



**Submission by the Office of the United Nations High Commissioner for Refugees  
in the case of *M.A. v. Denmark* (Application no. 6697/18)  
before the European Court of Human Rights**

## **1. Introduction\***

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and together with governments to seek solutions for refugees.<sup>1</sup> UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.<sup>2</sup> UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 18 December 2018.

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice applicable to beneficiaries of temporary protection status applying for family reunification in Denmark (Part 2), and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law to assist the Court (Part 3).

## **2. Domestic legislation and practice regarding family reunification of temporary protection beneficiaries**

### ***2.1. The relevant domestic legislation***

2.1.1 Danish law foresees three distinct protection statuses.<sup>3</sup> It grants international protection status where a person:

- (1) falls within the provisions of the 1951 Convention relating to the Status of Refugees (section 7(1) of the Aliens Act<sup>4</sup>), (hereafter 'status 1')
- (2) risks the death penalty or torture or inhuman or degrading treatment (section 7 (2) of the Aliens Act), (hereafter 'status 2') or
- (3) faces capital punishment, torture or inhumane or degrading treatment or punishment due to severe instability and indiscriminate violence against civilians in his or her home country (section 7(3) of the Aliens Act) (hereafter 'status 3').

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

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

<sup>2</sup> *Ibid.*, para. 8(a).

<sup>3</sup> Denmark has opted out of the recast Qualification Directive (QD), which provides for two EU protection statuses (refugee and subsidiary protection status). However, the Danish government considers the three Danish protection statuses to be fully in line with the statuses provided for under EU law, mirroring the language used in Articles 13 and 15(a), (b), and (c) QD, respectively: Council of the European Union, *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)*, 20 December 2011, OJ L. 337/9-337/26, <http://www.refworld.org/docid/4f197df02.html>.

<sup>4</sup> *Aliens Act*: <https://www.retsinformation.dk/Forms/R0710.aspx?id=194003>.

2.1.2. Denmark considers its three protection statuses as corresponding to refugee status and subsidiary protection status under European Union (EU) law.<sup>5</sup> Importantly, therefore, status (3) (Art. 7(3)) is equivalent to subsidiary protection status under Article 15 (c) of the Qualification Directive (QD)<sup>6</sup> although it is referred to as “temporary protection” under Danish law. This is despite the fact that subsidiary protection under Article 15 QD entitles the holder to a residence permit of one year that is explicitly subject to renewal and re-renewal, which can mean that it leads to long-term or permanent status.

2.1.3. In February 2015 and February 2016, respectively, the Danish government introduced amendments to the rights associated with temporary protection status. From these dates onward, holders of this status were required to have resided for a three-year period before becoming eligible to apply for family reunification.<sup>7</sup>

2.1.4. In introducing this requirement, the Danish government considered that “there is a certain risk that the European Court of Human Rights in a specific case, would find that it is not possible under Article 8 of the ECHR, in general, to require a 3-year residence as a condition for family reunification for foreigners who have a residence permit pursuant to section 7 (3) of the Aliens Act.”<sup>8</sup> However, the government also considered that “[g]iven the limited duration of the stay of the foreign national resident in Denmark, the expected temporary nature of the protection need and the fact that the residence permit is only valid for one year at a time, it is, however, the government’s opinion that there are serious arguments that the proposed scheme is compatible with Article 8 of the European Convention on Human Rights.”<sup>9</sup>

## **2.2. The relevant domestic practice**

2.2.1. Current practice in Denmark shows that a majority of Syrian applicants receive “temporary protection” status. In 2017, 59 per cent of Syrian applicants received status 3 (Art. 7(3)), whereas 32 per cent received status 1 (Art. 7(1)), and only 2 per cent received status 2 (Art. 7(2)).<sup>10</sup> When comparing the statistics of the past three years, the number of Syrian applicants receiving temporary protection has risen significantly.<sup>11</sup>

2.2.2. One of the most important differences between the three protection statuses concerns the entitlement to apply for family reunification. While holders of status 1 (Art. 7(1)) or status 2 (Art. 7(2)) may apply immediately after having been granted status, beneficiaries of status 3 (Art. 7(3)) are subject to a three-year waiting period. This waiting period only commences once such status is

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<sup>5</sup> See, the analysis of the EU legislation by the Danish Justice Ministry, p. 120:

[http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2015/samarbejdet\\_om\\_retlige\\_og\\_indeanliggender\\_pdfa.pdf](http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2015/samarbejdet_om_retlige_og_indeanliggender_pdfa.pdf).

<sup>6</sup> Under this provision, EU Member States shall grant subsidiary protection status to persons who face serious harm, which is defined as a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” See Article 15(c) and Article 18 QD and note 3 above.

<sup>7</sup> The first amendment in 2015 introduced a one-year waiting period, which was then extended to a three-year waiting period in 2016.

<sup>8</sup> *Travaux préparatoires* to Bill no. 87 of 10 December 2015, pp. 12-13:

[https://www.ft.dk/ripdf/samling/20151/lovforslag/187/20151\\_187\\_som\\_fremsat.pdf](https://www.ft.dk/ripdf/samling/20151/lovforslag/187/20151_187_som_fremsat.pdf).

<sup>9</sup> *Ibid.*

<sup>10</sup> Statistics obtained from Eurostat: <https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>.

<sup>11</sup> In 2015, 70 per cent of Syrians received status 1 (Art. 7(1)) protection (compared to 15 per cent receiving status 3 (Art. 7(3)) protection and 11 per cent receiving status 2 (Art. 7(2)) protection). In 2016, 56 per cent received status 1 (Art. 7(1)) protection (compared to 40 per cent receiving status 3 (Art. 7(3)) protection and 1 per cent receiving status 2 (Art. 7(2)) protection). The percentage of Syrians receiving status 1 (Art. 7(1)) protection therefore fell from 70 to 32 per cent within 3 years. Statistics from Eurostat, see note 10 above.

granted, after the asylum determination procedure is completed. While the average processing time for first instance decisions has decreased in 2018,<sup>12</sup> in 2016 and 2017 it was approximately 18 months at first instance and approximately five months at the appeals instance.<sup>13</sup> The procedure for family reunification itself took 10-12 months.<sup>14</sup> In total, therefore, a person who received temporary protection status during this time would on average be separated from his or her family members for approximately 65 months or five and a half years.

### **3. Principles of international refugee and human rights law regarding family life and non-discrimination**

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

3.1.1. The right to family and private life is recognized as an essential right under international human rights law. Under Article 16(3) of the 1948 Universal Declaration of Human Rights (UDHR), the family is recognized as “the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>15</sup> This universal right is given binding effect by Article 23(1) of the International Covenant on Civil and Political Rights (ICCPR) to which Denmark and all other European States are State parties.<sup>16</sup> Article 17 of the ICCPR further affirms that no one shall be subject to arbitrary or unlawful interference with his or her family and that everyone has the right to the protection of the law against such interference. This right is also expressed in similar language in Article 16 of the Convention on the Rights of the Child (CRC)<sup>17</sup>, and Article 14 of the Convention on Migrant Workers.<sup>18</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR), goes even further in Article 10(1) by providing that the “widest possible protection and assistance should be accorded to the family.”<sup>19</sup>

3.1.2. It is worth noting that the United Nations Human Rights Committee, in the context of its periodic review of Denmark, expressed concern about the application of the three-year waiting period

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<sup>12</sup> It is currently approximately seven months: see <https://www.nyidanmark.dk/da/Ord-og-begreber/US/Diverse-US/Sagsbehandlingstider-i-UdI%C3%A6ndingestyrelsen>.

<sup>13</sup> See: <http://refugees.dk/en/facts/the-asylum-procedure-in-denmark/case-processing-time/>.

<sup>14</sup> *Ibid.*

<sup>15</sup> UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III):

<http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>16</sup> UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p. 171:

<https://www.refworld.org/docid/3ae6b3aa0.html>. See, to similar effect, Article 18(1) of the Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 27 June 1981:

<https://www.refworld.org/docid/3ae6b3630.html> and Article 17(1) of the Organization of American States (OAS), *American Convention on Human Rights*, 22 November 1969: <https://www.refworld.org/docid/3ae6b36510.html>.

Furthermore, according to the UN Human Rights Committee, Article 23(1) ICCPR “*implies the adoption of appropriate measures, both at the internal level and, as the case may be, in cooperation with other States to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons*”. UN Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para. 5:

<https://www.refworld.org/docid/45139bd74.html>.

<sup>17</sup> UNGA, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3: <https://www.refworld.org/docid/3ae6b38f0.html>.

<sup>18</sup> UNGA, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158: <https://www.refworld.org/docid/3ae6b3980.html>. See also, Frances Nicholson, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, (The Essential Right) January 2018, 2nd edition: <https://www.refworld.org/docid/5a902a9b4.html>.

<sup>19</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3: <https://www.refworld.org/docid/3ae6b36c0.html>.

for holders of temporary protection status, and recommended that Denmark “should consider reducing the duration of residence required of persons under temporary protection status in order for them to obtain family reunification, in compliance with the Covenant [on Civil and Political Rights].”<sup>20</sup>

3.1.3. While the 1951 Convention does not specifically refer to the right to family reunification, the Final Act of the Conference of Plenipotentiaries at which the Convention was adopted affirmed “*that the unity of the family [...] is an essential right of the refugee*” and issued a specific and strongly worded recommendation that Governments “*take the necessary measures for the protection of the refugee’s family, especially with a view to ensuring that the unity of the family is maintained.*”<sup>21</sup>

3.1.4. As noted in the recent UNHCR Summary Conclusions on the Right to Family Life, “[w]hen refugees are separated from family members as a consequence of their flight, a prolonged separation can have devastating consequences on the wellbeing of the refugees and their families. The negative consequences impact on the refugees’ ability to integrate in their country of asylum, become active contributors to the society, and rebuild their lives.”<sup>22</sup> The restoration of the family unit can help to ease the sense of loss often experienced by persons in need of international protection who have had to abandon their countries of origin, communities and previous ways of life. Therefore, finding and reuniting with family members is often one of the most pressing concerns of beneficiaries of international protection.

3.1.5. Furthermore, UNHCR has consistently held that family reunification is essential for refugees to enjoy the fundamental right to family life and that there is no reason to distinguish between refugees and subsidiary protection beneficiaries in this regard.<sup>23</sup> In addition, UNHCR’s Executive Committee (ExCom) has repeatedly emphasized the “fundamental importance” of family reunification<sup>24</sup>, and recommended that “[i]n application of the Principle of the unity of the family and for obvious humanitarian reasons, *every effort should be made* to ensure the reunification of separated refugee families”, and that, further, “[f]or this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place *with the least possible delay.*”<sup>25</sup> Importantly,

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<sup>20</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Denmark*, 15 August 2016, CCPR/C/DNK/CO/6: <https://www.refworld.org/docid/58763dc64.html>.

<sup>21</sup> Final Act of the United Nations *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1: <http://www.refworld.org/docid/40a8a7394.html>. Although the recommendation is not part of the binding legal text of the 1951 Convention, it is in fact observed by the majority of States, whether or not they are parties to the treaties themselves. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, para. 183: <https://www.refworld.org/docid/4f33c8d92.html>.

<sup>22</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, para. 1: <https://www.refworld.org/docid/5b18f5774.html>.

<sup>23</sup> UNHCR, *Refugee Family Reunification. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, p. 5: <https://www.refworld.org/docid/4f55e1cf2.html>.

<sup>24</sup> UNHCR ExCom Conclusion No. 9. See further Conclusions Nos. 1, 22, 24, 84, 85, 88, and 104. *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: <https://www.refworld.org/docid/5a2ead6b4.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 102 States are Members of the Executive Committee, including Denmark which was one of the original members of the predecessor to the Executive Committee, the Advisory Committee established in 1951: <https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html>.

<sup>25</sup> UNHCR ExCom Conclusion, *Family Reunification No. 24 (XXXII) - 1981*, 21 October 1981, paras 1-2 [emphasis added]: <https://www.refworld.org/docid/3ae68c43a4.html>.

ExCom has underlined the need to protect the unity of the refugee's family, *inter alia* by "measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight."<sup>26</sup>

### ***3.2.The right to respect for private and family life as applied to persons in need of international protection under European human rights law (Article 8 ECHR)***

3.2.1. Under Article 8 ECHR, everyone has the right to respect for their private and family life.<sup>27</sup> The ability of family members to mutually enjoy each other's company constitutes a fundamental element of family life, and a state's measure to prevent this ability constitutes an interference with the right to family life. Indeed, the essential object of Article 8 ECHR is to protect the individual against arbitrary action by the public authorities, as well as to require the state, in certain cases, to take positive action to effectively ensure family life.<sup>28</sup>

3.2.2. In the particular case of refugees, this Court has recognized that family unity is an essential right and that family reunification is a fundamental element in enabling persons who have fled persecution to resume a normal life.<sup>29</sup> While Article 8 ECHR does not grant an absolute right to family reunification on the territory of the Contracting State,<sup>30</sup> and states have a certain margin of appreciation,<sup>31</sup> the Court has taken into account the particular situation of refugees as family separation, in their cases, does not occur due to voluntarily actions, but as a result of their flight. In order to strike a "fair balance [...] between the competing interests of the individual and of the community as a whole" it requires States to weigh the "particular circumstances of the persons involved and the general interest".<sup>32</sup> Similarly, the UN Human Rights Committee has also confirmed that while in principle, it is a matter for the State to decide who it will admit to its territory, there are certain circumstances in which "an alien may enjoy the protection of the [ICCPR] Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."<sup>33</sup>

3.2.3. While this Court regularly examines whether a move to the Contracting State would be the only way to develop family life and whether there are "insurmountable obstacles" or "major impediments" to relocate in the country of origin in order to enjoy family life, it does not engage in

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<sup>26</sup> UNHCR ExCom Conclusion, *Protection of the Refugee's Family, No. 88 (L) – 1999*, para. (b)(i):

<https://www.refworld.org/type,EXCONC.3ae68c4340,0.html>.

<sup>27</sup> Article 8 ECHR states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>28</sup> *Keegan v. Ireland*, Application no. 16/1993/411/490, European Court of Human Rights (ECtHR), 26 May 1994, para. 49: <https://www.refworld.org/cases,ECHR,3ae6b6ff8.html>. See also *Elsholz v. Germany*, Application no. 25735/94, ECtHR, 13 July 2000, para. 43: <https://www.refworld.org/cases,ECHR,58a72da64.html>.

<sup>29</sup> *Tanda-Muzinga c. France*, Application no. 2260/10, ECtHR, 10 July 2014, para. 75: <https://www.refworld.org/cases,ECHR,53be80094.html>; *Mugenzi c. France*, Application no. 52701/09, ECtHR, 10 July 2014, para.54: <https://www.refworld.org/cases,ECHR,53be81784.html>.

<sup>30</sup> *Gül v. Switzerland*, Application no. 23218/94, ECtHR, 19 February 1996, para. 38:

<https://www.refworld.org/cases,ECHR,3ae6b6b20.html>.

<sup>31</sup> *Tanda-Muzinga c. France*, see note 299 above, para. 64.

<sup>32</sup> *Gül v. Switzerland*, see note 30 above, para. 38.

<sup>33</sup> UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 5: <https://www.refworld.org/docid/45139acfc.html>.

this analysis in the case of refugees.<sup>34</sup> Rather, the Court has recognized that the fact that a person has already obtained international protection is proof of his or her vulnerability.<sup>35</sup> In *Mugenzi v. France*, the Court underlined that there exists a broad consensus at the international and European level on the need for refugees to benefit from a more favorable family reunification regime than other foreigners.<sup>36</sup> In UNHCR's view, this is equally important for other beneficiaries of subsidiary or temporary protection.<sup>37</sup>

3.2.4. As this Court has noted, it is not the status of the international protection holder but the gravity of interference with the individual's right and the concrete risk, weighed against the public interests, that is the correct criterion to determine an Article 8 ECHR violation. For example, in *Tuquabo-Tekle v. the Netherlands*, the Court held that the state would have been obliged to grant family reunification despite the fact that the applicant did not have refugee status but humanitarian protection status.<sup>38</sup> Therefore, it is not the status of the applicant that is determinative, but whether there is an obstacle preventing the applicant from enjoying family life in his or her home country.<sup>39</sup>

3.2.5. The issue of waiting periods for family reunification for subsidiary protection beneficiaries has also been challenged under national law. The Swedish Migration Court of Appeal, in a judgment of 13 November 2018, ruled that a three-year waiting period for family reunification for a minor Syrian subsidiary protection beneficiary violated Sweden's obligations under Article 8 ECHR. It found that the stated purpose of the Swedish government to limit the number of asylum seekers could not justify the denying of residence permits for the purpose of family reunification. The restrictions on the right to family life were therefore disproportionate.<sup>40</sup>

3.2.6. The right to family unity also enjoys superior status under EU law. Under Article 7 of the EU Charter of Fundamental Rights,<sup>41</sup> EU Member States are obliged to uphold the right to respect for private and family life.<sup>42</sup> Any limitation on the exercise of this right must respect the essence of the right, and may only be made if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.<sup>43</sup> Furthermore, while the Family Reunification Directive is only applicable to refugees, most of the instruments of the Common European Asylum System, which also apply to subsidiary protection beneficiaries, recognise the right to family life. The Dublin Regulation states that "respect for family life should

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<sup>34</sup> *Mugenzi, Tanda-Muzinga*, see note 299 above. See also the reasoning in *I.A.A. and Others v. the UK*, in which the Court refused family reunification because the applicants had not been granted refugee status or had "sought to argue that they would be at risk of ill-treatment were they to return to Somalia". On the contrary, had she demonstrated that she was in need of international protection, different considerations would have applied: *I.A.A. and Others v. the UK*, Application no. 25960/13, ECtHR, 31 March 2016, para. 45: <https://www.refworld.org/cases,ECHR,5a2fa56f4.html>.

<sup>35</sup> *Mugenzi c. France*, see note 29 above, para. 54.

<sup>36</sup> *Ibid.*

<sup>37</sup> Several EU Member States accord refugees and beneficiaries of subsidiary and temporary protection access to family reunification on the same basis as refugee. Frances Nicholson, *The "Essential Right"*, p.147-148, see note 18 above.

<sup>38</sup> *Tuquabo-Tekle and Others v. the Netherlands*, Application no. 60665/00, ECtHR, 1 December 2005, para. 52: <https://www.refworld.org/cases,ECHR,43a29e674.html>.

<sup>39</sup> *Gül v. Switzerland*, see note 30 above, para. 42.

<sup>40</sup> *Ayed and others v. Swedish Migration Board*, UM 5407-18, Swedish Migration Court of Appeal, 13 November 2018: <http://www.kammarrattenstockholm.domstol.se/Om-kammarratten-/Vagledande-avgoranden/Migrationsoverdomstolen-20171/UM-5407-18/>.

<sup>41</sup> European Union, *Charter of Fundamental Rights of the European Union*, (EU Charter), 26 October 2012, 2012/C 326/02: <https://www.refworld.org/docid/3ae6b3b70.html>.

<sup>42</sup> Without qualification, Article 7 EU Charter states: "Everyone has the right to respect for his or her private and family life, home and communications." As per Article 52(3) of the EU Charter, the meaning and scope of this right shall be the same as Article 8 ECHR, without preventing more extensive protection. Article 33(1) of the EU Charter further provides that the "family shall enjoy legal, economic and social protection."

<sup>43</sup> Article 52(1) EU Charter.

be a primary consideration of Member States when applying this Regulation.”<sup>44</sup> In addition, the QD requires Member States to ensure that family unity can be maintained<sup>45</sup> and recognises that “[f]amily members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.”<sup>46</sup> Finally, the EU Temporary Protection Directive (TPD) explicitly entitles beneficiaries of temporary protection to reunite with their family members; even though protection under this Directive is only *temporary* (maximum 3 years),<sup>47</sup> beneficiaries are immediately entitled to the right to family reunification.<sup>48</sup> These three instruments are an expression of a European consensus on the crucial importance of family reunification for beneficiaries of international protection, as recognised by this Court.<sup>49</sup>

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

3.3.1. The 1951 Refugee Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, including the principle of non-discrimination and explicitly states that it shall be applied without discrimination as to race, religion or country of origin.<sup>50</sup> As an overarching principle of international human rights law, the principle of non-discrimination is contained in virtually every major international human rights instrument, prohibiting discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>51</sup>

3.3.2. The principle of non-discrimination requires that similarly situated individuals should enjoy the same rights and receive similar treatment.<sup>52</sup> This includes measures impacting upon individuals’ right to family life and family unity, regardless of their immigration or other status, except where such distinctions can be objectively justified.<sup>53</sup> Differential treatment based on prohibited grounds

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<sup>44</sup> Recital 14 of the Council of the European Union, *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)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013: <https://www.refworld.org/docid/51d298f04.html>.

<sup>45</sup> Article 23(1) QD.

<sup>46</sup> Recital 36 QD.

<sup>47</sup> Article 4 (1)-(2) of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (TPD): <https://www.refworld.org/docid/3ddcee2e4.html>.

<sup>48</sup> Article 15 (3) TPD.

<sup>49</sup> *Mugenzi*, see note 29 above, para. 54.

<sup>50</sup> Article 3 of the 1951 Convention. It is noteworthy that it in accordance with Article 42, it is one of the few articles which Member States are not permitted to enter a reservation against.

<sup>51</sup> Article 1 of the UDHR states that “[a]ll human beings are born free and equal in dignity and rights.” Article 2 UDHR provides that every individual is “entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 UDHR further provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.” The principle of non-discrimination is also found in Article 2 in each of the ICCPR, ICESCR, CRC, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): UNGA, 18 December 1979, UNTS, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html>.

<sup>52</sup> UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989: <https://www.refworld.org/docid/453883fa8.html>. This Court has held that “the requirement to demonstrate an ‘analogous situation’ does not require that the comparator groups be identical.” Instead, one must demonstrate that they have been in a “relevantly similar situation to others treated differently.” *Hode and Abdi v. The United Kingdom*, Application no. 22341/09, ECtHR, 6 November 2012, para. 50: <https://www.refworld.org/cases/ECHR.509b93792.html>.

<sup>53</sup> Frances Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, section 2.1.2., p. 7: <https://www.refworld.org/docid/5a902a9b4.html>.

will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with human rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.<sup>54</sup>

3.3.3. UNHCR has consistently underlined that distinctions between beneficiaries of international protection are often neither necessary nor objectively justified in terms of flight experience and protection needs.<sup>55</sup> This is evidenced by practice, as the application of the protection statuses across the EU is inconsistent. Some Member States regularly grant refugee status to people from a particular country of origin, while other Member States grant subsidiary protection status to people with similar profiles from the same country of origin. It is thus not clear which objective criteria may justify a different duration of status,<sup>56</sup> and the rights that may derive from it, in particular the right to family unity.

3.3.4. UNHCR recalls that there is no evidence that the protection needs of subsidiary protection beneficiaries (status 2 and 3 in the Danish context) will, in all or most cases, be of a different nature or shorter duration than the need for protection as refugees (status 1). In practice, beneficiaries of subsidiary protection are generally not able to return home earlier than refugees.<sup>57</sup> The principles of equal treatment and non-discrimination<sup>58</sup> allow for a differentiated treatment according to immigration status only when the grounds therefore are objectively and reasonably justified. In UNHCR's view, such justification will not be present in relation to refugees and beneficiaries of subsidiary protection, who frequently share the same experiences and protection needs.

3.3.5. The Council of Europe's Parliamentary Assembly in its recently adopted resolution has noted "with concern" the refusal of visas to family members of those "who have not been granted refugee status but have been given subsidiary or temporary protection on humanitarian grounds". Importantly, it emphasized that "such subsidiary or temporary protection status must not be considered as an 'alternative refugee status' with fewer rights", and indicated that "[s]tates should thus not substitute subsidiary or temporary protection status for refugee status, in order to limit family reunification due to the temporary and personal nature of this subsidiary status".<sup>59</sup> Rapporteur Sandbæk observed that "irrespective of the status granted, the protection needs and flight experiences of refugees and beneficiaries of subsidiary protection are very similar. As with refugees, beneficiaries of subsidiary protection are temporarily unable to return to their countries of origin due to the risk of serious harm. There is therefore no reason to distinguish between the two statuses as regards their right to family life."<sup>60</sup>

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<sup>54</sup> *Ibid.*, p. 8.

<sup>55</sup> See *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, February 2018, p. 33: <https://www.refworld.org/docid/5a7835f24.html>.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> As found in Article 14 ECHR, Article 26 ICCPR and Article 21 EU Charter among others. Article 14 ECHR states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

<sup>59</sup> Council of Europe, Parliamentary Assembly (PACE), *Resolution 2243(2018), Family reunification of refugees and migrants in Council of Europe member states*, adopted on 11 October 2018, para. 6: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25185&lang=EN>.

<sup>60</sup> Council of Europe, Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons, *Report on Family reunification of refugees and migrants in Council of Europe member States*, by Rapporteur Ulla Sandbæk, para. 28: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25058&lang=EN>.



### ***3.4. The prohibition of discrimination in the context of family reunification under European human rights law (Article 14 read in conjunction with Article 8 ECHR)***

3.4.1. The case law of this Court clearly shows that differences in treatment between persons who are similarly situated – such as refugees and subsidiary protection beneficiaries – can only be justified if they pursue a legitimate aim and there is a proportionate relationship between this aim and the means employed to realise it.<sup>61</sup>

3.4.2. Under Article 14 ECHR,<sup>62</sup> differences in treatment between refugees and others granted protection status are “legally suspect”.<sup>63</sup> Notably, this Court has held that the margin of appreciation is restricted when discrimination is based on an immutable characteristic, which is the case for differences of treatment that are grounded in international protection status since this status does not entail an element of choice.<sup>64</sup>

3.4.3. Accordingly, this Court has held that the length of a residence permit is an improper criterion and provides insufficient justification for differential treatment because “[t]he fact that a person was in possession of a limited residence title did not form a sufficient basis to predict the duration of his or her stay” in the host country.<sup>65</sup> In other words, differentiation merely on the basis of length of residence permit was considered discriminatory, as this did not give a solid indication of how long the person would *actually* reside in the country.

3.4.4. Further, it is important to underline that refugee status, too, is at its core a temporary status, as it is subject to various cessation grounds, including if there is a fundamental change in circumstances in the country of origin. The refugee law regime envisages refugee status as a temporary phenomenon which should last for as long as international protection is needed.<sup>66</sup> This was this Court’s key consideration in *Hode and Abdi v. the United Kingdom*, which concerned the difference in treatment between beneficiaries of international protection who married post-flight and other migrants entitled to family reunification. In comparing the two groups, this Court held that they were similarly situated, since student and workers, (whose spouses were entitled to join them), were usually, equally granted leave to remain for only a limited period. Thus, they were in an analogous position, and since the UK failed to demonstrate that the difference in treatment regarding family reunification pursued a legitimate aim, this Court found a violation of Article 14 read in conjunction with Article 8.<sup>67</sup>

3.4.5. Specifically on the right to family reunification of subsidiary protection holders, the European Commission “considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages Members States to adopt rules that

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<sup>61</sup> According to this Court, a difference of treatment is discriminatory for the purposes of Article 14 ECHR if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. See *Niedzwiecki v. Germany*, Application no. 58453/00, ECtHR, 15 February 2006, para. 32: <https://www.refworld.org/cases.ECHR.4406d6cc4.html>, and *Okpiz v. Germany*, Application no. 59140/00, ECtHR, 25 October 2005, which states at para. 33, that “[t]he Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.”: <http://www.unhcr.org/refworld/docid/4406d7ea4.html>.

<sup>62</sup> See note 58 above.

<sup>63</sup> Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, June 2017, p. 23: <https://www.refworld.org/docid/5a0d5eae4.html>.

<sup>64</sup> *Bah v. United Kingdom*, Application no. 56328/07, ECtHR, 27 September 2011, para. 47: <https://www.refworld.org/cases.ECHR.4ee0fad32.html>.

<sup>65</sup> *Niedzwiecki v. Germany*, see note 61 above, para. 24.

<sup>66</sup> UNHCR, *Note on Cessation Clauses*, 30 May 1997, para. 39: <https://www.refworld.org/docid/47fdfaf1d.html>.

<sup>67</sup> *Hode and Abdi v. The United Kingdom*, note 52 above, paras 50, 55, 56.

grant similar rights to refugees and beneficiaries of temporary or subsidiary protection.”<sup>68</sup> It further states that “[t]he convergence of both protection statuses is also confirmed in the recast Qualification Directive 2011/95/EU<sup>79</sup>” and that “[i]n any case, even when a situation is not covered by European Union law, Member States are still obliged to respect Article 8 and 14 ECHR.”<sup>69</sup> It also recalled the EU Stockholm Programme’s aim to establish a uniform status of protection “based on the fact that protection needs of refugees and of beneficiaries of subsidiary protection are the same.”<sup>70</sup>

3.4.6. A similar reasoning has also been most recently applied by the Court of Justice of the EU (CJEU) in its *Ayubi* decision.<sup>71</sup> The CJEU held that the needs of protection holders are the same (for social security benefits, in that case), irrespective of length of residence permits, and “only objective differences in the situations of those two categories of persons may be relevant”.<sup>72</sup> Measures only targeting one group are inappropriate for achieving the stated goal, since, in this case, the burden of paying social benefits, “will entail costs for the institution that is required to provide those benefits, *regardless of whether that person is a beneficiary of subsidiary protection status, a refugee or a national of the Member State concerned*. A difference in situation between the two categories of persons cannot therefore be established in that regard.”<sup>73</sup> This case is a renewed confirmation of the principle of non-discrimination in the EU, according to which difference in treatment is only permissible if, and to the extent of which, protection status holders are not in an objectively comparable situation as the relevant reference group, as regards the objective pursued by the rules in question.<sup>74</sup> What is true for social benefits, must be *a fortiori* true for right to family life, since this is a fundamental right which, in the case of protection holders, cannot be realized on the protection holder’s own motion, since returning to the country of origin would pose an insurmountable obstacle for him or her.

#### 4. Conclusion

4.1. In light of all the foregoing, UNHCR submits that Danish legislation and practice is at variance with both international and European human rights law, as it undermines the fundamental right to family life for persons in need of international protection and excludes certain groups in a disproportionate and discriminatory fashion, contrary to what is required under Article 8 ECHR as well as Article 14 read in conjunction with 8 ECHR.

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<sup>68</sup> European Commission, *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, p. 24: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0210\\_/com\\_com\(2014\)0210\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf).

<sup>69</sup> *Ibid.*, p. 25, citing CJEU cases *Murat Dereci and others v. Bundesministerium für Inneres*, C-256/11, 15 November 2011, para. 72: <https://www.refworld.org/cases,ECJ,4ff17d622.html>, and *Metock and Others v. Minister for Justice, Equality and Law Reform*, C-127/08, 25 July 2008, para. 79: <https://www.refworld.org/cases,ECJ,48a574262.html>.

<sup>70</sup> European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union* (Directive 2003/86/EC), p. 6: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0735&from=hr>.

<sup>71</sup> *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land*, C713/17, 21 November 2018, para. 31: <https://www.refworld.org/cases,ECJ,5bf82e4d4.html>.

<sup>72</sup> In that case, the two categories were refugees with temporary and refugees with permanent residence permits.

<sup>73</sup> *Ayubi*, note 71 above, para. 34 [emphasis added].

<sup>74</sup> *Ibid.*, citing *Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover*, C-443/14 and C-444/14, 1 March 2016, paras 54, 55 and 59: <https://www.refworld.org/cases,ECJ,56e67d9f4.html>. See also *E.G. v Slovenia*, C-662/17, 18 October 2016, para. 40: <https://www.refworld.org/cases,ECJ,5c3dae194.html>.