

Access to Justice in the Protection of Migrant's Rights to Family Life

Training Materials on Access to Justice for Migrants



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Training Materials on Access to Justice
for Migrants

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This training module is the fourth in a five-part series of training materials¹ relevant to protecting the rights of migrants in Europe. This part provides an overview of the guiding principles on access to justice in the protection of migrant's rights to family life.

I. Right to family life and family unity

All individuals, including migrants, are holders of human rights and have the right to family life and family unity under international and EU law.

International legal framework

Universal declaration of human rights (UDHR), adopted by UNGA Resolution 217 A (III) of 10 December 1948

Article 16.3

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

International Covenant on Civil and Political Rights (ICCPR), adopted by UNGA Resolution 2200(XXI) of 16 December 1966

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honor and reputation.

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

Article 23

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

International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UNGA Resolution 2200(XXI) of 16 December 1966

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

¹ These training materials on access to justice for migrants were developed as part of the FAIR PLUS (Fostering Access to Immigrant's Rights PLUS) project and include the following training modules:

0. Access to justice
I. Fair asylum procedures and effective remedy
II. Access to justice in detention
III. Access to justice for economic, social and cultural rights
IV. Access to justice in the protection of migrant's right to family life
V. Access to justice for migrant children

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), adopted by UNGA Resolution 45/158 of 18 December 1990

Article 44

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.
2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

Convention on the Rights of the Child (CRC), adopted by UNGA Resolution 44/25 of 20 November 1989

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 22 (2)

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Convention on the Rights of the Child (CRC)

Also relevant are Article 2: non-discrimination and Article 3: best interest of the child.

For more information on these principles cfr. Module V Children's rights, section II.

The Committee on the Rights of the Child (CRC) and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in their joint general comment on children in the context of international migration stress that migrant children have a lack of timely family reunification opportunities and that best interests of the child should be taken fully into consideration in decisions regarding family unity.

Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017

29. States parties shall ensure that the best interests of the child are taken fully into consideration in immigration law, (...) and decisions regarding family unity and child custody, where the best interests of the child shall be a primary consideration and thus have high priority. The Committees acknowledge that the lack of regular and safe channels for children and families to migrate contribute to children taking life-threatening and extremely dangerous migration journeys. The same is true for border control and surveillance measures that focus on repression rather than facilitating, regulating and governing mobility, including detention and deportation practices, lack of timely family reunification opportunities and lack of avenues for regularization.

European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), CoE, ETS No. 5, adopted 4 November 1950

Article 8

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.

European Social Charter (revised), ETS No. 163 of 3 March 1966

Article 16 – The right of the family to social, legal and economic protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Article 19.6

...obligation to "facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory"

The Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrants Workers and Members of Their Families (CMW) have affirmed that the child, – and when in the child's best interest, the parents – must **not be detained** under the banner of family unity. If a child is involved, non-custodial measures should be applied. Detaining the child and his family together may also amount to a violation of the right to family life (*Popov v. France*).

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CRC, 16 November 2017

11. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family.

Popov v. France, ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 2012

134. The Court is of the opinion that whilst mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (see *Olsson v. Sweden* (no. 1), 24

March 1988, § 59, Series A no. 130), it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life, particularly where the family is detained. It finds that the fact of confining the applicants to a detention centre, for fifteen days, thereby subjecting them to custodial living conditions typical of that kind of institution, can be regarded as an interference with the effective exercise of their family life.

EU legal framework

EU Charter on Fundamental Rights, 2012/C 326/02, adopted 6 October 2012

Article 7

Respect for private and family life

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

Article 33 Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

II. The definition of family

While there is no internationally agreed definition of a "family" per se applicable to the implementation of all provisions of international human rights treaties related to the family, some international human rights bodies have clarified the scope of family life that States are bound to respect and protect, in particular contexts. For example, as highlighted below, the case law of the European Court of Human Rights has clarified the scope of the right to family life that the State has a duty to respect and protect under article 8 ECHR, including in the context of the determination of claims for international protection and family reunification.

Furthermore, various EU instruments which concern migrants, including the EU Directive on Family Reunification, the Qualifications Directive and the Dublin Regulation, each contain provisions that define the relationships to which the term "family" applies.

International legal framework

European Convention on Human Rights

The European Court's definition of family life is a broad one, which has developed over time in accordance with changing ideas of family, and is likely to continue to do so in light of evolving social attitudes.

"Family" under the ECHR includes a person's children, and adult partnerships, including both opposite-sex and same-sex marital relationships (*Schalk and Kopf v. Austria*; *P.B. and J.S. v. Austria*; *Pajić v. Croatia*), and stable and committed cohabiting non-marital relationships. Relevant decisive factors include: whether the couple live together, the length of their relationship, whether they have demonstrated their commitment to each other by having children together or by any other means. The relevance and weight of these decisive factors vary on a case-by-case basis according to the particular circumstances involved.

Both couples in same-sex and different sex relationships are considered by ECtHR case-law to constitute a family for the purpose of Article 8 ECHR. Stable relationships, including between non-cohabiting and/or same-sex couples, attract this legal protection. Indeed, failing to apply a broad understanding of "family" in applying family reunification rules has at times been found to give rise to violations of the Convention (*Pajić v. Croatia*).

Schalk and Kopf v. Austria ECtHR, Application no. 30141/04, 24 June, 2010

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (...). Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family" (...).
94. (...) the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

Pajić v. Croatia, ECtHR, Application no. 68453/13, 23 February, 2016

65. The Court further explained in *Vallianatos* that there can be no basis for drawing a distinction between stable same-sex couples who live together and those who – for professional and social reasons – do not, since the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8 (...).
80. (...) the present case concerns compliance with Article 14 in conjunction with Article 8 of the Convention, with the result that immigration control measures, which may be found to be compatible with Article 8 § 2, including the legitimate aim requirement, may nevertheless amount to unjustified discrimination in breach of Article 14 read in conjunction with Article 8. Indeed, it is the Court's well-established case-law that although Article 8 does not include a right to settle in a particular country or a right to obtain a residence permit, the State must nevertheless exercise its immigration policies in a manner which is compatible with a foreign national's human rights, in particular the right to respect for his or her private or family life and the right not to be subject to discrimination (...)
84. Instead, the relevant provisions of the Aliens Act provided for a blanket exclusion of persons living in a same-sex relationship from the possibility of obtaining family reunification, which cannot be considered compatible with the standards under the Convention (...). Indeed, as already noted above, a difference in treatment based solely or decisively on considerations regarding the applicant's sexual orientation would amount to a distinction which is not acceptable under the Convention (...).

The Court has refused to acknowledge a marriage of convenience as 'family' protected by the right to family life (*Concetta Schembri v. Malta*). However, marriage after having moved from the country of origin should in principle be protected under the right to family life and those couples should not be discriminated against in comparison to pre-flight couples (*Hode and Abdi v. the United Kingdom*).

Concetta Schembri v. Malta, ECtHR, Application no. 66297/13, 19 September 2017.

52. The Court considers that while nowadays cohabitation might not be a defining criterion to establish the stability of a long-lasting relationship (see the case-law quoted in paragraph 47 above), in the present case it certainly is a factor which could help rebut other indications which raise doubts about the sincerity of the applicant's marriage with S. (see paragraph 7 above). While the Court can accept that his illegal status is what caused S. to move back to Pakistan, substantiation concerning a consistent cohabitation of the applicant and S. at least in connection with the period antecedent to the return to Pakistan, would have been welcomed in a case such as the present one. The Court also notes that at no stage have the applicant's submissions referred to her future plans with S. or to any special bond or similar which she shared with S.
53. In light of the above, the Court considers that it does not appear from the material produced before it that the applicant and S. genuinely wished to cohabit and to lead a normal family life (see, conversely, *Abdulaziz, Cabales and Balkandali*, cited above, § 63 in fine). It follows that it cannot be said that the domestic courts' conclusions are unreasonable, much less arbitrary. In the circumstances, the Court must thus confirm the decision of the domestic courts that the applicant and S.'s marriage was not genuine and that there was not a committed relationship which was sufficient to attract the application of Article 8.

Hode and Abdi v. the United Kingdom, ECtHR, Application no. 22341/09, 6 November 2012.

50. The Court notes that the requirement to demonstrate an “analogous situation” does not require that the comparator groups be identical. Rather, the applicants must demonstrate that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently (*Clift v. the United Kingdom*, cited above, § 66). In the present case, the applicants are complaining that at the relevant time the Immigration Rules did not permit refugees to be joined in the United Kingdom by spouses where the marriage took place after the refugee had left the country of permanent residence. The Court therefore considers that refugees who married before leaving their country of permanent residence were in an analogous position as they were also in receipt of a grant of refugee status and a limited period of leave to remain in the United Kingdom. In fact, the only relevant difference was the time at which the marriage took place. Moreover, as students and workers, whose spouses were entitled to join them, were usually granted a limited period of leave to remain in the United Kingdom, the Court considers that they too were in an analogous position to the applicants for the purpose of Article 14 of the Convention.
55. Furthermore, the Court sees no justification for treating refugees who married post-flight differently from those who married pre-flight. The Court accepts that in permitting refugees to be joined by pre-flight spouses, the United Kingdom was honouring its international obligations. However, where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the State’s international obligation will not itself justify the difference in treatment.
56. The Court therefore finds that there has been a violation of Article 14 of the Convention read together with Article 8. It notes, however, that the situation giving rise to the breach no longer exists as the Immigration Rules have subsequently been amended (see paragraphs 13, 17 and 74, above).

The protection furnished by article 8 ECHR also extends to the relationship between a child and the biological parent if the child is born out of a marriage or to a co-habiting couple (*Onur v. the United Kingdom*). Where a child’s parents are married or cohabiting, this family relationship will continue to exist even where, due to parental separation, the child ceases to live with one of the parents (*Ciliz v. the Netherlands*).

Onur v. United Kingdom ECtHR, Application no. 27319/07, 17 February, 2009

43. ... children born either to a married couple or to a co-habiting couple are ipso jure part of that family from the moment of birth and that family life exists between the children and their parents (...)

Ciliz v. the Netherlands, ECtHR, Application no. 29192/95, 11 July 2000

59. ... there can be no doubt that a bond amounting to family life ... exists between the parents and the child born from their marriage-based relationship, as was the case in the present application Such natural family relationship is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents ... The notion ‘family life’ is not confined solely to marriage-based relationships and may encompass other de facto family ties where parties are living together outside ‘marriage’.

Kroon and others v The Netherlands, ECtHR, Application no. 18535/91, 27 October 1994

30. (...) In any case, the Court recalls that the notion of “family life” in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto “family ties” where parties are living together outside marriage Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto “family ties”; ...

Generally, the relationship between the adopted child and the adoptive parent is protected by article 8 ECHR in the same manner as the relationship between a child and a biological parent (*Kurochkin v. Ukraine*).

Where a child’s parents have never been married or cohabiting, other factors may serve to demonstrate that the child’s relationship with the parent with whom the child does not live, amounts to a family relationship. These factors will include the nature and duration of the parents’ relationship pri-

or to the birth of the child, and in particular whether they had planned to have a child, contributions made to the child's care and upbringing, and the quality and regularity of contact. In a case concerning migration, the European Court held that for adult parents and adult children, an additional element of dependence is normally required to give rise to the protection of the right to a family life.²

In the case where there are neither biological ties nor legally recognized parental relationship, the Court can still recognize a right to family life (eg. foster care). It will depend on the personal relationships between the adult and the child, on the role of the adult vis-à-vis the child and the time spent together (*Moretti and Benedetti v. Italy*). In the case of adoption when there is no legal recognition of foreign judicial decision acting the adoption, the Court recognizes de facto family ties (*Wagner and J.M.W.L. v. Luxembourg*). However, when there has been no long-term relationship and there is uncertainty regarding its legal status, the Court considers that there are no de facto family relationships (*Paradiso and Campanelli v. Italy*). Finally, legal tutorship is not enough to amount to family life (*Lazoriva v. Ukraine*).

Moretti and Benedetti v. Italy, ECtHR, Application no. 16318/07, 27 April 2010

48. The Court will thus examine the de facto relationship such as the common life of both applicants and A. in the absence of any recognised legal parental relationship between them. (...). It will examine the effectivity of the relationship between the applicants and A. Indeed, the Court estimates that in de facto relationships, the determination of the relationship's family character must take into account a number of elements such as, the duration of cohabitation, the quality of the relationships and the role of the adult vis à vis the child.

Wagner and J.M.W.L. v. Luxembourg, ECtHR, Application no. 76240/01, 28 June 2007

117. The Court reiterates that "[b]y guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family" (...). In the present case, the applicant has acted as the minor child's mother in every respect since 1996, so that "family ties" exist "de facto" between them (...). The Court further observes that the Government do not dispute that a family tie has been established between the two applicants. It follows that Article 8 is applicable.

Paradiso and Campanelli v. Italy, ECtHR, Application no. 25358/12, 24 January 2017

151. It is therefore necessary, in the instant case, to consider the quality of the ties, the role played by the applicants vis-à-vis the child and the duration of the cohabitation between them and the child.

The totality of social ties can constitute part of the concept of **private life**. The right to respect for private life under Article 8 ECHR extends to protection of personal and social relationships. This has been repeatedly interpreted by the Court to cover the ties between settled migrants and the community within which they are living. Indeed, the Court establishes that close ties that generally do not fall under the concept of family life, may fall under the broader concept of private life which protects the development of relationships with other human beings and the outside world. This wider interpretation of the Court also protects the right to private life of adults and children not tied legally or biologically but who develop an emotional bond and a genuine intention of fulfilling that role.

Osman v. Denmark, ECtHR, Application no. 38058/09, 14 June, 2011

55. (...) The Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted "family life". Furthermore, Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (...).

² The dependency must be a strong one: *A.W. Khan v. United Kingdom*, ECtHR, Application No. 47486/06, Judgment of 12 January 2010, para. 32; *Osman v. Denmark*, ECtHR, Application no. 38058/09, 14 June 2011, para. 55.

³ Unofficial translation by the ICJ

M.P.E.V. and others v. Switzerland, ECtHR, Application no. 3910/13, 8 July, 2014

31. The Court has previously found that the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties (...). However, family life must include the relationship arising from a lawful and genuine marriage (...). Furthermore, it follows from the concept of family on which Article 8 is based that a child born of a marital union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" which subsequent events cannot break, save in exceptional circumstances (...), until the child reaches adulthood. The Court has further held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence (...).
32. The Court also reiterates that, as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8 (...).
57. With regard to the first applicant's relationship with his young daughter, the fourth applicant, the Court observes that he raised her with the second applicant and continued to involve himself in the child's upbringing following their separation, as is reflected in the extensive access rights accorded to him. The Court further observes that the Federal Administrative Court considered that, given her integration into Swiss society, lack of knowledge about her country of origin, where she never returned after having entered Switzerland at the age of two, and the fact that she hardly spoke Spanish, it would amount to an "uprooting of excessive rigidity" to send her back to Ecuador (...). Under these circumstances, it can be expected that personal contact between the two applicants would, at the least, be drastically diminished if the first applicant were forced to return to Ecuador. The Court puts emphasis on the fact that the Federal Administrative Court, when considering the first applicant's case, did not make any reference to the child's best interests, because it did not consider that the relationship between them fell under the protection of "family life" within the meaning of Article 8 of the Convention. Under these circumstances, the Court is not convinced that sufficient weight was attached to the child's best interests. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, in accordance with which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (...).

Lazoriva v. Ukraine, ECtHR, Application no. 6878/14, 17 April 2018

61. In accordance with the Court's established case-law, the existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties (...). Close relationships short of "family life" would generally fall within the scope of "private life" (...).
66. However, the applicant's interest in maintaining and developing her relationship or link with her nephew arguably falls within the scope of "private life", which is a broader concept and encompasses, inter alia, the right to establish and develop relationships with other human beings (...).

The above jurisprudence falls in line with the [Council of Europe's Recommendation 1686 \(2004\)](#) on human mobility and the right to family reunion, which urges European states to apply a broad interpretation of "family", where possible and appropriate, and extend its meaning particularly to members of the natural family, non-married couples, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents.

European Social Charter

European Social Charter (revised)

Article 19.6 obligation to "facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory"

Art 19.6 should be interpreted to mean "at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker." (Interpretation by the [CJEU Opinion of Advocate General Kokott delivered on 8 September 2005 in Case C-540/03 European Parliament v Council of the European Union](#) supported by Federal Republic of Germany and Commission of the European Communities).

ICCPR

The Human Rights Committee has clarified the notion of "family" under Article 23 of the ICCPR, in *Ngambi and Nébol v. France*.

ICCPR: Benjamin Ngambi and Marie-Louise Nébol v. France, HRC, Comm No. 1179/2003, 16 July 2004

6.4 Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect. (...)

CRC

The Committee on the Rights of the Child, in its [*General Comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration*](#), states that the term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom (para 59).

Human Rights Council

Human Rights Council, Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development, UN Doc A/HRC/31/37 (2016) paras 24-27, 34-36

A. Definition of the family

24. There is no definition of the family under international human rights law. The Human Rights Committee notes that the concept of family may differ in some respects from State to State, and even from region to region within a State, and that is therefore not possible to give the concept a standard definition. Similarly, the Committee on Economic, Social and Cultural Rights has stated that the concept of family must be understood in a wide sense and in accordance with appropriate local usage. Other international human rights mechanisms have expressed similar views. (...)

26. States retain some leeway in defining the concept of family in national legislation, taking into consideration the various legal systems, religions, customs or traditions within their society, including indigenous and minority cultures. However, international standards set forth at least two minimum conditions for the recognition and protection of families at the national level: first, respect for the principle of equality and non-discrimination, including the equal treatment of women; and second, the effective guarantee of the best interest of the child. Given those parameters, human rights mechanisms have found that some forms of relationships, such as polygamy and child marriage, are contrary to international human rights standards and should be prohibited.

27. In addition to the above principles, international mechanisms have called upon States to protect specific forms of the family in view of the vulnerability of their members in relation to the enjoyment of human rights. For instance, attention has been drawn to the discrimination suffered by women and children in de facto unions and there have been calls for the regulation of those unions in domestic law. In similar terms, the Committee on Economic, Social and Cultural Rights has called upon States to legally recognize same-sex couples.

(...)C. Right to privacy and family life (...)

35. The right to family life is reflected in the general preference for preserving the family unit and not separating its members, particularly dependent members. The Convention on the Rights of the Child affirms the right of children not to be separated from their parents against their will, except where necessary for the best interest of the child, such as in cases of abuse or neglect (art. 9(1)), following a judicial determination to that effect. Children deprived of their family environment should be provided with alternative care (art. 20) and, whenever possible, have contact with their parents (art. 9(3)). According to the Convention on the Rights of Persons with Disabilities (art. 23(4)), in no case shall a child be separated from parents on the

basis of a disability of either the child or one or both of the parents.

36. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families requires States to ensure the protection of the unity of the families of migrant workers, including by facilitating the reunification of documented migrants with their spouses and dependent children (art. 44). The Convention on the Rights of the Child urges States parties to deal with such requests in a positive, humane and expeditious manner (art. 10).

EU law

The scope of application of the Family Reunification Directive is considerably narrower than the definition of family as it has evolved in international human rights law, although the preamble refers to Article 8 ECHR and states that the Directive should be applied "without discrimination on the basis of [...] sexual orientation" (Preamble, paras. 2 and 5). In order to comply with their international human rights law obligations, EU Member States would need to interpret and apply the provisions of the Directive in accordance with the broader meaning of family life established by the European Court of Human Rights, considered above.

Family Reunification Directive, Council Directive 2003/86/EC of 22 September 2003

Article 4 Family members

1. The Member States shall authorise the entry and residence... of the following family members:
 - (a) the sponsor's spouse
 - (b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;
 - (c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorize the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;
 - (d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement. The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.
 2. The Member States may, by law or regulation, authorize the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:
 - (a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;
 - (b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.
- (...)

Article 10

1. Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees.
2. The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.
3. If the refugee is an unaccompanied minor, the Member States:

- (a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);
- (b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

Common European Asylum System (CEAS)

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

Article 2 (j)

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

- the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried

Dublin III. Regulation, 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)

Article 2 (g)

(g) 'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:

- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, — when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,
- when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present

III. The right to family reunification

States have positive obligations to ensure migrants' effective enjoyment of their right to respect for family life. The best interest of the child must be the primary consideration by all judicial and administrative authorities in any decision related to the child's right to respect for their family life. This obligation will also be applicable when an adult is a subject of a case which might engage the best interests of a child.

Other key principles for family reunification of children include non-discrimination, the right to be heard, the right to a guardian, to be represented by a lawyer, their economic, social and cultural rights and the need for individualized assessments and treatment of each case.⁴

In terms of an application to enter a country for the purposes of family reunification, Article 10.1 *Convention on the Rights of the Child* (see above) spells out the State's obligations. States must always respect the principle of proportionality, best interests of the child principle and the principle of non-discrimination.

In determining proportionality, the ECtHR considers whether there exist insurmountable obstacles to exercise the right under Article 8 in the country of origin of the applicant or family member. The EU Directive on Family Reunification goes further by requiring Member States, in deciding family reunification application, to consider factors such as the nature and solidity of an individual's familial ties, the duration of residence in the host State, and the existence of family, cultural and social ties in the country of origin.⁵

A number of international instruments emphasize the importance of family reunification and encourage States to ensure family reunification in order to fulfill the right to family life.

International law

HRC – Human Rights Committee

In *Ngambi and Nébol v. France*, the Human Rights Committee affirmed that article 23 of the ICCPR on the protection of family includes the interest in family reunification.

HRC, Ngambi and Nébol v. France (2004)

6.4 Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned.

The Committee has further specified that "it cannot be expected of a refugee to return to his country of origin to enjoy his right to family life" (*El Dernawi v. Lybia*), and that a couple must not be made to be living in separated countries with no option to live somewhere as a couple (*Gonzalez v. Guyana*).

UNHCR

The Final Act of the Conference of Plenipotentiaries, which adopted the Geneva Refugee Convention, affirmed that: "the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee."

Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR, UN Doc. HCR/GIP/09/08, 22 December 2009

For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/ or where parents or family members may be implicated or have been involved in their persecution.

⁴ See also cfr. Module V children's rights, sections II-III (General principles on children's rights and Access to fair and child sensitive procedures) and Module III on Economic, social and cultural rights.

⁵ Family Reunification Directive, Article 17.

UNHCR, Executive Committee Conclusion No. 107 (LVIII) on Children at Risk, 2007

Paragraph (h)(iii)

Facilitate children's enjoyment of family unity through putting in place procedures to prevent separation, and in respect of unaccompanied and separated children, facilitate tracing and family reunification with their family members in accordance with the respective child's best interests, with due respect for the national legislation of respective States

UNHCR Executive Committee, Conclusion No. 15 (XXX) on Refugees without as Asylum Country, 1979

Paragraph (e)

In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;

UNHCR Executive Committee, Conclusion No. 24 (XXXII) on Family Reunification, 1981

Paragraph 8

In order to promote the rapid integration of refugee families in the country of settlement, joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee.

UNGA – United Nations General Assembly

The New York Declaration for Refugees and Migrants, unanimously adopted by all UN Member States, reflects the first international expression of political will to establish a comprehensive approach to migration and enhanced global cooperation. While the political commitments of the Declaration are not legally binding, it set in motion the groundwork for further action to develop the inter-governmentally negotiated Global Compact on migration.

New York Declaration for Refugees and Migrants, UNGA Resolution 71/1 of 19 September 2016

57. We will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities. We will pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration-related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.

(...)79. We will consider the expansion of existing humanitarian admission programmes, possible temporary evacuation programmes, including evacuation for medical reasons, flexible arrangements to assist family reunification, private sponsorship for individual refugees and opportunities for labour mobility for refugees, including through private sector partnerships, and for education, such as scholarships and student visas.

164 UN Member States⁶ further adopted the Global Compact and committed to concrete measures:

UN Global Compact for Safe, Orderly and Regular Migration, A/CONF.231/3, 30 July 2018

21. (i) Facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realization of the right to family life and the best interests of the child, including by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services;

⁶ All UN Member States, excluding among others Italy, Hungary, Austria, Poland, Slovakia and the United States, agreed to the Global Compact.

In [Recommendation No. R \(99\) 23](#) of 15 December 1999, the **Committee of Ministers of the Council of Europe** recommended that applications for family reunion be treated "in a positive, humane and expeditious manner" and stipulated that "[w]here applications for family reunion by such persons are rejected, independent and impartial review of such decisions should be available."⁷

Article 8 ECHR

There is a positive obligation on the State of destination of a migrant to facilitate family reunification on its territory where there is an insurmountable objective obstacle preventing the migrant already with its jurisdiction from realising his or her family life rights in any other place.

Sen v. the Netherlands, ECtHR, Application No. 31465/96, 21 December 2001, paras. 40-4.

In this case, the European Court of Human Rights found that an "insurmountable obstacle" to the enjoyment of a family life outside of the country of residence existed because the mother seeking family reunification with her child who had been left in the country of origin also had a second child in the country of destination who had grown up there. In this case, the Court found that the reunification in the country of destination would have been the most adequate solution to develop a family life, considering the difficulties that a resettlement of the whole family in the country of origin would have caused to the second child.

Conditions for family reunification imposed by a state must be reasonable and must not violate the right to respect for family life. The Court did not consider unreasonable a requirement that an adult seeking family reunification with her children in their country of origin, "demonstrate that he or she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of the family members with whom reunion is sought." ([Haydarie and Others v. the Netherlands](#), ECtHR admissibility decision 8876/04 of 20 October 2005). In addition, the family reunification procedure must be flexible, effective and prompt ([Tanda-Muzinga v. France](#)).

A rule or practice on family reunification that discriminates on grounds of gender would breach the prohibition of discrimination in connection with the right to family life. ([Abdulaziz, Cabales and Balkandali v. United Kingdom](#), ECtHR, 15/1983/71/107-109, 24 April 1985, paras 74-83)

Tanda-Muzinga v. France, ECtHR, Application no. 2260/10, 10 July 2014

82. Having regard to the foregoing, and notwithstanding the margin of appreciation left to the respondent State in this area, the Court considers that the national authorities did not give due consideration to the applicant's specific situation, and concludes that the decision-making process did not offer the guarantees of flexibility, promptness and effectiveness required in order to secure his right to respect for family life under Article 8 of the Convention. Accordingly, the State has failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other.

In examining whether a State has fulfilled its positive obligation under Article 8 ECHR with regard to family reunification of a parent migrant with a child who is outside of the country, the European Court will have regard to the age of the child concerned, their situation in their country of origin and the extent to which the child is dependent on his or her parents. The best interest of the child should be given crucial weight in the considerations ([El Ghatet v. Switzerland](#)).

Tuquabo-Tekle and Others v. the Netherlands, ECtHR, Application no. 60665/00, 1 December, 2005

50. In the present case the Court notes that the applicants have not alleged that Mehret, who undoubtedly has strong cultural and linguistic links with Eritrea, could no longer be looked after by the relatives who have been doing so ever since her mother left. They have, nevertheless, argued that Mehret's age – rather than making her less dependent on her mother – made it even more pertinent for her to be allowed to join her family in the Netherlands. This was because, in accordance with Eritrean custom, Mehret's grandmother had taken her out of school, and Mehret had also reached an age where she could be married off (...). Although Mrs Tuquabo-Tekle disagreed with the choices made for Mehret, she was unable to do anything about them as long as her daughter was living in Eritrea. The Court agrees with the Government that the applicants' arguments in this context do not, by themselves, warrant the conclusion that the State is under a positive obligation to allow Mehret to reside in the Netherlands. Even so – and bearing in mind that she was, after all, still a minor – the Court accepts in the

⁷ Para 4.

particular circumstances of the present case that Mehret's age at the time the application for family reunion was lodged is not an element which should lead it to assess the case differently from that of Sen.

52. Having regard to the above, the Court finds that the respondent State has failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other. Accordingly, there has been a violation of Article 8 of the Convention.

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, Application No. 13178/03 12 October 2006

In this case the Court examined the obligations of Belgium regarding the family reunification of an unaccompanied five-year-old girl apprehended there with her mother who was in Canada.

(Applying Article 3 ECHR):

58. The Court considers that the measures taken by the Belgian authorities – informing the [mother] of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the [daughter] and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfil the Belgian State's obligation to provide care for the [daughter]. The State had, moreover, had an array of means at its disposal [...].

(Applying Article 8 ECHR):

82. [...] The Court further notes that, far from assisting her reunification with her mother, the authorities' actions in fact hindered it. Having been informed at the outset that the [mother] was in Canada, the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter. The Court considers that that duty became more pressing from 16 October 2002 onwards, that being the date when the Belgian authorities received the fax from the UNHCR contradicting the information they had previously held.
85. Ultimately, since the [daughter] was an unaccompanied foreign minor, the Belgian State was under an obligation to facilitate the family's reunification [...].

Mengesha Kimfe v. Switzerland, ECtHR, Application No. 24404/05, 29 July 2010

In this case, the European Court of Human Rights held that a Swiss asylum programme which assigned refugees to mandatory residence in a particular canton (region) of the country, thereby making very difficult the maintenance of family links between two refugees breached their right to family life under Article 8 ECHR. The desire for equitable distribution of refugees within the country for economic reason did not legitimately override the refugees' right to family life.

El Ghatet v. Switzerland, ECtHR, Application No. 56971/10, 8 November 2016

46. (...) While the best interests of the child cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State (...), the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it (...).
47. (...) In line with the principle of subsidiarity, it is not the Court's task to take the place of the competent authorities in determining the best interests of the child, but to ascertain whether the domestic courts secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests, which must be sufficiently reflected in the reasoning of the domestic courts (...). Domestic courts must put forward specific reasons in light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it (...). Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention (...).

Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence.

Gül v. Switzerland, ECtHR, Application no. 23218/94, 19 February 1996

38. The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, 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 (...). The present case concerns not only family life but also immigration, and the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory (...). Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorize family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered (...).
39. In this case, therefore, the Court's task is to determine to what extent it is true that Ersin's move to Switzerland would be the only way for Mr Gül to develop family life with his son.
42. In view of the length of time Mr and Mrs Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. That possibility is all the more real because Ersin has always lived there and has therefore grown up in the cultural and linguistic environment of his country. On that point the situation is not the same as in the Berrehab case, where the daughter of a Moroccan applicant had been born in the Netherlands and spent all her life there (see the Berrehab judgment previously cited, p. 8, para. 7).
43. Having regard to all these considerations, and while acknowledging that the Gül family's situation is very difficult from the human point of view, the Court finds that Switzerland has not failed to fulfil the obligations arising under Article 8 para. 1 (art. 8-1), and there has therefore been no interference in the applicant's family life within the meaning of that Article (art. 8-1).

The rules of family reunification must be applied in a **non-discriminatory way**. In *Biao v. Denmark*, Denmark breached article 8 and 14 of the Convention by establishing varying family reunification rules for persons with Danish citizenship below and over the age of 28. In practice this rule impacted only citizens of non-Danish origin, which amounted to indirect discrimination on the basis of ethnicity and the State failed to provide any reasonable justification for this difference of treatment.⁸

Biao v. Denmark, ECtHR, Application no. 38590/10, 24 May 2016.

138. In conclusion, having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28 year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.
139. It follows that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 in the present case.

The Committee on the Rights of the Child has affirmed that compliance with the Convention on the Rights of the Child requires that separated and unaccompanied children should not be discriminated on the basis of their immigration status.

CRC, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, 1 September 2005.

b) Non-discrimination (art. 2)

18. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible mispercep-

⁸ On the principle of non-discrimination see also cfr. Module V Children's rights, section II.1. The non-discrimination principle

tions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.

Dependency

In many countries the residence permit of a person who enters a country for the purposes of family reunification is premised on either:

- (a) the existence and validity of the permit, whether for work or international protection reasons, of a primary permit holder, i.e. usually someone who migrated there first, or
- (b) his or her family relationship with a citizen of the country.

In both cases this leads to dependency on the existence of the relationship with that person.

International human rights bodies and mechanisms have recognized the vulnerability of women whose residence permits are dependent on their employment or relationship with a partner. The Committee on the Elimination of Discrimination against Women (CEDAW) has recommended that States adopt regulations which permit a woman migrant worker who is granted a residence permit based on the sponsorship of an employer or a spouse to allow the woman to continue to reside in the country lawfully if she flees the employer or spouse because of their abuse or is fired from employment after complaining of such abuse. The Committee of Ministers of the Council of Europe has similarly recommended that States should consider granting immigrant women who have been/are victims of domestic violence an independent right to residence.

CEDAW General Recommendation No. 26 on women migrant workers, UN Doc. CEDAW/C/2009/WP.1/R (2008)

26. (f) Non-discriminatory residency regulations: when residency permits of women migrant workers are premised on the sponsorship of an employer or spouse, States parties should enact provisions relating to independent residency status. Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or spouse or is fired for complaining about abuse (article 2 (f));

Council of Europe Committee of Ministers Recommendation Rec(2002)5 to Member States on The Protection of Women Against Violence of 30 April 2002 recommended that States:

24. In particular, ensure that all services and legal remedies available for victims of domestic violence are provided to immigrant women upon their request;
59. Consider, where needed, granting immigrant women who have been/are victims of domestic violence an independent right to residence in order to enable them to leave their violent husbands without having to leave the host country.

Committee of Ministers in Recommendation Rec(2002)4 of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification, adopted by the Committee of Ministers of the Council of Europe on 26 March 2002 at the 790th meeting of the Ministers' Deputies

- I. Autonomy of the family member's residence status in relation to that of the principal right holder
 1. After a period of four years of legal residence, adult family members should be granted an autonomous residence permit independent of that of the principal.
 2. In the case of divorce, separation or death of the principal, a family member having been legally resident for at least one year may apply for an autonomous residence permit. Member states will give due consideration to such applications. In their decisions, the best interests of the children concerned shall be a primary consideration.

The right to family reunification where children are involved

The CRC and CMW in their joint General Comment on children in the context of international migration (No. 4 and 23, see below) stress that States should facilitate family reunification procedures in order to complete them in an expeditious manner, in line with the best interests of the child.⁹

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017

32. Under article 10 of the Convention on the Rights of the Child, States parties are to ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents. When the child's relations with his or her parents and/or sibling(s) are interrupted by migration (in both the cases of the parents without the child, or of the child without his or her parents and/or sibling(s)), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.
33. In the case of undocumented children in the context of international migration, States shall develop and implement guidelines, taking particular care that time limits, discretionary powers, and/or lack of transparency in administration procedures should not hinder the child's right to family reunification.
34. In the case of unaccompanied or separated children, including children separated from their parents due to the enforcement of immigration laws, such as the parents' detention, efforts to find sustainable, rights-based solutions for them should be initiated and implemented without delay, including the possibility of family reunification. If the child has family in the country of destination, the country of origin or a third country, child protection and welfare authorities in countries of transit or destination should contact family members as soon as possible. The decision as to whether a child should be reunited with his or her family in the country of origin, transit and/or destination should be based on a robust assessment in which the child's best interests are upheld as a primary consideration and family reunification is taken into consideration, and which includes a sustainable reintegration plan where the child is guaranteed to participate in the process.
35. Family reunification in the country of origin should not be pursued where there is a "reasonable risk" that such a return would lead to the violation of the human rights of the child. When family reunification in the country of origin is not in the best interests of the child or not possible due to legal or other obstacles to return, the obligations under article 9 and 10 of the Convention of the Rights of the Child come into effect and should govern the State's decisions on family reunification therein. Measures for parents to reunify with their children and/or regularize their status on the basis of their children's best interests should be put in place. Countries should facilitate family reunification procedures in order to complete them in an expeditious manner, in line with the best interests of the child. It is recommended that States apply best interest determination procedures in finalizing family reunification.
36. When a country of destination refuses family reunification to the child and/or to his/her family, it should provide detailed information to the child, in a child-friendly and age-appropriate manner, on the reasons for the refusal and on the child's right to appeal.
37. Children that remain in their countries of origin may end up migrating irregularly and unsafely, seeking to be reunited with their parents and/or older siblings in destination countries. States should develop effective and accessible family reunification procedures that allow children to migrate in a regular manner, including children remaining in countries of origin who may migrate irregularly. States are encouraged to develop policies that enable migrants to regularly be accompanied by their families in order to avoid separation. Procedures should seek to facilitate family life and ensure that any restrictions are legitimate, necessary and proportionate. While this duty is primarily for receiving and transit countries, States of origin should also take measures to facilitate family reunification.
38. The Committees are aware that insufficient financial resources often hinder the exercise of the right to family reunification and that the lack of proof of adequate family income can constitute a barrier to reunion procedures. States are encouraged to provide adequate financial support and other social services to those children and their parent(s), siblings and, where applicable, other relatives

⁹ See also *cf.* Module V, section II.2 The best interest of the child.

The enjoyment of rights stipulated in the Convention on the Rights of the Child are not limited to children who are citizens of a State party and must therefore, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.

UN CRC, General Comment no. 6

12. State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention are not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.
18. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.
20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques.
21. Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

According to General Comment No. 6 of the Committee on the Rights of the Child (above), States must first assess whether or not family reunification is possible in the country of origin. This assessment should be carried out following the best interest of the child principle and must not serve to jeopardize the human rights of those being traced. Family reunification in the country of origin is not in the best interests of the child and should not be pursued where there is a "reasonable risk" that such a return would lead to the violation of the human rights of the child. When it is found that family reunification is only possible in the host country, States must proceed to the reunification in a positive, humane and expeditious manner and it should entail no adverse consequences for the applicants and for the members of their family.

UN CRC, General Comment no. 6

80. "(...) tracing is an essential component of any search for a durable solution and should be prioritized except where the act of tracing, or the way in which the tracing is conducted, would be contrary to the best interest of the child or jeopardize fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee." (...)

82. Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations (including those deriving from article 3 of the CAT and articles 6 and 7 of the ICCPR). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.
83. Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, States parties are particularly reminded that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner" and "shall entail no adverse consequences for the applicants and for the members of their family" (art. 10(1)). Countries of origin must respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country" (art. 10(2)).

UNHCR Executive Committee, Conclusion No. 24

7. "(...) every effort should be made to trace the parents or other close relatives of unaccompanied minors before their settlement (...)"

Concluding Observations on Denmark, CCPR, UN Doc. CCPR/CO/70/DNK, 15 November 2000

The Committee notes that, under the Aliens Act, article 40c, the Immigration Authorities may require DNA testing of an applicant and the persons with whom the applicant claims family ties on which a residence permit is to be based. DNA testing may have important implications for the right of privacy under article 17 of the Covenant. Denmark should ensure that such testing is used only when necessary and appropriate to the determination of the family ties on which a residence permit is based (.).

Concluding Observations on France, CCPR, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008

The Committee is concerned about the length of family reunification procedures for recognized refugees. It also notes that the procedure allowing the use of DNA testing as a way to establish filiation for the purpose of family reunification, introduced by article 13 of Act No. 2007/1631 of 20 November 2007, may pose problems regarding its compatibility with articles 17 and 23 of the Covenant, despite its optional nature and the procedural guarantees provided by the law. (Articles 17 and 23)

EU law

The Charter of Fundamental Rights of the European Union (EUCFR)

When implementing Union law, Member States have to respect the EUCFR in all its aspects including article 7 guaranteeing the respect for family life and article 21 on non-discrimination. Consequently, all instruments of European asylum law have to be interpreted in the light and in respect with the Charter. (see above)

Family Reunification Directive

Family reunification of third country nationals in the EU is governed by the Family Reunification Directive of 2003. Its provisions have been further clarified by the CJEU case-law and in 2014 by the Interpretative guidelines issued as Communication by the European Commission.¹⁰

¹⁰ Commission to the European Parliament and the Council, [Communication on guidance for application of Directive 2003/86/EC on the right to family reunification](#), COM/2014/0210 (2014).

The CJEU has clarified that the Directive requires Member States, in specific cases, to authorize family reunification of certain members of the sponsor's family, without being left a margin of appreciation (*EP v Council of the European Union* below).

CJEU further clarified that the provisions of the Directive on Family Reunification require that States ensure that family reunification is the general rule (para 43 of *Chakroun* case below). The margin of appreciation in the Directive should "be interpreted strictly". The interpretation of the provisions of the Directive should not deprive them of their effectiveness.

The CJEU also highlighted that states must "examine applications in interest of children and with a view to promoting family life" (*O., S. & L. below*).

Recently, the CJEU recognized that Member States may authorize the reunification of other members of a refugee's family, not referred to in Article 4 of the Family Reunification Directive 2003/86, if they are dependent on the refugee (*TB v Bevándorlási és Menekültügyi Hivatal*, see extracts below). However, in such cases the individual concerned must be dependent on the refugee. The Court defines dependency according to two criteria:

1. The relative is not in a position to support him/herself at the date of the request for family reunification.
2. The material support must be provided by the refugee or considering the situation the refugee is in the best position to provide this support.

In addition, Member States can add any other requirement provided that: (1) it respects the Charter of Fundamental Rights of the European Union and the principle of proportionality, (2) and that a case by case analysis is undertaken by the authorities.

EP v Council of the European Union, C-540/03, CJEU, 27 June 2006

[...] Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation (para 60)

[...] as is apparent from Article 17 of the Directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors. (para 99)

Rhimou Chakroun v. Minister van Buitenlandse Zaken, CJEU, C-578/08, 4 March 2010

43. (...) Since authorization of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

64. [...] necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, [...]

O. and S. and L., C-356/11 and C-357/11, CJEU, 6 December 2012

81. It is for the competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned.

82. [...] that faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive. [...]

TB v Bevándorlási és Menekültügyi Hivatal, CJEU, Case C-519/18, 12 December 2019

41. In the second place, it must be stated that the Member States' latitude in implementing Article 10(2) is, however, limited by the condition to which such implementation is made subject by that provision. It is apparent from the wording of Article 10(2) that Member States may

authorise the reunification of other members of a refugee's family, not referred to in Article 4 of Directive 2003/86, if they are dependent on the refugee.

47. According to that case-law, the status of 'dependent' family member of a Union citizen holding a right of residence presupposes that the existence of a situation of real dependence is established. That dependent status is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (...).
51. In that regard, to require the refugee actually to provide, as at the date of the application for family reunification, material support for the member of his or her family in the State of origin or the country whence that family member came could result in the members of a refugee's family who are genuinely dependent on him or her being excluded from the scope of Article 10(2) of Directive 2003/86, merely because the refugee is not, or is no longer, in a position to supply the material support required by them in order to ensure that they are supported in the State of origin or country whence they came. It cannot be precluded that the refugee is unable, or no longer able, to provide such support because of factors beyond his or her control, such as the physical impossibility of supplying the necessary funds or the fear of endangering the safety of the members of his or her family by entering into contact with them.
52. Consequently, a member of a refugee's family must be considered dependent on that refugee, within the meaning of Article 10(2) of Directive 2003/86, where the family member is genuinely dependent in the sense that, first, having regard to his or her financial and social conditions, the family member is not in a position to support himself or herself in his or her State of origin or the country whence he or she came and, secondly, it is ascertained that the family member's material support is actually provided by the refugee, or that, having regard to all the relevant circumstances, such as the degree of relationship of the family member concerned with the refugee, the nature and solidity of the family member's other family relationships and the age and financial situation of his or her other relatives, the refugee appears as the family member most able to provide the material support required.
53. That interpretation is reinforced by Article 17 of Directive 2003/86 which requires applications for family reunification to be examined on a case-by-case basis, according to which, as is apparent from recital 8 of that directive, account must be taken, inter alia, of the specificities related to the sponsor's refugee status (see, to that effect, judgment of 7 November 2018, K and B, C 380/17, EU:C:2018:877, paragraph 53).
67. Consequently, national legislation implementing the option provided for in Article 10(2) must observe both the fundamental rights enshrined in the Charter and the principle of proportionality and must not prevent an application for family reunification from being examined on a case-by-case basis, and that examination must also be carried out having regard to the special situation of refugees.

Although the Directive provides more favorable conditions for refugees, it does not exclude the right to family reunification for beneficiaries of subsidiary protection. The Commission issued [guidelines](#) encouraging States to adopt similar rules for beneficiaries of subsidiary protection as existing for refugees.¹¹ The CJEU also accepted that the Directive is applicable when States decide to include sponsors benefiting from subsidiary protection in their national law.

K. and B. Staatssecretaris van Veiligheid en Justitie, CJEU, C-380/17, 7 November 2018

21. According to that court, the rules of the directive nevertheless apply directly and unconditionally to beneficiaries of subsidiary protection, since the Netherlands legislature chose to apply those rules to such beneficiaries in order to ensure that they are treated in the same way as refugees.

Conditions

The Directive allows Member states to require conditions for family reunification, among others: costs, accommodation requirement, sickness insurance, sufficient resources, pre-integration measures, etc. The CJEU clarified that there always needs to be individual assessment of each case and that the objective of the Directive is to promote family reunification and the effectiveness thereof.

¹¹ European Union, [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](#), COM(2014)210, 3 April 2014, p. 24-25 (hereafter Interpretative Guidelines of the Family Reunification Directive).

Family Reunification Directive

Article 7(1)

'When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

- (a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;
- (b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;
- (c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

The [Interpretative Guidelines of the Family Reunification Directive](#) provide that criteria for the conditions for family reunification adopted may not be discriminatory and must be transparent and clearly specified in national legislation.

The term "without recourse to the social assistance system" has been interpreted in the *Chakroun case*.

C-578/08, Chakroun, 4 March 2010

1. The phrase 'recourse to the social assistance system' in Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid').
2. Directive 2003/86, in particular Article 2(d) thereof, must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c) of Directive 2003/86, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

Integration measures

Family Reunification Directive

Article 7(2) integration measures

Member States may require third country nationals to comply with integration measures, in accordance with national law

European Commission Communication: [Interpretative guidelines of the Family Reunification Directive](#), 3 April 2014

4.5 Integration measures

(...) MSs may impose a requirement on family members to comply with integration measures under Article 7(2), but this may not amount to an absolute condition upon which the right to family reunification is dependent. The nature of the integration measures in Article 7(2) is different from the conditions envisaged in Articles 4(1) and 7(1). First, Article 4(1) — as a stand-still clause only — allows MSs to verify for children over 12 arriving independently of the rest of their families whether they meet a condition for integration before authorising entry and residence. Secondly, under Article 7(1), MSs may require evidence that these requirements are fulfilled or fulfillable, based on a reasonable prognosis. These can therefore be considered as pre-conditions, which MSs may require the sponsor to achieve before authorising entry and residence of family members.

In contrast, Article 7(2) allows MSs to require third-country nationals to comply with integration measures. MSs may require family members to make a certain effort to demonstrate their willingness to integrate, for instance, by requiring participation in language or integration courses, prior to or after arrival. Since these measures are meant to help facilitate the integration process, this also implies that the way in which MSs conceive this possibility cannot be unlimited.

Article 7(2) comes down to the possibility to ask an immigrant to make the necessary efforts to be able to live his/her day-to-day life in the society in which he/she has to integrate him/herself and to the possibility for MS to verify whether this person shows the required willingness to integrate in his/her new environment. The verification of willingness to integrate may take the form of an examination on basic skills deemed necessary for this purpose. This examination should be gender sensitive to take into account the specific situation of some women that might, for instance, have poor level of education. The level of difficulty of the exam, the cost of participating, the accessibility of the teaching material necessary to prepare for such an examination, or the accessibility of the examination itself must not, in fact, be barriers that complicate the achievement of this purpose. **In other words, the integration measures that a MS may require cannot result in a performance obligation that is in fact a measure that limits the possibility of family reunification. The measures must, on the contrary, contribute to the success of family reunification.**

Furthermore, integration measures must be proportionate and applied with the necessary flexibility to ensure that, on a case-by-case basis and in view of specific circumstances, family reunification may be granted even where integration requirements are not met. MSs should therefore provide the effective possibility of an exemption, a deferral or other forms of integration measures in case of certain specific issues or personal circumstances of the immigrant in question.

Specific individual circumstances that may be taken into account are, for instance, cognitive abilities, the vulnerable position of the person in question, special cases of inaccessibility of teaching or testing facilities, or other situations of exceptional hardship. Special attention should also be paid to the fact that in several parts of the world women and girls have less access to education and might have a lower literacy level than men. **Therefore, MSs may not refuse entry and stay on its territory to a family member referred to in Article 4(1) on the sole ground that this family member, while still abroad, did not succeed in the integration examination provided for in the legislation of that MS.**

The Commission considers that MSs should provide the necessary integration measures for family members to learn about their new country of residence and acquire language skills that can facilitate the integration process. Therefore, the Commission considers that language and integration courses should be offered in an accessible way (available in several locations), be free or at least affordable, and tailored to individual needs, including gender specific needs (e.g. childcare facilities). While pre-departure integration measures may help prepare migrants for their new life in the host country by providing information and training before migration takes place, integration measures may often be more effective in the host country.

Waiting period (Article 8 Family Reunification Directive)

The **Interpretative guidelines of the Family Reunification Directive** clarified that there cannot be a general blanket waiting period applied in the same way to all applicants.

C-540/03, EP v Council of the European Union, 27 June 2006

Duration of residence is only one of the factors to be taken into account; [also take] into account, in specific cases, all the relevant factors", (para 99) "while having due regard to the best interests of minor children" (para 101)

Purpose: "to make sure that family reunification will take place in favorable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration" (para 98)

European Commission Communication: Interpretative guidelines of the Family Reunification Directive, 3 April 2014

4.6 Waiting period

(...) The CJEU has stressed that duration of residence in the MS is only one of the factors that the MS must take into account when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.

(...)

Fees

The EC interpretative guidelines clarified that reasonable and proportional administrative fees for family reunification applications are allowed. It also clarified that there is a limited margin of discretion for Member States in regard to the level of the fees, as they need to make sure not to jeopardise the achievement of the objectives and the effectiveness of the Directive. The level of fees should not constitute an obstacle to the exercise of the right to family reunification. The fees should be proportionate in comparison with those for similar national permits.

European Commission Communication: Interpretative guidelines of the Family Reunification Directive, 3 April 2014

3.1. Submission of the application

(...) MSs are allowed to charge reasonable, proportional administrative fees for an application for family reunification and they have a limited margin of discretion in setting these charges, as long as they do not jeopardize the achievement of the objectives and the effectiveness of the Directive [32]. The level at which fees are set must not have either the object or the effect of creating an obstacle to the exercise of the right to family reunification. Fees which have a significant financial impact on third-country nationals who satisfy the conditions laid down by the Directive could prevent them from exercising the rights conferred by the Directive and would therefore be per se excessive and disproportionate [33]. The fees levied on third-country nationals and their family members under Directive 2003/86 could be compared to those levied on own nationals for the issue of similar documents, to evaluate whether the fees for third-country nationals are proportionate, taking into account that these persons are not in identical situations [34]. To promote best interests of the child, the Commission encourages MSs to exempt applications submitted by minors from administrative fees. In case that an entry visa is required in a MS, the issuing conditions of such a visa should be facilitated and the visa should be granted without additional administrative fees.

5.1 Entry, long-stay visas and residence permits

(...) Administrative fees for visas are allowed, but these may not be excessive or disproportionate. They must not have either the object or the effect of creating an obstacle to obtaining the rights conferred by the Directive and, therefore, depriving it of its effectiveness

6.1.2. Absence of official documentary evidence

(...) The Directive does not prevent MSs from charging refugees or applicants for DNA tests or other investigations. However, fees cannot be excessive or disproportionate to the point that they have the effect of creating an obstacle to obtaining the rights conferred by the Directive and, therefore, deprive it of its effectiveness [74]. In setting potential fees, the Commission considers that MSs should take into account the particular situation of refugees and encourages MSs to bear the costs of a DNA test, especially if it is imposed upon the refugee or his/her family members.

Advocate General's Opinion in Case C-153/14, K and A:

Advocate General Kokott Opinion states that family reunification, in the case of married couples who are third-country nationals, may in principle be made contingent on the spouse, who is intending to join the family, passing an examination that tests his or her knowledge of the requested receiving country and of its language. States must permit exemptions from the examination to be granted in individual cases, and any examination fees must not be so high as to create an obstacle to the exercise of the right to family reunification. The AG considered that the Netherlands legislation is, however, disproportionate and incompatible with the Directive if the civic integration examination requirement applies even where that requirement is unreasonable for the

person intending to join his family, taking into account his individual circumstances, or where, on account of the special circumstances of an individual case, there are grounds on which family reunification should be granted notwithstanding the failure to pass the examination. According to Advocate General Kokott, the Directive also precludes national provisions which attach fees to a civic integration examination such as that at issue here, where those fees and the charging of them are liable to prevent the person intending to join his family from exercising the right to family reunification.

It was confirmed in the final judgement of the CJEU: **C-153/14 K and A**:

The first subparagraph of Article 7(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as meaning that Member States may require third country nationals to pass a civic integration examination, such as the one at issue in the main proceedings, which consists in an assessment of basic knowledge both of the language of the Member State concerned and of its society and which entails the payment of various costs, before authorising that national's entry into and residence in the territory of the Member State for the purposes of family reunification, provided that the conditions of application of such a requirement do not make it impossible or excessively difficult to exercise the right to family reunification. In circumstances such as those of the cases in the main proceedings, in so far as they do not allow regard to be had to special circumstances objectively forming an obstacle to the applicants passing the examination and in so far as they set the fees relating to such an examination at too high a level, those conditions make the exercise of the right to family reunification impossible or excessively difficult.

Length of procedures

(Article 5(4) of the Family Reunification Directive)

As a general rule, a standard application under normal workload circumstances should be processed promptly without unnecessary delay. In situations of exceptional workload that exceeds the administrative capacity or when the application necessitates further examination, the maximum time limit of nine months may be justified (9 months from the date of first submitted, not the moment of notification of receipt of the application). The extension beyond 9 months can only be justified "in exceptional circumstances linked to the complexity of the examination of [a specific] application" (Article 5(4) second subparagraph). Derogation must be interpreted strictly and on a case-by-case basis. Member States must justify this extension.

European Commission Communication: **Interpretative guidelines of the Family Reunification Directive**, 3 April 2014

3.3. Length of procedures Article 5(4) imposes an obligation on MSs to give a written notification of the decision on an application as soon as possible. Recital 13 specifies that the procedure for examination of applications should be effective and manageable, taking account of the normal workload of the MSs' administrations.

Therefore, as a general rule, a standard application under normal workload circumstances should be processed promptly without unnecessary delay. If the workload exceptionally exceeds administrative capacity or if the application needs further examination, the maximum time limit of nine months may be justified. The nine-month period starts from the date on which the application is first submitted, not the moment of notification of receipt of the application by the MS.

The exception provided for in Article 5(4) second subparagraph of an extension beyond the nine-month deadline is only justified in exceptional circumstances linked to the complexity of the examination of a specific application. This derogation should be interpreted strictly and on a case-by-case basis. A MS administration, which wants to make use of this possibility, must justify such an extension by demonstrating that the exceptional complexity of a particular case amounts to exceptional circumstances. Administrative capacity issues cannot justify an exceptional extension and any extension should be kept to the strict minimum necessary to reach a decision. Exceptional circumstances linked to the complexity of a particular case could be, for instance, the need to assess the family relationship within the context of multiple family units, a severe crisis in the country of origin impeding access to administrative records, difficulties in organizing hearings of family members in the country of origin due to the security situation, or difficult access to diplomatic missions, or determining the right to legal custody if the parents are separated.

Article 5(4) states that the decision must be notified in writing and that if it is negative, legal and factual reasons should be given to allow the applicant to effectively exercise the right to mount a legal challenge.

CEAS

The Dublin Regulation

Article 8 of the [Dublin Regulation](#) states that if an unaccompanied minor arrives in an EU Member State, and already has family members legally present in another EU country, that country should be responsible for her or his asylum application, so family reunification should be facilitated. The same applies for applicants other than unaccompanied minors when their family members have already been granted international protection in another EU Member State (Article 9) or when family members' application for international protection is under review (Article 10).

Qualification Directive

The [Qualification Directive](#) provides for family unity either after carrying out a procedure on the merits on the assumption that the person does not individually qualify for such protection.¹²

Qualification Directive, 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)

Article 23 Maintaining family unity

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.
3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection.
4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

Reception Conditions Directive

The [recast Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection](#) (hereafter Reception Conditions Directive) takes into account that there are special needs of families and that the unity of families should be an essential goal. The Directive contains provisions on tracing of family members of unaccompanied minors.¹³ Article 23 highlights that the best interest principle should be a primary consideration and that member states shall in particular take due account family reunification possibilities (article 23.2.a).

The Directive requires that Member States must take appropriate measures to maintain family unity as far as possible regarding accommodation of families (article 12, 18.5).

Specific considerations for sexual and gender-based violence victims

In the context of migration, CEDAW recognises victims of gender-based violence, which in its interpretation includes sexual forms of violence, as warranting international protection both in law and in practice.

¹² Brandl U., in *Reforming the Common European Asylum System: The New European Refugee Law* edited by Chetail, De Bruycker, Maiani (2016) vol. 39, p. 157.

¹³ Brandl U., in *Reforming the Common European Asylum System: The New European Refugee Law* edited by Chetail, De Bruycker, Maiani (2016) vol. 39, p. 155.

CEDAW, General Recommendation no. 32 on gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32 (2014)

15. [...] The Committee notes that violence against women that is a prohibited form of discrimination against women is one of the major forms of persecution experienced by women in the context of refugee status and asylum. Such violence, just as other gender-related forms of persecution, may breach specific provisions of the Convention. Such forms are recognized as legitimate grounds for international protection in law and in practice. They may include the threat of female genital mutilation, forced/early marriage, threat of violence and/or so-called "honour crimes", trafficking in women, acid attacks, rape and other forms of sexual assault, serious forms of domestic violence, the imposition of the death penalty or other physical punishments existing in discriminatory justice systems, forced sterilization, political or religious persecution for holding feminist or other views and the persecutory consequences of failing to conform to gender-prescribed social norms and mores or for claiming their rights under the Convention.

Some international authorities have stressed the need to better inform refugee and migrant victims of SGBV on the family reunification procedure and its implications for their right to legal protection owing to their difficult circumstances. They have indicated that family reunification should be supported and that legal assistance should be available and accessible to this group of refugees and migrants to address SGBV-related protection risks.

CoE Resolution 2159 (2017) on Protecting refugee women and girls from gender-based violence, 26 April 2017

In the light of these considerations, the Assembly calls on Council of Europe member and observer States to take the following concrete measures to address gaps in protection and mitigate risks:

5.4 with regard to the overall management of cases of gender-based violence and refugee policies:

5.4.3. support the family reunification;

UNHCR, UNFPA, Women's Refugee Commission, INITIAL ASSESSMENT REPORT: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis (2019), p. 16.

"(...) Ensure legal assistance is available and accessible to refugees and migrants to address SGBV-related protection risks. This should be available for all countries, and should include the provision of information on all legal protection processes, such as family reunification."

UNICEF, Preventing and Responding to Violence Against Children and Adolescents Theory of Change (2017), p. 49.

Humanitarian/emergency programming (H/E)

- Implement gender-based violence in emergencies programming.
- Implement family reunification strategies in emergencies

The European Commission and UN treaty bodies have also stressed Member States' obligation to protect SGBV refugee and migrant victims by granting them autonomous residence, which prevents them from remaining attached or vulnerable to potentially difficult family circumstances. This includes the 2014 Interpretative Guidelines of the Family Reunification Directive and concluding observations by CEDAW and the Committee on the Elimination of Racial Discrimination (CERD).

European Commission Communication: Interpretative guidelines of the Family Reunification Directive, 3 April 2014

5.3 Access to autonomous residence permit

[...]Articles 15(3) (second sentence) states that MSs must issue an autonomous residence permit in the event of particularly difficult circumstances to any family members who have entered by virtue of family reunification. MSs are required to lay down provisions in national law for this purpose. The particularly difficult circumstances must have been caused by the family situation or the break-down thereof, not in difficulties with other causes. Examples of particularly difficult circumstances may be, for instance, cases of domestic violence against women and children, cer-

tain cases of forced marriages, risk of female genital mutilation, or cases where the person would be in a particularly difficult family situation if forced to return to the country of origin.

CEDAW, Concluding observations on the seventh periodic report of Belgium, UN Doc. CEDAW/C/BEL/CO/7, (2014)

21. The Committee recommends that the State party

- (c) Amend the Aliens Law to grant temporary residence to migrant women who are victims of domestic violence who are undocumented or are awaiting their residence permits on the basis of family reunification and to ensure that migrant women having residence permits as a result of family reunification, who are victims of domestic violence and want to leave their husbands, are not required to prove that they are employed, self-employed, or have sufficient means of subsistence to receive residence permits on their own. The State party should work to raise awareness among migrant women of the existence of the new legal provisions once they are adopted.

CERD, Concluding observations on the combined seventeenth to nineteenth periodic reports of the Republic of Korea, UN Doc. CERD/C/KOR/CO/17-19 (2019)

20. The Committee recommends that the State party:

- (a) Take measures to protect migrant women from gender-based violence and ensure that those who are victims are provided with adequate legal, medical and psychosocial assistance, regardless of their immigration status, and take measures to ensure that the perpetrators be held accountable;
- (b) Grant undocumented migrants who have been victims of gender-based violence the possibility to reside in the country after their case has been closed, and
- (c) Ensure that migrant women be provided with clear information, in a language they understand, about the services and remedies available to them, as victims of gender-based violence.

IV. Expulsions and the right to maintain a family life

International law

In principle, it is within the competency of individual States to set the terms and conditions in respect of foreign nationals residing or seeking to reside on their territory. However, this power is limited and constrained by obligations of international law and especially international human rights law. Among these limitations is that of protecting the right to family life, which might be threatened by the expulsion of a member of the family.

When determining if an expulsion is contrary to the right to family life, the Human Rights Committee states that justification for the expulsions must be subjected to the principles of necessity and proportionality, taking into account the State's justification for removal and the hardship it would cause to the family and its members. (*Madafferi v. Australia*, 2004 below).

CCPR, Maalem et al. v. Uzbekistan, Comm No. 2371/2014, 17 July 2018

11.2 The Committee reiterates its jurisprudence according to which there may be cases in which a State party's refusal to allow one member of the family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference (...).

Human Rights Committee General Comment 15: The Position of Aliens Under the Covenant, CCPR, 20th Session, 11 April 1986

"(...) in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry and residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise".

CERD, General Recommendation XXX on Discrimination Against Non Citizens, 1 October 2002

28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

CCPR Madafferri v. Australia, Comm. No. 1011/2001, 26 July 2004

9.8 (...) The Committee observes that in cases of imminent deportation the material point in time for assessing this issue must be that of its consideration of the case. It further observes that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.

CCPR, Maalem et al. v. Uzbekistan (2018)

11.3 In the present case, the Committee considers that the decision of the State party to expel the father of five children, some of them minors, coupled with a restriction on re-entry into the country, constitutes "interference" with the family, in particular in circumstances in which, as in the present case, substantial changes in family life would follow.

European Convention on Human Rights

In order to assess whether the expulsion infringes the right to family life (Art 8.1 ECHR), the Court examines if such a family life exists and then make use of article 8.2 to examine if the interference in family life is in line with the Convention. In general, all interferences with the rights enshrined in the ECHR have to respect four criteria:

- a) Be in accordance with the law
- b) Pursue a legitimate aim
- c) Be necessary in democratic society
- d) Be proportionate to the aim pursued

In addition to the Convention, additional protocol n°7 (amended by protocol n°11) sets out specific safeguards for the expulsion of aliens: procedural safeguards, the right of appeal in criminal matters, compensation for wrongful conviction, the right not to be punished or tried twice and the equality between spouses.

Protocol No. 7 to the ECHR as amended by Protocol No. 11, ETS No. 117, 22 November 1984

Article 1

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
 - A. to submit reasons against his expulsion,
 - B. to have his case reviewed, and
 - C. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Respect for private and family life is often invoked as a safeguard against expulsion in cases concerning children who otherwise would have been assessed as not in need of international protection, incl. subsidiary protection.

The expulsion of a non-national family member will amount to an Article 8 violation "only in exceptional circumstances" (ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Application no. 50435/99, 31 January 2006, para. 39 and *Nunez v. Norway*, Application no. 55597/09, 28 June 2011, para. 70).

It is possible to deport or refuse entry to family members provided there are **no insurmountable objective obstacles** to establishing family life elsewhere (*Tuquabo/Tekle and others v. the Netherlands*).

In the case of *Jeunesse v. the Netherlands* (below), the Grand Chamber of the ECtHR found a violation of Article 8 despite the applicant's awareness of her precarious residence status before starting her family life in the Netherlands and despite the absence of insurmountable obstacles for the family to settle in the applicant's country of origin.

In addition, the Court held in *B.A.C. v. Greece* (below) that there was a violation of article 8 where the authorities had failed to put in place adequate procedure allowing the migrant to regularize his situation and improving his precarious status.

Jeunesse v. the Netherlands, ECtHR, Application no. 12738/10, 3 October, 2014

116. ...The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities (para. 116).

117. ...given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents

119. Nothing that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

B.A.C. v. Greece, ECtHR, Application No. 11981/15, 13 October 2016

46. Accordingly, the Court considers that the competent authorities failed, in the circumstances of the case, to fulfill their positive obligation under Article 8 of the Convention, consisting of putting in place an effective and accessible procedure with a view to protecting the right to private life, by means of appropriate regulations aimed at having the applicant's asylum request examined within a reasonable period of time in order to reduce as much as possible his precarious situation (...). There has therefore been a violation of this provision.

When migrants are well settled in the host country and commit criminal offences, the State may have a specific and legitimate purpose to justify the expulsion. However, the expulsion must comply with a proportionality test, which was set in *Boultif v. Switzerland*. In *Üner v. the Netherlands*, the Court adopted the "Boultif Criteria" applying guiding principles to assess the compatibility of such removal with the right to family life under article 8, namely (1) the best interest of the child and (2) the solidity of ties with the host country or the country of destination.

Üner v. the Netherlands, ECtHR, Application no. 46410/99, 18 October 2006

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, *Moustaquim*, cited above; *Beldjoudi v. France*, 26 March 1992, Series A no. 234-A; and *Boultif*, cited above; see also *Amrollahi v. Denmark*, no. [56811/00](#), 11 July 2002; *Yilmaz v. Germany*, no. [52853/99](#), 17 April 2003; and *Keles v. Germany*, no. [32231/02](#), 27 October 2005). In *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:
- the nature and seriousness of the offence committed by the applicant;
 - the length of the applicant's stay in the country from which he or she is to be expelled;
 - the time elapsed since the offence was committed and the applicant's conduct during that period;
 - the nationalities of the various persons concerned;
 - the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
 - whether the spouse knew about the offence at the time when he or she entered into a family relationship;
 - whether there are children of the marriage, and if so, their age; and
 - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
58. The Court would wish to make explicit two criteria which may already be implicit in those identified in *Boultif*:
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
 - the solidity of social, cultural and family ties with the host country and with the country of destination.
59. (...) It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002 III) and can sometimes embrace aspects of an individual's social identity (see *Mikulic v. Croatia*, no. 53176/99, § 53, ECHR 2002-I), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect.

Maslov v. Austria (residence prohibition of long term residence based on non violent criminal offence as juvenile violation of the right to family life), ECtHR, Application no. 1638/03, 23 June, 2008

41. (...) the Court attaches weight to the period of good conduct after the applicant's release (...) During this time he did not commit any further offences. The fact that he was able to resume life in freedom without relapsing into crime during a substantial period mitigates the fear that the applicant may constitute a danger to public order and security (...)
42. As to the solidity of the applicant's social, cultural and family ties in Austria, the Court observes that the applicant has spent the formative years of his childhood and youth there and that all his close family members are living there.
43. As to the applicant's ties with his country of origin, the Government asserted that the appli-

cant speaks Bulgarian while the latter denies this. The Court notes that while it appears likely that the applicant, who lived in Bulgaria until the age of six has some basic knowledge of the spoken language, it seems credible that he does not read or write Cyrillic since he never went to school in Bulgaria. Nor does it appear that he has any close relatives there or that he maintained any other contacts with his country of origin, except for spending holidays there twice.

44. Finally, the Government argued that the residence prohibition was limited in duration. It is true that the duration of a residence prohibition is to be taken into account when assessing its proportionality. However, it is only one factor among others (...).
45. Having regard to the circumstances of the present case, in particular to the nature and severity of the offences, which are to be qualified as non-violent juvenile delinquency, the applicant's good conduct after his release from prison and his lack of ties with his country of origin, a ten years' residence prohibition appears nevertheless disproportionate to the legitimate aim pursued.
46. Consequently, there has been a violation of Article 8 of the Convention.

The obligation of the State to ensure a fair and adversarial proceeding applies in all cases of expulsion, including those justified on grounds that an individual is alleged to pose a **risk to national security**.

Gaspar v. Russia, ECtHR, Application no. 23038/15, 12 June 2018

42. The Court is prepared to accept that the revocation of a residence permit may pursue the legitimate aim of protection of national security. It remains to be ascertained whether the decision making process leading to such a measure of interference afforded due respect to the applicant's interests safeguarded by Article 8 of the Convention (...). To this end, the Court reiterates that where there is an arguable claim that the measure threatens to interfere with an alien's right to respect for his or her private and family life, States must make available to the individual concerned the effective possibility of challenging the measure and having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (...).

Al-Nashif v. Bulgaria, ECtHR, Application no. 50963/99, 20 June 2002

137. The Court considers that in cases of the expulsion of aliens on grounds of national security ... reconciling the interest of preserving sensitive information with the individual's right to an effective remedy is obviously less difficult than in the above-mentioned cases where the system of secret surveillance or secret checks could only function if the individual remained unaware of the measures affecting him. While procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and while any independent authority dealing with an appeal against a deportation decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term "national security"....

Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined.

In the case of settled migrants, particularly compelling reasons are required to justify the expulsion of the individual. The Court stated that while national authorities are generally best placed to assess whether or not individuals should be expelled, in certain instances there may be good reasons justifying the intervention of the Court ([Ndid v. the United Kingdom](#) below) in this regard. When the domestic courts do not appropriately justify their decisions and assess the proportionality of the expulsion measure, so as to prevent the European Court from performing its supervisory function, the result will be a breach of the right to family life ([I.M. v. Switzerland](#), see below).

Ndidi v. The United Kingdom, ECtHR, Application no. 41215/14, 14 September 2017

76. (...) On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.

I.M. v. Switzerland, ECtHR, Application No. 23887/16, 9 April 2019

72. The Court also recalls that the domestic courts must give sufficient reasons for their decisions, in particular in order to enable the Court to carry out the European control entrusted to it (...). Insufficient reasoning by domestic courts, without proper balancing of the interests involved, is contrary to the requirements of Article 8 of the Convention.

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