Family Reunification for Beneficiaries of Subsidiary Protection in Austria as an Example of how European States use Family Migration Policies as a Means of Compartmentalisation

Paul Schwarzl
Student Number: 2635976
Date: 14 August 2019
First Reader: Betty de Hart
Second Reader: B. Aarrass
Table of Contents

1. Introduction ........................................................................................................... 1

2. Exposition of the Relevant Domestic Legislation .................................................. 4
   2.1 The Domestic Political and Parliamentary Process on Family Reunification Measures ....... 5
   2.2 Status of Subsidiary Protection and Rules for Family Reunification for Beneficiaries in Austrian Law ........................................................................................................... 8
   2.3 Conclusion .......................................................................................................... 10

3. Beneficiaries of Subsidiary Protection and their Exclusion of the Right to Family Reunification within the CEAS Framework ................................................................. 11
   3.1 Introduction ....................................................................................................... 11
   3.2 The Emergence and Development of the CEAS .................................................. 11
   3.3 The Drafting Process of the FRD and the Exclusion of Beneficiaries of Subsidiary Protection .............................................................. 13
   3.4 Refugee Status and Subsidiary Protection – A justified Differentiation? ................. 15
   3.5 Conclusion ....................................................................................................... 19

4. Family Reunification within the ECHR Framework ................................................. 21
   4.1 Introduction ...................................................................................................... 21
   4.2 A Quick Glance on Two of Strasbourg’s Principles ........................................... 22
   4.3 Art 8 ECHR – The Right to Respect for Private and Family Life ......................... 24
      4.3.1 Abdulazi, Cabales and Balkandali v. The UK or how Strasbourg chose Sides for the very First Time ............................................................ 24
      4.3.2 Negative vs. Positive Obligations – A Consistent Distinction? ....................... 26
      4.3.3 Conclusion ................................................................................................ 32
   4.4 The ECtHR and its Stance on Waiting Periods for Family Reunification ............... 33
      4.4.1 How the Conduct of French Authorities led the ECtHR to lay down Procedural Safeguards in Art 8 ECHR Cases ................................. 34
   4.5 Art 14 ECHR – The Prohibition of Discrimination ............................................. 38
      4.5.1 Art 14 ECHR – A Brief Introduction ............................................................. 38
      4.5.2 What constitutes a Discrimination according to Art 14 ECHR? ....................... 39
      4.5.3 The Starting Point of any ECHR Discrimination Case – Find a Comparator ......... 40
      4.5.4 Legitimate Aim, Margin of Appreciation & the Principle of Proportionality or the Crucial Question when a Difference in Treatment is objectively and reasonably justified ......................... 42
5. Conclusion – Applying the Findings on Austria’s Legal Position ........................................... 53

Bibliography ................................................................................................................................. 59

List of Cases ....................................................................................................................................... 62

Abbreviations

CFREU = Charter of Fundamental Rights of the European Union
CRC = Convention on the Rights of the Child
ECHR = European Convention of Human Rights
ECtHR = European Court of Human Rights
EMN = European Migration Network
EP = European Parliament
FRD = Family Reunification Directive
MoA = Margin of Appreciation
QD = Qualification Directive
RC = Refugee Convention
TCN = Third Country National
TEC = Treaty establishing the European Community
TFEU = Treaty on the Functioning of the European Union
1. Introduction

“Wir schaffen das!” It was the current German chancellor Angela Merkel who made this famous statement at an official press conference on 31 August 2015 when she talked about the beginning of the so-called refugee crisis and the admission of asylum seekers to Germany.\footnote{The literal translation would be “We can do this!”; The exact wording of the press conference is available at: https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/sommerpressekonferenz-von-bundeskanzlerin-merkel-848300 [accessed 14 August 2019].} It was also in the same summer that throughout Europe in many countries civil society started to organize itself and supported national governments in dealing with the high influx of people coming to Europe.\footnote{For an in-depth analysis on the solidarity movement which emerged due to “refugee crisis” see: Oscar Garcia Agustin, Martin Bak Jorgensen, \textit{Solidarity and the “refugee crisis” in Europe} (Palgrave Macmillan 2019).} But even though there was a strong feeling of solidarity and civic engagement, a growing number of European citizens and politicians were convinced that the opposite of what Angela Merkel said was true and rejected the occurring developments. Thus, it does not come as a surprise that the watershed events of 2015 and 2016 had tremendous repercussions in Europe in a variety of different realms of society, whether it be in the political, societal or legal one.

In this thesis I focus on one very specific ramification in the legal context, namely the restriction of the right to reunite with family members for beneficiaries of subsidiary protection in Austria. In Austria, like in other European countries, the events of 2015 & 2016 led to more restrictive policies in the field of migration & asylum law. One of the measures introduced by the Austrian government was the tightening of rules under which beneficiaries of subsidiary protection (hereinafter: BSPs) are entitled to bring their family members to Austria. The main newly introduced feature of these rules is a waiting period of three years. Essentially this means that any person which is granted the BSP status by the Austrian authorities has to wait another three years before the process for family reunification can be initiated. This general exclusion for a period of three years attracted my attention and thus I asked myself: Is the domestic legislator completely free in its decision to restrict this essential right to live with family members if one cannot stay in his/her country of origin any longer? How is it possible that refugees and BSPs are treated so different in that regard, especially if one considers that both forms of international protection are issued because the persons affected are unable to live in their home country? And what does European law or the European Convention of Human Rights say about a policy like this?
Therefore, my main research question for this thesis is:

*Is a difference in treatment between refugees and beneficiaries of subsidiary protection with regards to the right to family reunification laid down in Austrian law legally justified?*

It is not an anticipation of my findings, when I already state that there is no simple yes or no answer to this question. I am going to approach the topic from different angles in order to not only discuss the existing legal questions that go along with this issue, but also to give the reader a broader understanding of how policies in the field of migration law are established on different levels. Hence, there are two distinctive methods that I applied for my research: On the one hand my method is legal-historical when I scrutinize the process of establishing policies and rules on the domestic and European level; on the other hand I applied the classic legal doctrinal method in order to find out which outcomes the application of the relevant ECHR provisions might provide for the issue at stake.

The thesis is thus structured as follows: In chapter 2 I will depict the current relevant domestic legislation. The chapter does not focus solely on the pertinent provisions in the Austrian Asylum Act but is furthermore shedding some light on the political and parliamentary process that eventually led to the introduction of the measures at stake.

Chapter 3 moves the focus from the domestic to the European level. First, I will scrutinize which factors led to the emergence and development of the Common European Asylum System (hereinafter: CEAS). Subsequently, the drafting process of the Family Reunification Directive (hereinafter: FRD) will be the subject of close scrutiny. This is insofar of relevance, as the FRD implies privileged requirements for the family reunification of refugees, whereas BSPs are generally excluded from the scope of the Directive. The last paragraph hence deals with the question whether the existing differentiation between refugees and BSPs within the CEAS legal framework is actually justified. Moreover, this chapter gives an insight into the different stakeholders’ conduct in the European Union and how they try to make sure that their interests are asserted. Thus, I will show that there is a certain tension between the ideal of creating a realm which adheres to human rights on the one hand, and rather uncompromising national interests followed by the domestic governments on a European level.

In chapter 4 I will shift the focus to Strasbourg, to be more accurate to the European Convention of Human Rights (hereinafter: ECHR) and the European Court of Human Rights (hereinafter: ECtHR). Since there is no right to family reunification for BSPs in the CEAS framework, the emphasis in this chapter will be on the question whether such a right can be derived from the ECHR. Therefore, I will
scrutinize Art 8 ECHR, the right to respect private and family life, and Art 14 ECHR, the prohibition of discrimination. The chapter starts with a brief digression on two important legal principles of the Strasbourg Court. My analysis on Art 8 ECHR will focus on the existing ECtHR case law and the question whether it is possible to pinpoint consistent rules that the Court applies in family reunification cases. Furthermore, I will discuss whether the Court has developed a clear stance on the issue of waiting periods and whether Art 8 ECHR entails any procedural safeguards which should be considered in family reunification cases and therefore might have an impact on the treatment of BSPs and their family members in that regard. The paragraph on Art 14 ECHR, however, is structured in the same way the ECtHR assesses a discrimination case. Thus, I will discuss all the relevant steps and issues through the lenses of a BSP who wants to reunite with his/her family before I will lay down my conclusions.

The final chapter summarizes my findings and applies them to the current Austrian legal position. Thus, the chapter serves both as the conclusion, and my personal appraisal of how I believe the ECtHR will decide on pending cases from Sweden, Denmark and Switzerland which deal exactly with the same issue of family reunification of BSPs.
2. Exposition of the Relevant Domestic Legislation

This chapter serves as the basis for the research and its results that is being discussed in the following chapters. Firstly, I point out significant specifics which are inherent in the general Austrian migration law framework. Secondly, I scrutinize how the domestic legislative process developed starting from the large influx of people coming to Europe to the restrictive measure at stake. Finally, I will give an overview of the specific rules for family reunification of beneficiaries of subsidiary protection and the amendments which the government introduced in order to restrict this right.

Within the Austrian legal framework, migration law has to be qualified as a salient subject matter for several reasons. First of all, it is conspicuous that it is an area of law which has been changed and amended in what one could call a continual manner. The Asylgesetz 2005 (Asylum Act 2005), which covers the majority of domestic asylum legislation, is a perfect example: It came into force in 2005 and has ever since been amended 19 times.3

Another factor that is striking is the tangled structure of Austrian migration law. Since the year of 2005 when the legislator introduced a full rearrangement of the subject matter, a number of new laws and decrees were implemented, different provisions were moved from one act to another and due to a vast number of references within the different acts the readability was impaired, all of this leading to an immense lack of clarity. Undoubtedly, this lack of clarity has to be seen even more critical, when one visualizes that the legal issues at stake concern the realm of essential human rights such as the non-refoulement principle.

Lastly, and most importantly, the ongoing changes and amendments went hand in hand with a restrictive policy approach which could be observed not only since, but especially after the so-called “refugee crisis” in 2015/16. It was in this time that Austria caused uproar, because the government went even as far as to introduce an emergency regulation which could – and still can - be invoked by the main committee of the National Council – the main chamber of the Austrian parliament – if an upper limit of asylum applications is reached within a year, eventually leading to a general suspension of the right to asylum. Needless to mention, that this measure was highly disputed not only among

---

3 Cf. the Asylgesetz 2005 in the official Austrian Law Information System (Rechtsinformationssystem) where every amendment is listed: [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240](https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240) [accessed 14 August 2019].
legal scholars, but also the general public. It was because of these changes that Benedek aptly asked the rhetorical question whether the recent developments in Austria could be called “a race to the bottom”. These aforementioned reasons led to the current state in which both practitioners, whether it be lawyers, social workers or therapists, and the people concerned directly, namely people seeking refuge in Austria, find it harder and harder to see light at the end of what I call the “Austrian asylum law tunnel”.

2.1 The Domestic Political and Parliamentary Process on Family Reunification Measures

As explained above, amendments within the Austrian legal asylum framework are in fact nothing special, but rather the normality. Thus, it was not surprising when the then ruling government – a coalition between the Social Democratic Party and the Austrian People’s Party – introduced its plan to implement new restrictions with regards to different aspects of the domestic asylum system at the end of 2015. It was exactly at that time, when the so-called “refugee crisis” was at its peak and Austria faced a high number of migrants either applying for international protection or travelling through the country to reach other middle or north European states. In light of the exceptional situation of mass influx, it was already in summer 2015 that the former Interior Minister Johanna Mikl-Leitner publicly spoke about the proposal to implement certain restricting measures such as limiting the right to stay for people who received a positive asylum decision.

On 3 November 2015 the government started the parliamentary process by publishing the legislative text, which aimed to change several provisions in the Asylum Act 2005. At this time, the proposal encompassed two major changes: the aforementioned limitation of the residence right of recognized refugees (“Asyl auf Zeit”) and the limitation of the right to family reunification for recognized refugees as well as for beneficiaries of subsidiary protection.

Even though the period of consultation was limited to four weeks, there were in total 50 written statements handed in by diverse stakeholders, from NGOs which traditionally work in the field of

---

migration like the Caritas or the Diakonie up to the administrative bodies of the federal states or the Constitutional Court. 34 of these 50 statements directly referred to the provision which concerned the restriction of family reunification for BSPs (which will be described in detail in the upcoming paragraph) and 30 out of these 34 statements have to be qualified as critical of the proposed measure.8 Interestingly, the critical statements came not only from the “usual suspects”, but from very different stakeholders, which are at least not known for standing up for human rights of migrants such as the Federation of Industry (Industriellenvereinigung). Also, the ministry for Integration, Europe & Foreign Affairs raised doubts, whether the enhanced waiting period could lead to tension with the obligations that Austria has due to the Convention on the Rights of the Child.9 This is even more remarkable in light of the fact that the former Chancellor Sebastian Kurz, who praised himself for closing the “Balkan-route” and is well-known for his restrictive stance in migration matters, was the Minister for Foreign Affairs and therefore responsible for this ministry at the time of the parliamentary procedure.10 The tenor of the critical statements was essentially very similar – namely, that the restriction violated human rights like Art 8 ECHR and put an extra burden on a group which has already less rights than refugees.

As regards to the reasons why the government saw a necessity in changing the existing family reunification rules, one can find astonishingly little about it in the Explanatory Notes of the legislative proposal. In the “problem analysis” it is simply stated in one brief sentence that without these changes Austria’s attraction as a country of destination would not decrease.11 In another chapter which deals with the possible effects on state’s expenditures it is again stated that due to the changes one can assume that less family members will come to Austria which is accompanied by less attraction as a country of destination.12 Hence, one can draw no other conclusion, but that the aim for the measure at stake was – as explicitly confirmed in the Explanatory Notes - to make Austria less attractive for people seeking for international protection.

---

12 Ibid, 9.
Eventually, although the majority of written statements was very critical of the proposal in question, the Austrian government didn’t make any adaptations. Quite the contrary, the government even went one step further and added a number of additional restrictions like the implementation of the aforementioned emergency regulation. With this policy Austria was in line with other EU member states like Germany or Sweden, which also levelled down their rights for beneficiaries of international protection due to the watershed events of 2015 & 2016.\textsuperscript{13}

With regards to the parliamentary debate, it is noteworthy that the restriction of the right to family reunification did not raise a big controversy within the Nationalrat, the first chamber of the Austrian parliament. According to the default legislation process, the issue was at first delegated and discussed in the committee of internal affairs of the Nationalrat. In this hearing, experts which were nominated by the liberal opposition parties raised concerns whether the new rules were in line with the constitution, while the representative of the right-winged Freedom’s Party claimed that the new rules wouldn’t be strict enough and that family reunification shouldn’t be possible at all.\textsuperscript{14} When it came to the vote and the preceding debate in parliament, family reunification rules and the introduced restrictions were not discussed at all.\textsuperscript{15} However, there is an obvious reason for that: As explained above, the government introduced during the parliamentary process further restrictions, most notably the emergency regulation. Therefore, the focus shifted from specific amendments like the one regarding family reunification to a general debate about the (potential) overburdening of Austria’s asylum system.\textsuperscript{16}

On 20 May 2016, the law was published and thereby came into force.\textsuperscript{17} To make things a little bit more complicated, the legislator chose for the issue of family reunification a rule with different time limits, thereby creating even more confusion and hardship for the people affected.\textsuperscript{18} But what did the Austrian government actually change and which exact rules for the reunification of family members of beneficiaries of subsidiary protection are laid down in the Austrian Asylum Act? The following


\textsuperscript{14} Parlamentskorrespondenz Nr. 129 (17 February 2016) \url{https://www.parlament.gv.at/PAKT/PR/JAHR_2016/PK0129/#XXV_I_00996} [accessed 14 August 2019].

\textsuperscript{15} Parlamentskorrespondenz Nr. 411 (27 April 2016) \url{https://www.parlament.gv.at/PAKT/PR/JAHR_2016/PK0411/#XXV_I_00996} [accessed 14 August 2019].

\textsuperscript{16} Ibid.

\textsuperscript{17} BGBl. I Nr. 24/2016.

\textsuperscript{18} Cf. § 74 (24) AsylG.
paragraph will shed light on the definition of the status of subsidiary protection and the rules for family reunification respectively.

2.2 Status of Subsidiary Protection and Rules for Family Reunification for Beneficiaries in Austrian Law

As mentioned above, the Asylum Act 2005 is the main legal source regarding the criteria and procedural rules for the determination of international protection. Since Austria is a member of the European Union, it goes without saying that it is bound to and shaped by European legislation which has been introduced with the implementation of the CEAS framework.

With regards to the qualification of beneficiaries of subsidiary protection, the relevant provision is laid down in Section 2, § 8 (1) Asylum Act, which states that an alien has to be recognized as a beneficiary if

- the application for refugee status is rejected or withdrawn, and
- an expulsion or deportation of the alien in his country of origin would lead to a real danger of breaching Art 2, Art 3 or Protocols 6 or 13 of the ECHR or to a serious and individual threat to him as a civilian by reasons of indiscriminate violence in situations of international or internal armed conflict.

While it is not the topic of this thesis, it can be generally determined that the Austrian provision is in compliance with European legislation laid down in chapter V of the Qualification Directive\textsuperscript{19} and international human rights obligations with regards to Art 3 ECHR and the principle of non-refoulement.

The rules regarding family reunification for beneficiaries of international protection can be found in Section 4, § 35 Asylum Act. Before the discussed amendment was adopted the rules for beneficiaries of subsidiary protection were as follows: Provided that the family member definition was fulfilled,\textsuperscript{20} the concerned family member(s) could apply for a visa at the responsible Austrian embassy after a waiting period of one year calculated from the date where the sponsor officially received his decision. No further requirements had to be fulfilled.

\textsuperscript{19} Council Directive 2011/95/EU 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) (2011) L 337/9.

\textsuperscript{20} Cf. § 22 (1) Z 22 AsylG.
With the amendment of § 35 (2) Asylum Act, the government implemented the following new requirements:

- The waiting time to be eligible for an application got extended from one to three years.
- Furthermore, the beneficiary of subsidiary protection has to henceforth provide evidence that he/she
  - has accommodation which is regarded as normal for a comparable family in the same region,
  - can provide health insurance for the applying family members and
  - has stable and regular resources which are sufficient to maintain himself/herself and the family members, without recourse to the social assistance system.

Compared to the hitherto existing provision, the new rule imposed therefore two main conditions on BSPs: an enhanced waiting time and material conditions which resemble those introduced by the Family Reunification Directive (hereinafter: FRD)\(^\text{21}\) and are essentially the same like for other TCNs who are allowed to apply for family reunification to join family members living in Austria with a corresponding residence permit.

Another issue that is striking is the fact that the new rule does not entail any specific hardship clause. The legislator confined himself to state in the Explanatory Notes of the draft that even if the material conditions are not fulfilled, it does not lead to an automatic rejection, but that it has to be checked in every individual case whether there is an obligation to allow the reunification due to Art 8 ECHR.\(^\text{22}\) This is remarkable for several reasons: First of all, the wording in the Explanatory Notes implies that Art 8 ECHR only needs to be considered when the material conditions are not fulfilled, whereas the waiting period apparently doesn’t seem to raise any issues regarding Art 8 ECHR for the legislator. Secondly, it is noteworthy, that the ECHR is part of the Austrian constitution since 1964.\(^\text{23}\) This means that due to the hierarchy of Austrian’s legal system, the ECHR and its provisions respectively have to be considered in any case, otherwise a decision by an authority or court might be in breach with the constitutional law. However, the legislator nevertheless refrained from explicitly referring to international human rights obligations in § 34 AsylG.

\(^{21}\) Cf. Art 7 of the Directive 2003/86/EC of September 2003 on the right to family reunification; However, unaccompanied minors are exempted from fulfilling the material conditions: Cf. § 35 (2a) AsylG.

\(^{22}\) Vorblatt/Explanatory Notes (N.10), 2.

\(^{23}\) Johannes Hengstschläger, David Leeb, Grundrechte (MANZ 2013), 1/14.
2.3 Conclusion

In this chapter, I showed that the introduction of the restrictions to the right of family reunification for BSPs followed a well-known pattern in Austrian migration law. Despite criticism from experts, the government rubber-stamped its amendments. However, one has to bear in mind that the government acted in light of the “refugee crisis”. Certainly, the large number of migrants coming to Europe and Austria respectively, the changing atmosphere within Europe’s societies and other European states changing to a more and more restrictive policy towards asylum-seekers and beneficiaries of international protection led to the amendments at stake. Nevertheless, it has to be said that the Austrian’s government conduct is a typical example of ad-hoc legislation in migration law which does not follow a rights-centred approach, but focuses on one clear-cut aim, namely deterrence. This is confirmed by statements of the responsible people in government and the Explanatory Notes of the legislative draft.
3. Beneficiaries of Subsidiary Protection and their Exclusion of the Right to Family Reunification within the CEAS Framework

3.1 Introduction
For the past 30 years, family reunification has been one of the main reasons of immigration to the EU. The following chapter therefore turns the focus from the domestic to the European level and explores how European states started to cooperate in the field of immigration. I am going to show firstly, how the status of subsidiary protection was established within the CEAS and secondly, why the topic of family reunification for beneficiaries of subsidiary protection hasn’t even started to be regulated due to a missing consensus amongst the different stakeholders. The chapter is hence structured as follows: First, I will give a brief historical overview of the emergence and development of the CEAS. Second, I will scrutinize the drafting process of the Family Reunification Directive. Particular attention will be paid to the exclusion of BSPs from the scope of the Directive and which reasons de facto led to this limitation. The third paragraph deals with the distinctions between the refugee and BSP status within the CEAS and raises the question whether these distinctions are actually objectively justified.

3.2 The Emergence and Development of the CEAS
While this chapter’s purpose is not to give a complete historical overview about the development of the CEAS and how migration policies became European competences, it is nevertheless important to reveal the milestones in order to be aware of the big picture of European migration policies. Therefore, I focus on how a harmonised European approach was established and which decisive steps were taken to come closer to the goal of harmonisation.

It was already in 1974 that the heads of European states endorsed the need for a “stage-by-stage harmonisation of legislation affecting aliens and for the abolition of passport control within the Community”. The driving force was not so much the idea that dealing with the issue of migration could be better achieved on a multinational level, but that the abolition of internal borders between

---

EU member states and the creation of an internal market required concerted action of states.\textsuperscript{26} It was thus not an interest in creating a common human rights-based policy approach for people migrating to Europe that led the path to deepened cooperation in immigration policies, but rather a pragmatic realisation that free movement within an area presupposes that one has to control who enters and leaves this area. However, it was not until November 1993 and the signing of the Treaty of Maastricht\textsuperscript{27} that the issue of asylum became part of the European Treaties.\textsuperscript{28} Before that, European states dealt with it on an intergovernmental level by adopting the Schengen Implementing Convention\textsuperscript{29} and the Dublin Convention.\textsuperscript{30} As the next step of development, the Maastricht Treaty introduced the three-pillar-model, which gave birth to the European Union, the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA), the latter including asylum policies, however still under the intergovernmental umbrella of the third pillar.

With the Treaty of Amsterdam,\textsuperscript{31} which entered into force on 1 May 1999, the process of “communitarisation” progressed, asylum and immigration becoming part of Community law.\textsuperscript{32} Accordingly, the issue was thus shifted from the inter-governmental third pillar to the first one.\textsuperscript{33} What is noteworthy is that the Treaty of Amsterdam did not mention the notion of the CEAS in the treaty text.\textsuperscript{34} It was in the subsequent Tampere Conclusions by the European Council in October 1999 that the aim to establish a Common European Asylum System was introduced to the public for the very first time.\textsuperscript{35}

Art 63 TEC set the general rule that asylum measures shall be adopted within five years to establish minimum standards within the European Union. However, neither the time limit nor the focus on minimum standards applied to measures on immigration policies which included those for the purpose of family reunion. And indeed, in the period from 1999 to 2005, the European Community

\textsuperscript{26} Ibid, 4.
\textsuperscript{28} Francesco Cherubini, \textit{Asylum Law in the European Union} (Routledge 2015), 138.
\textsuperscript{30} Convention Determining the State Responsibility for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, OJ C 254/1, 15 June 1990 (entry into force 1 September 1997).
\textsuperscript{32} Cherubini (N. 28), 142.
\textsuperscript{33} Chetail (N. 25), 9.
\textsuperscript{34} Ibid, 10.
showed intense legislative activity and adopted Regulations and Directives for most of the core issues on migration and asylum law.\textsuperscript{36} What all the drafting procedures had generally in common, however, was the fact that the European Council used its influence to mitigate and undermine the content of the relevant pieces of legislation.\textsuperscript{37} This could particularly be discerned in the drafting of the Family Reunification Directive as will be shown in the subsequent paragraph.

On 1 December 2009, the Treaty of Lisbon entered into force. With regards to asylum and immigration matters, the Treaty on the Functioning of the EU (TFEU) introduced a broadening of the legal basis for adopting legislation.\textsuperscript{38} Furthermore, the Charter of Fundamental Rights (CFREU) was conferred legally binding character, an important milestone since any action taken by a Member State which falls within the scope of the EU legal framework has to be in line with the conditions laid down by the provisions of the Charter.

\subsection*{3.3 The Drafting Process of the FRD and the Exclusion of Beneficiaries of Subsidiary Protection}

Before the Treaty of Amsterdam entered into force in 1999, there already had been attempts to create a common legal framework for family reunion on a European level. These attempts led to a “\textit{Resolution on the harmonisation of the national policies on family reunion}”\textsuperscript{39} and a draft Convention\textsuperscript{40} compiled by the Commission to cover all policies related to the “admission of TCNs for family reasons”.\textsuperscript{41} These legislative instruments can be qualified as the corner stone when the Commission disclosed its first proposal for a Directive on Family Reunification in December 1999.\textsuperscript{42}

The Commission’s proposal followed an ambitious approach. First of all, it suggested a wide scope of application by qualifying any TCN “\textit{residing lawfully in a Member State and holding a residence permit issued by that Member State for a period of at least one year}” as a potential sponsor eligible for reunification. This first proposal’s scope was thus very broad and implied amongst other TCNs not only refugees, but also BSPs. Furthermore, the range of family members that could potentially reunite with

\begin{footnotes}
\footnotetext[36]{Pieter Boeles, \textit{European Migration Law} (Intersentia 2014), 35.}
\footnotetext[37]{Chetail (N. 25), 12.}
\footnotetext[38]{Boeles (N. 36), 35.}
\footnotetext[39]{Resolution on the harmonisation of the national policies on family reunion, Ad Hoc Immigration Group, Copenhagen, 1 June 1993 (SN 2828/1/93).}
\footnotetext[40]{Commission Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States, COM (97) 387 (final).}
\footnotetext[41]{Marie De Somer, \textit{Precedents and judicial politics in EU immigration law} (Palgrave Macmillan 2019), 120.}
\end{footnotes}
the sponsor living in the host state was broader than in the final version. Moreover, both refugees and BSPs were exempted from any kind of waiting periods or any other additional requirements.

In response to the Commission’s proposal, the European Parliament issued in July 2000 the so-called “Watson Report”, which generally supported the Commission’s first draft. Yet, the Watson-Report also laid down 16 specific suggestions for amendments. Thereupon, the Commission released an amended version of the proposal. The new version included - amongst others - one decisive change which was reduced to one of the suggestions by the EP: the exclusion of BSPs from the scope of the Directive. Although the Commission stressed that persons in this category must have the right to family reunion and need protection, the restraint was justified for one specific reason, namely the absence of a harmonised concept of subsidiary protection at Community level. It was after this new version of the proposal that the European Council came into play and uttered strong resistance against various other parts of the Commission’s draft. Because of the Council’s opposition it took several rounds of negotiations among the Council States and another proposal from the Commission until in September 2003 the final version was eventually adopted by the Council. The EP on the other hand, was highly critical of the last Commission’s proposal and stated in its final opinion in April 2003 that “...the current proposal has been divested of its original ambition, that its scope has been reduced, and that instead of harmonising national legislation upwards it is harmonising it downwards, with a view to arriving at a lowest common denominator for the current laws governing this area in the various Member States.” However, the new proposition for amendments in the opinion of the EP were dismissed by the Commission, presumably because it was fully aware of the fact that a political consensus within the Council could not be reached for a proposal that would resemble the initial one.

Retrospectively, the drafting process disclosed a clear allocation of roles between the different stakeholders. Even though the exclusion of BSPs from the scope of the Directive can be traced back to a suggestion made by the EP, one can spot an apparent distinction between the Commission and the EP as the driving forces for a broad scope of application on the one hand, and the member states on the other hand, which focused on retaining a maximum degree of legal discretion regarding especially

43 Ibid, Art 5.
46 Ibid, 2.
47 For an in-depth analysis of the drafting process see: De Somer (N. 41), 124 ff.
those provisions which set out the personal scope. Nevertheless, the Commission does not get tired of pointing out that “the Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification”, and even encourages member states to adopt rules that grant the same family reunification rights to BSPs.

According to an EMN study from 2017 there are no less than 14 member states which actually give the same rights to BSPs regarding family reunification. Furthermore, it is noteworthy that three particular countries which manifested themselves as “brakemen” to any changes that could reinforce the existing fears of losing too much competence in the highly sensitive field of sovereignty could be singled out — the Netherlands, Germany and Austria.

Given the long-lasting drafting process and the result which evidently carries the member states’ thumbprint, it is not surprising that the final version of the FRD and especially its limited scope led to criticism. One of the points of criticism that were raised was for example by Peers, who stated that the Directive violated principles of clear and precise drafting. From my perspective both the drafting process and the final outcome exemplify perfectly the divergent stakeholder’s interests. Moreover, it shows that strong European solutions are first and foremost dependent on the nation states and their willingness to create solutions on a European level. Even if Commission and the EP work unitedly, the gravity centre of the power relations within the European Union is undoubtedly the European Council. This leads to the eminent danger that national interests prevail over working on real European solutions. This is even more evidently the case, if policies touch the extremely sensitive issue of state sovereignty.

3.4 Refugee Status and Subsidiary Protection – A justified Differentiation?

As the previous chapter has shown, the distinction between BSPs and refugees (and other lawfully residing TCNs) with regards to family reunification can be traced back to the fact that at the time of drafting, there was no harmonized concept of a subsidiary protection within the European Union. It was not until 2004 when the first Qualification Directive came into force, that another form of

---

49 De Somer (N. 41), 140.
51 Ibid.
international protection next to the refugee status was established within the CEAS framework.\(^{54}\) This chapter does not deal with the exact requirements which need to be fulfilled in order to qualify as a BSP according to the provisions of the QD.\(^{55}\) Regarding this issue it is sufficient to outline that the status derives from the principle of non-refoulement and the corresponding case law of the ECtHR. The focus in this paragraph will be, however, on the differentiations which exist between the refugee and the subsidiary protection status. Moreover, I am going to scrutinize why there even are differentiations in the CEAS pieces of legislation and whether these distinctions are based on reasonable justifications.

The approach to harmonize the already existing concepts of subsidiary protection in the European Union was yet again not driven by the will to become the vanguard of international human rights protection, but because there was a need for a pragmatic response to the political realities of the EU and the creation of an instrument of compromise.\(^{56}\) As the name already suggests, subsidiary protection complements the refugee status, which means that according to European legislation it is only conferred when the person concerned does not meet the criteria of the refugee definition.\(^{57}\) In its initial proposal for the QD, the Commission argued that there were two reasons for this distinction: firstly, the recognition of the primacy of the Refugee Convention and secondly, the fact that the regime of subsidiary protection starts from the premise that the need for such protection is temporary in nature.\(^{58}\) Interestingly enough, the Commission also stated in the same breath that “...the rights and benefits attached to both international protection statuses are the same, to reflect the fact that the needs of all persons in need of international protection are broadly similar.”\(^{59}\) Furthermore, the argument that the BSP status is more temporary in nature was already relativized by the Commission by stating “...the fact that in reality the need for subsidiary protection often turns out to be more lasting.”\(^{60}\)

\(^{54}\) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30 September 2004.


\(^{57}\) Cf. Art. 2 f QD Recast.

\(^{58}\) Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM/2001/0510 final), 4.

\(^{59}\) Ibid.

\(^{60}\) Ibid.
The hierarchical structure was not only established through the arguments mentioned above, but also because the member states – once again it was Germany being at the forefront – limited the entitlements of BSPs.\textsuperscript{61} The differentiation was criticised by several stakeholders, like the UNHCR,\textsuperscript{62} the EP\textsuperscript{63} or the House of Lords Select Committee which stated:

“We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection.”\textsuperscript{64}

Although the QD 2004 constituted the first legally binding supranational instrument of regional scope in Europe which established the criteria that individuals need to meet in order to qualify as refugees or BSPs and the rights attached to these statuses,\textsuperscript{65} the factual differentiation that had been established between the two forms of international protection was not convincing from the very beginning. In its draft for the Recast Qualification Directive the Commission therefore went even one step further and suggested to completely harmonize the benefits attached to the refugee and BSP status.\textsuperscript{66} The Commission argued in this case as follows (emphasis added by author):

“An amendment expected to significantly simplify and streamline procedures and to reduce administrative costs is aimed at approximating the rights granted to the two categories of beneficiaries of protection. When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus

\textsuperscript{61} McAdam (N. 56), 498.
\textsuperscript{65} Maria-Teresa Gil-Bazo & Office of the UNHCR, Refugee Status, subsidiary protection, and the right to be granted asylum under EC law, New Issues in Refugee Research No. 136 (2006), 1.
\textsuperscript{66} Celina Bauloz and Geraldine Ruiz, Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection? in V. Chetail, P. de Bruycker, and F. Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (Brill Nijhoff 2016), 243.
necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified. Such an approximation of rights is necessary to ensure full respect of the principle of non-discrimination, as interpreted in recent case law of the ECtHR, and of the UN Convention on the Rights of the Child. It responds moreover to the call of the Hague Programme for the creation of a uniform status of protection.”

Nevertheless, the final version of the Recast QD did not lead to a complete harmonisation but only to an approximation of the two statuses. The Commission’s stance is depicted in Recital 39 of the QD which states that

“...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.”

With regards to the topics of residence permits and social welfare, however, the Commission failed to achieve a political consensus among the member states that uniformity would have been the best possible solution, while the other five other rights and benefits laid down in the Directive were amended and do not distinguish between refugees and BSPs any longer. The arguments which were put forward by the member states for maintaining differentiations overlap with the ones the Commission put forward in the very first proposal of the QD: First of all, the member states were afraid that a complete uniformization would lead to increased costs, a stance that wasn’t yet introduced by the Commission. Secondly however, member states still relied on the argument that subsidiary protection had a more temporary nature.

It would go beyond the scope of this thesis to analyse in detail whether a uniformization would have actually led to an increase of costs for the member states. It is noteworthy though, that even some

---

68 For a detailed analysis on the QD Recast with regards to the distinctions of the two statuses see Bauloz and Ruiz (N. 66), 244 ff.
69 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) (hereinafter “the recast Qualification Directive”), OJ 2011 L 337/9, Recital 39.
70 Bauloz and Ruiz (N. 66), 268.
71 Bauloz and Ruiz (N. 66), 258.
member states argued that in practice approximation could have led to cost savings.\textsuperscript{72} Hence, it remains at least contested whether the cost argument justifies the difference in treatment.

As to the argument that the BSP status is more of a temporary nature than the refugee status it has to be stressed that there are no data available which effectively confirm this claim. Given the fact that BSPs are entitled to international protection based on serious harm they would face in the country of origin, whereas refugees are entitled because of personal persecution based on the persecution grounds laid down in the RC 1951, this distinction still does not say anything about the duration a person is in need of international protection.

Lastly, I want to point out that also in the academic discussion different legal scholars have raised the question whether there is a need for a separate status. Bauloz/Ruiz state that both types of international protection have similar protection needs because of the identical nature of the risk they fear, namely serious violations of human rights.\textsuperscript{73} Battjes argues in a similar way regarding the distinctions in respect to the benefits laid down in the QD when he states that “...a balance of interests of the refugee and the host state resulted in the set of refugee benefits in the RC and (with slight alterations) in the QD. Exactly the same interests are at stake when defining the benefits for subsidiary protection beneficiaries.”\textsuperscript{74} Spijkerboer argues that the restrictive interpretation of the refugee definition in the RC led to the political necessity, rather than a legal one, to create a subsidiary protection status.\textsuperscript{75}

\subsection*{3.5 Conclusion}

As the glance back into history has shown, the development of a common immigration and asylum policy on a European level is strongly intertwined with the creation of the internal market. European states were well aware of the fact that if they wanted to establish an “area without internal frontiers in which free movement of persons is ensured”,\textsuperscript{76} they also had to cooperate in the field of immigration. This inevitably led over the course of time to the emergence and development of the CEAS. Even though the member states were willing to hand over competences to the European Union, this did not mean that the states adopted a real community perspective, not to speak of a human

\begin{footnotes}
\item[72] Revised Note from the Presidency to Permanent Representatives Committee (15939/1/10 REV 1 ASILE 92), 3.
\item[73] Bauloz and Ruiz (N. 66), 262 f.
\item[76] Cf. Art 14 TEC.
\end{footnotes}
rights-centred perspective, which can undoubtedly be seen in the drafting procedures of the discussed Directives.

The distinction between BSPs and refugees within the CEAS framework exists first and foremost because of political motives of the member states and not because of factual reasons. Both the Commission and the EP have been driving forces when it comes to the uniformization process, however one major obstacle towards that goal has not been overcome yet, namely the exclusion of BSPs of the scope of the FRD. Since its entry into force in 2003, there has not been any amendment of the Directive, although the main argument for the exclusion of BSPs was solved with the introduction of a unified BSP status in the QD 2004. However, there seems to be no consensus to finally work on a revision of the Directive.

Although it is encouraging that half of the current member states do not differentiate and apply the rules laid down in the FRD for BSPs equally, this should not distract from the fact that the existing differences between the two different statuses are based on arguments which are not convincing. It is due to the member states and their unwillingness to establish a full harmonisation that the subsidiary protection status still has to be qualified as what I call a "2nd class international protection status" within the CEAS framework.
4. Family Reunification within the ECHR Framework

4.1 Introduction

As the previous chapter has shown, the CEAS framework does not provide a right to family reunification for BSPs. Hence, I will shift the focus from EU legislation to an international human rights instrument which is of great importance in the field of migration law and has created, as it has been argued, the most effective system of international protection of human rights in existence – the ECHR.\(^77\) The ECtHR and its case law on Art 8 ECHR has been highly influential in determining requirements and restrictions on both sides of the migration spectrum, whether it be regarding the admission to enter and reside in a country or regarding the question of expulsion and whether someone might be enabled to stay in a country due to the establishment of strong connections. Moreover, the prohibition of discrimination laid down in Art 14 ECHR is of significance in the context of family reunification, especially because states like Austria chose to treat persons with distinct residence statuses differently. This difference in treatment raises the crucial question whether these allegedly different groups are in fact comparable. If that is the case, the subsequent question is what justification a state has to submit in order to preserve such a policy.

Turning our eyes to BSPs and their right to reunite with family members there are currently different cases pending at the ECtHR, all of them essentially dealing with the question what limits a state is allowed to set regarding family reunification policies for BSPs.\(^78\) Sweden and Denmark have - similar to Austria - introduced more restrictive laws in the aftermath of the so-called refugee crisis. Thus, my aim in this chapter is to find out whether there are general rules or requirements which can be derived from the Court’s jurisprudence in so-called “first admission” cases. As it will be shown in the following, this central issue goes hand in hand with the question whether it is even possible to ascertain a consistent line of case law from Strasbourg with regards to family reunification.

The structure of this chapter will be therefore as follows: In the first paragraph I will briefly discuss two principles which I find necessary to explain in order to get a better understanding of the Court


\(^{78}\) ECtHR, *J.K. v. Switzerland* (Appl. no. 15500/18), Communicated on 09.01.2019; ECtHR, *B.F. and D.E. v. Switzerland* (Appl. no. 13258/28), Communicated on 09.01.2019; Note that the Suisse migration law does not know the term “subsidiary protection”, but only has a “temporary admission” status which is issued if a removal is either contrary to international law or not reasonable because of a situation of war or generalised violence. ECtHR, *M.A. v. Denmark* (Appl. no. 6697/18), Communicated on 07.09.2018; ECtHR, *M.T. and others v. Sweden* (Appl. no. 22105/18), Communicated on 20.12.2018.
and its jurisprudence, namely the living instrument doctrine and the theory of autonomous concepts. With regards to the two pertinent ECHR provisions, I chose different approaches to tackle the emergent legal questions. The second paragraph addresses Art 8 ECHR, which lays down the right to respect family and private life. Since there is a broad range of ECtHR jurisprudence, I will analyse different cases in order to extract the most important standards laid down by the Court, starting with the landmark judgment Abdulaziz, Cabales and Balkandali v. The UK.\textsuperscript{79} Furthermore, I will lay down a categorization of Art 8 ECHR family reunification case law, although the main focus will be on the category of positive obligation cases.

Since the Austrian legislator introduced a waiting period of three years for BSPs who want to reunite with their family, I will put special considerations on the topic of waiting periods in family reunification procedures in paragraph three. Therefore, I performed a case law research in HUDOC. Subsequently, I will analyse three particular decisions by the ECtHR which deal with the topic of procedural minimum standards in family reunification procedures.

The third paragraph focuses on Art 14 ECHR, which covers the prohibition of discrimination. However, the structure will be different than the one on Art 8 ECHR since there is less jurisprudence on the topic at stake. Therefore, I approach Art 14 ECHR by scrutinizing the scheme that the Strasbourg judges apply when handling a discrimination case. Thus, the first two paragraphs will explain the accessory character of the provision, as well as there will be an explanation of how a discrimination is actually defined according to the ECtHR. From there I dive into the issues of discrimination grounds and comparability. I argue that BSPs are in a comparable situation to refugees and TCNs with a limited leave to remain. Lastly, I discuss the crucial topic of justification by analysing the legitimate aim test, the margin of appreciation and the proportionality assessment before eventually I lay down my conclusions.

\textbf{4.2 A Quick Glance on Two of Strasbourg’s Principles}

When taking a closer look at the ECHR, one will search in vain for a provision that lays down a right to family reunification, not even to speak of a general right to enter or reside in a Council State. Art 8 (1) ECHR merely states that “everyone has the right to respect for his private and family life, his home and his correspondence”. Thus, by reading Art 8 ECHR, one gets the feeling that it is not so much a brilliant legal mind that is needed, but rather creativity and a broad sense for interpretation to picture that

\textsuperscript{79} ECtHR, Case of Abdulaziz, Cabales and Balkandali v. United Kingdom (Appl. Nos. 92140/80; 9473/81; 9474/81), 28.05.1985.
this provision is actually the cornerstone for the ECtHR in migration related cases. Thus, before I focus on Art 8 ECHR and its implications for family migration, I believe it is necessary to allude to two of the basic principles to get a better understanding of how the ECHR provisions in general and particularly Art 8 ECHR respectively are applied by Strasbourg judges.

While the exact evolution of the ECHR starting from its emergence until today cannot be discussed in this context, it is nevertheless interesting to note that the Convention drafters’ primary aim was to create a type of collective pact against totalitarianism. However, the development soon showed that the Strasbourg organs were aiming in another direction by perceiving the Convention as a European Bill of Rights, which should deal with isolated violations of human rights. Accordingly, this understanding of the Convention had a decisive impact on the interpretation of the ECHR provisions and particularly with regard to the scope of its rights.

It was in 1978 when the ECtHR delivered a judgment in which it stated that “...the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions.” Thereby the Strasbourg judges introduced the living instrument doctrine which allows the Court to interpret and apply the meaning of Convention rights in a broad way since the ECtHR has to address and consider current circumstances, but also keep the need for appropriate legal measures in a specific area under review. As the area of migration law is undoubtedly a topic where policy-makers show extensive activities, I consider the living instrument doctrine as an important instrument to enable the Court to react to ongoing developments without being limited to legal dogmatic reasoning. Thus, the living instrument doctrine is an essential tool which allows the Court to progress and adjust human rights obligations in line with political and social developments within the realm of the European Council.

Another principle that the Court introduced already in the 1970s is what Letsas calls the theory of autonomous concepts. In a nutshell, the concept says that Convention terms have an independent meaning which is not to be equated with the one a term might have in domestic law. As regards to

---

80 Bates (N. 77), Preface.
81 Maris Burbergs, How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born in E. Brems, J.H. Gerards (eds), Shaping Rights in the ECHR: The role of the European Court of Rights in determining the scope of human rights (Cambridge University Press 2013), 317.
82 Ibid, 319.
83 ECtHR, Case of Tyrer v. United Kingdom (Appl. No. 5856/72), 25.04.1978, para 31.
84 See e.g. ECtHR, Case of Cassey v. United Kingdom (Appl. No. 10843/84), 27.09.1990, para 42.
86 Letsas (N. 85), 2.
the terms laid down in Art 8 ECHR – private life, family life, home and correspondence – all of them have been given an autonomous meaning by the Strasbourg organs by taking into account social, legal and technological developments across the Council member states.\textsuperscript{87} It is because of these dynamic concepts that the scope of Art 8 ECHR has been developed and is described by Burbergs as a “tree-like mode” where one branch is the base and support for other branches to grow.\textsuperscript{88} But how did the notion of private and family life lead Strasbourg to apply it in migration policies in the first place, especially when it is a topic which has always been at the core of national sovereignty? The following paragraph will shed light on this question.

4.3 Art 8 ECHR – The Right to Respect for Private and Family Life

4.3.1 Abdulaziz, Cabales and Balkandali v. The UK or how Strasbourg chose Sides for the very First Time

As stated earlier, the ECHR does not contain a specific provision which implies a right to migration or a right to choose the country of residence. This is confirmed by what Costello calls the statist assumption which treats immigration control as the State’s right.\textsuperscript{89} Consequently, the ECtHR repeatedly states in his judgments in Art 8 ECHR migration cases:

“... a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of an alien to enter or to reside in a particular country.”\textsuperscript{90}

The first time that the ECtHR established its case law on Article 8 ECHR with regards to immigration control and the right to family life was in 1985 in the landmark Abdulaziz, Cabales and Balkandali v. The UK judgment. In a nutshell, the facts of the case concerned three women who had permanent residence in the UK and whose husbands were precluded from joining them due to the UK Immigration Rules in force at that time.\textsuperscript{91} Interestingly enough, these exact Immigration Rules allowed men to be

\textsuperscript{87} Ursula Kilkelly, \textit{The Right to Respect for Private and Family Life; A Guide to the Implementation of Article 8 of the European Convention on Human Rights}, Human Rights Handbooks No. 1, (Council of Europe 2003), 10; For a thorough overview on how the Court defined the terms laid down in Art 8 ECHR, see: Ibid, 11 – 18.
\textsuperscript{88} Burbergs (N. 81), 325.
\textsuperscript{89} Cathrin Costello, \textit{The Human Rights of Migrants and Refugees in European Law}, (Oxford University Press 2016), 112.
\textsuperscript{90} ECtHR, Case of Abdulaziz, Cabales and Balkandali v. United Kingdom, para 67; Regarding the question, whether the state’s entitlement to control the entry of aliens is actually a matter of well-established international law see Marie-Benedicte Dembour, \textit{When Humans become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint} (Oxford University Press 2015), 117 f.
joined by their wives. The women claimed a violation of Art 8 ECHR as well as discrimination based on gender and race according to Art 14 ECHR. The government, on the other hand, claimed that the aim of its policy was to protect the domestic labour market and maintain public tranquillity. Furthermore, the UK government initially contested the applicability of Art 8 ECHR by stating that the facts of the cases lie outside of the scope of Art 8 and therefore no complaints based on the application of immigration control could succeed under this provision.

Hence, the Court not only had to answer the question whether the facts would fall under the scope of Art 8 ECHR, but also, if it was to decide the first question in the affirmative, whether the right to family life would entail a positive obligation to admit the spouses. The Court left no doubt about the fact that each of the applicants had to a sufficient degree entered upon “family life” for the purposes of Art 8 due to the existing marriages. Furthermore, the Court stated concerning Art 8 that “(...) there may be positive obligations inherent in effective “respect” for family life”. It went on to explain that “(...) this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals”. Finally, it concluded: “The duty imposed by Art 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.”

Accordingly, the Court found no violation of Art 8 ECHR, as well as no discrimination based on racial grounds. With regards to the discrimination based on gender the Court held unanimously that the UK policy was in breach of Art 14 ECHR. Eventually, this led to a situation which can be observed in other cases related to the issue of migration: Instead of enhancing the legal opportunities for family reunification, the UK government levelled down the Immigration Rules by taking away the right of

92 This is just one example that shows that family reunification has had and still has strong gender-related implications. On this issue see Sarah van Walsum & Thomas Spijkerboer, Women and immigration law: new variations on classical feminist themes (Routledge-Cavendish 2007) or Fulvio Staiano, Good Mothers, Bad Mothers: Transnational Mothering in European Court of Human Rights’ Case Law, 15 European Journal of Migration and Law 2 (2013), 155 – 182.
93 Since the topic of this thesis does not raise any questions regarding the questions which relationships constitute family life, I won’t discuss this issue. A pertinent overview can be found in Daniel Thym, Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?, 57 The International and Comparative Law Quarterly 1 (2008), 89 ff.
94 ECtHR, Case of Abdulaziz, Cabales and Balkandali v. United Kingdom, para 67.
95 Ibid.
96 Ibid.
97 Costello rightly points out that the case predates a proper indirect discrimination jurisprudence in Strasbourg: see Costello (N. 89), 118.
men to be joined by their wives. Although the Court found a violation, migrants ended up with fewer rights than before, an outcome which was certainly not intended by the applicants.

With regard to the state’s obligation according to Art 8 ECHR the essential principles laid down by the Court can therefore be summarized as follows:

- There is no general obligation on a State to respect the choice by married couples of the country of matrimonial residence.
- States enjoy a wide margin of appreciation in this area.
- It is of relevance whether there are obstacles to establish the matrimonial home elsewhere.
- It is relevant whether married spouses were aware of the problems of entry and the limited leave available.  

Hence, I agree with Dembour, who rightly pointed out that the general rule the Court defined in this precedent is that it is the state’s right which is considered first, whereas Convention rights are relegated to the status of exception. This is also underpinned by the argument of the Court that states enjoy in this area a wide margin of appreciation, which allows the ECtHR a considerable leeway in making a decision in the field of immigration. This basic rule/exception structure and the above-mentioned principles play until today a decisive role in judgments of the ECtHR in migration cases. However, it does not come as a surprise that more than thirty years after the ABC judgment, there have been further developments in the Court’s case law, which I will discuss subsequently.

4.3.2 Negative vs. Positive Obligations – A Consistent Distinction?

Even though the aforementioned statist assumption, which says that immigration control is the state’s right, is valid for every Art 8 ECHR case that concerns migration, it is nevertheless not only possible but also necessary to further distinct between different categories of case law in order to better understand the approaches the Court took so far in migration related cases. The most logical way to do this is by differentiating between the distinctive obligations the responsible state may have. Generally speaking, one can distinguish between negative and positive obligation cases. However, even the Court is sometimes not crystal clear in its determination and simply does not make a statement about the kind of obligation a state has. Klaasen has therefore introduced a third category which he called hybrid obligation cases. These are cases where it is difficult to make a sharp distinction

98 Kilkelly (N. 87), 57.
99 Dembour (N. 90), 119.
100 Due to the structure of this thesis, I will discuss the concept of the margin of appreciation extensively in paragraph 4.5.4.
between negative and positive obligations. The aim of this paragraph is to provide an analysis on what the different forms of obligations in the migration context actually mean and entail. As I will show subsequently, the existing differentiation is due to the diverging jurisprudence being not as clear-cut and consistent as one might think.

4.3.2.1 Negative Obligation Cases

Negative obligation cases deal with settled migrants who have established private and/or family life and the state wants to terminate the residence of the person concerned. Since this kind of cases do not cover the topic of family reunification per se, I will only briefly address them. Therefore, it is sufficient to state that the Court qualifies the state’s intervention as an interference with the private/family life and for this reason applies the justification test according to Art 8 (2) ECHR. Essentially, the main question is whether the state has a negative obligation to refrain from interfering with the right to respect for family or private life. With regards to settled migrants who got convicted for crimes in their host state, the ECtHR formulated a list of criteria which have to be considered when assessing whether an expulsion is necessary in a democratic society. Although the Court has developed these criteria, it is still being criticized for not having a consistent line in how to weigh them. However, this form of criticism is not limited to negative obligation cases, but emerges generally in immigration related cases as I will show subsequently.

4.3.2.2 Positive Obligation Cases

Positive obligation cases on the other hand, deal with migrants who claim a first right of entry or residence. It goes without saying that the main issue is not whether the state has to abstain from an action, but whether it has to accept the entry and residence of an applicant for reasons of family life according to Art 8 (1) ECHR. This implies not only cases of family reunification where the family life was already established before the sponsor emigrated, but also cases of family formation where the family has been established after immigration of the sponsor. In contrast to negative obligation cases the Court does not apply the justification test according to Art 8 (2) ECHR since it is assumed that there is no interference with established family life.

102 See Boeles (N. 36), 215 ff. for an elaborated analysis on negative obligation cases.
103 Klaasen (N. 101), 3.
104 The two landmark cases are ECtHR, Case of Boultif v. Switzerland (Appl. No. 54273/00), 02.08.2001 and ECtHR, Case of Üner v. The Netherlands (Appl. No. 46410/99), 18.10.2006.
105 E.g. Boeles (N. 36), 223.
Accordingly, the Court applies a different test which was introduced for the first time in the case of *Gül v. Switzerland*. The case concerned Mr. Gül, a Turkish citizen who was granted a humanitarian visa in Switzerland. Mr. Gül wanted his minor son Ersin to reunite with the rest of the family which already lived in Switzerland. The Court, however, chose a restrictive approach and focused solely on the question whether the admittance of Ersin would be the only possible way of exercising the right to family life. It concluded that this was not the case since the family could return to Turkey. Hence, no violation of Art 8 was found by the ECtHR. In the same year the Court came to the same conclusion in the case of *Ahmut v. The Netherlands*. In essence the Court established the rule that migrants, if they wish to live with their family members, should do so in their country of origin and only if that is absolutely impossible, there might be an obligation for the state to allow family reunification. Costello refers to this feature of the case law as the “elsewhere test”.

In this context, two further decisions of the Court which concerned the first admittance of children need special consideration. In 2001, the ECtHR decided on the case of *Sen v. The Netherlands*. The facts of the case can be briefly summarized as follows: Mr. and Mrs. Sen had three children, two of them were born in the Netherlands and were already living together with the parents. Only Sinem, the oldest daughter, was still in Turkey living there with relatives. The Dutch government rejected the application for family reunification for various reasons, one of them being the argument the ECtHR had used in *Gül* and *Ahmut*. Interestingly enough, this time the Court came to a different outcome. The main consideration by the Strasbourg judges was that there was a major impediment for the family to return to Turkey, namely the fact that both of Sinem’s siblings were born and raised in the Netherlands. Accordingly, the Court did not ask whether the admittance was the only possible way of exercising the right to family life, but whether the admittance was considered as the most adequate means to develop family life.

This somewhat more liberal approach was confirmed by the ECtHR in 2005 in the case of *Tuquabo-Tekle and others v. The Netherlands*. Again the case concerned the admittance of a child that was left behind in the country of origin and again the Court applied the “most adequate means to develop family life” rule because Mrs. Tuquabo-Tekle had two children who were born and raised in the Netherlands. Hence, in the *Sen* judgment and in *Tuquabo-Tekle* the Court put considerable emphasis

---

107 ECtHR, Case of *Ahmut v. The Netherlands* (Appl. no. 21702/93), 28.11.1996.
108 Costello (N. 89), 113.
110 ECtHR, Case of *Tuquabo-Tekle and others v. The Netherlands* (Appl. no. 60665/00), 01.12.2005.
on presence of siblings in Europe, a fact that was held true for the Gül case too but was nevertheless ignored by the ECtHR.\textsuperscript{111}

These two different strains of case law already show that the Court’s decisions have not been without any ambiguity. However, the ECtHR expanded its jurisprudence and therewith the ongoing search for comprehensibility and consistency also continued. In 2006, the ECtHR decided on the case of 

\textit{Rodrigues da Silva & Hoogkamer v. The Netherlands} in which it laid down a general premise: Where persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious, only in the most exceptional circumstances will a removal constitute a violation of Art 8 ECHR.\textsuperscript{112} According to the ECtHR, the relevant factors to determine this are:

- the extent to which family life is effectively ruptured;
- the extent of the family ties in the host state;
- whether there are insurmountable obstacles to the family living in the country of origin of one or more of them;
- whether there are factors of immigration control, such as a history of breaches of immigration law;
- whether considerations of public order are applicable; and (as already mentioned above)
- whether family life was created at a time when the persons involved were aware of the fact that the immigration status of one of them was precarious.\textsuperscript{113}

It should be noted that the Court did not give any clear guidance in its judgment on how to weight these different factors, leaving practitioners once again in limbo on how to find a right balance between the individual’s and the state’s interest.

Subsequently, the Court added another facet to its case law with the judgment of \textit{Nunez v. Norway}.\textsuperscript{114} First of all, it is noteworthy that the ECtHR did not find it necessary to even determine whether the state has a positive or negative obligation. This can be observed in many decisions of the Court in which it regularly states:

\begin{itemize}
\item \textsuperscript{111} Thomas Spijkerboer, \textit{Structural Instability: Strasbourg Case Law on Children’s Family Reunion}, \textit{11 European Journal of Migration and Law} 3 (2009), 279.
\item \textsuperscript{112} ECtHR, Case of Rodrigues da Silva & Hoogkamer v. The Netherlands (Appl. no. 50435/99), 31.01.2006, para. 39.
\item \textsuperscript{113} Ibid.
\item \textsuperscript{114} ECtHR, Case of Nunez v. Norway (Appl. no. 55597/09), 28.06.2011.
\end{itemize}
“... 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.”

Secondly, the ECtHR’s assessment deviates from the exceptional circumstances test established in Rodrigues da Silva & Hoogkamer v. The Netherlands in so far, as the judges put particular regard to the best interest of the child principle according to Art 3 (1) UN Convention of the Rights of the Child. The judges concluded that the Norwegian authorities did not strike a fair balance between its public interest in ensuring effective immigration control on the one hand, and the applicant’s need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

However, it would be wrong to assume that the best interest of the child principle is always pivotal in immigration cases. This was confirmed by the Court shortly after the Nunez judgment in Antwi v. Norway where no violation of Art 8 ECHR was found, although the facts of the case were fairly similar to the ones in Nunez. Interestingly, in both decisions there were dissenting opinions, although obviously for distinct reasons. The Nunez judgment was criticized by dissenting judges for “…send(ing) the wrong signal, namely that persons who are illegally in a country can somehow contrive to have their residence “legitimised” through the expedient of marriage and of having children.” In the Antwi judgment the dissenting judges pronounced due to the negative outcome a totally different opinion: “Admit that the impugned measure was “clearly not” in – i.e. against - the best interests of the third applicant, while at the same time affirming that such interests have been duly taken into account seems to pay lip service to a guiding human rights principle.” These two different opinions show quite remarkably the disparity that seemed to exist within the ECtHR judges as regards to how to apply the principle correctly. It goes without saying that Strasbourg did not leave the impression of having a clear stance on how to weight the best interest of the child in immigration cases.

In this regard the reasoning in the El Ghatet v. Switzerland judgment from 2016 can be seen as an attempt by the Court to give further guidance and clarification for domestic authorities:

115 E.g. ECtHR, Case of Gül v. Switzerland, para 38.
117 ECtHR, Case of Nunez v. Norway, Dissenting Opinions by Judges Mijovic and De Geatano, para 1.
118 ECtHR, Case of Antwi and others v. Norway (Appl. no. 26940/10), 14.02.2012, Dissenting Opinion by Judge Sicilianos, joined by Judge Lazarova Trajkovska, para 8.
“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.”\textsuperscript{119}

Hence, although lawyers and practitioners yearn for general applicable rules and statements, one can only state that the best interest of the child is an important factor in cases where children are involved. However, any kind of statement that claims that this principle is always the decisive one and prevails over any other criteria is certainly oversimplified.

Last but not least, it is worthwhile to take a closer look at the case of \textit{Jeunesse v. The Netherlands}.\textsuperscript{120} First of all, a brief overview of the facts: The case concerned a Surinamese national who lived with her Dutch spouse and her two children, both of them also Dutch nationals, in the Netherlands. The applicant had over-stayed her short-term visa and tried multiple times to obtain a residence permit, however without success. By the time the ECtHR judgment was published, she had stayed in the Netherlands for 18 years. Although the applicant lived for such a long time in the Netherlands, the Court made a clear distinction between her and settled migrants and qualified it as a positive obligation case. As \textit{Klaasen} rightly points out, the Court identified four elements which made the case exceptional and eventually led to the conclusion that there was a breach of Art 8 ECHR:

1. Both the husband and the children of the applicant were Dutch nationals. The applicant also held a Dutch nationality, which she lost previously because of the independence of Suriname.
2. The applicant lived in the Netherlands for more than 16 years and did not have a criminal record. In this context the Court considered that the applicant’s presence was tolerated by the Dutch authorities.
3. Although there were no insurmountable obstacles, the applicant and her family would experience a certain degree of hardship, if they were forced to settle in Suriname.
4. The national authorities fell short of considering the best interest of the children appropriately.\textsuperscript{121}

Ultimately, the decision, which is one of the few Art 8 ECHR migration cases which was decided by the Grand Chamber of the Court, combines all the principles which we have already encountered in the aforementioned decisions. Furthermore, the Strasbourg judges stressed again the exceptional circumstances of the applicant’s case, a reasoning we have encountered several times in the case law

\textsuperscript{119} ECtHR, Case of \textit{El Ghatet v. Switzerland} (Appl. no. 56971/10), 08.11.2016, para 46.
\textsuperscript{120} ECtHR, Case of \textit{Jeunesse v. The Netherlands} (Appl. no. 12738/10), 03.10.2014.
\textsuperscript{121} Klaasen (N. 101), 12 f; ECtHR, \textit{Jeunesse v. The Netherlands}, para 115 -120.
and which again confirms the rule that the State’s right to immigration control is the default position and the individual’s right to respect family life remains the exception to the rule.

4.3.3 Conclusion

The case-law analysis laid down in the previous paragraph has confirmed that a comprehensible and congruent categorization of the ECtHR jurisprudence is close to a “mission impossible” due to the inconsistency that is inherent in the case law. This inconsistency raises the question whether the distinction between the two different categories of obligations actually provides a benefit. Although the Court repeatedly states that the boundaries between the different obligations do not lend themselves to precise definition, one nevertheless gets the impression that positive obligation cases are less likely to be successful in Strasbourg. In this regard, I resonate with Spijkerboer’s opinion that a positive obligation seems to be something more exceptional than a negative one. Thereby the whole issue of family reunion is located under the exception to the rule. Thus, it fits perfectly well in the rule/exception structure which the Court is eager to apply as we have already first encountered in the Abdulaziz judgment.

On the other hand, the scrutinized case law has shown that the ECtHR is not only far from being consistent in its own determination of obligations, but also that the Court persistently stresses the fact that the applicable principles are similar. Hence, as Spijkerboer rightly points out, the result of this anti-formal attitude is that the Court can assess the facts of each case separately and minimizes the precedent value of its judgments. This effect is most likely seen positive by the Council states and the Court itself, yet it should be considered that the increase of uncertainty concerns not only lawyers and individuals who strive for justice in Strasbourg in this field of law, but also the Council states.

And where does all of what has been said lead us with regards to the situation of BSPs in Austria? Form an overall perspective I claim that the case law’s ambiguity exacerbates any general assessment. However, the Court’s jurisprudence shows one thing clearly: The facts and the individual circumstances of the applicants play a pivotal role in the Court’s assessment. Nevertheless, it is possible to single out some factors which I claim to be significant with regards to BSPs: First of all, BSPs face insurmountable obstacles when it comes to continuing family life in the country of origin. Like refugees, BSPs are forced to migrate and therefore the exceptionality of the circumstances has to be considered appropriately. This argument is in line with all the different and divergent strains of case

122 Spijkerboer (N. 111), 284.
123 Ibid, 291.
law, whether it be the elsewhere test, the most adequate means to develop family life or the most exceptional circumstances assessments. Moreover, if the case concerns children, crucial weight must be attached to the best interest of the child. Hence, I claim that under consideration of the Court’s exception/rule structure there are strong arguments that a provision like the one in Austria is not in compliance with the requirements of Art 8 ECHR. Nevertheless, the question remains whether the balancing between the competing interests of the individual and of the community as a whole and the margin of appreciation which states have could lead the Court to conclude otherwise. Therefore, I will address these issues extensively in paragraph 4.5.4. But before I will put my focus on the prohibition of discrimination according Art 14 ECHR, I will scrutinize what the ECtHR has to say on waiting periods and procedural minimum standards in family reunification cases.

4.4 The ECtHR and its Stance on Waiting Periods for Family Reunification

The issue of waiting periods is insofar a noteworthy one, as the Austrian legislator has extended the waiting period from one to three years before an application for family members of BSPs is even admissible. Nevertheless, Austria is not alone in implementing these kinds of policies, but follows a recent trend of introducing restrictive provisions which could be observed in several other European countries as ramifications of the so-called “refugee crisis”. As stated in the introduction of this chapter, there are currently cases from Switzerland, Denmark and Sweden pending at the ECtHR.

All of them have in common that they concern the restricted legal access to family reunification of BSPs. Also, all of these countries have introduced a waiting period of three years for the group of BSPs. Thus, it is important to scrutinize what the ECtHR has to say on the topic of waiting periods. Has the Court in Strasbourg even ever explicitly addressed the topic in its jurisprudence or is it yet again an area in which Council states seem to have wide discretion?

To find out what the ECtHR has to say on waiting periods in family reunification cases, I performed a HUDOC-case law research based on different search terms. The research parameters were as follows:

- No limitations regarding the time frame

---

124 Cf. Paragraph 2.2.


126 ECtHR, J.K. v. Switzerland (Appl. no. 15500/18), Communicated on 09.01.2019; ECtHR, B.F. and D.E. v. Switzerland (Appl. no. 13258/28), Communicated on 09.01.2019; ECtHR, M.A. v. Denmark (Appl. no. 6697/18), Communicated on 07.09.2018; ECtHR, M.T. and others v. Sweden (Appl. no. 22105/18), Communicated on 20.12.2018.
- Limitation on Art 8 & Art 8 in conjunction with Art 14 ECHR case law (under the “applicability” search option)
- Search terms: “waiting period” or “waiting time” or just “waiting”

The highest number of 14 results was found with the search term “waiting” and the lowest with “waiting time” with only one result. However, after thoroughly scrutinizing every decision based on the research parameters the conclusion is disenchanted: There is not a single decision of the Court were the issue of waiting periods in the context of family reunification was actually explicitly addressed so far. Apparently, the Strasbourg judges were either able to work around this issue or – and I am in favour of this possible explanation – it was simply not tackled in such a way that the Court had to explicitly give its stance on the compliance with the obligations which derive from the pertinent ECtHR provisions.

4.4.1 How the Conduct of French Authorities led the ECtHR to lay down Procedural Safeguards in Art 8 ECHR Cases

Nevertheless, there are three judgments which are interesting to look at from the vantage point of “waiting periods”, namely *Mugenzi v. France*, *Tanda-Muzinga v. France* and *Senigo Longue and others v. France*, all in which the Court found a violation of Art 8 ECHR.\(^{127}\) What makes these rulings noteworthy is that the Court stated in them that the procedure for assessing an application of family reunification had to contain a number of elements, thereby focusing on procedural aspects which are safeguarded by Art 8 ECHR. To what extent the outcome is applicable for the issue at stake is questionable and will be looked at as a next step, but first, I will give an overview of the facts.

In *Mugenzi & Tanda-Muzinga*, both of the applicants obtained refugee status in France and applied for family reunification subsequently. The consular authorities rejected to issue visas for the children in both cases because of difficulties in establishing the children’s civil registration status. Without going too much into the specifics of the case, it can be said that Mr. Mugenzi went through an odyssey with the French authorities until eventually in March 2009 – six years after the initial application – the Conseil d’Etat gave judgment against the applicant, the initial ground for refusal being an age deviation between the physiological age determined with an age examination ordered by the French Embassy in Nairobi and the age mentioned in the children’s birth certificates.

\(^{127}\) ECtHR, Case of *Mugenzi v. France* (Appl. no. 52701/09), 10.07.2014; ECtHR, Case of *Tanda-Muzinga v. France* (Appl. no. 2260/10), 10.07.2014; ECtHR, Case of *Senigo Longue v. France* (Appl. no. 19113/09), 10.07.2014.
Mr. Tanda-Muzinga faced similar difficulties. After lodging the application for visas in June 2007, the applicant did not get any answer from the authorities until he lodged an urgent application at the Conseil d’Etat. It was only then, that the applicant got the information that the Minister of Immigration contested the birth certificates of two of his children. After the application was dismissed by the Conseil d’Etat due to the fraudulent nature of at least one of the documents, Mr. Tanda-Muzinga applied a second time for family reunification, which again was unsuccessful. The applicant submitted another appeal; however, the Appeals Board did not reply. It was only after the involvement of the ECtHR that and another issuance of a child’s birth certificate in Cameroon that the consular authorities issued the visas in December 2010.

The case of Senigo Longue and others v. France concerned Ms. Longue who lived lawfully in France since October 2005 with her French husband. She obtained the French citizenship in November 2010. In May 2007 she applied for family reunification, her two children living in Cameroon at that time. The consular authorities rejected the application due to the fact that the presented birth certificates were not authentic. Ms. Longue appealed and even went to Cameroon to carry out DNA checks, which confirmed that the probability of her being the mother was 99,99 %. However, the Conseil D’Etat dismissed the appeal, claiming that the submitted documents were forged. After the ECtHR communicated the case to the government, the French authorities issued visas in July 2010.

As already stated, the ECtHR found unanimously a violation of Art 8 ECHR in all of the three cases. What is even more interesting, however, is the Court’s reasoning, especially because it addresses certain arguments for the very first time. First of all, in all three cases the ECtHR stated that the refusal to issue visas cannot be qualified as an interference, thus clarifying that the cases at stake concern positive obligations. Regarding the applicants there is one decisive distinction, namely that in Mugenzi & Tanda-Muzinga the applicants were refugees, whereas Ms. Longue was “only” a TCN with a residence right in France. This distinction plays insofar an essential role, as the Court emphasised in Mugenzi & Tanda-Muzinga the fact that refugee status was granted and the subsequent recognition of the principle of family reunification. Hence, “...it was of crucial importance that the visa applications be examined promptly, attentively and with particular diligence.”128 The Court approached the issue therefore from a procedural perspective, putting its focus on the quality of the procedure.

If one compares the Court’s reasoning with other family reunification cases, it catches one’s eye how much the Court stresses that family unity is an essential right for refugees. To underpin this argument

128 Cf. ECtHR, Tanda-Muzinga v. France, para 75.
the Court referred to the existing 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. Furthermore, the Court directly refers to the vulnerability of refugees by citing Hirsi Jamaa and others v. Italy where it held that obtaining international protection constitutes evidence of the vulnerability of the parties concerned.\(^{129}\) The Court took this argument up again in Tanda-Muzinga by holding that:

“All of the above considerations reveal the agonising and apparently hopeless situation in which the applicant found himself. The Court notes that the accumulation and protracted nature of the numerous hurdles encountered in the course of the proceedings by the applicant – who had already been subject to traumatic experiences which justified the granting of refugee status – have left him in a state of severe depression.”  

Next to the “vulnerability/refugee” argument, it is moreover striking that the Court considers it relevant to take account of the standards set out in the international instruments in this area and to bear in mind the recommendations of NGOs specialising in the rights of aliens. This isn’t something which hasn’t been encountered in the Court’s jurisprudence, yet it is another piece to the puzzle that eventually led the Court to its conclusion 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.”\(^{130}\)

In Seni Longue the argumentation in the reasoning obviously had to be different, simply because the applicant was not a refugee. Nevertheless, the Court argued likewise that it had been of overriding importance that the applicant’s visa applications be examined rapidly, attentively and with particular diligence because the dismissal of her applications had left her with a choice of either abandoning the status she had acquired in France or accepting that she would not live with her children. Another criticism the Court uttered in Seni Longue, same as in Tanda-Muzinga, was the fact that it had been difficult for the applicants to understand what exactly the objections were, which made it hard for the applicants to effectively participate in the procedures. Regarding the long time periods that passed until there were final decisions in the domestic proceedings, the ECtHR qualified them in all rulings as being excessive.

\(^{129}\) ECtHR, Case of Hirsi Jamaa and others v. Italy (Appl. no. 27765/09), 23.02.2012, para 155.  
\(^{130}\) ECtHR, Tanda-Muzinga v. France, para 81.  
\(^{131}\) Ibid, para 82.
Hence, the outcomes of these rulings raise several issues: Are there any general implications that can be drawn from the discussed cases? To what extent are the conclusions by the Court applicable to other family reunification cases and what are the idiosyncrasies of the specific cases? To answer these questions, I point out the obvious differences and arguments which speak rather against a general applicability. However, I will also demonstrate that there are possible counter arguments which could lead the Court to give the presented judgments a wider meaning than at first sight expected.

While the Court made it clear that it qualifies refugees as vulnerable, no such explicit statement can so far be found by the Court regarding BSPs. As I already laid down in paragraph 4.3.2, I claim that there are strong arguments in favour of BSPs being in fact comparable to refugees due to the same protection needs both groups have. This implies that BSPs, same as refugees, should be qualified as vulnerable and therefore the margin of appreciation for the concerned state has to narrow down. However, it remains to be seen whether the Strasbourg judges are willing to explicitly state that any person entitled to international protection has to be qualified as vulnerable.

Secondly, with regards to the issue of family reunification for BSPs it has to be said that there is no such consensus on the international and European level as there is for refugees. Again, I already laid down in paragraph 3.4 that there is arguably a respectable bandwidth of stakeholders which opine for the same treatment of BSPs and refugees, but undoubtedly it does not reach the broad consent as there is for refugees. This speaks rather for a wide margin of appreciation for the states concerned.

Thirdly, the Court explicitly stated in all of the discussed cases that the time periods were excessive, regardless of whether the applicant was a refugee or a TCN with a residence right. Moreover, the Court stressed that visa applications should be examined rapidly, attentively and with particular diligence. Thereby the Court basically laid down a minimum standard procedural rule for family reunification procedures. But is it possible to equate a procedure which is excessive due to the authorities’ conduct with a general waiting period which is prescribed by law?

One might come up with the argumentation that it is questionable to state on the one hand that the decision-making process has to be prompt and effective, while on the other hand a 3-year-exclusion to even apply for reunification is acceptable. This *argumentum a fortiori* initially presupposes that BSPs and refugees are in a comparable situation. However, I contest that a procedure which does not reach the minimum standards of flexibility, promptness and effectiveness can be equated with a legal

---

132 Cf. paragraph 4.5.4.
provision in which the legislator consciously chose to exclude a specific group from being entitled to start a procedure for a certain period of time is a too far-reaching and unconvincing argument. Therefore, I hold that the outcome of the cases cannot be transferred on the issue of general waiting periods.

What can be stated in any case is that any kind of visa procedure enabling a person to reunify with his/her family members has to be examined rapidly, attentively and with particular diligence. My claim is that this has to be even more so, if the right to family reunification is “blocked” at first due to an artificial waiting period established by the legislator. However, I suggest that anything that goes beyond this reading is not intended by the Court and thus, these judgments do not clarify the Court’s stance on waiting periods prescribed by law.

4.5 Art 14 ECHR — The Prohibition of Discrimination

4.5.1 Art 14 ECHR — A Brief Introduction

The prohibition of discrimination based upon race, sex, language, religion, and other analogous grounds is in many ways unique. It is the only substantive human right set out in the Charter of the United Nations and can be found in a multitude of other international human rights treaties. Within the ECHR framework it is established in Art 14 in respect of the rights protected by the Convention and reads as follows:

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.

Thus, Art 14 ECHR is not an independent equality clause that applies across the board to any activity, but a guarantee “accessory” to the enjoyment of the other rights protected by the Convention. This means that there doesn’t have to be a violation of a specific right laid down in the Convention, but merely that the facts of the case fall within the ambit of one or more Articles of the Convention.

---


136 ECtHR, Case of Burden v. The UK (Appl. no. 13378/06), 29.04.2008, para 75.
Furthermore, the ECtHR has clarified that Art 14 ECHR “… applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide.”  

4.5.2 What constitutes a Discrimination according to Art 14 ECHR?

In short, in order to invoke Art 14 ECHR, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. According to the ECtHR case law, the difference in treatment is discriminatory, if it has no objective and reasonable justification. Hence, in Art 14 ECHR cases one has to apply a framework which entails the following elements:

- The facts of the case fall within the ambit of Art 14 in conjunction with another ECHR provision;
- There is a difference in treatment of person in an analogous or relevantly similar situation;
- The difference in treatment is based on one of the protected grounds laid down in Art 14 ECHR;
- The differential treatment is only justified, if
  - it pursues a legitimate aim and
  - if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.
  - Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

Before I will scrutinize these elements through a “family reunification/BSP” lens, it is necessary for the sake of completeness to state that there are different categories of discrimination. For this thesis I will focus first and foremost on direct discrimination which is defined by the ECtHR as a “a difference in the treatment of persons in analogous, or relevantly similar, situations based on an identifiable characteristic”. With regards to indirect discrimination, on the other hand, the Court has stated that “…a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.”

---

137 ECtHR, Case of Andrle v. Czech Republic (Appl. no. 6268/08), 17.02.2011, para 28.
138 ECtHR, Case of D.H. and others v. the Czech Republic (Appl. no. 57325/00), 13.11.2007, para 175.
139 ECtHR, Case of Bah v. the UK (Appl. no. 56328/07), 27.09.2011, para 36.
140 ECtHR, Case of Biao v. Denmark (Appl no. 38590/10), 24.05.2016, para 89.
141 Ibid, para 103;
4.5.3 The Starting Point of any ECHR Discrimination Case – Find a Comparator

Art 14 ECHR can be invoked for the issue of family reunification since it undoubtedly falls within the ambit of family life according to Art 8 ECHR. The first element of the Art 14 ECHR scheme is thus certainly met. Therefore, the next questions which are being raised are:

- First, is there a difference in treatment based on identifiable characteristic or “status”?
- Second, is there a difference in treatment of persons in an analogous, or relevantly similar situation or to put it bluntly: Is there a group which is comparable to BSPs?

Only if both of these two questions can be answered in the affirmative, it needs to be assessed whether there is an objective and reasonable justification for the difference in treatment.

With regards to the first question, the Court has already clarified that an immigration status falls within the meaning of “other status” according to Art 14 ECHR. As subsidiary protection is a type of immigration status, the first prerequisite is undoubtedly fulfilled. Hence, it remains to be answered which groups could in fact be compared to BSPs. In order to find possible solutions, it is helpful to take a closer look at the case of Hode & Abdi v. the UK, which dealt with the rejection of an application to reunite a post-flight spouse. The first applicant was recognized as a refugee in the UK and had a limited leave to remain for the first five years. Subsequently he was granted indefinite leave to remain. At the relevant time of application, a spouse could only be reunited with the person holding refugee status, if the marriage had taken place before leaving the country of formal habitual residence or if the refugee was already granted an indefinite leave to remain. However, other TCNs with a limited leave to remain like students or workers were in general entitled to apply for family reunification.

The ECtHR made some considerable statements in its assessment. As stated above, the Court did not only conclude that the applicant enjoyed some “other status”, but it also emphasised that the argument was even stronger since unlike immigration status refugee status did not entail an element of choice. Moreover, contrary to what the British government argued, the Court considered that the applicant was in an analogous position to refugees who married before leaving their country of permanent residence, as well as to students and workers with a limited leave to remain. Eventually, the Court concluded that there was no objective and reasonable justification although it accepted the argument by the government that offering incentives to certain groups of immigrants amounts to a

142 Cf. ECtHR, Abdulaziz, Cabales and Balkandali v. The UK, para 59 f.
143 ECtHR, Case of Bah v. the UK, para 46.
144 ECtHR, Case of Hode and Abdi v. United Kingdom (Appl. no.22341/09), 06.11.2012.
145 Ibid, para 46 f.
146 Ibid, para 50.
The Court found a violation by referring to domestic cases in which the Upper Tribunal of the UK found no justification for the particularly disadvantaged position of refugees. This was reinforced by the fact that the Secretary of State for the Home Department changed the Immigration Rules subsequently due to the suggestions of the Upper Tribunal. Since the Court found a breach of Art 14 ECHR in conjunction with Art 8 ECHR, it did not find it necessary to examine the alleged violation of Art 8 ECHR.

Although the ECtHR noted already repeatedly that the requirement to demonstrate an “analogous situation” does not require the comparator groups to be identical, the Hode & Abdi judgment confirmed that the Court doesn’t linger over this question but is straight-forward in its assessment that they are in fact comparable groups. This is insofar of relevance, as it should also allow the same wide range of comparable groups for the issue at stake, as I will argue below. But which groups are in an analogous or relevantly similar situation with BSPs?

The most obvious group to compare BSPs with is the group of refugees. Both of these groups are entitled to a form of international protection which is granted to an individual because the person concerned is forced to leave the country of origin either because of personal persecution or because of the risk of ill-treatment contrary to Art 3 ECHR. As I already laid down in detail in paragraph 3.4, the similarity of the two statuses was also repeatedly highlighted by different stakeholders like the European Commission which stated inter alia: “The Commission considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages MSs to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection.” Given the fact that the Court emphasised in Hode & Abdi that the refugee status does not entail an element of choice and that the same is true for the subsidiary protection status, I claim that the requirement of comparability according to Court’s jurisprudence is fulfilled.

Hode & Abdi has furthermore shown, that the Court is willing to accept a comparison with TCNs with a limited leave to remain. The Austrian legal framework entitles a wide number of TCNs with a limited residence right to apply for family reunification, amongst them skilled workers, students, artists or researchers. These TCNs who fall within the ambit of the Austrian Residence Act (Niederlassungs-
& Aufenthaltsgesetz) are not restricted by a waiting period like BSPs are. Hence, I contend that the factual situation of BSPs and TCNs with a limited leave to remain in Austria fulfils the criterion of being in a relevantly similar situation.

In sum, there are very strong indications that the ECtHR embraces the assumption that a comparability at least between refugees and BSPs is given. Since there is certainly a difference in treatment based on the immigration or residence status not only in the countries against which there are cases pending in Strasbourg, but also in Austria, the question is how this difference in treatment could be justified. Thus, we have to turn our eyes towards the justification test.

4.5.4 Legitimate Aim, Margin of Appreciation & the Principle of Proportionality or the Crucial Question when a Difference in Treatment is objectively and reasonably justified

Once a difference in treatment based on one of the grounds laid down in Art 14 ECHR is established, it is the Court’s task to assess if there is an objective and reasonable justification. This assessment is built on different steps of which every single one entails special features and legal niceties. These special features and their application in individual cases is also what makes it hard to grasp whether the Court has actually developed a sound and consistent jurisprudence. O’Connell goes even one step further by claiming: “The possibility to justify discrimination, and the spectre of the margin of appreciation, have further potential to dilute the strength of the non-discrimination principle.” 149 This leads me to the assumption that the justification test might not only be a challenging task for anyone who has to apply it. It also implies that the prohibition of discrimination can only then be qualified as a strong human rights tool if the leeway for states to justify a difference in treatment is not too broad. However, my aim for this chapter is not to give a comprehensive overview about every single aspect of the different (and certainly interesting) features of the justification test, but to focus on the elements from a perspective that keeps in mind the idiosyncrasies of BSPs. 150

Legitimate Aim

The legitimate aim-criterion is the first thing to assess, when the Court considers whether an identified difference in treatment is justified. As it was shown in the landmark case of Abdulaziz, even discriminatory racial segregation can be argued to pursue legitimate aims such as conduction towards

---

149 Rory O’Connell, Cinderella comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR, 29 Legal Studies 2 (2009), 212.

150 Note that the different elements of the justification test that I discuss in this chapter also play an important role in Art 8 ECHR cases. However, for the sake of clarity and due to the structure of this thesis, I address them only in this chapter.
public tranquillity, restoring calm and order in society or similar aims which in themselves would be considered legitimate under the Convention.\footnote{151} In this regard I fully agree with Arnardottir who claims that the legitimate aim-criterion atrophies to a mere phrase which always can be fulfilled by certain measures, if governments claim good intentions and noble aims and the aim itself is considered in isolation.\footnote{152}

However, a closer look at the jurisprudence shows that in exceptional cases, the Court does come to the conclusion that the different treatment does not pursue a legitimate aim. In the recent ruling of \textit{Aleksandr Aleksandrov v. Russia} the Court stated with regards to a differential treatment of convicts due to their residence, that “\textit{...the Government failed to indicate in their observations what legitimate aim the difference in treatment pursued and how it was capable of being objectively and reasonably justified.}”\footnote{153} The Court came to similar conclusions, inter alia, in \textit{Petrov v. Bulgaria}\footnote{154} and \textit{Clift v. UK}.\footnote{155}

Thus, there seems to be only one conceivable scenario in which the legitimate aim assessment can lead to an actual violation of Art 14 ECHR, namely when the responsible government does not put forward any legitimate aim at all. Whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized is a different matter and should not be confused with the mere explanation by a State which aim the measure or policy pursues. The lesson that can be learned for family reunification cases is essentially the same like for any other discrimination cases: The government in question will usually don’t have any problems to state an aim which is considered to be legitimate. However, if there is also a reasonable relationship of proportionality is yet another story.

\textbf{Margin of Appreciation}

Since many years, the margin of appreciation doctrine is a widely discussed topic amongst scholars.\footnote{156} For the issue at stake it is neither necessary nor possible to address all the different aspects of discussion that go along with this doctrine. Nevertheless, I will first briefly explain what this enigmatic tool which the Court applies constantly in its jurisprudence is actually about before I will once again

\footnote{152} Ibid.
\footnote{153} ECtHR, Case of \textit{Aleksandr Aleksandrov v. Russia} (Appl. no. 14431/06), 27.03.2018, para 29.
\footnote{154} ECtHR, Case of \textit{Petrov v. Bulgaria} (Appl. no. 15197/02), 22.05.2008, para 54.
\footnote{155} ECtHR, Case of \textit{Clift v. UK} (Appl. no. 7205/07), 13.07.2010, para 77 f.
focus on the idiosyncrasies which have to be considered with regards to family reunification of BSPs and their family members.

The Convention itself does not contain any definition of the margin of appreciation and also the Court has always abstained to give a clear definition.\textsuperscript{157} Needless to say that there a myriad of definitions and explanations by scholars. By way of example, I chose Yourow’s definition who outlines the concept of the margin of appreciation in this way:

“The national margin of appreciation or discretion can be defined in the ECHR context as the freedom to act; manoeuvring, breathing or elbow room; or the latitude of deference or error which the Strasbourg organs will allow national legislation, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction, or limitation upon a right guaranteed by the Convention, to continue a violation of one of the Convention’s substantive guarantees.”\textsuperscript{158}

Some might say that not only this definition, but the concept in general is hard to grasp and way too blurry because of the wide leeway it ascertains to the Court. Nevertheless, it is widely accepted that the doctrine constitutes an important instrument for the ECtHR to accommodate its complex role as an international human rights court.\textsuperscript{159}

The doctrine was established by the Court in \textit{Handyside v. The UK} in which it pointed out that “...the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.”\textsuperscript{160} Hence, it seems obvious that the ECtHR was inspired by the classic argument of subsidiarity when it developed the MoA doctrine.\textsuperscript{161} This notion of subsidiarity is underpinned by another wording that the Court regularly uses when it states for instance in \textit{Stec v. The UK} with regards to general measures of economic or social strategy which have been implemented by states:

“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social

\begin{footnotesize}
\textsuperscript{160} ECtHR,Case of \textit{Handyside v. The UK} (Appl. No. 5493/72), 07.12.1976, para 48.
\textsuperscript{161} Gerards (N. 159), 104.
\end{footnotesize}
or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation.”  

But what does all of this mean in practice? Do national authorities generally have a broad leeway, and can one even claim that the Court underenforces Convention rights by applying the margin of appreciation? And what are the ramifications for the issue of immigration policies which touches the core of state sovereignty? According to the Court’s case law, the scope of the margin will vary according to circumstances, subject-matter and background. The above-mentioned measures of economic and social strategy usually allow the Contracting States a wide margin in this realm. However, the Strasbourg judges have also singled out several factors which narrow down the margin and come into play when it comes to the issue at stake.

First of all, it is noteworthy that the Court differentiates between the distinct discrimination grounds when it assesses how wide the margin in a specific case is. On the top end, there are the so-called “suspect grounds” which relate to certain inherent personal characteristics or deeply held convictions or beliefs. In Eweida and others v. The UK the Court identified sex, sexual orientation, ethnic origin, nationality and religious faith as grounds which require “very weighty reasons” to justify discrimination. With regards to other discrimination grounds, the Court has developed a sliding scale of increasingly lenient review which concerns discrimination grounds which are not or only very loosely related to personal status. With regards to immigration status, the Court has stated that it is not an inherent or immutable characteristic and is rather subject to an element of choice. This implies that states generally do have a wide margin if there is a difference in treatment based on the immigration status.

However, in cases regarding international protection status, this aforementioned element of choice is not present. This is because, as it is inherent to international protection, individuals in such situations

---

162 ECtHR, Case of Stec and others v. The UK (App. nos. 65731/01 and 65900/01), 12.04.2006, para 52.
164 ECtHR, Case of Burden v. The UK, para 60.
167 Arnardóttir (N. 165), 155.
168 ECtHR, Case of Bah v. UK, para 45.
do not have the choice to return to their country of origin.\textsuperscript{169} This lack of choice is emphasised by the Court in its case law concerning non-refoulement cases, where the risk of return to face treatment contrary to Article 3 ECHR amounts to a non-derogable obligation on the part of states.\textsuperscript{170} Hence, the logical conclusion for the group of BSPs is that the margin of appreciation cannot be equated with cases which “only” concern immigration status. Due to the implicit fact that BSPs, same as refugees, are forced to migrate, the margin has to be accordingly narrower.

Another factor that needs special consideration in this context is the \textit{vulnerable group approach} which the Court has established in its case law. The first time the Court used this concept was in relation to the Roma minority in the case of \textit{D.H. and others v. the Czech Republic} where it held that “...as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority. As the Court has noted in previous cases, they therefore require special protection.”\textsuperscript{171} Since this first landmark decision, the ECtHR has applied the concept for several groups such as people with mental disabilities,\textsuperscript{172} people living with HIV\textsuperscript{173} or asylum seekers.\textsuperscript{174} Regarding its influence on the scope of the margin of appreciation the ECtHR’s jurisprudence is straightforward: Once the Court qualifies a group as vulnerable, the State should be afforded only a narrow margin.\textsuperscript{175}

In order to define a vulnerable group, emphasis must be placed on the history of discrimination resulting in the social exclusion of a particular group. The Court thereby does not focus on essential or innate characteristics, but on the social structures that lead to the social exclusion of the group.\textsuperscript{176} Therefore, one can define the Court’s understanding of group vulnerability as relational/social-contextual.\textsuperscript{177}

Interestingly enough, neither Arnardóttir nor Peroni & Timmer include refugees or beneficiaries of international protection in their list of vulnerable groups, although the vulnerability of refugees was addressed by the Court in \textit{Hirsi Jamaa and others v. Italy} for the first time when it stated: “Therefore,\

\textsuperscript{169} ECtHR, Case of Bah v. UK, para 47; ECtHR, Case of Hode and Abdi v. United Kingdom, para 44.
\textsuperscript{170} ECtHR, Case of Soering v The United Kingdom (Appl. no. 14038/88), 07.07.1989; and subsequent jurisprudence.
\textsuperscript{171} ECtHR, Case of D.H. and others v. the Czech Republic, para 182.
\textsuperscript{172} ECtHR, Case of Alajos Kiss v. Hungary (Appl. no. 38832/10), 20.05.2010, para 42.
\textsuperscript{173} ECtHR, Case of Kiyutin v. Russia, para 63.
\textsuperscript{174} ECtHR, Case of M.S.S. v. Belgium & Greece (Appl. no. 30696/09), 21.01.2011, para 251.
\textsuperscript{175} Cf. ECtHR, Case of Kiyutin v. Russia, para 64.
\textsuperscript{176} Arnardóttir (N. 165), 164.
the fact that some of the applicants have obtained refugee status does not reassure the Court as regards the risk of arbitrary return. On the contrary, the Court shares the applicants’ view that that constitutes additional evidence of the vulnerability of the parties concerned.” Furthermore, in the case of Tanda-Musinga v. France the Court held that “obtaining such international protection constitutes evidence of the vulnerability of the parties concerned” when it referred to refugees. Thus, what can be derived for the group of BSPs? Do they have to be qualified as vulnerable and again, if yes, what are the ramifications regarding the margin of appreciation?

As I have already argued, I hold the view that the distinction between refugees and BSPs is first and foremost an artificial one. Undoubtedly, the reasons for fleeing from the country of origin differ, however both groups are forced to migrate, and inevitably have the same protection needs. Additionally, it can be observed throughout Europe that especially since the events of 2015 asylum seekers and beneficiaries of international protection respectively face an increasing hostile environment within European societies. This leads me to the conclusion that with regards to the question of vulnerability, there is no convincing argument why the Court should distinguish between the two different types of international protection. Hence, even if the ECtHR has not explicitly addressed the vulnerability of refugees in a case that concerned Art 14 ECHR, I claim that there are strong arguments to do so for all beneficiaries of international protection. Accordingly, my second claim in this regard is that the margin of appreciation should be narrow due to the vulnerability of beneficiaries of international protection.

Last but not least, there is another factor which plays an important role in determining how wide the State’s margin in a specific case is. The Court regularly refers to the existence or non-existence of a general consensus (or common ground) within the Council States regarding the particular issue at stake. If there is a broad consensus, the margin will accordingly be narrower. However, if that is not the case and policies or measures regarding a specific issue are diverse within the European Council States, the implication is that there will be hardly any support for the ECtHR to provide a far reaching judgment on a sensitive issue and therefore the Court may not feel empowered to take a critical “second look” at the national measure or decision.

178 ECtHR, Case of Hirsi Jamaa and others v. Italy, para 155.
179 ECtHR, Tanda-Musinga v. France (Appl. no. 2260/10), 10.07.2014, para 75.
180 Gerards (N. 159), 108.
181 Cf. ECtHR, Case of Kiyutin v. Russia, para 65 in which the Court declared that the exclusion of HIV-positive applicants from residence does not reflect an established European consensus and has little support among the Council of Europe member States.
182 Gerards (N. 159), 109; Regarding the points of critique that are raised concerning the establishment of a presence of a European consensus see also: Gerards (N. 159), Ibid.
If we take a closer look at the European Council and its member states and their policies regarding family reunification of BSPs, I am of the opinion that it would go too far to speak of an existing broad consensus. Let’s take a look at the EU member states first: According to a report by the European Migration Network published in 2017 out of the 28 member states, there are 14 which differentiate between refugees and BSPs as regards the granting of the right to family reunification. Amongst them are countries like Cyprus which don’t provide family reunification for BSPs at all. Hence, it does not come as a surprise that by including the 19 remaining Council States it is hard to argue that there is common ground in the European Council. Admittedly, there are countries like Norway, Iceland or Serbia which do provide family reunification procedures for BSPs under the same conditions as for refugees. However, it should not be forgotten that the Council also encompasses countries like Azerbaijan, Armenia or Georgia, where there is a general lack of a clear legal framework for family reunification. A cursory internet research resulted in a small majority of 24 out of 47 countries which do not distinguish between BSPs and refugees regarding their family reunification rules. This raises inevitably the question which amount of convergence is actually needed to speak of a common ground. Gerards rightly points out that the Court has not developed a conclusive stance on this issue. The ECtHR does not seem to require complete unanimity; however, it speaks of a “clear and uncontested evidence of a continuing international trend” in order to narrow the margin. Is that the case for the subject of family reunification for BSPs? As I argued in the beginning of this paragraph, I find it hard to contend that this requirement, although there certainly exists some ambiguity, is fulfilled. Accordingly, I opine that the non-existing broad consensus allows the states a wide-ranging margin of appreciation.

In sum, I argue that there are two factors which speak in favour of a narrow margin, whereas the non-existing common ground allows states to apply a wider margin. A simple two against one calculation undoubtedly oversimplifies the issue. Thus, the question of which of the factors prevails or is deemed

---

183 European Migration Network (N. 52), 20.
184 Ibid.
186 Cf. for instance the UNHCR report on Azerbaijan: UNCHR, UNHCR Submission on Azerbaijan: UPR 30th Session, May 2018, available at [https://www.refworld.org/country,,UNHCR,,AZE,,5b081e2f4,0.html](https://www.refworld.org/country,,UNHCR,,AZE,,5b081e2f4,0.html) [accessed 14 August 2019].
187 Note that this number is with reservation since it was not possible to find for all Council States official sources.
188 Gerards (N. 159), 109.
189 ECtHR, Case of Christine Goodwin v. The UK (Appl. no. 28957/95), 11.07.2002, para 85.
to be decisive for the Court respectively has to be raised. So far, the ECtHR has not solved this mystery and I doubt that it will enlighten us with a straight-forward answer any time soon. The reason for this persistent ambiguity is that the margin exemplifies the difficult task the Court has to manage as a supranational court: It has to cope with the balancing act between maintaining its necessary flexibility and a consistent application of the margin-doctrine. Hence, it is unlikely that the Court limits itself with a straightforward answer how the different criteria should be applied and weighed, but rather keeps its flexibility by the avoidance of elaborating a clear stance.

**Proportionality Assessment**

Additionally to the legitimate aim and the margin of appreciation, the Court assesses in Art 14 ECHR cases whether there is a “reasonable relationship of proportionality” between the means employed and the aim sought to be realized. In other words, the Court must be satisfied that

- firstly, there is no other means of achieving the aim that would impose less of an interference with the right to equal treatment (or, put otherwise, the disadvantage suffered is the minimum possible level of harm needed to achieve the aim sought);
- and secondly, the aim to be achieved is important enough to justify this level of interference.

To elaborate on all the different aspects of this balancing exercise between the interests of the individual and those of the State would unquestionably go beyond this thesis. Thus, it is sufficient to state that balancing rights and the public interest is endemic under the Convention. Furthermore it is noteworthy that when one scrutinizes Art 14 ECHR judgments, it is impossible to single out a consistent scheme applied by the Court. The Court’s case law rather leaves the impression that it mingles the margin of appreciation and the proportionality assessment without having a strict template of application. From the perspective of the Court this flexible approach naturally seems desirable, yet from the outside perspective it leaves one once again behind with a feeling of ambiguity.

---

192 See A comprehensive analysis on this topic can be found in Jonas Christofferson, *Fair Balance: Proportionality, Subsidiarity and the Primarity in the European Convention of Human Rights* (Martinus Nijhoff 2009); Regarding the structure of the Court’s proportionality assessment compared to the one of the CJEU see: Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Martinus Nijhoff 2015), 71 ff.
Turning to an individual who is not entitled to family reunification due to his status as a BSP, there are several exemplary factors that should be considered by the Court in a proportionality assessment. First of all, I have to yet again point out the arbitrary distinction between refugees and BSPs and their comparability respectively which I discussed extensively in paragraphs 3.4 and 4.5.3. I want to highlight that the Court should be well aware of the danger that states proceed further to create a 2nd class of international protection. Especially because the subsidiary protection status is derived from the Court’s jurisprudence on the principle of non-refoulement, the Strasbourg judges should pay close attention not to further encourage states to enhance this already existing distinction between the two statuses. Thus, I strongly opine that the factual arbitrariness of this distinction should weight in favour for the individual.

In the same breath, it should be stressed that the introduction of the aforementioned distinction between refugees and BSPs and the general restrictions of legal means to reunite with the family is a trend that could be observed especially after the so-called “refugee crisis” in 2015 & 2016. This would suggest that, rather than being consistent practice, distinguishing in this manner and introducing further requirements is a recent and atypical phenomenon that is a deviation from common state practice. This is not only at risk of being discriminatory under Articles 14 ECHR in conjunction with 8 ECHR, but it also exemplifies how European states aim to use the introduction of restrictive measures in a “race to the bottom” as a method of managing and limiting migration. Therefore, the Court should consider in its balancing that states use this kind of restrictive policies first and foremost as means of deterrence.

Furthermore, and as the case law laid down in paragraph 4.3.2 has evidenced, if one of the applicants is a minor, the best interest of the child principle has to be considered appropriately. As the Court itself stated in El Ghatet vs. Switzerland, the principle itself cannot be qualified as a general trump card in cases which concern children, however it certainly does touch the core of an individual’s interest in Art 8 ECHR and Art 14 ECHR in conjunction with Art 8 ECHR cases, namely, to actually be able to resume family life with family members. Hence, the Court has to consider the principle not only in Art 8 ECHR, but inevitably also in Art 14 ECHR cases.

Depending on the arguments brought forward by the State in a specific case, there are surely further counterarguments which could be submitted in favour of affected individuals. However, it also has to be kept in mind that the Court obviously has to consider and weight the state’s interests. As the

---

194 European Council on Refugees and Exiles (N. 125), para 1.
jurisprudence of the Court has evidenced, the ECtHR does not have the reputation of being hostile to interests of the states. Therefore, it would be not only a too simplified analysis, but also presumptuous to state that a proportionality assessment in a case which concerns family reunification of BSPs generally has to lead to the conclusion that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. For this reason, I believe that it is highly dependent on the specific facts of the individual case whether the Court will find a state measure proportionate or not. Not only with the margin of appreciation, but also with the proportionality assessment the Court deploys two legal tools that allow or even force the judges to consider the variety of legal practices and policies in Council States in order to come to a decision which ultimately should find acceptance within the Council.

4.6 Conclusion

While the previous chapter has clarified that the current EU legal framework de facto does not provide any legal options for BSPs and their families, one can state without doubt that the situation is different with regards to the ECHR. Although the ECHR does not comprise a right to immigration or family reunification per se, the right to respect for private and family life and the prohibition of discrimination as laid down in Art 8 ECHR and Art 14 ECHR respectively play a decisive role in the realm of family reunification.

However, my analysis of the existing case law and the legal assessments which the Court applies has shown that it is almost impossible to single out universally valid conclusions which would allow an exact prognosis of how the ECtHR will decide on the issue at stake. Nevertheless, I claim that there are specific factors in favour of BSPs which have to be considered in assessing Art 8 ECHR and Art 14 ECHR in conjunction with Art 8 ECHR respectively:

⇒ With regards to an Art 8 ECHR assessment, the ECtHR tends to focus on the exceptionality of the circumstances when assessing the individual facts of the case. I claim that BSPs fulfil this “exceptional circumstances criterion” since the continuation of family life in the country of origin is not possible for BSPs. Hence, the Court has to accordingly consider that in cases of forced migration family life can usually only be resumed in the host state of the BSP which is also in line with “most adequate means to develop family life” strain of case law.

⇒ The Court has made it very clear that in cases which concern children, the best interest of the child is not a mere phrase but plays a pivotal role in weighing the individual’s against the state’s interests.
Although only discussed extensively in relation to Art 14 ECHR, I claim that the generally wide margin of appreciation in cases that concern immigration policies has to narrow down for two main reasons:

- The lack of choice that persons with an international protection status have unlike people with other forms of immigration statuses. This form of “forced migration” leads to a narrower margin.
- The vulnerable group approach which is based on the ECHR’s case law and essentially says that if the Court qualifies a group as vulnerable, the margin afforded to the State should be narrow. I claim that the Court has already qualified refugees as vulnerable, hence it should do the same with BSPs due to the existing comparability of these two forms of international protection.

The Court has already emphasised in the case of Tanda-Muzinga 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. In this respect the Court takes into account the standards set out in international instruments in this area and recommendations of NGOs. With regards to BSPs there certainly does not exist an international standard as there is for refugees. However, my claim is firstly, that it should not matter whether a person fled due to persecution or the risk of ill-treatment; secondly, I claim that there is already a broad consensus amongst stakeholders like the European Commission, the European Parliament or UNHCR which clearly opine for the same rights for BSPs when compared with refugees simply for the crucial reason that the protection needs of the groups are essentially the same.

These arguments do not lead to the immediate conclusion that Art 8 ECHR and Art 14 ECHR in conjunction with Art 8 ECHR are violated if states restrict family reunification for BSPs. However, the answer to that question might also not be as straight-forward as it apparently was for the Austrian Constitutional Court as we will in the following chapter. In this I will not only critically assess the decision by the domestic High Court on this issue, but also summarize and apply my overall findings on the current legal position in Austria.
5. Conclusion – Applying the Findings on Austria’s Legal Position

It is not surprising that the legal restrictions which were introduced by the Austrian government in 2016 were subsequently challenged by BSPs who were affected by the measure. Thus, it took a little less than two and a half years until the issue was finally decided by the Austrian Constitutional Court.\footnote{Verfassungsgerichtshof, VfGH E 4249-4251/2017-20, 10.10.2018.} The case concerned a Syrian minor, who entered Austria with his adult brother. The boy was granted the status of subsidiary protection, and subsequently his parents applied for a visa family at the Austrian embassy in Damascus to reunite in Austria. It is noteworthy as a side note that the responsible Austrian authority withdrew the custody from the elder brother since it doubted that he could fulfil this task. The family exhausted all possible domestic remedies, before lodging the appeal at the Constitutional Court. In the appeal the applicants stated that the relevant provision was not in compliance with Art 8 ECHR and Art 14 ECHR in conjunction with Art 8 ECHR and the principle of equality among aliens which is laid down in Austrian constitutional law, respectively.\footnote{Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung, BGBl. 390/1973.} The applicants reinforced this claim with numerous arguments: First, they stated that the unexceptional waiting period of three years is not in compliance with Art 8 ECHR because it does not allow to consider the individual facts, especially the best interest of the child. Secondly, the applicants emphasised that the “anchor” was a minor and the best interest of the child should be of primary consideration, in particular since the principle is also laid down in Austrian constitutional law.\footnote{Art 1, Bundesverfassungsgesetz über die Rechte von Kindern, BGBl. I 4/2011.} Furthermore, the applicants stated that there is no relevant justification why beneficiaries of subsidiary protection and recognized refugees should be treated differently.

The Constitutional Court rejected the application and found no violation of the aforementioned provisions. The first argument which was put forward by the judges was one that we know already very well from the ECtHR case law. The Austrian High Court emphasised that one cannot deduce a right to family reunification based on Art 8 ECHR. It referred to what we got to know in chapter 4 as the \textit{statist assumption}. Although the Constitutional Court mentioned the relevant case law such as \textit{Jeunesse v. The Netherlands, El Ghatet v. Switzerland & Tanda-Muzinga v. France}, it concluded that the Austrian legislator did not overstep the leeway that Art 8 ECHR provides to states.
Another argument put forward by the Court was the fact that the status of subsidiary protection was only of “provisional character”. The Court relied on the assumption that the circumstances which lead to the granting of the status were at the outset only temporary, whereas this could not be presumed for systemic persecution like it is laid down in the Refugee Convention for refugees. Therefore, according to the Court, it is legitimate to have a waiting period of three years since only after this period it can be expected that the provisional character of the stay cannot be maintained anymore. Also, the judges held that in that regard it is reasonable to consider the individual circumstances of the specific case only after the three years waiting period.

Concerning the argument that the difference in treatment between refugees and BSPs has no objective and reasonable justification the Constitutional Court underlined once again that there is an objective ground for the differentiation of refugees and subsidiary protected, namely the provisional character of the BSP status. Additionally, it was argued that BSPs are excluded from the FRD’s scope, whereas refugees are even entitled to a privileged from of family reunification according to Art 12 (2) FRD. This argument was enough for the judges to negate the comparability of refugees and BSPs. No further reference to ECtHR case law regarding Art 14 ECHR was made.

What does the Constitutional Court’s decision mean for the family concerned and the general situation of BSPs in Austria respectively? Should the domestic decision be accepted as the final word on this subject or is there hope for BSPs that a Strasbourg judgment eventually leads to an overturn of the domestic ruling? The final outcome in the domestic proceedings is undoubtedly a disappointment for the applicants. Since the three-year waiting period has already expired in the specific case, the affected family did not file an application in Strasbourg.\footnote{Note that the BSP status was issued to the minor already in July 2015, cf. VfGH E 4249-4251/2017-20, 10.10.2018, para 1.} However, as stated earlier, there are currently several cases pending at the ECtHR which concern exactly the same issue. In that regard it is noteworthy that the facts of the pending case of \textit{M.T. \& others v. Sweden} are actually very similar to the one decided by the Austrian Constitutional Court since it also concerns a minor Syrian BSP whose family members applied to be reunited with him in Sweden. As in Austria, the Swedish government has also introduced a waiting period of three years for BSPs. Therefore, it will be interesting to see how this case is going to be decided in Strasbourg and what the conceivable repercussions for the Austrian legal position might be.
As the previous chapter has shown, I believe that there are unquestionably very strong arguments to find a violation of Art 8 ECHR and Art 14 ECHR in conjunction with Art 8 ECHR with regards to policies that restrict family reunification for BSPs like the one in Austria. However, it should not be disregarded that both assessments, Art 8 ECHR alone and in conjunction with Art 14 ECHR, provide arguably a wide leeway to the Court in deciding otherwise. As I explained, this is so because both provisions allow the Court to apply the margin of appreciation and the proportionality assessment. These legal tools provide the Court the flexibility that a supranational human rights court needs in order to consider the existing pluralism within the Council realm.

Strictly from a legal perspective speaking, it would be disappointing if the Court indeed finds a breach of Art 8 ECHR but does not assess Art 14 ECHR. Especially with regards to the distinction of refugees and BSPs I opine that the Court should take a clear stance. There are two strong arguments laid down in this thesis which I would like to highlight in that regard:

- Firstly, it has to be stressed that it goes back to the Court’s jurisprudence that the BSP status was actually established in the European context. Therefore, I claim that the Court should not shut its eyes to the fact that the nation states deliberately increase the differences between the two forms of international protection rather than diminishing it.

- Secondly, the alleged argument that the BSP status is only of provisional character simply cannot be upheld anymore. There are no public data available that would in any way substantiate that BSPs stay de facto for a shorter period of time in their host states when compared with refugees. Nevertheless, exactly this is used by governments as their default argument. Even if it was the case that BSPs live for a significantly shorter amount of time in a host state, I claim that the focus should not be on the duration of the stay, but on the protection needs of the individual. Hence, I am of the opinion that the existing differentiation is not objectively justified.

My final claim is that it is one of the idiosyncrasies of the topic of family reunification within the ECHR framework that one can spend countless hours on research and still come to the conclusion that any estimation of a possible outcome in Strasbourg remains a personal prediction which cannot be built solely on legal doctrinal arguments. Nevertheless, I believe that this thesis shed light on some significant aspects in the legal debate regarding BSPs, their right to family reunification and the existing distinction between BSPs and refugees:

- On a national level it could be observed that the introduction of restrictive policies in Austria are the repercussions of the high influx during the so-called refugee crisis. The legislative
process in Austria and the statements made by political decision-makers demonstrate that
the goal of this measures was deterrence and compartmentalization in order to decrease the
number of people coming to Austria to seek for international protection.

- On a European level it is noteworthy that the European Commission and the European
  Parliament have shown to be in favour of equating the two different forms of international
  protection. However, due to the refusal of the member states to align them, the CEAS
  framework differentiates between refugees and beneficiaries of subsidiary protection in
different realms, but especially with regards to the area of family reunification in which BSPs
are currently excluded from the scope of EU legislation.

- Therefore, the possibility to invoke rights through the ECHR and its provisions is the most
  promising one for BSPs. However, as my analysis in chapter 4 has shown, both Art 8 ECHR and
Art 14 ECHR assessments provide the ECtHR a relatively wide leeway in deciding in favour or
against BSPs. With regards to Art 8 ECHR case law, it could be observed that the ECtHR has
not developed a clear line of jurisprudence. The Court’s case law in immigration cases is built
on the premise that it is the rule that states do have the right to control immigration, whereas
the right of the individual to reunite and live with family members has to be qualified as the
exception. Regarding an Art 14 ECHR assessment I argued that there are strong arguments
which affirm the comparability of refugees and BSPs. However, the different elements of the
justification test and the non-existing clarity of how to weight them makes it very hard to
predict how the Court is going to decide. This ambiguity is also reflected in the fact that the
ECtHR has so far never directly add
ressed the question whether waiting periods like the one
introduced in Austria are in compliance with the relevant ECHR provisions. But the ECtHR has
clarified that there are minimum procedural standards in family reunification procedures.
However, the fact that the Court explicitly stated that visa applications by family members in
the country of origin should be examined rapidly, attentively and with particular diligence
does not lead to the conclusion that the ECtHR does not accept general waiting periods.

My personal appraisal or rather worry is that the Court might try to avoid touching the sensitive issues
that go along with the topic at stake, although it might even come to the conclusion that there is a
violation of Art 8 ECHR in M.T. & others v. Sweden or one of the other pending cases. Moreover, I am
of the opinion that the Court could circumvent the introduction of a far-reaching new precedent in
the field of family reunification by emphasising the special features of the individual facts such as the
minority of the “anchor” like it is the case in M.T. & others v. Sweden. Thus, the Court could choose to
come to the conclusion that there is a violation of Art 8 ECHR based on the very exceptional
circumstances, in order to avoid an Art 14 ECHR assessment. Consequently, the ECtHR could evade to address sensitive issues like the general waiting period or the Court’s stance on the comparability of refugees and BSPs while a violation of Art 8 ECHR based on the “exceptional circumstances” argumentation wouldn’t have as far-reaching effects due to the already existing inconsistency in Art 8 ECHR case law.

Furthermore, one should not forget the political dimensions and implications that these cases potentially have. The Strasbourg judges are surely very well aware of the fact that the biggest burden during the so-called “refugee crisis” was carried by countries like Sweden, Germany and Austria. To underpin this with some data, one can for instance take a look at the EUROSTAT statistics of 2015 in which almost 55% of all 1.322.845 applications for international protection within the European Union were registered in the three aforementioned countries.\(^\text{199}\) Thus, the ECtHR is in a delicate position: On the one hand it is questionable whether it is actually willing to penalize exactly these countries for their restrictive conduct implemented after the so-called refugee crisis and thereby cause most likely heavy discontent in the respective countries. However, on the other hand, it is the Court’s task to ensure compliance with human rights standards which also means that it should clearly oppose measures and policies of deterrence and compartmentalization which not only touch very sensitive human rights issues but also arguably lack a reasonable justification.

Hence, my personal appraisal is rather sceptical regarding the question how far-reaching the Court will be with its rulings in the aforementioned pending cases. There are no indications that the ECtHR will deviate from its established stance that state sovereignty remains the pivotal premise in family migration cases. As explained in paragraph 4.3, regarding this issue I am fully in line with Costello, who argues that the multifactor balancing approach in migration cases does not reflect a clear-cut proportionality approach and that the proportionality assessment is distorted by the statist assumption.\(^\text{200}\) That is why I suggest that anything else but rulings which preserve the continuation of the well-established exception-rule structure would come as a huge surprise.

From the perspective of the Austrian legislator it is clear that it would welcome any decision that does not find a violation of the ECHR. Even if we assume that the ECtHR finds a violation of Art 8 ECHR due to “exceptional circumstances” as described above, the immediate effect on the legal position in


\(^{200}\) Costello (N. 89), 130.
Austria would be very little. Although authorities and courts are obliged to interpret the law in accordance with the constitution and hence also in accordance with the ECHR, there would be a state of legal uncertainty due to the unequivocal wording of the domestic provision compared to the ECtHR ruling. An actual change of the pertinent domestic provision could in further consequence be reached either through a change in legislation by the parliament or through a further decision by the Constitutional Court. However, it is questionable if a political consensus could be reached and a quick ruling by the Constitutional Court can’t be expected because of the stages of appeal in the domestic legal system.

Finally, I allow myself to express the wish that the Court does not try to avoid addressing the pressing issues that I discussed in this thesis, but on the contrary provides some clarification. Independently of what the outcomes in the individual cases might be, I believe it is in any case necessary that the ECtHR caters for explanation to which extent it sees itself as a guardian for BSPs and their right to family reunification respectively. However, this can only be done, if the Court is also willing to tackle contentious questions. In the close future we will know whether the Court is willing to accept that states openly use family migration policies as a means of deterrence or whether the Strasbourg judges will be in the vanguard of protecting the rights of BSPs.
Bibliography

Agustin Oscar Garcia, Jorgensen Martin Bak, Solidarity and the “refugee crisis” in Europe (Palgrave Macmillan 2019)


Bauloz Celina and Ruiz Geraldine, Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection? in V. Chetail, P. de Bruycker, and F. Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (Brill Nijhoff 2016), 240 – 268

Benedek Wolfgang, Recent Developments in Austrian Asylum Law: A Race to the Bottom?, 17 German Law Journal 6 (2016), 949–966

Boeles Pieter, European Migration Law (Intersentia 2014)

Burbergs Maris, How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born in E. Brems, J.H. Gerards (eds), Shaping Rights in the ECHR: The role of the European Court of Rights in determining the scope of human rights (Cambridge University Press 2013), 315 – 329

Cherubini Francesco, Asylum Law in the European Union (Routledge 2015)

Chetail V., P. de Bruycker, and F. Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (Brill Nijhoff 2016)


Harbo Tor-Inge, *The Function of Proportionality Analysis in European Law* (Martinus Nijhoff 2015)

Hengstschläger Johannes, Leeb David, *Grundrechte* (MANZ 2013)


O’Connell Rory, *Cinderella comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR*, 29 Legal Studies 2 (2009), 211 – 229


List of Cases

ECtHR
ECtHR, Case of Engel and others v. the Netherlands, (Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), 08.06.1976
ECtHR, Case of Handyside v. The UK (Appl. No. 5493/72), 07.12.1976
ECtHR, Case of Tyrer v. United Kingdom (Appl. No. 5856/72), 25.04.1978
ECtHR, Case of Abdulaziz, Cabales and Balkandali v. United Kingdom (Appl. Nos. 92140/80; 9473/81; 9474/81), 28.05.1985
ECtHR, Case of Soering v The United Kingdom (Appl. no. 14038/88), 07.07.1989
ECtHR, Case of Cossey v. United Kingdom (Appl. No. 10843/84), 27.09.1990
ECtHR, Case of Gül v. Switzerland, (Appl. no. 23218/94), 19.02.1996
ECtHR, Case of Ahmut v. The Netherlands (Appl. no. 21702/93), 28.11.1996
ECtHR, Case of Boultif v. Switzerland (Appl. No. 54273/00), 02.08.2001
ECtHR, Case of Sen v. The Netherlands (Appl. no. 31465/96), 21.12.2001
ECtHR, Case of Christine Goodwin v. The UK (Appl. no. 28957/95), 11.07.2002
ECtHR, Case of Tuquabo-Tekle and others v. The Netherlands (Appl. no. 60665/00), 01.12.2005
ECtHR, Case of Rodrigues da Silva & Hoogkamer v. The Netherlands (Appl. no. 50435/99), 31.01.2006
ECtHR, Case of Stec and others v. The UK (Appl. nos. 65731/01 and 65900/01), 12.04.2006
ECtHR, Case of Üner v. The Netherlands (Appl. No. 46410/99), 18.10.2006
ECtHR, Case of D.H. and others v. the Czech Republic (Appl. no. 57325/00), 13.11.2007
ECtHR, Case of Burden v. The UK (Appl. no. 13378/06), 29.04.2008
ECtHR, Case of Petrov v. Bulgaria (Appl. no. 15197/02), 22.05.2008
ECtHR, Case of Alajos Kiss v. Hungary (Appl. no. 38832/10), 20.05.2010
ECtHR, Case of Clift v. UK (Appl. no. 7205/07), 13.07.2010
ECtHR, Case of M.S.S. v. Belgium & Greece (Appl. no. 30696/09), 21.01.2011
ECtHR, Case of Andrle v. Czech Republic (Appl. no. 6268/08), 17.02.2011
ECtHR, Case of Nunez v. Norway (Appl. no. 55597/09), 28.06.2011
ECtHR, Case of Bah v. the UK (Appl. no. 56328/07), 27.09.2011
ECtHR, Case of Antwi and others v. Norway (Appl. no. 26940/10), 14.02.2012
ECtHR, Case of Hirsi Jamaa and others v. Italy (Appl. no. 27765/09), 23.02.2012
ECtHR, Case of Hode and Abdi v. United Kingdom (Appl. no. 22341/09), 06.11.2012
ECtHR, Case of *Eweida and others v. The UK* (Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10), 15.01.2013

ECtHR, Case of *Mugenzi v. France* (Appl. no. 52701/09), 10.07.2014

ECtHR, Case of *Tanda-Muzinga v. France* (Appl. no. 2260/10), 10.07.2014

ECtHR, Case of *Senigo Longue v. France* (Appl. no. 19113/09), 10.07.2014

ECtHR, Case of *Jeunesse v. The Netherlands* (Appl. no. 12738/10), 03.10.2014

ECtHR, Case of *Biao v. Denmark* (Appl no. 38590/10), 24.05.2016

ECtHR, Case of *El Ghatet v. Switzerland* (Appl. no. 56971/10), 08.11.2016

ECtHR, Case of *Aleksandr Aleksandrov v. Russia* (Appl. no. 14431/06), 27.03.2018

ECtHR, *M.A. v. Denmark* (Appl. no. 6697/18), Communicated on 07.09.2018

ECtHR, *M.T. and others v. Sweden* (Appl. no. 22105/18), Communicated on 20.12.2018

ECtHR, *B.F. and D.E. v. Switzerland* (Appl. no. 13258/28), Communicated on 09.01.2019

ECtHR, *J.K. v. Switzerland* (Appl. no. 15500/18), Communicated on 09.01.2019

**Domestic Decision**

Verfassungsgerichtshof, VfGH E 4249-4251/2017-20, 10.10.2018