

# Refugee and Migrant CRISIS IN EUROPE

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## The Right of the Child to Family Reunification

### A. Overview and Main Recommendations

#### I. Introduction

Family life is one of the fundamental pillars of our cultures and societies, and it largely impacts the protection and wellbeing of its individual members. As such, the right to family life and the principle of family unity are recognised and protected by several international legal instruments.<sup>1</sup> Family life is even more important when it comes to children, who, because of their age and development, are more in need of care, support and protection by their parents and other family members.

In a humanitarian situation, children count even more on their family members for a sense of stability, protection and support. In such situations, however, the risks of losing one's family are high. Family separation might occur by accident as a result of crisis situations, movement restrictions, etc. It might also be a protective and coping measure undertaken by parents and/or children, when the situation becomes life-threatening and resources are exhausted. In all cases, family separation increases distress and instability in children, and negatively impacts their capacities to cope and integrate in the host society.

Apart from forced migration and displacement in a humanitarian context, there are other numerous linkages between family life and migration. On the one hand, family reunification is a common reason for migrants to enter Europe.<sup>2</sup> On the other hand, migration shapes family life for those who, for various motives, leave their country of origin. Currently many children remain at home once their parents migrate, while others migrate with them, or independently from them. In all of these cases, the inter-connection between migration and family life strongly impacts child rights.

#### II. The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) goes further than other legal instruments in defining what the right to family life entails. First, it refers to the right of the child not to be separated from his or her parents against their will, except when competent authorities determine, according to the law, that such separation is in the best interests of the child. Secondly, it states that every child separated from his/her family has the right to maintain personal relations and direct contact with both parents on a regular basis, except if this is contrary to the child's best interests. Thirdly, it specifically recognises the right to enter and remain in a territory so that the child can be reunified with his/her parents.<sup>3</sup>



<sup>1</sup> Article 16, Universal Declaration of Human Rights, available at: <http://www.un.org/en/universal-declaration-human-rights/>. Article 8, European Convention of Human Rights

<sup>2</sup> The numbers of newly arrived non-EU families have remained rather stable in the EU from 2008-2013, reaching approximately half a million per year, see for more: Migrant international policy index 2015, family reunification, available at: <http://www.mipex.eu/family-reunion>

<sup>3</sup> Articles 9 and 10, UN Convention on the Rights of the Child, available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>



### III. Family Reunification in Europe

Both the European Convention on Human Rights<sup>4</sup> and the Charter of the Fundamental Rights of the European Union protect the right to family life.<sup>5</sup> The European Court of Human Rights has ruled on various occasions on what family life means, based on a case-by-case assessment and going beyond a mere 'blood ties' approach.<sup>6</sup>

Despite these binding document, in Europe the right to family reunification<sup>7</sup> as recognised by the CRC is not an absolute right, but is instead subject to several conditions and qualifications. Within the EU, different regimes apply based on whether the sponsor is an EU citizen or not. For non-EU citizens, the Family Reunification Directive (hereinafter: the Directive)<sup>8</sup> provides for a certain level of harmonisation in the rules guiding family reunification. It applies to all EU Member States, except for UK, Denmark and Ireland. Though not bound by the Directive, these three States have similar family reunification rules.

The Directive and national legislations defines who falls within the definition of family and determines the conditions under which family reunification can take place, as well as the rights of family members once reunited with the sponsor. The notion of family refers mainly to nuclear family and the conditions foreseen include a minimum previous residence of the sponsor in the country, his/her socio-economic status, public security clearance, and integration measures.

However, as it will be elaborated on below, the Directive is far from a straightforward document. Many of its clauses include exceptions to the general rule. Moreover, while some provisions are mandatory for EU Member States, others are optional or give Member States a considerable level of discretion. Consequently, family reunification rules remain far from harmonised in Europe and discretions have consistently been used by Member States to establish even more restrictive conditions for family reunification.

Such a trend has become even more visible in recent months, when refugees and migrants have started to arrive in large numbers to Europe. In this context, some Member States have proposed legislative changes restricting further family reunification and making a clear difference in entitlements between refugees and persons granted subsidiary protection. According to the Directive, Member States might apply more favourable provisions for refugees as compared to other foreigners in the territory. Though this is not an obligation for States, many of them do apply this more favourable regime, including UK, Denmark and Ireland, which have opted out of the Directive. On the other hand, persons granted subsidiary protection<sup>9</sup> are not covered by the Directive. This means that Member States can exclude them from the favourable regime applied to refugees.

Against this background, it is not surprising that the interpretation and implementation of the Directive has been subject to a number of judgments by the Court of Justice of the European Union (CJEU).

<sup>10</sup>In 2014, the Commission also issued a specific Communication providing further guidance on its implementation to EU Member States.<sup>11</sup> Despite these efforts, the right to family reunification remains *far from harmonised* across the EU and children seeking to be reunited with their family face considerable obstacles.

There is thus a need to revise the Directive. Today, when Governments are committed in the 2030 Agenda for Sustainable Development to 'orderly, safe, regular and responsible migration and mobility of people', the transformation of the current Directive into a clearer legal instrument promoting family reunification in EU Member States can become a first step in this direction. This means straightforward rules and less discretion to Member States on restrictions to family reunification. Similarly, UK, Denmark and Ireland could further improve the efficiency of their family reunification schemes.

<sup>4</sup> European Convention on Human Rights, available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>5</sup> The Charter of the Fundamental Rights of the European Union, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

<sup>6</sup> For an overview of the European Court of Human Rights case law see: The right to respect for private and family life, Human Rights Handbooks No.1, available at: [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf)

<sup>7</sup> Family reunification is the term used to describe a situation in which members of a family come to join one of its members (the sponsor), who is lawfully resident in another country

<sup>8</sup> EU Directive 2003/86/EC on the right to family reunification, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF>

<sup>9</sup> Subsidiary protection is offered when the person cannot be qualified as a refugee under the 1951 Geneva Convention, but can still not be returned to his/her country of origin, or of formal habitual residence, due to well-substantiated risks of suffering serious harm, see Directive 2001/95/EU at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>

<sup>10</sup> See for example Case C- 540/03, European Parliament v Council of the European Union, 2006: C-578/08, Chakroun, 2010: Case C- 356/11 and C- 357/11. O. & S., 2012

<sup>11</sup> Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, available at: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0210\\_com\(2014\)0210\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_com(2014)0210_en.pdf)

## IV. UNICEF Key Recommendations

UNICEF recommends that EU and its Member States' legislation (including UK, Denmark and Ireland) is amended to<sup>12</sup>:

- 1. Expand family reunification rights for persons under subsidiary protection:** Humanitarian and protection needs are similar for refugee children and for children granted subsidiary protection. Thus, children with subsidiary status and refugee children should benefit on equal grounds from favourable entitlements to family reunification. In fact, all children should grow up in a family environment and be entitled to family reunification, when in their best interests.
- 2. Ensure families separated due to conflict and disaster are reunited in line with the child's best interests:** Children in neighbouring countries to conflict areas (i.e. Lebanon, Jordan, Turkey) or stranded in a European State (i.e. Greece) should be able to join their family members who are applying or have already received international protection status in another European State.<sup>13</sup>
- 3. Encourage a flexible use of existing family reunification mechanisms to respond to humanitarian situations:** When faced with humanitarian situations, EU and Member States legislation should foresee the possibility to ease the procedures and conditions required and interpret definitions of family in a way that helps save children's lives and guarantees their best interests.
- 4. Broaden the definition of family for all children:** Unaccompanied and separated children should be able to include their siblings in family reunification schemes; foster children should be entitled to family reunification, and a more culturally-sensitive interpretation of family should allow children to join relatives that de facto cared and looked after them back home, which could include adult siblings, grandparents, aunts, uncles.
- 5. Ease existing conditions and procedures so that children are not kept apart from their family:** Children should be entitled to family reunification from the moment their caretaker receives a residence permit. No family should be kept apart because of low income or high application fees. For UNICEF, social inclusion of any child, regardless of age, migration, or any other status, is best pursued by ensuring equal access to quality services and meaningful participation of the child in the society once family reunification has taken place.

In addition, at a more policy and implementation level, UNICEF calls upon States to:

- 6. Give priority to applications for family reunification involving children.**
- 7. Apply accelerated procedures in cases involving children. Children should be reunified with their family in a timely manner, when this is in the child best interests.**
- 8. Allocate further resources to adequately respond to and process family reunification requests.**
- 9. Invest in guidance and training on child rights for officials who consider family reunification applications.**

<sup>12</sup> Recommended options for legislative and policy reform easing family reunification for children are discussed more in details in the section below, *Detailed Analysis*.

<sup>13</sup> See also UNICEF recommendations on Dublin Reform in Advocacy Brief, *Analysis and recommendations Dublin reform: effective access to an asylum Procedure within Europe*, UNICEF Refugee and Migrant Crisis in Europe, 2016.





## B. Detailed Analysis

### I. The Definition of Family

The notion of what constitutes a ‘family’ differs in various parts of the world. For many people arriving in Europe, family entails a large number of persons, the relations between whom are governed not only by blood ties, but also customs, dependency, community, etc. This broad notion of family is recognised in the jurisprudence of the European Court of Human Rights, which does not strictly define who falls under ‘family’, but takes a case-by-case decision based on the personal ties between the persons concerned.<sup>14</sup>

EU law explicitly recognises family reunification rights to members of the nuclear family, consisting of the spouse and the biological children of the couple who are below the age of majority and unmarried. Adopted children and children of the sponsor and spouse are also considered members of the nuclear family as long as they are under 18 years of age, unmarried, and under the custody and dependency of the sponsor/spouse. When the biological children of the couple are above 18, in most EU Member States they would be entitled to family reunification if proven to be unmarried and still dependent on their parents.

In addition, most EU Member States also allow family reunification for the partner and the unmarried children, under 18, born in this partnership. However, evidence required to demonstrate a partnership differs significantly from State to State, and some States will extend family reunification rights only to the partner recognised in, and children born in, registered partnerships (Germany, Belgium).

Beyond the nuclear family, the Directive leaves it to the discretion of Member States to authorise family reunification for first-degree ascendants in the direct line (father and mother) when they are dependent and without proper support in the country of origin. Some Member States, however, do not recognise this right (France, Belgium), while others demand strong evidence of dependency (Spain, Netherlands, UK). Only a few Member States recognise siblings as entitled to family reunification.

Polygamy is not recognised in the Directive. However, children of the sponsor and ineligible spouses can be entitled to family reunification when in their best interests. Many EU Member States require the sponsor to have the guardianship of the child(ren) and documents proving family links, which are carefully scrutinised.

The Directive does not refer to foster children. EU Member States do not extend family reunification rights to foster children, despite the fact that, around the world, informal foster care is an important source of care and protection for children.

#### Recommendations:

1. UNICEF calls on the EU and its Member States to extend the right to family reunification *beyond the nuclear family*. UNICEF recommends a culturally-sensitive definition of family, which constructs family on a case-by-case approach, based on blood relations but also on *de facto* personal ties and dependency.
2. *Foster children* should be entitled to family reunification, if foster parents are the main caretakers and it is in the best interests of the foster child.
3. *Unaccompanied and separated children* should be able to include their siblings in family reunification schemes, when in the best interests of all children involved.

<sup>14</sup> The right to respect for private and family life, Human Rights Handbooks No.1, supra note 5

## II. Conditions for Family Reunification

The narrow definition of family is complemented by requirements for exercising the right to family reunification. The Directive outlines that the sponsor should be in possession of a residence permit for at least one year and have a reasonable prospect for obtaining a permanent residence permit. In most EU Member States the application may be submitted only after a certain period of lawful residence by the sponsor. This period - referred to as 'waiting period' - varies between 1 and 2 years across Member States (the maximum waiting period allowed is 2 years).

Further conditions regard the socio-economic situation of the sponsor, who may be required to prove: a) accommodation considered in line with safety and health requirements; b) insurance for him/herself and members of the family, in line with nationally-determined requirements; and c) stable and regular resources sufficient to maintain him/herself and members of the family without recourse to social welfare benefits. Most EU Member States apply these conditions (including UK, Ireland and Denmark) in a way in which socio-economic requirements increase proportionally with the size of the family. Thus, in large families, it might be difficult for the parent to fulfil all of the criteria and bring over all his/her children.

The Report of the 2012 Day of General Discussion of the Committee on the Rights of the Child highlights that, according to the prevailing view of migration experts, the kind of restrictions listed above are likely to contribute to the irregular entry of children seeking to reunite with their parents.<sup>15</sup> They might also expose children to risks such as trafficking, exploitation, and other forms of harm.<sup>16</sup>

As for the person(s) wishing to benefit from family reunification, two conditions are laid down by the Directive. First, the person should not constitute a threat to public policy and security. This includes suspicions of (potential) engagement in criminal acts. However, a criminal record as such does not automatically imply refusal of the application, and the Directive asks Member States to consider the severity and type of the offence, as well as the potential risk the individual poses to public security.

Second, Member States might also require the person(s) to comply with integration measures. An increasing number of EU Member States require this (France, Germany, Netherlands, Denmark, UK), with the difference being whether such a requirement applies already in the country of origin (prior to the administrative granting of the right to family reunification) or upon arrival (after the right is granted). Measures which provide opportunities to learn the language, get to know the country and society of destination, and facilitate access to services and participation do support the integration process. This is however different to integration measures applied as a threshold to family reunification. It is only in article 4.1 that the Directive allows Member States to apply integration as a pre-entry condition - for any unaccompanied child above 12 years of age. Germany is the only country where this requirement is actually applied for unaccompanied children above 16.

It is worth mentioning that according to the ruling of the CJEU and the European Commission's Communication on the Directive, all economic and integration measures should be interpreted holistically, on a case-by-case basis, and not used separately to reject family reunification. The objective of the Directive is to promote effective family reunification, and Member States should not use their discretion to undermine such objective.

### Recommendation:

1. UNICEF calls upon the EU and its Member States to apply less restrictive conditions to family reunification, as these push children into the hands of smugglers and traffickers.
2. When children are concerned, existing conditions should be interpreted in light of the best interests of the child and the promotion of family life. Financial conditions as such should not constitute a threshold to keep children apart from their caretakers.
3. The right of the child to be reunified with his/her caretaker(s) should not be hindered by waiting periods or type of residence permit of the caretaker.
4. States should invest in facilitating the integration of all children arriving to the country for the purpose of family reunification and promote an inclusive society for all. Integration, however, should not be applied as a precondition for family reunification.

## III. Best Interests of the Child

In cases concerning children, according to article 5 of the Directive, the child's best interests should be a primary consideration in all actions. The CJEU has recognised that children should grow up in a family environment and that Member States should ensure that a child is not separated from his/her parents against his/her will. It has also stated that applications by a child or his/her family member to enter or leave a Member State for the purpose of family reunification are to be dealt with by Member States in a positive, humane, and expeditious manner.<sup>17</sup> However, the CJEU has upheld the legitimacy of integration as a pre-entry condition for unaccompanied children above 12 years of age applying for family reunification.<sup>18</sup>

### Recommendations:

1. Applications for family reunification involving children should be prioritised by EU Member States.
2. The best interests of the child conditions family reunification, but the age of the child should not constitute a ground for different family reunification entitlements. UNICEF calls upon the EU and its Member States to amend / abolish legislation applying a less favourable family reunification regime to older children.<sup>19</sup>
3. UNICEF calls for child rights training and guidance to be provided to responsible officers, to ensure that the best interests of the child is respected throughout all family reunification procedures.

<sup>15</sup> The rights of all children in the context of international migration, CRC Report of the 2012 CRC Day of General Discussion, available at: <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf>

<sup>16</sup> See for example the Quattara case in Spain, at: [http://politica.elpais.com/politica/2015/06/09/actualidad/1433865149\\_646316.html](http://politica.elpais.com/politica/2015/06/09/actualidad/1433865149_646316.html)

<sup>17</sup> See CJEU, Case C-578/08, Chakroun, 2010 and C-540/03, European Parliament v Council of the European Union, 2006

<sup>18</sup> See above, C-540/03

<sup>19</sup> Herein a child is defined as any person below 18 years of age, as per the CRC



#### IV. Refugees

The Directive establishes a more favourable system for recognised refugees within the 1951 Convention and 1967 Protocol. It does, however, not cover asylum seekers, resulting in significant delays in family reunification while asylum claims are being processed.

In the case of a recognised refugee, the right to family reunification applies beyond the nuclear family. When the refugee is an unaccompanied and separated child, his/her mother and father are entitled to family reunification, without any requirement of dependency. In absence of the mother and father, or when they cannot be traced, Member States may allow the reunification of the refugee child with his/her legal guardian or any other member of the family. This is not possible under UK legislation and even in Member States which apply the Directive, as of today, only a few of them make provisions for such a possibility in their national legislation. Most of them place such recognition under strict conditions for proving legal guardianship.

In the case of refugees, the Directive does not establish any restriction as to the degree of relatedness. Member States have full discretion in this regard and the European Commission has encouraged Member States to use this discretion in the most humanitarian way.

Refugees also do not have to meet financial preconditions, and Member States cannot apply integration requirements on their family members. This is also the case in UK, Ireland and Denmark, even though they are not part of the Directive. Moreover, when documentary evidence of family relations cannot be provided, other evidence can be taken into account. Although in the case of refugees the Directive leaves less space for discretion for Member States to restrict family reunification, it still allows them to limit family reunification rights to:

- Family relations that predate the entry of the refugee in the country;
- Applications made within three months of the granting of refugee status;
- Situations in which family reunification is impossible in a third country with which the sponsor and/or family members have special links.

#### Recommendations:

1. UNICEF encourages Member States to implement the Directive's guidance on allowing reunification of refugee children with their guardian or any other member of the family when the parents cannot be traced. Such a right should be guided by the best interests of the child and by a flexible interpretation of documentary evidence.
2. The right of the child to family reunification should not be dependent on whether the application is submitted within three months of being granted refugee status. This period is considered by UNICEF as too short for a refugee to understand the system and procedures in place, trace back and liaise with family members, obtain necessary documents, and submit the application.
3. As the Directive applies without prejudice to international obligations, the third country option should be considered in light of the non-refoulement principle. Therefore, when children are involved, family reunification in a third country should not be an option if in that country the child is exposed to real threats of exploitation, trafficking, abuse, torture, arbitrary detention, and other child - and gender- specific threats to life and survival.
4. UNICEF calls upon States to be proactive in facilitating family tracing by i.a. informing asylum seekers and refugees about existing services, financing such services, and coordinating with civil society actors.
5. UNICEF calls for an extension of the role of the guardianship services to assist unaccompanied and separated children during family reunification procedures.



## V. Persons Granted Subsidiary or Temporary Protection

Persons benefitting from subsidiary or temporary protection fall outside the scope of application of the Directive. This does not mean that they are not entitled to family reunification, but States may limit family reunification to only their nuclear family and apply additional conditions, including the requirement for a previous legal residence period by the sponsor.

As already mentioned, some EU Member States (Germany, Austria, Norway, Denmark, Finland, Sweden) are currently discussing reforms or have already amended national legislation so that new arrivals are granted subsidiary protection and entitled to family reunification only after a period of time (typically 2-3 years). Such an approach to family reunification cannot be justified by the humanitarian situation and protection needs of people granted subsidiary protection, which are very similar to those of refugees. These amendments are also in conflict with previous EU positions on approximation of the rights of refugees and those of persons benefitting from subsidiary protection.<sup>20</sup>

An increasing number of children are being granted temporary protection, unless children's need for protection falls under the standard required by the 1951 Convention or for subsidiary protection. Temporary permits are valid until the person reaches 18 years of age, they may not be renewed, and in most States their holders and family members are excluded from family reunification entitlements.

### Recommendations:

1. UNICEF calls upon States to apply the more favourable regime of family reunification of refugees to holders of subsidiary protection, and to refrain from restricting their right to family reunification.
2. Unaccompanied and separated children granted temporary protection status should be able to exercise their right to family reunification and to sponsor their family members to join them in destination countries when in their best interests, without fulfilling any conditions.

<sup>20</sup> See Directive 2011/95/EU of the European Parliament and of the Council 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, 2011, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>



## VI. Procedures for Family Reunification

Procedures for family reunification are complex and can take long – and as the numbers of refugees, asylum seekers and migrants arriving in Europe continue to rise, migration authorities are faced with the challenge of processing increasing numbers of applications, often with limited resources, whilst still being bound to afford due care and process to each claim individually. Some Member States have high procedural requirements, including requests for official documents that might be difficult or virtually impossible to obtain in the country of origin. In the absence of official documents, Member States rely on further investigation. DNA tests results are also used as evidence, although in some countries of origin they are not available, or are too expensive.

During the procedure, the family member to be reunited must remain outside the EU, except in special cases. Some Member States require the application to be submitted by the sponsor (France, Slovenia, Spain), while others require submission by the person to be reunited (Germany, Belgium, Sweden). Other Member States have a dual system (both the sponsor and the family member might apply). When the application is to be submitted by the family member, additional practical obstacles might appear, as it means that the application must be made in the embassy of the country of origin. To do this, family members might have to travel long distances, often to neighbouring countries (where an embassy exists) and at extra costs.

According to the Directive, the application must be examined within a period of time no greater than 9 months after its submission, although Member States have discretion to extend this period for complex cases. In their national legislation, Member States apply an examination period varying between 3 and 6 months and recognise the possibility of extension for another 6 months. The examination period, in addition to the prior residence requirement period, means that a child might be deprived of his/her full right to family life for a period between 18 months and 3 years.

Last but not least, the Directive leaves the application of administrative fees to the discretion of Member States. Once again there are substantial differences between Member States in terms of costs applied. While some countries apply reasonable costs, in others such costs are disproportionately high, especially when large families are involved.

### Recommendations:

1. UNICEF calls upon States to provide sufficient resources to ensure timely processing of family reunification applications. Measures enhancing transparency of procedures, information sharing, and accessibility of relevant services also contribute to promoting family reunification.
2. States should take into account the type of documents that countries of origin issue when establishing the list of official documents required. In absence of such documents, UNICEF recommends the use of alternative evidence, such as statements by the sponsor and family members, audio and/or video materials, bank statements, money transfer receipts, etc. The use of DNA testing should be limited to a last resort and not become mandatory. Disproportionally high costs of such tests should be covered by the State.
3. UNICEF calls upon States to put in place a dual system where both the sponsor and the family member(s) are entitled to submit applications. The choice should be given for such applications to be submitted in the country of residence of the sponsor, in the country of origin, as well as in third countries for family members on the move.
4. UNICEF advocates for low application fees for children, as well as a reduction in fees according to the number of child applicants.



### ADVOCACY BRIEF

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