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FAMILY UNITY: A FUNDAMENTAL RIGHT

A PROJECT INTEGRATED 2018 POLICY PAPER ON
THE RIGHT TO FAMILY REUNIFICATION FOR
BENEFICIARIES OF SUBSIDIARY PROTECTION

EXECUTIVE SUMMARY

Fragmented families – spouses and their children separated by thousands of miles, often for many years – are sadly a very common consequence of forced displacement. For many separated families, their only hope of being able to live together as a family is to obtain the right to family reunification in a country where they can live with dignity, in safety and security.

For many, though not for all, obtaining international protection in an EU member state offers the possibility of family reunification. In Malta, while refugees are granted the right to family reunification, beneficiaries of subsidiary protection are not. This difference in treatment, which, in practice, translates into a blanket ban on family reunification for beneficiaries of subsidiary protection, is justified by reference to the fact that they are excluded from the scope of the Family Reunification Regulations, which transpose the European Union (EU) Directive 2003/86/EC on the right to family reunification into Maltese law.

This paper examines national law and policy on family reunification for beneficiaries of subsidiary protection in the light of European and human rights law and concludes that current law and policy is highly questionable in the light of these standards.

The Directive does not prohibit EU member states (MS) from allowing categories of migrants other than those included within its scope to access family reunification. On the contrary, it explicitly states that MS may adopt more favourable provisions should they wish to do so. In fact, all but three MS do allow some form of family reunification for beneficiaries of subsidiary protection.

Moreover, current law and policy would seem to be out of sync with the requirements of human rights law. The enjoyment of family life is a fundamental human right, guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although human rights law does not grant a right to family reunification, the Convention provides individuals with protection from arbitrary and unlawful interference or discrimination in the exercise of their right to family life. In this context, the European Court of Human Rights (ECtHR) has at times found a breach of human rights in cases where family reunification was denied.

While the ECtHR acknowledges that the state has discretion to refuse applications for family reunification, it also makes clear that this right is not absolute. In examining cases brought before it the ECtHR has held that in cases where reunification is the only way to re-

establish family life, or where it is the most adequate way to do so, failure to accept an application would breach Article 8.

Of course, in Malta, the fundamental problem is not that applications are refused, but that beneficiaries of subsidiary protection cannot even apply for family reunification, unlike other categories of migrants in Malta – e.g. refugees and TCNs with reasonable prospects of obtaining the right of permanent residence. The question therefore arises whether this difference in treatment on the basis of legal status is justifiable in terms of Article 14 of the same Convention, which guarantees the enjoyment of the rights protected by the Convention without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The ECtHR examined a number of cases dealing with discrimination in the enjoyment of the right to family life and, in determining whether there was a breach of the Convention, it considered the following factors:

- (1) Whether or not the individuals concerned enjoy close personal ties that constitute ‘family life’ in terms of Article 8 and whether the facts complained of disturb the exercise of this right.
- (2) Whether the difference in treatment is based on an identifiable characteristic, or “status” as only these are capable of amounting to discrimination within the meaning of Article 14.
- (3) Whether there is a difference in the treatment of persons in analogous, or relevantly similar, situations.
- (4) Whether or not there is an objective and reasonable justification for the different treatment, and whether or not it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Analysing current law and policy on family reunification for beneficiaries of subsidiary protection we concluded that:

The prohibition on family reunification for beneficiaries of subsidiary protection falls within the scope of article 8, because it prevents them in the most absolute way from living with their spouses and children.

Although it could perhaps be argued that the rules on family reunification do not distinguish between individuals on the basis of personal characteristics, but on the basis



Credit: Dorin Zammit Lupi

of their immigration status, it should be noted that the ECtHR, in *Bah v. U.K.* determined that “the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to “other status” for the purposes of Article 14.”

Moreover, although there are differences between the two categories of migrants allowed to apply for family reunification – i.e. refugees and TCNs with reasonable prospects of obtaining the right of permanent residence – and beneficiaries of subsidiary protection, we believe that these categories of migrants can be considered to be in an analogous situation, as any differences, such as they are, do not justify a distinction with regard to their right to family life.

In relation to refugees and beneficiaries of subsidiary protection, although the legal grounds for granting refugee status and subsidiary protection are different, their “protection needs and flight experiences... are very similar.” Beneficiaries of subsidiary protection are also in an analogous situation to TCNs with reasonable prospects of obtaining the right of permanent residence, however there is one major difference, which is particularly relevant for the purposes of family reunification: unlike most other TCNs residing in Malta, beneficiaries of subsidiary protection cannot choose to return home at will to enjoy their right to family life.

Even if we do not question the legitimacy of the aim of the ban on family reunification for beneficiaries of subsidiary protection, which we assume is linked to concerns regarding the potential burden that the new arrivals would place on the relatively limited resources available, we still need to question whether it is necessary and proportionate in the circumstances. The ban, which causes much suffering and distress, is leading to a deterioration in the psychological well-being of beneficiaries of protection. It also has a negative impact on social cohesion, as it severely undermines the individual’s chances of achieving integration. In our view therefore, the ban is disproportionate in the circumstances. Moreover, with regard to the principle of necessity, it is indeed questionable whether such is truly necessary to achieve the intended aim. We believe that it would be possible to do this through other means, such as the introduction of basic income requirements, as with refugees who marry post-recognition.

In the light of the above, it is clear that the current blanket ban on family reunification for beneficiaries of subsidiary protection raises serious human rights concerns.

We therefore urge the Government to review the existing legislative framework and to grant beneficiaries of subsidiary protection the right to be reunited with their families in Malta.

We strongly recommend that they will be granted access to this right under the same conditions as refugees, or, as a minimum, under the same conditions as refugees who married post recognition.

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"Our migrant journeys were the last resort in our pursuit of liberty ... We left our beloved families behind, torn apart... Most of us have been granted subsidiary protection which... falls short of addressing our desperate and unsettled situation, [as we are not] ... permitted to have our beloved family ... with us. Family unity is a fundamental right... Such entitlement would allow us to better integrate in Malta with our beloved ones, and be able to settle and contribute to the Maltese society as active members. This will lead to feelings of security, clarity, and a sense of belonging."

Excerpt from a statement issued by the Eritrean Community in Malta on March 18, 2018

BACKGROUND

On December 6, 2017 the undersigned organisations met with the Parliamentary Secretary for Reforms, Citizenship and Simplification of Administrative Processes, the Hon Julia Farrugia, as part of Project Integrated¹, to discuss a number of issues related to the integration of beneficiaries of protection in Malta. During that meeting we highlighted the obstacles to family unity faced by refugees and other beneficiaries of international protection² in Malta.

From our perspective, the possibility to reunite with family members is an essential component of integration. As we stated during that meeting, from our experience working with beneficiaries of protection we can see that it is humanly impossible for people to integrate and to rebuild their lives in Malta, when their family is miles away, at times even at risk of harm.

Family reunification is not only beneficial for beneficiaries of protection, but also for Malta. In the words of the EU Commission: "Family reunification helps create socio-cultural stability, facilitating the integration of third-country nationals residing in EU Member States, thus promoting economic and social cohesion – a fundamental EU objective."³

Unfortunately, as we highlighted during the meeting, beneficiaries of protection in Malta face several legal and practical obstacles to family unity.

This policy paper, which was drafted as a follow-up to the meeting, focuses exclusively on one such obstacle – the blanket ban on family reunification for beneficiaries of subsidiary protection – outlining our position and making arguments for a change in current policy.

It is not a detailed legal treatise, nor was it intended to be. Possibly more important, it is not intended as a commentary on the obstacles to family reunification for beneficiaries of international protection generally.

Rather, this paper summarises and contextualises the main legal arguments in support of our position, with a view to encouraging a review of current law and policy on family reunification for beneficiaries of subsidiary protection.

Our position is grounded in our firm belief that this absolute ban is not only inhuman, but also constitutes a violation of the right to family life, as protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴, which is an integral part of Maltese law.

THE RIGHT TO FAMILY LIFE IN INTERNATIONAL AND EU LAW

Human rights law recognises the family as the fundamental unit group of society and specifically protects the right to family life.⁵ However, most human rights instruments fall short of guaranteeing a right to family reunification; the only explicit reference to family reunification in international human rights law is found in Article 10 of the Convention on the Rights of the Child⁶, which grants a right to family reunification for children and their parents.

The 1951 Convention makes no reference to refugee's right to family life, however, "the Final Act of the Conference of Plenipotentiaries, at which the 1951 Convention was adopted, refers to "the unity of the family ... [as] an essential right of the refugee" and recommends that Governments "take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained."⁷

Possibly because of the impact of flight on refugee families, and the high incidence of separated families among the refugee population, much has been written about the application of the right to family life in relation to refugees. At the outset, therefore, reference is made to these documents, the content of which will not be reproduced here, as they can serve as guidance in the interpretation of these established legal principles in relation to refugees.⁸ As was highlighted in the introduction to this document, this paper will focus exclusively on the extent to which the current exclusion of beneficiaries of subsidiary protection from family reunification is in conformity with human rights law.

MALTA'S LAW AND POLICY ON FAMILY REUNIFICATION

Family reunification in Malta is regulated by the Family Reunification Regulations⁹, which transpose "the provisions of the European Union Directive 2003/86/EC on the right to family reunification"¹⁰ into Maltese law.

The aim of the Directive, which was adopted in 2003, is to create a common set of rules regulating "the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States." The rules contained therein apply only "where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status" (Article 3(1)).

It does not apply in the following cases: where the sponsor is a citizen of the European Union; where s/he is awaiting a decision on an application for refugee status; where s/he is authorised to reside in the EU on the basis of temporary protection; or, where s/he is authorised to reside in the EU on the basis of a subsidiary form of protection.

This said, the Directive does not prohibit EU MS from allowing these categories of migrants to access family reunification. As with all other EU Directives, the Family Reunification Directive lays down the basic uniform standards that EU MS are obliged to observe in relation to specific groups of TCNs residing in their territory. It does not prevent MS from adopting broader or more favourable provisions on family reunification should they wish to do so, as explicitly stated in Article 3(5) of the Directive.

In fact, according to data collected by UNHCR, most EU Member States grant beneficiaries of subsidiary protection the possibility to unite with family members. Of 23 Member States surveyed by UNHCR, only 3 – Greece, Cyprus and Malta – impose a blanket ban on family reunification for beneficiaries of subsidiary protection. 17 – Belgium, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Luxembourg, Latvia, the Netherlands, Norway, Portugal, Spain, Sweden and the UK – all allow beneficiaries of subsidiary protection to access family reunification under the same conditions as refugees. Switzerland, Germany and Austria too allow family reunification for this category of migrants, albeit under more stringent conditions than refugees.

National law on family reunification lays down the conditions under which the different categories of migrants may access family reunification. Refugees whose family existed at moment when they were granted protection are subject to the least stringent requirements. Refugees whose marriage post-dates their recognition must satisfy more onerous requirements in order to avail themselves of this right. By far the most onerous are the provisions applicable to other TCNs legally resident in Malta.

FAMILY REUNIFICATION FOR BENEFICIARIES OF SUBSIDIARY PROTECTION: A HUMAN RIGHTS PERSPECTIVE

Although it is true that the Directive does not oblige Malta to grant the right of family reunification to beneficiaries of subsidiary protection, we believe that this fact alone cannot justify the current absolute ban on family reunification for this category of migrants. Moreover, in our view, the ban is legally questionable, particularly in the light of recent developments in the field of human rights law, more specifically the case law of the European Court of Human Rights¹².

Family reunification and Article 8

Human rights law does not grant a right to family reunification¹³. However, it is clear that the enjoyment of family life is a fundamental human right, as is the right to be protected from arbitrary and unlawful interference or discrimination in the exercise of this right. Accordingly, the Court has at times found a breach of human rights in cases where family reunification was denied.

With specific reference to refugees, the Court has held that: “family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life ... obtaining such international protection constitutes evidence of the vulnerability of the parties concerned (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 155, ECHR 2012). In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union.”¹⁴

To our knowledge, the Court has never been asked to rule on a case concerning beneficiaries of subsidiary protection. This said, in a number of cases relating to the denial of requests for family reunification more generally the court has enunciated a number of principles which, if applied to the local context, raise questions about the conformity of the ban with the requirements of human rights law.

Over the years the Court has examined a number of cases

where applications for family reunification submitted by third country nationals residing in a state party to the Convention were refused. The cases concerned individual applicants with different forms of legal status; few of these cases concerned refugees or beneficiaries of protection. All of the individuals petitioning the Court had applied for family reunification in terms of existing national legislation, which in principle granted a right to reunification, albeit subject to certain conditions. Moreover, all had had their applications refused as, following an assessment of the individual circumstances of the case, the State in question had deemed that their cases did not meet the specific criteria established by law. Most of the Court’s judgements therefore focus on whether or not the State’s decision to refuse the application in a particular case is justifiable or whether, in the particular circumstances of the case, it constitutes a breach of Article 8.

On account of the specificity of these cases, it is not easy to draw clear analogies/parallels, with the situation of beneficiaries of subsidiary protection in Malta, who are completely excluded from the current legal framework. However, the principles developed and applied by the court when examining these cases give an indication of the circumstances in which the Court would consider a decision to refuse an application for family reunification to run counter to Article 8.

In reaching a decision the Court invariably examines the decision taken by the national authorities and the reasons for it in the light of the particular circumstances of the case, in order to assess its impact on the lives of individuals concerned and to determine whether or not it is in conformity with the state’s obligations under Article 8.

As a starting point the Court acknowledges that the state has a right and a duty to control immigration within its territory. This implies that, in examining and deciding on applications for family reunification, the state is justified in balancing the individual’s need for family reunification with the public interest in ensuring effective immigration control.

However, the Court makes clear that, the state’s discretion to refuse applications is not absolute and that, in certain

circumstances, a refusal to allow family reunification in an individual case could breach Article 8.

An examination of the Court’s case law as it developed over time, would seem to indicate a shift in approach. Whereas in the earlier judgements on this issue the Court would find a violation of Article 8 only where there was no other way to (re)establish family life¹⁵, in later cases¹⁶ it was regarded as sufficient that this was the most adequate way to do so¹⁷.

In determining whether or not this is the case, the Court takes into account various factors including:

- o the circumstances leading to the separation of the family;
- o the family members’ ties in the country of origin as well as in the state party to the Convention;
- o the immigration / residence status of the persons concerned in the state party to the Convention;
- o the existence of insurmountable obstacles preventing the family from living in their country of origin;
- o the best interests of any children involved.¹⁸

In most cases where the Court established that there were insurmountable obstacles or major impediments which prevented the family from enjoying family life in another state, it found a violation of Article 8.

The existence of such obstacles or impediments is a foregone conclusion in the case of beneficiaries of international protection, be they refugees or beneficiaries of subsidiary protection, who by definition cannot return to their country of origin as they face a real risk of persecution or serious harm if they were to be returned there.¹⁹ In fact, it is precisely for this reason that they were granted protection in Malta.

In spite of this, national law only grants recognised refugees the possibility to reunite with their family in Malta; as was highlighted above, beneficiaries of subsidiary protection are automatically and completely denied the right to be reunited with their family in Malta.

Does current ban constitute discrimination in terms of Article 14?

In this context, it is particularly pertinent to examine whether this distinction on the basis of legal status constitutes discrimination on the basis of Article 14 of the Convention, which states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Court has examined a small number of cases where

the right to private and family life of certain categories of people was limited by law, in order to determine whether this discrimination violated Article 14 when taken in conjunction with Article 8 of the Convention. Thus, for example, in *Pajic v. Croatia*²⁰ and *Taddeucci and McCall v. Italy*²¹ the Court examined the ban on family reunification/ granting of a residence permit on grounds of family unity for same sex couples in the light of Articles 8 and 14. In *Biao v. Denmark*²², the Court examined the differences in family reunification rights for different categories of Danish nationals, and in *Hode and Abdi v. UK*²³ the Court examined the restriction of access to family reunification for refugees who married post-recognition, as opposed to the family reunification rules applicable to students and workers.

In all of these cases, when reaching a decision, the Court took into account the following factors:

- (1) Whether the facts underlying the complaint fall within the ambit of Article 8 – i.e. whether or not the individuals concerned enjoy close personal ties that constitute ‘family life’ in terms of Article 8 and whether the facts complained of disturb the exercise of this right.
- (2) Whether the discrimination was linked to one of the characteristics protected by Article 14 – i.e. whether the difference in treatment is based on an identifiable characteristic, or “status” as only these are capable of amounting to discrimination within the meaning of Article 14.
- (3) Whether there is a difference in the treatment of persons in analogous, or relevantly similar, situations.²⁴
- (4) Whether or not there is an objective and reasonable justification for the different treatment, and whether or not it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.²⁵

Applying these considerations to the current ban on family reunification for beneficiaries of SP, we cannot but conclude that it constitutes discrimination in terms of Article 14, for the reasons outlined below.

Applicability of Article 8

It is clear that the prohibition of family reunification for spouses and children of beneficiaries of protection comes within the ambit of Article 8, as it directly affects their home and family life because it prevents them in the most absolute way possible from living with their spouses and children.²⁶

Discrimination in access to FR, which is linked to a protected characteristic

That there is a distinction in the rules regulating the right to family reunification between different categories of

migrants – i.e. refugees and beneficiaries of subsidiary protection on the one hand and between beneficiaries of subsidiary protection and other TCNs “with reasonable prospects of permanent residence” on the other – on the grounds of legal status is equally clear.

The question to be answered is therefore whether this distinction is justifiable in terms of Article 14.

As was highlighted above, Article 14 protects individuals who are in an “analogous or relevantly similar” situation from discrimination on the basis of personal characteristics, “such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

It could perhaps be argued that the rules on family reunification do not distinguish between individuals on the basis of personal characteristics, but on the basis of their immigration status.

While this may be true, it should be noted that, the Court has repeatedly noted that “the list [of characteristics] set out in Article 14 is illustrative and not exhaustive.”²⁷ Moreover, in the case of *Bah v UK*, the Court found that “the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to “other status” for the purposes of Article 14.”²⁸

Difference in the treatment of persons in analogous, or relevantly similar, situations

The next question to be answered is whether or not the other categories of migrants who have a right to family reunification are in a situation that is “analogous or relevantly similar” to that of beneficiaries of SP, for the purposes of this article.

Refugees and beneficiaries of SP

In terms of Article 20(1)(a) of S.L. 420.07, both refugees and beneficiaries of subsidiary protection are entitled to “a residence permit for a period of 3 years, which shall be renewable”.

Beyond this obvious similarity, it is widely acknowledged that, in spite of the fact that the legal grounds for granting refugee status and subsidiary protection are different, their “protection needs and flight experiences... are very similar”. Both forms of protection are granted to individuals who face a real risk of persecution or other serious human rights violations if they were to be returned to their country. In both cases it is clearly impossible for beneficiaries of protection to return to their home country in safety and dignity.

Moreover, in spite of the fact that there is a tendency to consider subsidiary protection as ‘temporary’ or, at any rate, as less permanent than refugee status, in practice it is often anything but. In a world where protracted refugee

crisis have unfortunately become the norm³⁰, beneficiaries of subsidiary protection are just as likely as refugees to be unable to return home in their lifetimes, since the situations which cause them to flee remain unresolved.

This is true of many of those granted subsidiary protection in Malta, a category which includes, among others, sizeable groups of Somalis³¹ and Eritreans³² – both populations that have been in exile for decades. Tragically, it cannot be excluded that beneficiaries of protection who are fleeing more recent conflicts, like those in Syria³³ and Libya³⁴, will face the same fate.

It is also undeniable that certain populations who are granted primarily subsidiary protection by the Maltese authorities, such as Syrians and Eritreans, have a significantly higher rate of refugee recognition in other member states. Thus, for example, according to UNHCR’s analysis, out of 270 decisions concerning Syrians in 2017, 19% were granted refugee status, and 56% subsidiary protection – this is significantly lower than the EU average of 42% refugee recognition rate. When it comes to Eritreans, in 2017 out of a total of 144 decisions, only 5% were granted refugee status, whilst 60% were granted subsidiary protection, compared to the EU average of 55%. Because of this it cannot be excluded that, had their asylum application been examined in another member state, a number of the individuals with subsidiary protection in Malta would have been granted refugee status.

It is perhaps because of this that the Qualification Directive states in Recital 19 that “with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility.” The Parliamentary Assembly of the Council of Europe recently highlighted the similarities between these two categories of migrants, both in law and in fact, stressing that: “there is therefore no reason to distinguish between the two statuses as regards their right to family life.”³⁵

Beneficiaries of SP and TCNs with reasonable prospects of obtaining the right of permanent residence

Although there are significant differences between beneficiaries of subsidiary protection and the second category of migrants entitled to family reunification, we believe that these too could be considered to be in an analogous situation for the purposes of Article 14.

Like refugees and beneficiaries of protection, they are residing in Malta on the basis of a residence permit that is temporary in nature. In order to qualify for family reunification, the law requires the sponsor to have a residence permit with a minimum validity period of one year and reasonable prospects of obtaining the right of

permanent residence. It should be noted in this regard that, like refugees, beneficiaries of subsidiary protection are entitled to a residence permit that is valid for 3 years. Moreover, they are also entitled to apply for Long Term Residence in Malta in terms of the Status of Long Term Residents (Third Country Nationals) Regulations³⁶.

In this case however, there is one major difference between beneficiaries of SP and other TCNs residing in Malta, which is particularly relevant for the purposes of family reunification. As was highlighted earlier, beneficiaries of subsidiary protection cannot choose to return home at will to enjoy their right to family life. Doing so would put them at risk of serious violations of their rights, including threats to their life or freedom.

Objective and reasonable justification, pursuit of legitimate aim, and proportionality between means employed – i.e. blanket ban on FR – and aim sought to be realised

The final criterion to be satisfied is the existence of an objective and reasonable justification for the different treatment, and whether or not it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In *Hode and Abdi v. U.K.*, the Court held that, “the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (Burden, cited above, § 60; and Carson, cited above, § 61). The scope of this margin will vary according to the circumstances, the subject-matter and the background.”³⁷

While, as a general rule, “very weighty reasons” would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality, gender or sexual orientation as compatible with the Convention³⁸, “a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy”³⁹, which includes measures relating to immigration.

The fact that the Court allows states a wide margin of appreciation in immigration cases, does not however mean that the equality rule does not apply, or that the State is justified in imposing any kind of restrictions on migrants’ access to the rights protected by the Convention. In fact, in the case of *Hode and Abdi v U.K.*, the court stated that: “if the domestic legislation in the United Kingdom confers a right to be joined by spouses on certain categories of immigrant, it must do so in a manner which is compliant with Article 14 of the Convention.”

Although the aim of the absolute ban on family reunification for beneficiaries of subsidiary protection is not completely clear, it is safe to assume that it is linked to concerns regarding the potential burden that the new arrivals would place on the relatively limited resources available.

Whatever the case, even if we assume, for the purposes of this paper, that the aim to be achieved is legitimate, we still need to question whether there is “a reasonable relationship of proportionality between the means employed and the aim sought to be realised”. It should be noted that, as the Court stated in *Pajic*, “the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary.”⁴⁰

The question therefore is whether the absolute ban on family reunification for beneficiaries of SP is necessary and proportionate in the circumstances.

It should be noted first and foremost that the absolute ban on family reunification, in any circumstances, is an extreme measure, which is causing extreme hardship and distress and leading to a deterioration in the psychological well-being of beneficiaries of protection, some of whom are experiencing mental ill-health as a result of the worry and stress the separation is causing them. This measure also has a negative impact on social cohesion, as it severely undermines the individual’s chances of achieving integration.

In our view therefore, the ban – a draconian measure, which causes so much suffering – is disproportionate in the circumstances. Moreover, with regard to the principle of necessity, it is indeed questionable whether such is truly necessary to achieve the intended aim. We believe that it would be possible to do this through other means, such as the introduction of basic income requirements, as with refugees who marry post-recognition.



SPECIFIC CONSIDERATIONS RELATING TO CHILDREN IN THE CONTEXT OF FR

Finally, we would like to highlight the specific situation of children, particularly unaccompanied or separated children, in relation to family reunification.

Although the Convention does not specifically mention children, it is clear from the Court's judgements in cases involving children that the best interest of the child is always a paramount, though clearly not the only, consideration.⁴¹

This is in line with the Convention on the Rights of the Child, the main human rights instrument protecting the rights of children, which states in Article 3, that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁴²

This principle is also an integral part of EU law. The EU Charter of Fundamental Rights, in Article 24, echoes this principle, and stresses the child's right to maintain contact with both parents, unless it is contrary to his/her interests. The duty to take the child's best interest into account is also specifically stated in a number of EU Directives, including those regulating asylum.⁴³

This subjective right, clearly creates a positive obligations for states, and limits their discretion to refuse to grant the possibility of family reunification to unaccompanied minors who are beneficiaries of protection, solely on the ground of legal status.

CONCLUSIONS AND RECOMMENDATIONS

In the light of the above, it is clear that the current blanket ban on family reunification for beneficiaries of subsidiary protection raises serious human rights concerns.

We therefore urge the Government to review the existing legislative framework and to grant beneficiaries of subsidiary protection the right to be reunited with their families in Malta.

We strongly recommend that they will be granted access to this right under the same conditions as refugees, or, as a minimum, under the same conditions as refugees who married post recognition.

NOTES:

¹ Project Integrated is a UNHCR-funded project implemented by JRS Malta, aditus foundation and Integra Foundation, aimed at facilitating the integration of beneficiaries of protection in Malta through the provision of services, as well as through advocacy and capacity-building.

² This term refers to refugee status and subsidiary protection.

³ European Commission, Migration and Home Affairs, https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/family-reunification_en

⁴ Hereinafter referred to as 'the Convention'

⁵ Cf. Article 8 of the Convention, Article 7 of the Charter of Fundamental Rights of the EU, Article 17 of the International Covenant on Civil and Political Rights

⁶ Hereinafter referred to as 'the CRC'

⁷ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, cited in: UN High Commissioner for Refugees (UNHCR), Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection , 4 December 2017, Expert Roundtable, available at: <https://www.refworld.org/docid/5b18f5774.html>

⁸ Cf. inter alia: the Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection cited at n.7, and the UN High Commissioner for Refugees (UNHCR), The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, January 2018, 2nd edition, available at: <https://www.refworld.org/docid/5a902a9b4.html>

⁹ S.L. 217.06

¹⁰ Hereinafter referred to as 'the Family Reunification Directive'

¹¹ Hereinafter referred to as 'the Court'

¹² This has been repeated stressed by the European Court of Human Rights. Virtually every decision on the subject states that, where immigration is concerned, Article 8 (protecting the right to family life) cannot be considered to impose on a State a binding obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory.

¹³ Tanda Muzinga v. France, Application no. 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, at para 75, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-145653%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-145653%22]})

¹⁴ See for example: Gül v. Switzerland, Application no. 23218/94, Council of Europe: European Court of Human Rights, 19 February 1996, available at: [https://hudoc.echr.coe.int/eng#{%22fulltext%22\[%22gul%20v%20switzerland%22\]%22documentcollectionid%22\[%222GRANDCHAMBER%22,%222CHAMBER%22\],%22itemid%22\[%22001-57975%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22[%22gul%20v%20switzerland%22]%22documentcollectionid%22[%222GRANDCHAMBER%22,%222CHAMBER%22],%22itemid%22[%22001-57975%22]}) ; Ahmut v. The Netherlands, Application No. 21702/93, Council of Europe: European Court of Human Rights, 26 October 1996, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-58002%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-58002%22]}) ; Arvelo Arponte v. the Netherlands, Application no. 28770/05, Council of Europe: European Court of Human Rights, 3 November 2011, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-107203%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-107203%22]}) and Useinov v. the Netherlands, Application No. 61292/00, Council of Europe: European Court of Human Rights, Admissibility Decision, 11 April 2016, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-75389%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-75389%22]})

¹⁵ Cf. Jeunesse v. the Netherlands, Application No. 12738/10, Council of Europe: European Court of Human Rights, 3 October 2014, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-147117%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-147117%22]}); and Tuquabo-Tekle and Others v. the Netherlands, Application No. 60665/00, Council of Europe: European Court of Human Rights, 1 December 2015, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-71439%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-71439%22]})

¹⁶ For commentary on this shift see among others, Philip Czech, A right to Family Reunification for Persons granted International Protection? The Strasbourg Caselaw, State Sovereignty and EU Harmonisation, EU Immigration and Asylum Law and Policy, 517 June 2016, available at: <http://eumigrationlawblog.eu/a-right-to-family-reunification-for-persons-under-international-protection-the-strasbourg-case-law-state-sovereignty->

and-eu-harmonisation-2/; and Lourdes Peroni, Jeunesse v. the Netherlands: Quiet shifts in Migration and Family Life Jurisprudence?, Strasbourg Observers, October 30, 2014, available at: <https://strasbourgobservers.com/2014/10/30/jeunesse-v-the-netherlands-quiet-shifts-in-migration-and-family-life-jurisprudence/>

¹⁷ See cases cited above. On the best interest of the child, see in particular: Jeunesse v. the Netherlands, Tuquabo-Tekle and Others v. the Netherlands, cited in 7 above, and Sen v. the Netherlands, Application No. 31465/96, Council of Europe: European Court of Human Rights, 21 December 2001, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-64569%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-64569%22]})

¹⁸ The Refugees Act (Chapter 420 of the Laws of Malta) defines a refuge as: "a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country," In terms of the same law, subsidiary protection is granted to persons, "in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, or in the case of a stateless person, to his country of former habitual residence, would face a real risk of suffering serious harm." The law defines "serious harm" as: "(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

¹⁹ Application no. 68453/13, Council of Europe: European Court of Human Rights, 23 February 2016, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-161061%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-161061%22]})

²⁰ Application no. 51362/09, Council of Europe: European Court of Human Rights, 30 June 2016, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-164715%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-164715%22]})

²¹ Application no. 38590/10, Council of Europe: European Court of Human Rights, 24 May 2016, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-163115%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-163115%22]})

²² Application no. 22341/09, Council of Europe: European Court of Human Rights, 6 November 2012, available at: [https://hudoc.echr.coe.int/eng#{%22fulltext%22\[%22Hode%20and%20Abdi%20v.%20UK%22\]%22documentcollectionid%22\[%22GRANDCHAMBER%22,%222CHAMBER%22\],%22itemid%22\[%22001-114244%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22[%22Hode%20and%20Abdi%20v.%20UK%22]%22documentcollectionid%22[%22GRANDCHAMBER%22,%222CHAMBER%22],%22itemid%22[%22001-114244%22]})

²³ See Biao v. Denmark, cited above at n.13, at para 89: "The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14."

²⁴ Ibid, "...for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see for example, Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, ECHR 2010; Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008; D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 175, ECHR 2007-IV; and Kjeldsen, Busk Madsen and Pedersen v. Denmark, 7 December 1976, § 56, Series A no. 23)."

²⁵ See among others: Taddeucci and McCall v. Italy, cited above at n.12 at para 87, Biao v. Denmark, cited above at n.13 at para 90, and Hode and Abdi v. U.K. cited above at n.14 at para 45. In the latter case, the Court observed that: "The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (Burden, cited above, § 60). However, the scope of this margin will vary according to the circumstances, the subject-matter and the background."

²⁶ Cf. Hode and Abdi v. the United Kingdom, cited above at n.14, where the court found that: "the Immigration Rules in this case obviously affected the home and family life of the applicants and their children as it impacted upon their ability to set up home together and enjoy family life while living together in a family unit. The Court therefore finds that the facts of this case fall within the ambit of Article 8."

²⁷ Cf. Biao v. Denmark, cited above at n.13, where the Court highlighted that: "The words "other status" have generally been given a wide meaning (see Carson and Others, cited above, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see Clift v. the United Kingdom, no. 7205/07, §§ 56–58, 13 July 2010)."

²⁸ Bah v. United Kingdom, Application no. 56328/07, Council of Europe: European Court of Human Rights, 27 September 2011, available at: [https://hudoc.echr.coe.int/eng#{%22fulltext%22\[%22Bah%22\]%22documentcollectionid%22\[%22GRANDCHAMBER%22,%222CHAMBER%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22[%22Bah%22]%22documentcollectionid%22[%22GRANDCHAMBER%22,%222CHAMBER%22]})

²⁹ [22itemid%22[%22001-106448%22]]

²⁹ Ulla Sandbaek, Family reunification of refugees and migrants in the Council of Europe Member States, Report, Council of Europe, Parliamentary Assembly, September 2018, para 28, available at: <http://website-pace.net/documents/19863/4249864/20180921-RapportSANDBAEK-EN.pdf/e80c616e-e4c0-4b8e-9a2d-2d703ba3d10c>

³⁰ UNHCR reported that, in 2016, some two thirds of the world's refugees, 11.6 million, were in protracted refugee situations. 4.1 million of them are in exceptionally drawn out situations of 20 years or more – UNHCR, Global Trends: Forced displacement 2016, accessible at: <http://www.unhcr.org/globaltrends2016/>

³¹ Somalis are fleeing one of Africa's oldest civil conflicts that has dragged on for almost 30 years and left the entire country, including the previously peaceful regions of Puntland and Somaliland, unstable and dangerous. For more information see, among others: Somali Conflict, International Committee of the Red Cross, available at: <https://www.icrc.org/en/where-we-work/africa/somalia/somalia-conflict>; Sally Healy and Mark Bradbury, Endless War: A brief history of the Somali conflict, Conciliation Resources, 2010, available at: <https://www.c-r.org/accord-article/endless-war-brief-history-somali-conflict>; Averting War in Northern Somalia, International Crisis Group, available at: <https://www.crisisgroup.org/africa/horn-of-africa/somaliland/141-averting-war-northern-somalia>

³² Eritreans are fleeing the harsh, oppressive and militarised regime that has governed the country since its independence from Ethiopia in 1993, which has a proven track record of silencing critics and routinely violating the right of its citizens who are subjected to forced indefinite military conscription from a very young age. For more information see, among others: Eritrea: Diplomacy changes, but political prisoners remain, Human Rights Watch, October 2018, available at: <https://www.hrw.org/news/2018/10/03/eritrea-diplomacy-changes-political-prisoners-remain>; Report of the Special Rapporteur on the Situation of Human Rights in Eritrea, UN General Assembly, A/HRC/38/50, June 2018, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/189/90/PDF/G1818990.pdf?OpenElement>; It's not a war, but up to 3% of its people have fled. What's going on in Eritrea?, Patrick Kingsley, The Guardian, 22 July 2015, available at: <https://www.theguardian.com/world/2015/jul/22/eritrea-migrants-child-soldier-fled-what-is-going>

³³ For more information see: International Crisis Group, Syria, available at: <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria>

³⁴ For more information see: International Crisis Group, Libya, available at: <https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya>

³⁵ Cf. n. 21 above

³⁶ SL 217.05

³⁷ Cf. Hode and Abdi v. United Kingdom, cited above at n.14, at para. 54.

³⁸ Cf. for example Biao v. Denmark, cited above at n.13, at para. 93, and Taddeuucci and McCall v. Italy, cited above at n.12, at para. 89

³⁹ As above at n.30

⁴⁰ Cf. Pajic v. Croatia, cited above at n.11 above, at para 82

⁴¹ See among others: Jeunesse v. the Netherlands, Tuquabo-Tekle and Others v. the Netherlands, cited in n.7 above, Sen v. the Netherlands, cited above at n.10, and Neulinger and Shuruk v. Switzerland, Application No. 41615/07, Council of Europe: European Court of Human Rights, 6 July 2010, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22\[%22001-99817%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22[%22001-99817%22]})

⁴² For a more detailed explanation of the concept of the best interest of the child see: UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html> In this document, the Committee describes the best interest of the child as "a right, a principle and a rule of procedure".

⁴³ See for example: Recital 13 and Article 6(1) of Regulation (EU) No 604/2013; Recital 33 and Article 25(6) of Directive 2013/32/EU; Recital 18 and Article 20(5) of Directive 2011/95/EU; Article 23(1) of Directive 2013/33/EU; and Recital 22 and Article 17(5) of Directive 2008/115/EC; Article 5 Council Directive 2003/86/EC

