FAC, E-504/2016, § 5.4. See also J.-P. Monnet, above fn. 51, p. 426 ff.

provision must be taken into consideration.<sup>248</sup> Unfortunately the SEM has not made its policy known,<sup>249</sup> and this detracts fundamentally from the transparency that is required by the FAC in its published case-law.

As a last point, the decision taken by the SEM must be exempt from arbitrariness and respect the right to be heard, as well as the general principles of equality and proportionality. In order to enable effective judicial review, and in light of the broad discretion enjoyed by the SEM, the Secretariat is subject to a reinforced duty to state reasons.<sup>250</sup>

#### 4.5 Options to prevent or end the separation of family members under the discretionary clauses

In the paragraphs above, the situations where there is a human rights or humanitarian duty to keep or bring together family relations have been outlined. Usually, these situations arise in a context where the applicant is resisting removal from Switzerland and requesting the authorities to apply the sovereignty clause. This, however, is not the only context where maintaining or restoring family unity may be required, nor is the application of the sovereignty clause the only measure liable to be adopted to this end. If the applicant and his family are present on State territory, family unity may in fact be achieved either by applying the sovereignty clause or by transferring all the family together, unless there are counter-indications.<sup>251</sup> If the applicant is in another Member State, positive obligations to admit the applicant as derived from the ECHR or from humanitarian considerations may translate into a duty to accept a request transmitted to Switzerland under the humanitarian clause of Article 17(2) DR III. This is simply the application to a different set of circumstances of the same logic that the FAC has followed in stating that Article 8 ECHR may make it mandatory to apply the sovereignty clause. Likewise, if the applicant is in Switzerland and the members of the family are in another Member State, the duty to promote reunification may entail a duty to send a take charge request and diligently follow it through under Article 17(2) DR III.<sup>252</sup>

There may even be cases where considerations of family unity make it *impermissible* to use the sovereignty clause. True, Article 17 DR III gives the Member States the right to derogate from the criteria and its exercise is not subject to any particular conditions (see above, 4.1). Still, as noted above, using that right in a situation where the family criteria would otherwise be applicable may be construed as an interference in family life that – assuming that the sovereignty clause is being used for reasons of expediency – cannot be justified in light of Article 8(2) ECHR.<sup>253</sup>

In short: whenever human rights law or compelling humanitarian considerations require that family unity be maintained or reconstituted, such duties may translate variously in

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<sup>248</sup> See ATAF 2011/9, § 8.2. See also FAC, E-504/2016, § 5.2.

<sup>249</sup> See SEM, above fn. 10, point 2.3.3.

<sup>250</sup> See ATAF 2015/9, § 8.1 and 8.2.2; FAC, E-504/2016, § 5.4 ff; FAC, E-2780/2016, § 7.4.

<sup>251</sup> See e.g. *Z.H. and R.H.*, above fn. 69, Concurring Opinion of Judge Nicolaou *in fine*.

<sup>252</sup> See FAC, D-3153/2014, § 9.9-9.19.

<sup>253</sup> See above, section 4.3.4.

duties to apply (or to refrain from applying) Article 17 DR III in all its aspects. The only imperative is family unity.

#### 4.6 Summary of main points

The discretionary clauses aim *inter alia* “at avoiding situations where family members would be separated due to the strict application of the Dublin criteria”.<sup>254</sup> Their application is mandatory whenever this is necessary to guarantee respect for Switzerland’s international obligations, including those that protect family life. Compelling humanitarian grounds may also make it mandatory to apply the clauses.

Nothing in the Dublin Regulation requires or encourages a restrictive approach in applying the discretionary clauses. On the contrary: in light of the aims and principles of the Regulation, as expressed in particular in the Preamble, the clauses should receive broad and systematic application whenever family life is at stake.

Article 8 ECHR comes into play whenever actions or omissions taken under the Dublin Regulation may affect “family life” within its meaning. The “settled status” of the family member of the applicant is not a condition for the applicability of Article 8 ECHR.

Marital relations constitute “family life” even if not yet fully established in fact. Likewise, the relations between parents and minor children constitute *ipso jure* “family life”. Denying the existence or stability of “family life” between the applicants and members of the nuclear family by referring to periods of separation runs counter to Article 8 ECHR. In other cases, the existence in practice of close personal ties is the controlling factor.

In assessing the existence of “family life”, the administration should adopt a non-formalistic, flexible approach, respect its inquisitorial duties and afford protection seekers the benefit of the doubt in view of their particular situation. As a matter of good practice, the first instance authority should ascertain in a holistic manner, at the outset of the Dublin procedure, the family situation from the standpoint of both the Dublin Regulation and the ECHR, taking full advantage of the procedural infrastructure provided by the Dublin Regulation (e.g. the right to an interview and family tracing).

The finding that Article 8 ECHR applies triggers a number of obligations: ensuring that the decision-making process is “fair and such as to afford due respect to the interests safeguarded by Article 8”; striking a “fair balance between the competing interests of the individual and of society”; guaranteeing an effective remedy against alleged violations as well as non-discrimination in the enjoyment of family life.

Whenever private and public interests are balanced against each other pursuant to Article 8 ECHR in a Dublin context, the following aspects should be taken into consideration:

- The possibility of establishing and enjoying family life elsewhere without undue obstacles may not be simply assumed. On the contrary, the starting assumption should be that the possibilities of enjoying family life “elsewhere” in the Dublin

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<sup>254</sup> Council of the EU, doc. No. 12364/09, above fn. 101, p. 35.

area are severely restricted. Even when such a possibility exists, it must be ascertained whether the sacrifice imposed on the persons already present in Switzerland would be proportionate.

- The potentially “temporary” character of the separation entailed by a Dublin transfer may be taken into account, but it must be borne in mind that separation may in fact last for a considerable time, and that even relatively short periods of separation may infringe Article 8 ECHR, e.g. in cases involving children.
- Asylum seekers are a vulnerable group entitled to particular protection.
- When assessing the compatibility with Article 8 ECHR of measures adopted under the Dublin Regulation, it is important to accurately identify and assess the public interest at stake. In Dublin cases, the intensity of the public order interests of “[...] controlling immigration” is arguably less pronounced than in ordinary family reunification cases. The public interest is further diminished where the applicant manifestly fulfils the conditions to benefit from family reunification in Switzerland at a later stage.
- As a matter not of ECHR law, but of “Dublin Law”, Recital 14 of the Preamble requires that additional weight be afforded to the interest in family unity.
- In a system where the protection of family life is a “primary consideration”, preserving or promoting family unity should be the norm rather than the exception.

In cases where particularly vulnerable persons, including children, are transferred with their family, appropriate guarantees must be in place so that family unity will be ensured upon reception. When the transfer is cancelled on account of the vulnerability of the person concerned, the rest of the family should not be transferred.

Whenever the transfer to another Member State of a torture victim would separate her from a supportive family environment, the authorities should start from the assumption that the transfer is impermissible and that the sovereignty clause should be applied instead. This reasoning should be extended to other categories of particularly vulnerable persons, in particular children falling under the scope of Article 39 CRC.

In borderline cases – i.e. cases that fall just outside the scope of application of the family-based responsibility criteria – careful scrutiny under the standpoint of non-discrimination is required, including an analysis of the comparability of the situations involved, of the objective reasons capable of justifying a disparity of treatment, and of the observance of the principle of proportionality.

For the cases formerly covered by Article 15(2) DR II and now falling outside the scope of Article 16 DR III – e.g. dependency between mother-in-law and daughter-in-law – “keeping or bringing together” the relatives concerned remains a qualified obligation in line with the *K* judgment of the CJEU.

Article 29a(3) OA1 is a “may” provision (*Kann-Vorschrift*) and vests broad discretion in the SEM. The latter has nonetheless the duty to examine whether it should be applied in a given case, to establish all the relevant facts and to take them into account in its decision. The decision itself must be taken on the basis of transparent, reasonable criteria including in particular the vulnerabilities of the persons concerned, the best interest of the child and considerations pertaining to family unity. When on the basis of cumulative grounds it appears that a transfer would be problematic from a humanitarian standpoint, the application of that provision must be taken into consideration. Finally, the SEM is subject to a reinforced duty to state reasons.

Whenever human rights law or compelling humanitarian considerations require that family unity be maintained or reconstituted, such duties may translate variously into duties to apply Article 17 DR III in all its aspects: applying (or refraining from applying) the sovereignty clause; sending requests under the humanitarian clause; or accepting such requests.

## 5. Concluding remarks and notes on legal protection

Properly interpreted and applied, the Dublin Regulation affords comprehensive protection to the families of those to whom it applies.

In keeping with the preamble, which makes respect for family life a primary consideration, the criteria should be interpreted and applied widely, flexibly and without undue formalism. In doing so, the administration has to assess a broad range of evidence of the existence of family, and duly consider the reduced evidentiary standards foreseen by the Regulation and the Implementing Rules. Furthermore, it should be proactive in establishing the relevant facts, in cooperation with the applicant and his family members. The obligation to trace family members, which is formally applicable only in favour of unaccompanied child applicants, should as a matter of good practice be applied systematically for all applicants, as it promotes a broad interpretation of the family criteria. Age assessment, which determines the applicability of the generous provisions laid down in the Regulation in favour of children, should be carried out in conformity with the recommendations of the Committee on the Rights of the Child. It therefore should be carried out in a holistic and child-friendly manner, respecting key due process guarantees including the appointment of a qualified representative, without undue reliance on medical methods, and in keeping with the principle that when the results are inconclusive the benefit of the doubt must be given to the applicant.

As the application of the criteria is limited in principle to the “take charge” phase, it is essential that comprehensive legal protection be afforded at this stage. Article 27 DR III explicitly foresees the right of applicants to appeal against transfer decisions, and in this context they may raise any argument relating to the incorrect application of the Regulation, including the wrong application of the criteria as well as the violation of the attendant procedural or evidentiary rules.<sup>255</sup> A host of other decisions taken under the

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<sup>255</sup> See *H. and R.*, Joined Cases C-582/17 and C-583/17, above fn. 47, paras 38 ff. On the violation of evidentiary rules, see ATAF 2017 VI/1.

Regulation – explicit or implicit<sup>256</sup> – may have a wide-ranging impact on the application of the criteria and on the lives of the applicants and their families: decisions not to send or not to accept a “take charge” application; decisions to assume responsibility, and therefore not to effect a transfer, when the applicant has family members in another State and the criteria indicate the latter as responsible. The fact that Article 27 DR III does not explicitly foresee a right to appeal against these decisions is not decisive. While the considerations of efficiency underpinning the Regulation speak against the availability of what the CJEU called “multiple remedies” – e.g. the right to challenge the decision not to use the sovereignty clause and then later to challenge the subsequent transfer decision<sup>257</sup> – an effective remedy must be available against *any* decision affecting the rights that applicants derive from EU law under Article 47 CFR.<sup>258</sup>

The same principles apply *mutatis mutandis* at the take back stage, except that here the criteria only play a limited role.<sup>259</sup>

At all stages of the Dublin procedure, human rights must also be fully respected, and humanitarian considerations duly taken into account. Whenever necessary in order to respect the ECHR, the CAT, the ICCPR, the CRC or other relevant standards, the SEM has a duty to apply the discretionary clauses – assume responsibility under the sovereignty clause, accept take charge requests under the humanitarian clause, or present such requests. In particular cases, human rights obligations may require the authorities to refrain from applying the sovereignty clause. The SEM also has a positive duty to examine humanitarian grounds, to decide on the basis of relevant and transparent criteria, and to provide reasons. Cumulative grounds may make a transfer problematic from a humanitarian standpoint, and restrict the administration’s discretion.

Human rights obligations also have important due process ramifications – e.g. the right of children to be heard in any procedure affecting them, and to challenge the outcome of age assessment.<sup>260</sup> More generally, whenever it is alleged that applicable human rights standards have been violated – no matter the stage of the Dublin procedure, or the type or decision or omission that may have caused the alleged violation – an effective remedy must be available domestically. The possibilities opened by international complaint procedure also have to be considered, as the *A.N. v. Switzerland* and *A.H. v. Switzerland* decisions taken by the CAT demonstrate.<sup>261</sup> Furthermore, as the comparison between these decisions and the judgment *A.S. v. Switzerland* of the ECtHR shows, it may be extremely fruitful to subject the same practice to the scrutiny of several international bodies. Switzerland is subject to the jurisdiction of the ECtHR, and has ratified the instruments giving individuals the right to bring individual complaints before the CAT and

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<sup>256</sup> See *Fathi*, C-56/17, above fn. 131, paras 57 ff.

<sup>257</sup> *M.A. and Others*, C-661/17, above fn. 155, paras 63 ff.

<sup>258</sup> *Ibidem*, para 77. In regard to Article 8 ECHR, see Meijers Committee, *Note on the Proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation)*, 2 December 2014, CM1415, available at: [https://www.commissie-meijers.nl/sites/all/files/cm1415\\_note\\_on\\_the\\_proposal\\_of\\_the\\_european\\_commission\\_of\\_26\\_june\\_2014\\_to\\_amend\\_the\\_dublin\\_iii\\_regulation\\_0.pdf](https://www.commissie-meijers.nl/sites/all/files/cm1415_note_on_the_proposal_of_the_european_commission_of_26_june_2014_to_amend_the_dublin_iii_regulation_0.pdf), p. 5.

<sup>259</sup> *H. and R.*, Joined Cases C-582/17 and C-583/17, above fn. 47, paras 41 ff.

<sup>260</sup> CRC, *A.L. v. Spain*, above fn. 111, para 12.3; CRC, *J.A.B. v. Spain*, above fn. 111, para 13.3; FAC, E-7333/2018, § 2.4-2.5.

<sup>261</sup> CAT, *A.N. v Switzerland*, above fn. 224 ; CAT, *Adam Harun v Switzerland*, above fn. 220.

the Committee on the Rights of the Child.<sup>262</sup> These bodies may illuminate, each from the standpoint of its areas of competence, and in dialogue with each other, the human rights implications of the Dublin system, and bring an essential contribution to a human-rights-compliant and humane Dublin practice including, and particularly, in matters of family unity.

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<sup>262</sup> UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 14 July 2011, A/HRC/RES/17/18, available at: <https://www.refworld.org/docid/4e72fbb12.html>, Article 5; Swiss United Federal Assembly, *Arrêté fédéral du 6 octobre 1986* (Optional declaration under Article 21 CAT), RO 1987 1306, Article 1, para 1.