

Realizing Refugees' Right to Family Unity

The challenges to family reunification
in Norway, Sweden and Denmark



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Norsk organisasjon for asylsøkere

www.noas.no

noas@noas.org

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Foreword

For many years, family reunification has been one of the largest sources of immigration to the Scandinavian countries. In the period 2014 – 2019, more than 345.000 people were granted residence permits for family reunification purposes in Denmark, Norway and Sweden combined. However, of the total number of reunified family members, only 35 percent (122.205 persons) were reunited with a beneficiary of international protection. Sweden has, not surprisingly, received the highest number of family immigrants, granting two thirds of the total family-related residence permits in this period. Denmark is by far granting the lowest number of family immigration permits but has on the other hand the highest proportion of applicants that are reuniting with a refugee.

Policies regarding family reunification have become increasingly strict over the last years, especially after the influx of asylum applications that all Scandinavian countries received in the summer and autumn of 2015. Shortly after, the number of asylum applications rapidly decreased, while the number of family reunification applications have continued to increase in recent years.

The report, commissioned by UNHCR, is a comparative legal study of the legal framework, policies and practice pertaining to the family reunification procedure in Norway, Sweden and Denmark.

This report was prepared by NOAS' Senior Legal Adviser Andreas Furuseth. Very valuable information regarding legislation, practice and procedure regarding family reunification in Denmark was provided by Lene Mølgaard Kristensen from the Danish Refugee Council, and Karl Nilsson from Asylrättscentrum and Migrationsverket regarding Sweden. The report has benefitted from input provided by Senior Legal Advisor Sanja Adjulovic and Senior Advisor Jon Ole Martinsen, as well as General Secretary Ann-Magrit Austenå and Political Advisor Mona Reigstad Dabour, all part of the NOAS' staff.

Olivia Mocanasu, Legal Officer with the UNHCR Regional Representation for Northern Europe has read through several drafts of the report and provided important perspectives on the international and regional human rights regimes and relevant jurisprudence.

Any errors or critical omissions in the report are the sole responsibility of the author.

I Methodology

The present report is a desk study, describing the right to family reunification for third-country nationals in the Scandinavian countries. The aim of the report is to present a comparative legal analysis, mapping the legal framework, policies and practice pertaining to the family reunification procedure in Norway, Sweden and Denmark vis-à-vis relevant UNHCR guidance and position papers, and international human rights legal framework and practices. The report furthermore aims to determine whether any gaps and inconsistencies exist in the current determination process pertaining to family reunification in cases concerning refugees and their family members.

Asylrättscentrum and Migrationsverket have contributed to the report by sharing information on Swedish legislation, practices and procedures regarding family reunification in Sweden, through questionnaires and additional information. Danish Refugee Council has provided information in the same way regarding family reunification in Denmark.

2 Summary

1. The right to family reunification depending on protection status

In **Denmark**, persons granted subsidiary protection due to generalised violence have to wait for minimum three years before they can lodge an application to be reunited with family members. Under the Temporary Immigration Act introduced in 2015, **Sweden** removed the right to family reunification for beneficiaries of subsidiary protection. When the law was extended in 2019, this group was again given the right to be reunited. **Norway** grants both groups refugee status and the same rights to family reunification.

2. Immediate family members entitled to family reunification

Family reunification in Scandinavia is generally reserved to members of the nuclear family; spouses, unmarried partners, minor children, and parents of unaccompanied children. **Sweden and Norway** grant residence permit to family members if they are dependent on a refugee, but the practice is strict and residence permits are given only in exceptional cases. Residence permits to “other” family members will normally only be granted if it would contravene international obligations to reject the application. The strict practice regarding “other” family members does not appear to be in line with the position of UNHCR in its Guidelines on Reunification of Refugee Families.¹

3. Not all children are entitled to a residence permit

In **Sweden and Norway** all children under the age of 18 have a legal right to be granted a residence permit through family reunification with parents. In **Denmark** only children under 15 have a legal claim to family reunification. Children between 15 and 18 will only be granted family reunification in Denmark if a refusal will be in violation of ECHR Article 8.

¹ UN High Commissioner for Refugees (UNHCR), *Note on Family Reunification*, 18 July 1983, available at: <https://www.refworld.org/docid/3bd3f0fa4.html>

4. Age assessment

Denmark, Norway and Sweden all consider the child as a minor if he or she was under 18 years at the time when the application for family reunification was submitted. The **Norwegian** Immigration Act² stipulates that children must be considered as minors if all necessary documentation has been submitted before the child reaches 18. **Swedish** law states that the child's age in family reunification cases should be assessed at the time of decision. Following a CJEU ruling, instructions have been issued to provide that a child who applies for protection before the age of 18, and who is granted refugee status, should be considered a minor if an application for family reunification is submitted no more than three months after the permit was granted. In **Denmark**, the age is assessed at the time of lodging the application for family reunification.

5. The best interests of the child vs political considerations

In **Norway**, the Convention on the Rights of the Child is incorporated into the Human Rights Act, which forms part of Norwegian law. The principle of the best interest of the child is codified in the Norwegian Constitution. In **Sweden**, the Convention on the Rights of the Child will become Swedish law in 2020, and the best interests of the child is codified in the Swedish Immigration Act.

The **Danish** authorities have ratified the Convention on the Rights of the Child, but the Convention has not been made a part of Danish law. The Danish Immigration Act does contain a number of provisions that refer to the child's best interests.

In all countries political considerations outweigh the best interests of the child in individual case assessments. Submitting of applications in the host country is routinely rejected, forcing many parents to leave their partner and their children for long periods of time. Parents and children are referred to having contact through telephone, skype or visits in neighbouring countries, although psychologists have pointed to the fact that such communication forms do not meet the children's need for contact with their parent, and that lengthy separation can in fact cause severe damage on a child.

6. Hearing of children

All children are, according to article 12 of the Convention on the Rights of the Child, entitled to express their views in matters affecting them. Family immigration cases

² Immigration Act section 50

are of fundamental importance to children. **Norwegian and Swedish** legislation have provisions that guarantee the child's right to be heard, depending on the child's age and maturity. In **Sweden**, as a clear rule, the child is given the opportunity to be heard, predominantly in an oral hearing. **Norway** conducts oral hearings to a much lesser extent.

In **Denmark**, the case processing is largely in writing, and Danish authorities will normally not initiate and carry out an oral hearing of a child.

7. Family reunification vs family establishment

In **Norway**, the requirements for obtaining a family immigration permit may depend on whether the family life was established before or after the refugee arrived. This will have impact on whether the parties have to meet maintenance requirements, 24-year age requirements for spouses and cohabitants and a requirement of completing four years of work or education for the reference person.

In **Sweden**, the distinction between family reunification and family establishment is not as sharp, but it can be important in cases where a couple intends to enter into marriage or cohabitation. In such cases, the seriousness of a relationship may be assessed before a residence permit is granted, which is not possible for existing marriages or cohabitations.

In **Denmark**, no significant distinction is made between family establishment and family reunification.

8. Difficult for LGBT couples to be reunited

Direct and indirect discrimination based on sexual orientation is illegal in all three countries, and same-sex couples have equal rights to family reunification as heterosexual couples. The majority of LGBT refugees originate from countries where it is not possible for same-sex couples to be married, and where cultural and legislative restrictions make it difficult for same-sex couples to live together as partners. They are unable to prove that family life existed in their home country and will be met with stricter criteria in order to be reunited.

9. Attachment requirements

Norway may reject family reunification if the family as a whole has stronger aggregate ties to a safe third country than it has to Norway.

Such attachment does not in itself constitute a ground for rejecting an application in **Sweden**. It may however be of relevance for the issue of being exempted from maintenance requirements, and in some cases it could also be relevant for the assessment of whether it would violate international obligations to deny residence permit for family members. **Denmark** applied a stringent attachment requirement for many years, which was abolished in 2018, following a ruling of the European Court of Human Rights, and later replaced with extensive integration requirements.

10. Application fees

In **Norway** applicants are required to pay an application fee in order to be reunited with a refugee. The amount (2019: 10.500 NOK) is described by UNHCR as the highest fee of its kind in the world and is often difficult if not impossible to reach for refugees that have recently arrived in the country. Only applicants under the age of 18 are exempted from the fee. Because of the six-month time frame where applications for family applications must be lodged in order to be exempted from the income requirement, refugees have to pay the fee within a short period of receiving their status. Many refugees have to resort to illegal work or very expensive loans in order to be able to pay the administrative fee in time. Applicants who do not have sufficient means to pay the processing fee have no legal remedy at disposal to request an exemption.

Fees are waived in most cases in **Denmark and Sweden** for applicants that are immediate family members of a reference person with refugee status or subsidiary protection.

11. Maintenance requirements and application deadlines

In **Norway and Sweden**, family members of refugees are exempted from the income requirement if applications are submitted within a set time limit.

In **Norway** this will only apply for families that were established pre-flight. The application must be registered online within six months, and all necessary documentation must be submitted in person within one year.

In **Sweden** the time limit is three months after the reference person was granted a res-

idence permit. **Denmark** does not have an income requirement as such, but imposes requirements on reference persons to be self-supporting. This would however normally not apply to reference persons who still risk persecution in the country of origin.

12. More favourable application processes should be introduced

In **Norway and Sweden** reference persons are generally denied the possibility of applying on behalf of the applicant. The applicant must submit the application from the home country or in a neighbouring country. Norwegian and Swedish authorities have designated foreign service missions or application centres where applications should be submitted in person. The place of application is often situated far from where the applicants are residing. This could result in applicants having to make costly and dangerous travels in order to submit necessary documentation, including illegal crossing of borders and illegal stay in the country where the application is submitted. For many it is difficult to meet the time limit to be exempted from maintenance requirements.

According to **Norwegian law**³ a postponement of the deadline is possible if the submission of the application was delayed for reasons outside the applicant's control. The practice is strict, and exemptions from this requirement is difficult to get. Even the waiting time to get an appointment at an embassy is not considered to be outside the applicant's control.

In **Denmark**, a parent can always apply on behalf of a child, and the reference person may also in some cases apply if the applicant is living in an area of conflict. Normally, only applicants with a legal stay are allowed to apply while residing in the host country. Applications must normally be submitted abroad also in Danish cases, but the applicant is able to choose the place of application, and no deadlines apply.

13. Documentation of identity and family links

Documentation is a general requirement to obtain residence permits. Proving identity and family links may be difficult where documents as passports, birth certificates, or marriage certificates are missing or are hard to access. Strict time limits make it hard to meet the documentation requirement. Exemptions can be made if the applicant originates from a country where it is difficult to provide documentation of identity and family relationships, or where documentation is not considered reliable. For this group, it is necessary to make the identity probable, through DNA-tests which confirm

³ Immigration Regulation section 10-8

family ties, and/or coherent information in the application and interviews. **Sweden and Norway** requires a letter of consent if the custody of a child is shared by both parents and the child applies to be reunited with one parent while the other parent remains in the home country.

In **Denmark** proof of separate or joint custody from the parent living in Denmark is sufficient for the granting of a residence permit to the child.

14. Denmark with lenient legislation and practice for refugees

Denmark is the country with the fewest restrictions on family reunification cases involving refugees, while being the Scandinavian country with the strictest policy regarding family reunification for other third country nationals. No distinction is made between family links established pre- or post-flight, the attachment requirement is abolished and a general exemption from integration requirements applies to refugees. Application fees and self-supporting requirements are waived for refugees and the practice regarding the application process is the most lenient. But Denmark is the only country who restricts the right to family reunification for beneficiaries of subsidiary protection, and has the strictest legislation on reunification between parents and children. See points 1 and 3.

15. Judicial review is important

Sweden: The ruling from the Swedish Migration Appeals Court was essential in re-introducing the right to family reunification for beneficiaries of subsidiary protection. A CJEU judgement has led the Swedish authorities to introduce a practice where a child's age normally will be assessed based on the time of application. A recent decision from the Migration Appeals Court clarified that the administrative authorities must apply a lower standard of proof where the applicants are citizens of countries where it is difficult to obtain identity documents.

Norway: Several court rulings have stated that separation of young children and their primary caregiver should only be allowed in exceptional cases.

Denmark: The Grand Chamber of the European Court of Human Rights concluded in *Biao v Denmark* that the attachment requirement in Danish law in part constituted indirect discrimination on the basis of ethnic origin.

3 Recommendations

All persons in need of protection, regardless of their status, should be given the same access to family reunification as Convention Refugees.

Denmark should reintroduce the right to family reunification for all beneficiaries of subsidiary protection.

To secure the best interest of the child, **Denmark** should implement the Convention on the Rights of the Child and ensure children's right to be heard in its legislation. Children should be given the opportunity of being heard orally - as long as this is possible and what the child prefers - regarding questions that are of importance to the child. The Danish authorities should also secure the right to family reunification for children between the age of 15 to 18.

Norway should abolish the attachment requirement, which enables rejection of family reunification if the family as a whole can be said to have stronger aggregate ties to a safe third country. Alternatively, it should only be applied in situations where the country of referral grants refugees access to the same rights as in Norway.

Norway should also waive the requirement of paying application fees for refugees, or at least reduce the fee to a level where it does not constitute an insurmountable obstacle to family reunification.

In both **Norway and Sweden** combination of strict time limits and high income requirements could effectively remove refugees' possibility of being reunited with family members. The two countries should refrain from applying strict time limits in order to avoid income requirements. If time limits do apply, it should be sufficient to request an appointment at the place of application within the designated time frame.

The reference person should – in both **Norway and Sweden** - be allowed to apply on the behalf of applicants in cases where the applicant has to put him- or herself at risk in order to submit the application or where children otherwise will be separated from a parent. More flexible application procedures should be established, to enable applicants to submit an application to a place that is approachable, and where the applicant do not need to put him- or herself at risk.

The best interest of the child is not just one of several considerations and must have high priority. Authorities in both **Norway and Sweden** should allow applications from the host country, if a rejection would result in children being separated from a parent for a lengthy period of time.

The absence of documents that prove identity or the existence of family life should not in itself lead to rejection of family reunification.

The requirement of a letter of consent from a parent in the home country when a child is reuniting with the other parent in the host country is important to avoid child abduction. Such documentation may be difficult to provide where one parent remains in a conflict zone. **Norway and Sweden** should not apply such requirement where the child may risk living without either parents.

Refugees, as others, should be given the possibility of freely choosing their life partner without facing restrictions based on the point in time the relationship was established. Integration requirements such as the 24-year requirement and the requirement of four years of employment or education in order to be granted family reunification should be revoked. In both **Norway and Sweden** refugees should be exempted from the maintenance requirement also when family life is established post-flight, and the level of income needed to fulfil the requirement should be reduced.

Children's age assessment should always be done at the time of application for family reunification. **Sweden** should include such policy in its legislation.

For all three countries a broader definition of family is needed, with special emphasis on family members depending on a refugee residing in **Denmark, Norway or Sweden**.

Authorities in **Denmark, Norway and Sweden** should take into account the difficulties same-sex couples have to document their family links. Provisions should be introduced to enable same-sex couples to prove their existing relationship and give LGBT families real possibilities of being reunited on equal footing as other families.

Denmark, Sweden and Norway should all recognise the complexity of family reunification cases and grant the right to legal aid in cases where refugees are denied the right to family reunification.

4 Statistics

Family reunification permits given in Scandinavian countries 2014 - 2019

Norway

Year	Number of family immigration permits	Number of family immigration permits where the sponsor is a refugee	Proportion of permits where sponsor is a refugee
2014	11.078	2.589	23 %
2015	12.592	2.721	22 %
2016	15.580	4.347	28 %
2017	14.432	4.703	33 %
2018	10.940	1.713	16 %
2019*	9.950	NA	NA

* As of 31.10.2019

Denmark

Year	Number of family immigration permits	Number of family immigration permits where the sponsor is a refugee	Proportion of permits where sponsor is a refugee
2014	5.727	2.401	42 %
2015	11.645	8.092	69 %
2016	7.679	4.312	56 %
2017	7.015	3.265	47 %
2018	4.601	1.136	25 %
2019*	2.273	557	25 %

* As of 30.09.2019

Sweden

Year	Number of family immigration permits	Number of family immigration permits where the sponsor is a refugee	Proportion of permits where sponsor is a refugee
2014	35.960	13.100	36 %
2015	37.262	16.251	44 %
2016	39.007	15.149	39 %
2017	48.046	19.124	40 %
2018	44.844	16.641	37 %
2019*	26.443	6.104	23 %

* As of 01.11.2019

5 International legal framework

Family unity is a fundamental and important human right contained in a number of international and regional instruments to which Norway, Sweden, and Denmark are contracting State Parties. These are the Universal Declaration of Human Rights (UDHR), (Article 16(3)); the International Covenant on Civil and Political Rights (ICCPR), (Article 17); the International Covenant on Economic, Social and Cultural Rights (ESCR), (Article 10); the Convention on the Rights of the Child (CRC), (Article 16); as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) (Article 8). Accordingly, the fundamental human right to respect family life constitutes the basis for judicial scrutiny at national, regional and international level of restrictions on migration of family, in particular family reunification.⁴ Sweden and Denmark are moreover bound by the Charter on Fundamental Rights of the European Union (Article 7) which comes into play when Member States implement and apply Union law. Article 7 (the right to respect for private and family life) corresponds to Article 8 (the right to respect for private life and family life) guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Unlike in asylum cases, there are no international conventions that provide an absolute right to be granted a residence permit in family immigration cases. Nevertheless, immigration authorities are not free to establish legislation, or decide in individual cases on family reunification without taking into account international treaties that they are bound by. International law will in many cases have a bearing on the right to family immigration in Denmark, Norway and Sweden.

5.1 Convention relating to the Status of Refugees

While the 1951 Convention is silent on the question on family reunification and family unity, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommends that Member States “take the necessary measures for the protection of the refugee’s family, especially with a view to (...) [e]nsuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.”

4 The Human Rights of Migrants and Refugees in European Law, Cathryn Costello, Oxford University Press, 2016

The Final Act of the UN Conference of Plenipotentiaries, which adopted the Convention relating to the Status of Refugees underlined that family reunification is an essential right of refugees. The Final Act of the 1951 Conference, in particular Recommendation B, explains UNHCR's position related to family reunion in the following terms: "*the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee*". Accordingly, UNHCR promoted the reunion of family members who were separated as a result of refugee movements.⁵ UNHCR continued to refine its position on the preservation of family unity by providing interpretation of types of family reunification.⁶ A further doctrinal development is contained in the Handbook which contains an interpretation of the principle of family unity clarifying in particular to whom it applies and in what circumstances.⁷

Furthermore, UNHCR's Executive Committee has adopted a series of conclusions that reiterate the fundamental importance of family unity and reunification, and call for facilitated entry on the basis of liberal criteria for family members of persons recognized as being in need of international protection. Specifically, the ExCom has underlined the need for the unity of the refugee's family to be protected by measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight, and noted that it is desirable that countries of asylum ensure that the reunification of separated refugee families takes place with the least possible delay. Following separation caused by forced displacement from persecution and war, family reunification in the country of refuge is the only way to ensure respect for a refugee's right to family unity.⁸

Although the 1951 Refugee Convention does not contain a specific provision on the right to family unity, there is agreement that refugee law generally, must be understood

5 See Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, Application No. 12510/18, *Dabo v. Sweden*, see also UNHCR and Refugee Law, *From Treaties to Innovation*, Corinne Lewis, Routledge 2012; See also UNHCR, Note on International Protection, 22, U.N. Doc. A/AC.96/227 (3 March 1964)

6 See UNHCR and Refugee Law, *From Treaties to Innovation*, Corinne Lewis, Routledge 2012; See also UNHCR, *The Reunification of Refugee Families*, UNHCR/IOM/52/83; UNHCR/FOM/49/83 (18 July 1983).

7 See UNHCR and Refugee Law, *From Treaties to Innovation*, Corinne Lewis, Routledge 2012

8 See Conclusions of UNHCR's Executive Committee, expressing the collective international expertise on refugee matters of nearly 100 countries are particularly relevant as they concern family reunion, family reunification and the protection of the refugee's family: UNHCR ExCom, Family Reunion, Conclusion No. 9 (XXVIII), 12 October 1977, available at: <http://www.refworld.org/docid/3ae68c4324.html>. 45 UNHCR ExCom, Family Reunification, Conclusion No. 24 (XXXII), 21 October 1981, available at: <http://www.refworld.org/docid/3ae68c43a4.html>. 46 UNHCR ExCom, Protection of the Refugee's Family, Conclusion No. 88, available at: <http://www.refworld.org/docid/3ae68c4340.html>

in light of subsequent developments in international law, including related treaties and agreements, State practice, and opinion juris.⁹

5.2 The European Convention on Human Rights

Article 8 (1) of the ECHR provides a “right to respect for his private and family life, his home and his correspondence”. However, article 8 (2) states that limitations may be imposed on this right if it is necessary to protect important social elements such as national security, public safety, the country’s economic well-being and the prevention of disorder or crime. In addition, a refusal of an individual’s rights must be grounded in law and be “necessary in a democratic society”. Therefore, a refusal of a person’s right to family life will not necessarily be a violation of article 8. An individual assessment must be made in each case, and the conclusion will depend, among other things, on whether it is possible to exercise family life in another country, how long the family will be separated and what conditions that have to be met in order to be granted a residence permit.

The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority (*Libert v. France*, §§ 40-42).¹⁰

If it is reasonable to expect that family life can be maintained and developed in another country, the European Court on Human Rights (ECtHR) has stated that a family immigration permit can be denied. Thus, the right to family life does not necessarily mean a right to choose where family life should exist. Such an assessment must take into account the opportunities the family has for staying in another country. There must be an actual and legal possibility of living together before a residence permit can be denied, if there is only a theoretical possibility this will obviously not be sufficient in order to reject an application.

If the reference person is granted refugee status, it will not be possible to refer the family to live together in the country of origin. Moreover, the European Court of Human Rights has established in its jurisprudence that family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who

9 Family Unity and Refugee Protection, Kate Jastram and Kathleen Newland, available at: <https://www.unhcr.org/3bd3d4a14.pdf>

10 Guide on Article 8 of the European Convention on Human Rights, Right to respect for private and family life, home and correspondence, European Court of Human Rights, available at: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

have fled persecution to resume a normal life. It further noted that obtaining international protection constitutes evidence of the vulnerability of the parties concerned. The Court underlined that there is 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. Accordingly, the Court established that it was essential for the national authorities to take account of the refugee's vulnerability and his particularly difficult personal history, to pay close attention to his arguments of relevance to the outcome of the dispute, to inform him of the reasons preventing family reunification, and, lastly, to take a rapid decision on the visa applications.¹¹

Therefore, if the family members of the refugee are denied family reunification, this will often constitute a violation of ECHR article 8. It may however be of relevance for the right to be granted family reunification whether the family ties existed in the home country before the reference person received refugee status, or if the family life was established by marriage post-flight. The right to be reunited with an already existing family is in practice often given greater weight than the right to establish new family relationships by marriage, and to bring a new spouse to the country. However, The ECtHR does not allow this type of discrimination: The court ruled in *Hode and Abdi v. the United Kingdom*¹² that the facts of the case fell within the ambit of Article 8 and that the first applicant's position as a refugee who married after leaving his country constituted a status upon which an individual could be discriminated against in the sense of Article 14. The Court concluded that the applicants had been in a situation analogous to that of refugees who had married before leaving their country and had obtained a limited period of leave to remain in the UK, the only difference being the time of their marriage. The Court found that the different treatment accorded to refugees with respect to the reunification of post-flight spouses lacked objective and reasonable justification.

It will also be of importance if family life was established at a time when one of the parties stayed illegally in the country, or where his or her residence status did not give a legitimate expectation to remain in the country. The issue has come up in a number of judgments regarding deportation, but will also be relevant to assessments of the right to family life in family immigration cases. In *Mitchell v. United Kingdom*, *Nunez v. Norway* and a number of other judgments, it has been held that the expulsion of a foreigner in such cases will only amount to violation of Article 8 under exceptional circumstances.

11 *Tanda-Muzinga v France*, application no. 2260/10, available at: <http://hudoc.echr.coe.int/eng?i=001-145653>

12 Application No. 22341/09, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-114244%22%5D%7D>

Any interferences with the right to respect for family life leading to family separation such as conditions to fulfil maintenance requirements or other requirements before family reunification can be granted, will not necessary constitute a violation of article 8, unless the decision-making process had not been attended by the guarantees of flexibility, promptness and effectiveness required in order to secure his right to respect for his family life under Article 8 of the Convention.

5.3 The United Nations Convention on the Rights of the Child

Article 10 of the Convention on the Rights of the Child states that applications for family reunification involving children must be processed “in a positive, humane and expeditious manner” and that the submission of such an application should have no negative impact on the applicant or his or her family members. Article 9 further states that children shall not be separated from their parents, except when deemed necessary by the competent authorities to safeguard the best interests of the child.

The general provision in article 3 regarding the best interests of the child is very relevant in family immigration cases involving children, and it shall be a primary consideration in all actions concerning a child. However, other considerations may be given equal or even greater weight. This follows from the wording of article 3 that the best interests of the child should be “a” primary consideration, and not “the” primary consideration. However, much is needed for the best interests of the child to be set aside for other reasons.

5.4 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and the Charter of Fundamental Rights of the European Union

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification¹³ is only binding on Sweden. One key observation following from the recital of the Directive is that its provisions must be interpreted and applied in accordance with fundamental rights and, in particular, the right to respect of private and family life, the principle of non-discrimination, the rights of the child and the right to an

¹³ Directive 2003/86 EC, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0086>

effective remedy, as enshrined in the European Convention of Human Rights and the EU Charter of Fundamental Rights.

The directive is not binding on Norway as a non-EU member. In the case of Denmark, in accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is not bound by it or subject to its application. Nevertheless, the directive is of relevance to Denmark and Norway because of the desire for harmonization of the regulations with other European countries. The directive sets minimum standards and applies only in cases where both the reference person and the applicant are third-country nationals. The reference person must have a residence permit that is valid for at least one year and must have a legitimate expectation of obtaining a permanent residence permit. If a residence permit is granted on the basis of an asylum application, the reference person must be recognized as a refugee in order for the directive to apply. Therefore, in cases where the reference person has been granted a stay on the basis of subsidiary protection or humanitarian reasons, the directive will not apply.

The directive states that spouses and minor children are, as a general rule, entitled to family reunification. States may set conditions on maintenance, housing and health insurance before a residence permit is granted. If the reference person is a refugee, the requirements will however not apply if the application for reunification is submitted within three months after the reference person was granted the status. It may be required that the reference person has been residing in the country for a certain duration before family reunification is granted, but again there is an exception from the requirement if the reference person is recognized as a refugee. In the case *European Parliament v. Council of the European Union*¹⁴, the CJEU established in clear terms that Member States must pay due regard to both the particular circumstances of specific cases and the best interests of minor children.

¹⁴ *European Parliament v. Council of the European Union* (C-540/03, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=55770&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5776961>)

6 Requirements for the reference person

6.1 Status of the reference person

The status a person is granted after applying for asylum may in many cases have an impact on the individual's ability to bring his or her family to the country of refuge through an application for family immigration. In this context, it is particularly of interest to look at differences between persons who have been recognised as refugees under the UN Refugee Convention and those who have been granted subsidiary protection under other human rights instruments, such as the European Convention on Human Rights of 1950 and the Convention against Torture.

In Denmark, a provision was introduced in 2015 which stated that persons who are beneficiaries of subsidiary protection due to generalized violence in their home country¹⁵, cannot be reunited with their family members until they were granted a renewal of their residence permit after one year. In 2016, the law was again amended, and the waiting period for family reunification for this group was increased from one to three years. Family reunification may be granted before this period has expired, pursuant to section 9c of the Immigration Act. However, family unity or the best interests of the child considerations may give grounds for exceptions. The assessment in such cases is however very strict. Exemptions would normally only be made if international conventions dictate that the rights to family life should take precedence, and that waiting three years prior to being permitted to apply for family reunification could cause significant hardship. Such exemptions could be made if e.g. the reference person, before leaving the home country, was the caretaker of a disabled spouse, if a child is still living in the home country and is seriously ill or if one of the spouses are terminally ill.

One should note that the Danish provision imposing a three-year waiting period does not appear to be in line with UNHCR's long standing position that refugee and subsidiary protection statuses must be harmonized as far as possible. This point has most recently been reiterated by UNHCR in its comments on the EU's proposal for a Qual-

¹⁵ Danish aliens act section 7.3

ification Regulation.¹⁶ Moreover, a general ban on family reunification for three years for the majority of beneficiaries of subsidiary protection or other forms of protection does also appear to be disproportionate and thereby exceeding the margin of discretion allowed by Article 8 ECHR.

Third-country nationals who have a subsidiary protection status due to individual reasons do not have the same restriction on the right to family reunification.

In the autumn of 2015, the Swedish authorities introduced a temporary immigration law, with the aim of reducing the number of asylum-seekers to Sweden. In the temporary law that came into force in 2016¹⁷, persons who had applied for asylum after 24 November 2015 and were granted subsidiary protection according to the temporary act, were deprived of the right to bring their family to the country. In November 2018, the Swedish Migration Court of Appeal issued a judgement in a case where an eight-year-old Syrian boy was refused reunification with his parents and siblings because he was a beneficiary of subsidiary protection.¹⁸

The judgement, which is precedent setting and binding on both lower courts and administrative authorities, established in clear terms that while beneficiaries of subsidiary protection do not fall within the scope of application of the Family Reunification Directive, their family life is guaranteed by Article 8 of the ECHR and relevant ECtHR jurisprudence, namely *Tuquabo-Tekle v the Netherlands*¹⁹, *Mugenzi v France*²⁰, *Nunez v Norway*²¹, *El Ghatet v Switzerland*²² and Sweden's obligations under the Convention on the Rights of the Child. Hence, the Court held that the authorities' refusal to grant family reunification to the child cannot be considered proportionate when balancing the family's interest in reuniting on one hand and the Swedish government's interest in reducing the number of asylum-seekers because of the major strains on the Swedish asylum system on the other hand. The Court concluded that the restriction imposed

16 <https://www.refworld.org/docid/5a7835f24.html>

17 Swedish Temporary Aliens Act (2016: 752)

18 See judgment UM 5407-18 of 13 November 2018, available here: <http://kammarrattenistockholm.old.domstol.se/Domstolar/kammarrattenistockholm/Domar/2018%20Juli-dec/Referat%20i%20mål%20nr%20UM%205407-18.pdf>

19 Application No. 60665/00, available at: <https://www.refworld.org/cases,ECHR,43a29e674.html>

20 Application No. 52701/09, available at: <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93mugenzi-v-france-application-no-5270109>

21 Application No. 55597/09, available at: <https://hudoc.echr.coe.int/eng#%7B%22item%22%3A%5B%5C%22001-105415%22%5D%7D>

22 Application No. 56971/10, available at: <https://hudoc.echr.coe.int/eng#%7B%22item%22%3A%5B%5C%22001-168377%22%5D%7D>

on the family's right to respect for family life was contrary to Sweden's international obligations i.e. Article 8 of the ECHR and the Convention on the Rights of the Child, in particular Article 3 and Articles 9 and 10.

When the Swedish authorities adopted a renewal of the Temporary Act in the spring of 2019, persons with subsidiary protection were again granted the same rights to family immigration as refugees under the Convention. The new Temporary Act applies from 20 July 2019 to 19 July 2021.

In Norway, asylum applicants that are deemed to have a need for protection are given basically the same rights whether they are recognised as refugees under the UN Refugee Convention or granted protection under other human rights instruments, most notably ECHR. There are therefore no significant differences between the two groups when it comes to the right to be reunited with family members. There have however been proposals made by politicians that a subsidiary protection status should be introduced, and that restricted rights should be given to beneficiaries of this status. Restrictions on the right to family reunification have been one of the proposals for this group, but so far there have been no concrete changes.

7 Who can obtain family immigration permits

A refugee in the Scandinavian countries will normally only have the right to be reunited with the closest family members, what is known as the “nuclear family”, and in most cases additional conditions must be fulfilled. The legislation in all three countries reserves the right to be reunited with family reunification to spouses, registered partners, cohabitants, underage children and parents of underage children. Other family members will as a main rule only rarely be granted family reunification in Denmark, Norway or Sweden.²³

²³ See chapter 14

8 Family immigration for spouses

Immigration based on marriage is the most common form of family immigration in the Scandinavian countries, and a refugee's spouse is, as a main rule, entitled to be granted a residence permit to be reunited with the refugee. Being married is however in itself not sufficient to be granted family reunification, in all three countries additional requirements must be fulfilled before a residence permit can be granted.

Marriages between couples of opposite sex and the same sex are treated equally, and there are no differences in requirements for family reunification for the two groups. Since there are relatively few countries that accept same-sex marriages, this group will naturally constitute a clear minority.²⁴

In some contexts, the requirements that have to be fulfilled in order to be eligible for a residence permit will depend on whether the marriage was entered into before the reference person left the country of origin (called family reunification), or whether the couple were married after the reference person came to Scandinavia (called family establishment).

8.1 How is the marriage established

In Norway, it is a requirement for family reunification that the marriage has been correctly established. As a main rule, a marriage that is contracted outside Norway shall be recognised in Norway if the marriage has been validly contracted in the country of marriage. This means, for example, that a marriage that is only established through a religious ceremony will be accepted if such a marriage is recognized in the relevant country, while a marriage entered into in Norway will not be accepted as a basis for family reunification unless it was conducted according to regulations and by someone authorised to perform wedding ceremonies.²⁵ The fact that a marriage is validly contracted in the relevant country does however not always mean that it will be recognised in Norway. A marriage will not be recognised if this would obviously be contrary to Norwegian public policy (*ordre public*). This would normally apply in cases where:

²⁴ See chapter 11

²⁵ See the following on conditions for marriage in Norway: <https://www.regjeringen.no/en/topics/families-and-children/innsiktsartikler/marriage-and-cohabitation1/vilkar-for-ekteskap/id672620/>

- the marriage was entered into under coercion or without the consent of one of the parties,
- if one or both spouses are very young²⁶, or
- if the marriage has been made through a proxy, where he or she is authorized to choose a spouse.

If requested by both parties, the marriage may still be recognised as a basis for family reunification if there are strong reasons for doing so. This is however a narrow exemption provision that is practised very strictly, and such marriages will therefore rarely form a ground for family reunification.

A particular issue has arisen in some cases where a male refugee in Norway has converted from Islam to Christianity, prior to being married to a Muslim woman in the country of origin. Norwegian immigration authorities have in a number of cases refused to accept the marriage on the grounds that marriages between a Christian and a Muslim woman are not recognised in the country of origin, and that the marriage would not have been entered into if it was known that the reference person had become a Christian. The applications for family immigration have therefore been rejected since the marriage was not considered validly contracted in the home country. However, recent decisions by the Norwegian Immigration Appeals Board, where it is stated that it would be offensive to Norwegian public policy (*ordre public*) if such a marriage was *not* acknowledged, indicate that this practice is declining.

As a main rule, foreign marriages are also recognized by Swedish authorities if they were valid in the country where the marriage was established. An application for family immigration may however be rejected if the marriage was contracted under coercion or without the consent of one of the parties, or if any of the spouses were under the age of 18 at the time of marriage.

Denmark also has rules regarding what types of marriages that are recognised and can provide a basis for family immigration. Religious weddings that are not approved by the authorities in the relevant country will not be recognized by Danish authorities as a basis for obtaining a residence permit. The marriage will also not be accepted if one or both of the spouses were not present, or were represented by someone else, during the wedding ceremony, if either of the spouses was under the age of 18 when the marriage

²⁶ If one of the spouses are a Norwegian citizen or permanently residing in Norway, marriages contracted abroad will not be accepted if one of the spouses were under 18 years at the time of marriage, see: https://www.regjeringen.no/globalassets/upload/bld/q-1130_netto7-2011_small.pdf

was established or if one or both of the spouses did not enter the marriage voluntarily.

If others in the immediate family previously have been involved in a forced marriage, Danish immigration authorities will normally conclude that the marriage is not voluntary. And if the marriage is established between close relatives, it will normally be considered doubtful whether the marriage is voluntary for both parties.

The legislation in all three countries makes a clear distinction between forced marriages and arranged marriages. In both cases, a person's spouse is chosen by others than the person him/herself, usually by parents or other close relatives. What separates arranged marriages from forced marriages is normally that the person who is getting married has the opportunity to refuse being married to the chosen spouse, without being subject to sanctions from the family. There are however many grey zones, where sanctions against a refusal of marriage can be more or less subtle. Normally, a marriage that is arranged, but where no coercion has been used, will be accepted by the Scandinavian countries as a basis for family immigration.

Denmark, Sweden and Norway all have provisions in their legislation that provide grounds for refusing family immigration if the purpose of the marriage is to grant one of the parties a residence permit. The standard of proof used to determine whether a marriage appears to be a marriage of convenience, and thus providing grounds for denying the application for family reunification, is however significantly different in the three countries. In Sweden, the application can be rejected if the marriage is established exclusively (*"uteslutande"*) in order to provide a basis for a residence permit for the applicant. In Denmark, a residence permit cannot be granted if there are specific reasons for assuming that the decisive (*"afgørende"*) purpose of marriage is to obtain a residence permit. The Norwegian Aliens Act provides grounds for refusing a residence permit if it seems most likely that the main purpose (*"hovedsakelige formål"*) of entering into marriage has been to establish a basis for residence in the country. The Norwegian Supreme Court issued a judgement in 2013²⁷ regarding what time the assessment of whether a marriage is of convenience or not, should be made. The Court referred to the wording in the Immigration Act (*"main purpose of entering into the marriage"*)²⁸ and concluded that the assessment should focus on the time of marriage, not the time of decision. This means that even if a real relationship develops after the marriage, it will still not qualify as the basis for family reunification if the main purpose at the time of marriage was to establish grounds for a residence permit in Norway.

27 RT 2013-937, available at: <https://www.udiregelverk.no/en/documents/supreme-court-decisions/rt-2013-937/>

28 Immigration Act, section 40

The threshold for rejecting an application for family immigration on the basis of a pro forma marriage is thus higher in Sweden than in Denmark and Norway.

Threshold to establish whether the marriage is one of convenience:

Sweden: sole purpose - «uteslutande»
Denmark: decisive - «afgørende»
Norway: main purpose - «hovedsakelige formål»

Some of the things that will be looked at by immigration authorities when assessing whether a marriage is pro forma are:

- Whether the spouses have lived together
- Whether they can communicate in the same language
- Whether there is a big age difference between the spouses²⁹
- How well they knew each other before getting married
- Previous marriages
- Whether the couple have children together
- Whether the reference person previously sponsored someone for family reunification, and then divorced the individual shortly after a permanent residence permit was granted

Another important factor in assessing whether a marriage should be considered pro forma is whether the parties actually live together or intend to live together. If the parties live, or will be living, at separate addresses, this will often be seen as an indication that no real marriage exists.

²⁹ This is mainly a factor if a woman is in a relationship with a much younger man, the opposite is considered to be more normal in many countries.

Polygamous marriages are illegal in all the Scandinavian countries, and it is therefore not possible to be reunited with more than one spouse.

8.2 Requirements based on age

All three countries have restrictions on the right to family reunification between spouses based on the age of the reference person and the applicant. The same restrictions apply in cases regarding partnership or cohabitation.

In Denmark, there has been a requirement since 2002 that both the reference person and the applicant must have turned 24 years before a permit can be granted. It is possible to apply for a permit when the youngest of the spouses / cohabitants is 23 years and 6 months. In some cases, this requirement may be waived if:

- the reference person still risks persecution in the country of origin
- the reference person is seriously ill or has a severe disability which makes it indefensible to refer the person to live in the country of origin,
- the reference person lives with a child who has an own connection to Denmark. According to current practice, the child must have lived in Denmark for 6-7 years to fulfil this criterion,
- the reference person has contact with minor children from previous relationships,
- the reference person works within a profession where there is a shortage of qualified professionals in Denmark,
- the reference person works for the Danish state and hold a position of special importance for Denmark's security or foreign policy.

In Sweden, it is a condition for family reunification that both the reference person and the applicant are over 18 years of age. However, when the reference person has a temporary residence permit granted by the Temporary Aliens Act, an application may be rejected if either of the spouses or partners are under 21 years of age. This is in keeping with the maximum threshold under Article 4(5) of the Family Reunification Directive which allows Member States to fix a minimum age for both sponsor and spouse. Most Member States have applied this optional clause, arguing that it can help prevent forced marriages. Five Member States set the age at 21 years.

In its judgement in case Marjan Noorzia³⁰, the CJEU held in its analysis of whether the minimum age requirement was objective and proportionate “that the minimum age fixed by the Member States by virtue of Article 4(5) of Directive 2003/86 ultimately corresponds with the age at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated there. (...) Further, such a measure does not undermine the purpose of preventing forced marriages since it permits the presumption that, due to greater maturity, it will be more difficult to influence the persons concerned to contract a forced marriage and accept family reunification if they must have reached the age of 21 by the date when the application is lodged than it would be if they were under 21 at that date.”³¹

In Norway, according to Section 40 (residence permits for spouses) of the Immigration Act both parties must be at least 24 years of age before an application for a residence permit as the sponsor’s spouse or cohabitant may be granted. The requirement does not apply if the marriage was contracted or the cohabitation established before the sponsor’s entry into the realm, or where the parties have contracted their marriage or established a cohabitation in Norway while both had a resident permit or a Norwegian or Nordic citizenship. Exemption may also be made if it is evident that the marriage or cohabitation is entered into voluntarily by both parties.³²

However, applicants having a background from countries/areas/ethnic groups where forced marriages occur³³ are in practice not exempted from the 24-year requirement as Norway, in general, considers that many applicants from these countries do not marry on a voluntary basis. To illustrate, in several decisions issued by the Norwegian Appeals Board concerning applicants from countries such as Afghanistan and Somalia, the Board held that the applicants’ marriages were not evidently contracted voluntarily since they originate from countries where forced marriages occur³⁴ while underlining the fol-

30 Marjan Noorzia v Bundesministerin für Inneres, Case C-338/13, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155102&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2305892>

31 Brussels, 29.3.2019 COM(2019) 162 final, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, 23 March 2019, available at: [http://www.europeanmigrationlaw.eu/documents/COM\(2019\)162-FamilyReunion.PDF](http://www.europeanmigrationlaw.eu/documents/COM(2019)162-FamilyReunion.PDF)

32 Prop. 90 L (2015-2016), available at: <https://www.regjeringen.no/contentassets/225c8eb568834fb-f866a6bc8f6e02dd8/no/pdfs/prp20152016009000oddpdfs.pdf>

33 Preparatory works (Prop. 90 L 2015-2016, p. 114) mentions Turkey, Pakistan, Iran, Iraq, Afghanistan, Morocco, Eritrea and Somalia as countries where forced marriages occur

34 Decisions of the Appeals Board, available at: <http://praksis.une.no/CES5/default.aspx?sk=NyLov>

lowing “it is almost impossible for the immigration authorities to determine with a high degree of certainty whether the marriage is evidently contracted on a voluntary manner”. The Board held moreover that it could not attach weight to the information provided by the reference person or the applicant, as both could have been subjected to pressure.

It is important to note in this regard that the Appeals’ Board decisions appear to be drafted in a stereotyped manner without details of the reasons for the decisions being given, hence raising issues under Article 8 of the ECHR and Article 13 which impose an obligation on Norway to carry out an individual assessment and refrain from formalistic attitudes which have the potential to unjustifiably hinder the applicant’s use of an otherwise effective domestic remedy to enforce the substance of the Convention rights and freedoms.³⁵

A separate issue arising from Section 40 of the Immigration Act is the apparent incongruence between the Marriage Act and provisions regulating family reunification of the Immigration Act. There have been cases where the County Governor has found that the applicants’ marriage was genuine under the Marriage Act, while the Directorate of Immigration and the Appeals Board held in light of Landinfo³⁶ reports that the marriage could not be said to be genuine for the purposes of the immigration rules governing family reunification. In light of the foregoing, it appears that there is a need for a harmonized interpretation of the two sets of rules in the Marriage Act and the Immigration Act in order to avoid conflicting and arbitrary results.

Questions have been raised on whether imposing age requirements in family reunification cases actually will have an impact in the work against forced marriages. UNHCR stated in a report regarding the right to family reunification in 2018³⁷ that:

It is questionable whether introducing an age requirement of 21 or 24 is an effective tool for tackling forced marriage, as the UK Supreme Court found in its judgment in Quila and Bibi³⁸ (...). As the Council of Europe Commissioner for Human Rights’ report notes: “This suggests that such age limits must be justified and, in refugee cases, where they could amount to a long waiting time in dangerous circumstances, their justification is likely to be more difficult.”³⁹

35 See in this regard for comparison purposes, ECtHR’s decision in G.R. v the Netherlands, Application no 2251/07, available at: <http://hudoc.echr.coe.int/eng?i=001-108436>

36 The Norwegian Country of Information Centre

37 “The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, available at: <https://www.refworld.org/docid/5a902a9b4.html>

38 [2011] UKSC 45, available at: <https://www.supremecourt.uk/cases/docs/uksc-2011-0022-judgment.pdf>

39 Council of Europe: Commissioner for Human Rights, Realising the Right to Family Reunification of

If the spouses were married before the reference person came to Norway, it will normally be recognised as a basis for family reunification if it was validly entered into in the country of marriage, which means that such marriages where one or both parties were minors normally will be accepted. However, a limit is set for marriages entered into before the age of 16. Such marriages will be contrary to ordre public and will only be recognised in very exceptional cases.⁴⁰ In a number of cases regarding Syrian nationals, marriages have however been accepted even if the female spouse were as young as 14 years of age at the time of marriage. The reasons for accepting such marriages have been, inter alia, that the woman has reached the age of 18 and continues to voluntarily continue the cohabitation, that the couple has joint children, and that a refusal of an application for family reunification will lead to a permanent separation of the family as the reference person has refugee status in Norway. The practice does however not seem to be entirely consistent.

Minimum age to contract marriage:

Norway: 18 (24 in family establishment cases)

Sweden: 18 (21 in cases where the reference person has temporary protection)

Denmark: 24 (18 if the reference person has refugee status or subsidiary protection)

Refugees in Europe, p. 38

⁴⁰ Circular GI 13/2016, available at: <https://www.regjeringen.no/no/dokumenter/gi-132016--nedre-aldersgrense-for-a-merkjenne-ekteskap-inngatt-i-utlandet/id2525096/>

9 Unmarried partners

Unmarried partners have the right to be reunited with refugees in all three of the Scandinavian countries, subject to certain requirements. Under the legislation in all three countries, unmarried partners are given the same rights to family reunification as married couples. The decisive factor in such cases is what it takes for a relationship to be considered as cohabitation.

In Norway, an applicant who has lived in permanent cohabitation with a reference person for at least two years is entitled to a residence permit when the couple intends to continue their cohabitation. Cohabitation abroad and in Norway both count in the calculation of the length of cohabitation. However, if the cohabitation took place in Norway, only periods of lawful residence may be taken into account to determine the length of cohabitation. The requirement of two years of cohabitation must, in principle, be met over the last two years before the application is made. If the parties have not lived together for the past two years due to work or other practical reasons, but have previously lived in a permanent and established cohabitation for at least two years, the two-year requirement will still be met if the parties can establish that they have had regular contact as far as possible in the period where they have lived apart, and they intend to resume their cohabitation.

If the requirement of two years of cohabitation is not fulfilled, an applicant will still be entitled to a residence permit on the grounds of family reunification if he or she has children with the reference person, and the couple intends to continue cohabitation. Such a case would be considered a family establishment unless the child was conceived prior to the reference person's entry into Norway, or while both parties had a residence permit in Norway. The 24-year requirement will therefore apply in such cases. It will also be required that the reference person can show that he or she has had four years of work or education before residence permit can be granted.⁴¹ An applicant who has not been in a permanent cohabitation relationship for two years but who is expecting a child with a reference person is not entitled to a residence permit, but a permit can still be granted. The same requirements for work, education and age will naturally apply in such cases.

In Denmark, there is no defined requirement for how long the cohabitation must have lasted before a residence permit can be granted. The Danish Immigration Act

⁴¹ See chapter 16

only stipulates a requirement for “*permanent cohabitation of longer duration*”. Danish immigration authorities have however established a practice where cohabitation must have lasted for a period of one and a half to two years to fulfil this requirement. The cohabitation could take place in Denmark, the country of origin or elsewhere, but it must have been continuous, which is considered fulfilled if there have been no significant interruptions. In principle, the period of cohabitation must immediately precede the application for family immigration, but exceptions to this requirement could be made if cohabitation has not been possible for a period of time because one or both of the parties had to escape in order to avoid persecution.

In cases where a couple cannot meet the requirement of one and a half to two years of cohabitation, it is possible for the authorities to take into account and give weight to whether the cohabitants have common children. But in order for this to become relevant in the assessment, the child must be considered to have an individual connection to Denmark. According to Danish legislation, such connection is achieved only after six to seven years of residence in the country. Although it appears that refugee children may benefit from exemptions, the connection requirement raises issues under the ECHR and the CRC. It is noted in this regard that a time period of 6-7 years preventing vulnerable refugee children from being reunited with their parent(s) is a very long period for children of the ages in question.⁴² In keeping with the CRC, in particular General Comment No. 6 (2005) on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, States parties are particularly reminded that “applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner” and “shall entail no adverse consequences for the applicants and for the members of their family” (art. 10 (1)).⁴³

As in Norway, residence time as cohabitants in Denmark can only be earned through periods of legal residence. When one party only visits Denmark for a short period or resides illegally in the country, this period will not be taken into account in the assessment of total residence time is made.

In Sweden, there is no time requirement for how long the cohabitation must have existed before it provides a basis for a residence permit as cohabitant. For a permit to be granted on this basis, the couple must have lived together in a marriage-like relationship over a certain period. The duration of this period is not specified, but it

42 See *mutatis mutandis* Nunez v Norway, application no 5597/09, available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-105415"\]}](https://hudoc.echr.coe.int/eng#{)

43 General Comment No 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC, Available at: <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

must be more than a few weeks. In the preparations for the Swedish law on cohabitation⁴⁴, it has been established that more or less temporary relations normally cannot be regarded as a cohabiting relationship. It follows from the same preparations that if a couple lives together and have common children, it must be assumed that a cohabitation exists.

Swedish legislation makes it possible to obtain a residence permit even if two parties intend to enter into cohabitation. This could also be the case where the parties have been cohabitants, but are not able to provide sufficient evidence that cohabitation has existed. In such cases, the authorities should assess whether the relationship appears to be serious and whether there are any specific reasons for not granting family reunification. In the seriousness assessment, which is quite similar to the pro forma assessments in cases regarding marriage, the immigration authorities will consider the following factors, among others:

- How long the relationship has existed
- What kind of contact the parties have had with each other
- What kind of knowledge the parties have about each other
- Whether they communicate in a common language
- Whether the parties have or are expecting children together

Even if the relationship is considered as serious, the authorities may refuse to grant a residence permit to an applicant that intends to enter into cohabitation, if there are special reasons for doing so. This may be the case, for example, if the reference person has been convicted of criminal offenses.

An assessment of the seriousness of the relationship can only be made in cases where there are plans to enter into cohabitation, the same applies to the assessment of the reference person's misconduct. These are factors that cannot be emphasized if cohabitation already exists. However, permission can be denied for both existing and planned cohabitation if it can be assumed that the applicant or the applicant's children may be subjected to violence or if their freedom can be seriously violated if a residence permit is granted.

44 prop. 2002/03:80

Minimum duration of cohabitation to qualify for residence permit

Norway: – minimum 2 years

Denmark: – 1½ – 2 years

Sweden: – no fixed requirement, more than a few weeks

10 Family immigration for persons that intend to be married

Norway and Sweden have provisions that authorize the immigration authorities to grant residence permits to persons who intends to be married to a reference person. In both countries, such a permit should normally be granted prior to the applicant's arrival.

In Norway, a residence permit issued for the purposes of getting married may be granted for up to six months. Both parties must be over the age of 24, and the terms of four years of work or education also apply to this provision as these cases always will be considered as a family establishment. The permit cannot be renewed, and it is therefore assumed that the applicant should return to the country of origin if the marriage is not established during this period.⁴⁵ When considering whether to grant a permit, it must be considered whether the engagement is a reality and whether there are obstacles to establish the marriage. The applicant must present an original marriage certificate or an original confirmation of marital status from the country of origin.⁴⁶ It will also be considered whether the applicant has the intention of returning to the country of origin if the parties do not marry during the six month period. It is the parties who must show that it is more likely than not that they intend to get married within the expiry of the permit.⁴⁷

A third-country national who intends to enter into marriage with a person residing in Sweden may be granted a residence permit, if the relationship appears to be serious and there are no special reasons against granting a permit. The Migration Agency will assess the seriousness of the relationship, and it is the applicant that has the burden of proof regarding the level of seriousness. Factors that can be used as the basis for such assessments are how long the relationship has lasted, what kind of contact they have had, their knowledge of each other and whether they communicate in a common language. Consideration will also be given to whether the parties have or are expecting children together. The permit will normally be given for two years, and it is possible to renew.

45 Ot.prp. nr. 75 (2006-2007) p. 425

46 Circular RS 2010-077

47 Ibid

It is a requirement that the parties should live together in Norway, even before the marriage is contracted. This requirement will automatically disqualify couples from being reunited if they decide on account of their religious, cultural or ethical reasons not to live together before the marriage is entered into. A significantly number of refugees originate from countries where it is only possible for a couple to live together after they have been formally married. Hence, it will not be possible for this group to benefit from this provision.

Unlike Norway, Sweden does not have a requirement of cohabitation between the parties after the applicant has arrived. The parties may still give sufficient proof of an intention to marry and cohabite even if the live separately in the first period. The issue might however arise at the time of renewal, normally after two years, where there will be an assessment of the relationship between the parties. If the couple do not cohabite at that time, it will be assumed that the relation has ceased to exist, and a renewal of the permit will be refused.

In Denmark, there is no specific legal basis for granting a residence permit in such cases.

II LGBT relationships

When a relationship exists between two people of the same sex, it is in Scandinavia, as in most countries in Europe, widely accepted that the couple should be given the same rights as heterosexual couples in most areas of society. This also applies to the question of family reunification. The ECtHR has ruled that same-sex couples in a relationship can constitute a family unit, including if they do not live together. In *Schalk and Kopf v. Austria*⁴⁸ the court stated that “*a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would*”.

Direct and indirect discrimination based on sexual orientation is illegal in all three countries; Denmark, Norway and Sweden. People engaged in same-sex relationships are thus treated equally to people in heterosexual relationships when it comes to the right to family reunification. The legislation in all three countries entitles same-sex couples the right to family reunification, subject to certain conditions. There are no differences between married and unmarried couples, but as many of the refugee-producing countries have legislations and practices that makes it extremely difficult, or even impossible, to enter into same-sex marriages, such relations will more often form the basis of family immigration as unmarried partners than as spouses.

None of the Scandinavian countries has specific rules regarding family reunification between married couples or cohabitants of the same sex. But even though the formal rights are the same as for same-sex relationships, and there are no legislative restrictions on family immigration for same-sex couples, significant criticism has been raised against the regulations and the practice in the three countries, in particular regarding the evidentiary standards because there are in reality substantial obstacles for same-sex couples to be reunited.

Hence, the administrative authorities should accept a lower standard of proof if the applicant demonstrates that cohabitation or marriage was not an obtainable option due to social and/or legal prohibitions.

The majority of lesbian or gay people who receive refugee status in one of the Scandinavian countries originate from countries where it is not possible for same-sex couples to be married. Such marriages are prohibited by law in many countries, and severe

⁴⁸ Application no. 30141/04, ECtHR, 24 June 2010

penalties, including corporal punishments and, ultimately, the death penalty, could be the result if a marriage between two persons of the same sex is entered into. For this group of refugees, it is often precisely the risk of persecution of persons with a different sexual orientation that has led them to flee their home country, and granted them a protection status in Scandinavia.

In reality, due to legislation and cultural norms, it is also very difficult for same-sex couples to live together in a real partnership, which is a condition for receiving a family immigration permit as cohabitants. For obvious reasons, LGBT couples do not have the possibility of proving their relationship through DNA testing. This means that many people in this group do not have a real opportunity of fulfilling the requirements for family reunification, even though the relationship was formed in the home country and have lasted for a long time.

Since couples in this group most often cannot provide evidence that they have been married, nor show that they have lived in an established partnership over time, they very often fall outside the circle of persons who normally are entitled to be reunited with close family members.

According to section 49 of the Norwegian Aliens Act, residence permits may be granted to family members other than those who are legally entitled to family immigration, if strong human considerations so indicate. The Immigration Regulations describe some types of family relationships that may provide the basis for family immigration under this provision.⁴⁹ Apart from these cases, this rule is however intended as a narrow exemption provision, intended to be used in exceptional cases where it will be clearly unreasonable to refuse an application for family reunification. Residence permits are therefore rarely granted on the basis of this provision. Significant obstacles to entering into marriage are not mentioned in the regulations as a basis for being included in the exemptions.

Because persons in same-sex relationships cannot in practice fulfil the usual requirements for family reunification, they are in Norway often referred by the immigration authorities to apply for a permit to come to Norway to enter into marriage.⁵⁰ This provision does however not entitle anyone to be granted a residence permit, but gives the immigration authorities a discretion to grant a six-month permit for persons who can come to Norway to enter into marriage. Since the family relationship in such cases is considered to be established at the time of marriage in Norway, it will be defined in

49 See chapter 14

50 See chapter 10

the Norwegian legislation as a case of family establishment. Because of this, the couple must fulfil several conditions that would not be required if their family relationship was considered to have originated in the home country.

In cases of family establishment, there is always a requirement of four years of full time employment or education for the reference person in Norway. Furthermore, such cases require that both parties must be over 24 years of age. These are requirements that are not made in cases where the reference person and the applicant entered into marriage or cohabitation before the reference person left the home country and came to Norway. Moreover, in family establishment cases there is always a requirement that the sponsor has sufficient income, and thus no exemption is given for the income requirement as could be done where the reference person has been recognized as a refugee and is to be reunited with his immediate family.

In May 2019, a request was made by the Norwegian Equality and Anti-Discrimination Ombudsman to the Directorate of Immigration regarding the practice of family reunification cases for same-sex couples. The Ombudsman expressed that she did not consider it as equality to refer same-sex couples, who should have a right to be granted family reunification, to apply for a permit which means that the case is considered as a family establishment hence allowing the authorities to apply very strict criteria. Although the practice of the regulation appears neutral, the Ombudsman considered that this in reality leads to same-sex couples being disadvantaged due to their sexual orientation compared to heterosexual couples.

The Ombudsman considered it inconsistent that the Norwegian authorities, when selecting quota refugees, identified persons persecuted because of their sexual orientation as priority cases for resettlement, *“yet they will not give these refugees the same opportunities to reunite with their family as unmarried couples.”*

The Equality and Anti-Discrimination Ombudsman pointed out that the European Court of Human Rights on several occasions has stated that family life between couples of the same sex is covered by the right to family life in Article 8 of the European Convention on Human Rights. It was further pointed out that the European Court of Human Rights (ECtHR) has also held that the Convention does not confer a right to family reunification in itself, but that Article 14 of the Convention, read in conjunction with Article 8, means that states cannot discriminate in their immigration policies. According to the ombudsman, there may be a risk that the Norwegian regulations' provisions, as they are applied today, are not in line with the jurisprudence of the ECtHR.

The ombudsman therefore proposed that obstacles in establishing a marriage due to sexual orientation should be included as a key element in the regulations on whether to make exemptions from the general conditions for family immigration.

In its reply, the Norwegian Directorate of Immigration pointed out that same-sex couples, who cannot marry or show that they have lived together in cohabitation for at least two years, have the opportunity to obtain a residence permit to enter into marriage in Norway under specific conditions. It is also possible to grant exemptions from the general requirements through discretionary exemption provisions in cases where strong humanitarian reasons exist. Furthermore, it was specified that the exemption provisions do not allow room to grant permits that could apply to a large number of applicants. The exemption provisions shall be a safety valve to prevent the Regulations in exceptional cases from leading to unreasonable decisions, and the threshold for making exceptions should be high so that it does not undermine the main rules of the law. Whether the regulations on family immigration should include more favourable provisions for same-sex couples was according to the Directorate of Immigration a political issue.

Same-sex couples are faced with the same challenges in Denmark and Sweden as in Norway. No restrictions exist in the legislation or practice for granting residence permits based on family immigration to LGBT couples, but no exceptions are made to the requirement of documenting the existence of a relationship in the country of origin.

It is thus quite clear that people who are in a same-sex relationship are in fact put at a serious disadvantage when it comes to being able to be reunited with their immediate family members in the Scandinavian countries.

12 Family immigration for children

Children whose parents have refugee status or subsidiary protection in a Scandinavian country have a legal right to be granted a residence permit if they apply for reunification with their parents. However, the legal right only applies up to a certain age. In Sweden and Norway, children under the age of 18 have this right. In Denmark, only children under the age of 15 have a legal right to obtain a residence permit for family reunification purposes, but in special cases, children between the ages of 15 and 18 may also be reunited with their parents.

In Norway, a child under the age of 18, who does not have a spouse or cohabitant, is entitled to a residence permit when both parents have or are granted a residence permit that is permanent, or which forms the basis for a permanent residence permit. It is a requirement for such a residence permit that the child shall live with the parents in Norway.

If only one of the parents has a residence permit in Norway, it must be considered that it is in the best interests of the child to grant a residence permit. It is also decisive whether the parent in Norway has sole parental responsibility for the child. If parental responsibility is shared, a consent must be obtained from the other parent that the child could live in Norway, unless such consent is not possible to obtain. Exceptions to the requirement of consent may also be granted if there are special reasons why a permit in any case should be granted, for instance if the other parent does not have the possibility to care for the child because he or she is serving a long prison sentence. There may also be cases where the other parent has never exercised contact with the child or shown any interest to do so, or that consent is denied based on purely obstructive motives, such as sabotaging the possibilities of the child and the other parent to live together. It follows from the preparatory works to the Norwegian Immigration Act that this exception to the general rule should be exercised with great caution, as the Norwegian authorities should normally not be able to decide where the child should live, if the parents disagree.⁵¹

If the child applies for family immigration with a parent who is married or cohabiting with a reference person who is not the child's parent, a permit can be denied if it is more likely than not that the child will be abused or grossly exploited. In such cases, a residence permit shall, as a general rule, be denied if, within the last 10 years, the

⁵¹ Ot.prp. nr. 75 (2006-2007) s. 211

reference person has been convicted of a violation of the Penal Code's provisions on sexual offenses committed against a child under the age of 18, unless special reasons indicate that a residence permit should nevertheless be granted.

Children who are adopted on the basis of Norwegian or foreign adoption legislation have rights on equal footing with biological children and thus also have a legal right to obtain a residence permit based on family immigration in Norway. In such cases, it is a condition that there is consent from the Norwegian Office for Children, Youth and Family Affairs.

A foster child will not be legally entitled to family reunification with its foster parents in Norway. In such cases, a residence permit can only be granted under the provision of strong humanitarian considerations.⁵² A residence permit can be granted to a foster child under the age of 18, when it is shown that the child is an established member of the household and that those who exercise parental responsibility over the child do so legally in accordance with the legislation in the country of origin. When the child's biological parents are alive, documentation must be provided that confirms that the parental responsibility has been transferred. The Norwegian child welfare authority must have approved the foster home, or make such an approval after arrival.

In Denmark, a child under 15 years of age has the right to be reunited with parents that are deemed to have a need for protection. It is required that the child has not entered into marriage or cohabitation, and that he or she shall live with the parents. The parent living in Denmark must show that he or she has joined custody or custody alone. In order to grant a residence permit for family reunification purposes to a child, it has to be considered that this would be in the child's best interest. The applicant's parent in Denmark, or his or her spouse, may not have been found guilty by a Danish court of child abuse within the past 10 years. In addition, the immigration authorities will consider whether the municipality where the parent's live needs to provide a statement about the child's well-being, and how well the parents can take care of the child. It could be considered that granting a family reunification permit would not be in the child's best interests if:

- There is a risk that the child could have serious social problems in Denmark
- There is significant risk that the child would be removed from the home after moving to Denmark
- There is a risk that the child could be abused

⁵² See chapter 14

If the child and one of the child's parents reside in the country of origin or in another country and the child is over the age of 8, the child's potential for integration into Denmark will be assessed before a residence permit can be granted. This provision was introduced in 2004, along with a number of other restrictions. Originally, the requirement was applicable to all children applying for a family immigration permit, but this was changed in 2014 so that the requirement is now only applied to children who have reached the age of 8. For this group, a residence permit can only be granted if the child has an attachment to Denmark which provides the basis for successful integration in the country, or if the child has prospects to achieve such an attachment. When deciding whether the integration requirement is met, both the child and the parents' situation will be considered. In particular, emphasis will be placed on:

- the duration and character of stay in the home country and in Denmark,
- whether the child have resided in Denmark before,
- in which country the child has spent most of its upbringing,
- where the child has attended school,
- whether the child speaks Danish, and
- whether the child speaks the language of its home country

The employment status of the parent living in Denmark, his or her Danish language abilities, educational activities, efforts made by the parent to become integrated into Danish society and the contact with the child will be considered, as will the conditions of the parent living in the home country and his or her ability and desire to care for the child. It will also be taken into account whether the child has lived with this parent prior to submitting the application for family reunification.

The integration requirement can be suspended in special situations, such as if the parent in Denmark cannot reside in the home country together with other minor children currently residing in Denmark, or in cases of serious illness.

Only children under the age of 15 have a legal right to obtain a residence permit for family reunification purposes in Denmark. The legal right to family reunification for children between the age of 15 and 18 years of age was removed with a law amendment in 2004. This restriction was motivated by the wish to integrate children living in Denmark into the Danish society. The law proposal stated that foreign children who shall live in Denmark should - for the sake of the child and for integration reasons -

enter Denmark as early as possible, and get as much of their upbringing as possible in Denmark.

With this law amendment, Danish authorities wanted to avoid that parents deliberately choose to let a child stay in their home country until they almost reached adulthood. However, differentiating between children aged 15-18 and children below the age of 15 raises issues under Article 8 of the ECHR taken together with article 14 of the ECHR which prohibits discrimination between persons in analogous situations. It is emphasised in this regard, that age discrimination is increasingly viewed as analogous to other forms of prohibited status-based discrimination. Although international human rights law does not contain many provisions which specifically address the problem of age discrimination, such discrimination is to be viewed as a form of “other status” discrimination as prohibited by Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Social, Economic and Cultural Rights (ICESCR), Article 14 and Protocol 12 of the European Convention on Human Rights.⁵³

The restrictions were further justified by the authorities as necessary in order to prevent immigrant parents living in Denmark from sending their children back to the parents’ country of origin or a neighbouring country on so-called “re-education journeys” to allow them to be brought up there and be influenced by the values and norms of that country. Such trips were used by conservative immigrant communities to discipline young people into a closer cultural and religious connection to the home country rather than a Danish way of life. The Danish Aliens Act today has a separate provision that provides a basis for revoking a residence permit when underage foreigners stay outside Denmark for more than three consecutive months on a re-education trip, or another stay which impacts negatively on the child’s schooling and integration in Denmark. However, a residence permit will still have to be issued to children over 15 years of age based on an application for family reunification if a refusal would be contrary to article 8 of the European Convention on Human Rights.

If children between 15 and 18 years of age are applying for family immigration with the rest of the family, a residence permit will generally be granted. If the child applies independently however, an evaluation will be made of how long it has been since the reference person in Denmark received the residence permit, which family members that are left in the home country and which are in Denmark, and if the child would be left behind if a residence permit is not granted. The status of the parent residing in Denmark is also relevant in this assessment. Generally, residence permits for chil-

53 The Growing Importance of Age Equality, Colm O’Cinneide, the Equal Rights Review, 2013, available at: <https://www.equalrightstrust.org/ertdocumentbank/Colm%20O%27Cinneide%20ERR11.pdf>

dren between the age of 15 and 18 years will be granted on the basis of an application for family reunification where a refusal to do so would be contrary to Article 8 of the European Convention on Human Rights. This may be the case, for example, where a refugee who has left his family in the country of origin or in another country, and subsequently have been granted refugee status in Denmark, are trying to reunite with children, and where the refugee is unable to enter or stay with the family in his home country or another country. In such cases, it will be of importance for the assessment whether the separation between children and their parents have been involuntary and thus made the application for family reunification for the child impossible, and whether an application was lodged immediately after the involuntary separation was ended.

For children between the age of 15 and 18, the Danish authorities will further consider whether the parent residing in the home country or other family can take care of the child in the home country or whether it will be inhumane to require a parent living in Denmark to live with the child because the parent has health problems for which there is no treatment in the country of origin.

In February 2015 and February 2016, respectively, the Danish government introduced important restrictions on children's possibilities for reuniting with parents in Denmark, by establishing rules on temporary protected status for persons who are granted temporary subsidiary protection due to generalized violence in their home country, pursuant to section 7 (3) of the Act⁵⁴⁵⁵. If parents have this protection status, they will normally need to have their residence permit extended beyond the initial three-year period before the child could apply for family reunification.

In introducing this requirement, the Danish government considered that "there is a certain risk that the European Court of Human Rights in a specific case, would find

54 Danish Aliens Act:

7.-(1) A residence permit will be granted to an alien upon application for the purpose of a temporary stay if the alien is covered by the provisions of the Convention Relating to the Status of Refugees of 28 July 1951.

(2) A residence permit will be granted to an alien upon application for the purpose of a temporary stay if the alien risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment if returning to his country of origin. An application as mentioned in the first sentence above will also be considered an application for a residence permit for the purpose of a temporary stay according to subsection (1).

(3) In cases comprised by subsection (2) where the risk of a death penalty or being subjected to torture or inhuman or degrading treatment or punishment originates from a particularly grave situation in the alien's country of origin characterised by random violence and assaults on civilians, a residence permit will be granted upon application for the purpose of a temporary stay. An application as referred to in the first sentence will also be considered an application for a residence permit under subsections (1) and (2) above.

55 See chapter 6.1

that it is not possible under Article 8 of the ECHR, in general, to require a 3-year residence as a condition for family reunification for foreigners who have a residence permit pursuant to section 7 (3) of the Aliens Act.” The Government’s rationale for introducing the requirement rests on the assumption that the protection need of beneficiaries of subsidiary protection, unlike the protection need of refugees, is of temporary nature. Therefore, the Government was of the view that there were serious arguments that the proposed scheme is compatible with Article 8 of the European Convention on Human Rights.⁵⁶

A child under 18 years of age can be granted a residence permit in Denmark under the rules for family reunification if the residence permit is granted for the purpose of adoption. The adoptive parent has to be approved by a Danish joint council or the Danish National Board of Adoption. In addition to being valid in the country of adoption, a foreign adoption must be recognised under Danish law before a residence permit can be granted.

Residence permit as a foster child can only be obtained if very special conditions apply. It has to be considered how closely attached the child is to the foster parent, how long the child has known the foster parent and whether the foster parent has supported the child financially in the home country. Normally, family reunification will not be granted if other caretakers exist in the home country.

In Sweden, a child of parents that are granted refugee status or subsidiary protection may be granted a residence permit if the child is under 18 years of age and unmarried. The parents must be able to support themselves financially and the child, and have a home of sufficient size and standard for them to live in.

If both parents are legal guardians, and one of them remains in the country of origin, a statement of consent from the other legal guardian must be included in the application. The requirement of consent from the remaining guardian was introduced in the Aliens Act when the Family Reunification Directive was implemented in 2006, and is intended to prevent children from being granted permission and move to another country in conflict with a custodian’s will. Exceptions to the requirement of consent may be granted if it is made probable that the other parent is dead or missing. There has been criticism raised regarding the practice of requiring a consent from the other parent where the family originates from war-torn countries. In such cases, it is often

⁵⁶ Denmark has opted out of the recast Qualification Directive (QD), which provides for two EU protection statuses (refugee and subsidiary protection status). However, the Danish government considers the three Danish protection statuses to be fully in line with the statuses provided for under EU law, mirroring the language used in Articles 13 and 15(a), (b), and (c) QD, respectively

extremely difficult to get any information on the other parent's whereabouts, and whether he or she is missing or dead. Moreover, the requirement to provide consent in cases concerning family reunification between children and refugee mothers originating from countries which deprive divorced or widowed women of custody on the sole basis of their gender appears to be disproportionate and would be contrary to the general sense of justice.

Swedish legislation does not provide any exemptions from the requirement of consent where this is possible to obtain. If the application does not contain an acceptable consent from the other parent, a residence permit for the child can therefore as a main rule not be given. However, in a legal recommendation from the Chief Legal Officer of the Swedish Migration Agency⁵⁷, reference is made to a guidance from the European Commission's Guidance regarding the for application of the Family Reunification Directive.⁵⁸ The Guidance stipulates that if a particular situation leads to an unresolvable blockage, for instance when the person sharing custody refuses to give consent or cannot be found, it is up to the Member States to determine how to deal with such situations, and that such a decision should be taken in line with the best interests of the child.

A child who has been adopted or is intended for adoption by someone who at the time of the adoption decision was resident in Sweden has the right to be granted a residence permit if the adoption decision:

- has been issued or is intended to be issued by a Swedish court,
- is valid in Sweden under the Act on International Legal Relations concerning Adoption (1971:796) or
- is valid in Sweden under the Act consequent on Sweden's Accession to The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1997:191)

Foster children do not have an unconditional right to be reunited with foster parents in Sweden, and such applications will, as a general rule, not be granted unless special circumstances exist.⁵⁹

57 Rättslig ställningstagande SR 02/2015, available at: <https://lifos.migrationsverket.se/dokument?documentSummaryId=33918>

58 COM(2014) 210 final, available at http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com%282014%290210_/com_com%282014%290210_en.pdf

59 See chapter 14

12.1 Ageing out

The processing time in family immigration cases can often be quite long, and an application that is submitted when a child is 17 ½ years will often not be decided until the person is over 18, a phenomenon commonly referred to as “ageing out”. Hence, an important question to be determined in cases where age is decisive is the point in time when age is assessed, namely whether the assessment was carried out at the time of application or the time of decision? In Norway, it is sufficient that the child is under 18 years of age at the time of submission of the application with all necessary documentation. The same rule applies in Denmark.

In Sweden, on the other hand, the age is assessed at the time of decision notwithstanding that the Migration Agency has included a reference in its instructions to ensure compliance with the decision of the Court of Justice of the European Union in judgment C-550-16.⁶⁰ The case concerned an Eritrean child who arrived alone in the Netherlands and lodged an application for asylum. During the examination of her asylum application, she attained the age of majority and was granted refugee status and a five-year residence permit with retroactive effect. Prior to the ruling, several jurisdictions with delays in asylum processing resulted in a situation where minors reaching majority prior to being granted refugee status were denied the right to family reunification with family members outside the Member State on account of being considered as adults and no longer as minors.

Through its ruling the CJEU affirmed the importance of the principle of family unity as a means to protect family life and recognised in particular the special situation of refugees and unaccompanied minors while emphasising the declaratory nature of refugee recognition. The CJEU ruling harmonises the point at which Member States must consider a person to be a minor for the purposes of family reunification and thereby ensures greater legal certainty for applicants by constraining the discretion of Member States with regard to family reunification applications lodged by minors and asserting the positive obligation on Member States with regard to it.

Following this judgement, Swedish authorities have instructed that a third-country national or stateless person, who is below the age of 18 at the time of entry and the lodging of an asylum application, but who reach the age of majority before refugee status is granted, must be regarded as a minor if a subsequent application for family reunification is lodged no more than three months after the refugee status was granted. The Migration Agency practice this rule for both convention refugees and beneficiaries of subsidiary protection.

60 CJEU – Case C-550 – 12 April 2018, available at <https://www.asylumlawdatabase.eu/en/content/cjeu-case-c-55016-and-s-12-april-2018>

13 Family immigration for parents of minor children

In most cases, stricter requirements are set when parents apply to be reunited with their minor children, than the other way around. Denmark, Norway and Sweden all have restrictions on the right to family reunification for parents. This is because, among other things, while underage children are legally considered to belong to their parents' immediate family in almost all contexts, parents are not always considered in a legal sense to be a part of the children's immediate family. To illustrate; parents will never have a legal entitlement to be reunited with children over the age of 18, but will in many cases be denied family reunification even where the children are minors.

The Danish Aliens Act does not have specific provisions for granting parents a residence permit in order to be reunited with minor children in Denmark. Instead, a permit must be given under the Aliens Act section 9 c, "*if exceptional reasons make it appropriate, including regard for family unity and, if the alien is under the age of 18, regard for the best interests of the child*". Still, such a permit is quite often granted, but it is often dependant on the child's age and legal status in Denmark. If the child is a minor and have refugee status (Danish aliens act § 7.1) or subsidiary protection (Danish aliens act § 7.2), a permit is usually granted to parents and siblings. If the child however has a temporary protection status (Danish aliens act § 7.3), it would normally depend on the age of the child:

- For children under 12 years of age, a residence permit is normally granted
- If the child is between 12 and 15 years of age, it would depend on the child's situation,
- If the child is over 15 years, a residence permit will normally be denied

In cases where a residence permit would depend on the situation of the child, the Danish Immigration Service will consider how the child's life was in the country of origin before entering Denmark. This assessment will for instance include whether the child had a family-like relationship with his or her family members and the reason for the interruption of family life, whether the child severed ties to his or her family, by, for example, living on his or her own or with others, such as other family members, and whether the child travelled independently to Denmark. The child's age will also be

of major importance. If the child is very young, the parent's chances of being granted family reunification are higher. If the child however is of an older age, more weight will be given to the child's situation in Denmark, given that an older child normally can be assumed to have less need to live with his or her parents. If the child has a family network in Denmark, this will also be taken into account when making the assessment.

In Norway, parents of children who have been granted a protection related residence permit, either as a refugee under the 1951 Refugee Convention or a different human rights regime, are entitled to be granted family reunification. It is a requirement that the parents shall live with the child.

There is no right to family reunification if the child, after applying for protection in Norway, has been granted residence due to strong humanitarian considerations. The reason for differentiating between children with a need for protection and children who have been granted residence permit on humanitarian reasons is to a large extent the concern that children without protection needs are in fact sent to Norway by their parents to create an "anchor", so that the parents later can apply for family reunification. The Norwegian authorities consider that children with humanitarian status in principle should be reunited with parents in their home country when possible. The Norwegian authorities have stated that tracing parents of children who seek asylum in Norway as unaccompanied and separated children is a priority. However, since such tracing is perceived as a difficult task, no concrete schemes have been put in place to secure tracing. Moreover, limited funding has been allocated by the Government for tracing activities.

In Sweden, a parent can be granted a residence permit for family reunification purposes to live with his or her child under the age of 18. In order for the parent to be able to receive a residence permit, the child needs to be unmarried. It is also required that the child came to Sweden without parents or other guardians, or that it has been left alone after the arrival. However, it follows from the jurisprudence of the Migration Appeal Court that children who arrived in Sweden with other guardians than his/her biological parents do have a right to be reunited with their parents.⁶¹ Normally, family reunification will only be granted if the child has received a residence permit in Sweden on the basis of a need for protection. Only in exceptional cases may a parent receive a residence permit to move to a child who does not have grounds for asylum in Sweden, but who has received a residence permit for particularly distressing circumstances.

61 UM 5407-18, available at: <https://lifos.migrationsverket.se/dokument?documentSummaryId=42408>

14 Family immigration for other family members

In recent years, family reunification policies and legislation have become increasingly stringent in the Scandinavian countries, and the right to be granted family reunification with a refugee is mainly reserved for the most immediate family members:

- spouses and registered partners
- cohabitants
- minor children, included adoptive children, and
- (in some cases) parents of minor children

For family members outside the immediate family circle, it is in most cases very difficult to obtain family reunification. Family reunification permits for this group would normally only be granted if a rejection would be in breach with international obligations, or in very special circumstances.

In this regard one should note that UNHCR recommends States to apply liberal criteria in identifying family members in order to promote the comprehensive reunification of families, including with extended family members when dependency is shown between such family members. Moreover, specific Guidelines should be adopted defining clearly what is understood as dependency in relation to a sponsor for the purposes of family reunification. This would also be in keeping with Article 8 ECHR and relevant ECtHR jurisprudence where the Court held that relationships between elderly parents and adult children fall within the protective scope of Article 8 where “additional factors of dependence, other than normal emotional ties, are shown to exist”.⁶² An additional factor which needs to be afforded weight in these cases is the refugee status of the applicant.

In Sweden, a residence permit may be granted when there is a special dependency between the applicant and the sponsor. The person must have a familial connection

⁶² See *Emonet and Others v. Switzerland*, no. 39051/03, § 35, 13 December 2007; and, *mutatis mutandis*, *Kwakyie-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000), *Slivenko v. Latvia* [GC], and *Senchishak v Finland*.

Applicants who are not covered by the other provisions of the Immigration Act may be granted a residence permit, if strong human considerations so indicate. The best interests of the child should be a fundamental consideration when assessing such applications, but immigration regulatory considerations will often be given much weight. The immigration regulation contains a list of family members who may be granted permission if they are able to show that there are strong human reasons:

- A child between the age of 18 to 21, with no spouse or cohabitant, when the applicant has previously had a lengthy stay in Norway with a residence permit.
- a dependent child aged 18 or older with no spouse or cohabitant who is to continue to be part of his/her parents' household, when the child concerned is or will be remaining in the country of origin with no parents or siblings, or when it is substantiated that for medical reasons the child is completely dependent on personal care provided by parents living in Norway. The practice is very strict, and residence permits are rarely given to this group. Residence permits to persons over 20 years of age is virtually non-existing.
- a foster child under the age of 18, when it is substantiated that the child is an established member of the household and that those persons exercising parental responsibility for the child are doing so lawfully in accordance with the legislation of the country of origin.
- a full sibling under the age of 18 with no parents, and no other care person in the country of origin or the country in which he or she is staying. It is a requirement that the sibling resident in Norway is suited to be a care person. A statement in this respect shall be provided by the child welfare service in the municipality in which the reference person is resident.

The list of family members who can obtain residence permit on these grounds is not exhaustive, but it will naturally be even more difficult to obtain a residence permit for family members who are not included in the list. In the Immigration Act's preparatory work, so-called "last-link" cases, in which the applicant is the only remaining family member in the home country while the rest of the family has been granted residence in Norway, when the applicant is dependent on being supported by his family, are mentioned as an example of cases where this provision may be applied to persons other than those mentioned in the list.⁶⁴

In very special situations, a family reunification permit can be granted by Danish

64 Ot.prp. nr. 75 (2006-2007) s. 226

authorities to persons who are neither spouses, partners, cohabitants nor minor children to the reference person in Denmark. An application for family reunification by a parent seeking to live with a minor in Denmark will be considered as an application from an 'other family member'. The practice in such cases is strict and applications for a residence permit on these grounds are rarely approved. Generally, residence permits as an 'other family member' will only be granted if rejecting the application would contravene Denmark's international obligations, such as Article 8 of the European Convention on Human Rights, regarding the right to family life.

When assessing whether a permit should be granted in such cases, it will be considered whether a family life that is worth protecting has been established. This assessment will among other things include:

- whether the attachment between the parties exceeds what follows from the family ties alone,
- whether the applicant was a long-term member of the household of the family member residing in Denmark,
- whether the reference person has supported the applicant financially before and after coming to Denmark,
- whether a health condition makes it impossible for the applicant to support him/herself, and, if this is the case
- whether there are individuals or social institutions in the country of origin that can care for the applicant.

15 Requirements for family reunification for refugees in Denmark

The rules for family reunification in Denmark are quite strict, and many restrictions have been introduced over the last 20 years. There are however substantial differences regarding the possibility of being reunited with family members based on the status of the person living in Denmark. For convention and protective status refugees, the path to being reunited with their immediate family members are in many ways significantly easier than for many other groups in the Danish society.

When an application to be reunited with a refugee in Denmark is made, Danish immigration authorities will consider whether the refugee still faces persecution in the country of origin. There will not be a thorough reassessment of the reference person's asylum case, but the authorities will make a brief assessment of whether the reference person is still in need of protection. Normally, only the general situation in the country and whether there have been any significant changes will be reviewed.

The purpose of the assessment is to consider whether the normal requirements for family reunification should be waived, not to review the status of the refugee. A revocation of the status could however happen in rare cases if the authorities discover fraudulent behaviour. This could be the case if the spouse of a person who has obtained refugee status based on his or her homosexual orientation, applies to be reunited with the refugee.

An assessment of the need for protection can also be carried out in the process of renewal, even a long time after the initial permit was given. This was the case in a decision by the Immigration Appeals Board in 2014.⁶⁵ A person from Bosnia-Herzegovina was granted a residence permit in 2004, in order to be reunited with a spouse that received refugee status in 1995. When an application for a renewal of the residence permit was delivered in 2011, The Immigration Service considered that there had been fundamental and durable changes in the country of origin, and that the risk for persecution for the reference person had ceased. This meant that the requirements for the applicant's residence permit could no longer be waived, and the residence permit was therefore subject to fulfilment of the ordinary requirements for family immigration.

65 <https://udln.dk/da/Praksis/Aegtefaellesammenforing/Genoplivelse-af-betingelserne-for-opholdstilladelse>

The authorities will also look at whether the spouses originate from different countries, and, if they do, whether they could live together in one of the spouses' home countries. If the refugee still risks persecution in his or her home country, and the couple cannot live together in another country, some or all of the normal requirements for family reunification will be suspended. If the applicant has a residence permit in an EU-country however, all the ordinary requirements for family reunification will have to be met.

The exemptions from the requirements applies equally for convention refugees and beneficiaries of subsidiary protection. For holders of temporary protection status, no family reunification will normally be possible until after a three-year waiting period. When the period has ended, the same assessments will be made regarding the protection need of the reference person.

16 Integration requirements

Integration criteria are an increasingly important factor in family immigration matters in Denmark. It is however important to note that in cases where the reference person still risks persecution in the country of origin, exemption from integration requirements may be given.⁶⁶

Six integration criteria have been established for applications submitted after 1 July 2018. Three of the conditions must be met by the reference person while the other three by the applicant. One of the requirements, that the reference person must pass a Danish language test on level 3, must always be fulfilled. Of the other five requirements, three of them must be fulfilled in order to be granted family reunification. The following requirements apply for the applicant:

- Passed language test
 - An applicant need to pass a test in Danish level 1 or English level B1
- Full-time work for at least 3 of the past 5 years
 - Both full-time positions and self-employment will be accepted. Full-time work means that the wages and working conditions at least have to be normal for the position
- Minimum one year of education
 - Education in this sense means programmes on a higher level than what is an equivalent of Danish upper-secondary education. Both vocational and post-secondary education programmes apply.

The requirements for the reference person are:

- Passed language test
 - The reference person must always have passed a Danish language test on level 3
- Full-time work for at least 5 years
 - The reference person must either have held a regular, full-time position, or been self-employed for at least 5 years. The employment does not need to be consecutive.

⁶⁶ See chapter 15

- Minimum 6 years of schooling in Denmark
 - Of the 6 years, at least 1 year needs to have been full-time enrolment at a secondary school (above 10th grade)

These integration requirements have replaced the former attachment requirement.⁶⁷

In addition to this, the applicant must normally have visited Denmark at least once before a family immigration permit is granted. There is no minimum requirement for the length of the stay, but the applicant needs to have stayed in Denmark legally. The requirement is not met if the applicant entered Denmark as an asylum-seeker, only residence permits, visas, visa-waiver programmes etc. qualify as valid stay for the purposes of family reunification.

Both spouses must also sign a declaration stating that together with their accompanying children, they commit to involve themselves actively with the Danish language courses and integration into the Danish society to the best of their ability.

After receiving a residence permit, the applicant needs to pass two Danish language tests; A test at A1 level or higher within 6 months of being granted a residence permit and a test at A2 level or higher within 9 months of being granted the permit. If the tests are not passed within the indicated timeframe, the residence permit can be revoked. The deadlines for passing the test can be postponed if maternity or serious illness can be documented, and the requirement can be exempted altogether if the reference person still risks persecution in the home country, raises minor children who have an attachment on their own to Denmark or suffers from serious illness or disability.

In Sweden, refugees do not need to fulfil any integration requirements, except for some financial⁶⁸ and housing requirements⁶⁹.

Refugees in Norway who want to be reunited with their family members do not need to meet work, education, language or residence requirements, if the application is made within a deadline.⁷⁰ However, such conditions have been set for refugees whose family life has been established after arriving to Norway. For this group, a provision was introduced in 2009 that required four years of work or education in Norway before

67 See chapter 18

68 See chapter 19

69 See chapter 17

70 See chapter 20.1

a spouse or cohabitant could enter Norway for family reunification purposes. Work and education are in this sense assessed equally, and the requirement can be fulfilled through a combination of part-time work and part-time education, as long as the work and education together constitute a full-time activity during the relevant period. The requirement for full-time activity is absolute, which means that if the reference person is employed in a 90% position, this will not be counted towards the four-year requirement. Similarly, students who are not able to document normal progression in the educational process will also not meet the requirement.

All levels of education, from primary school to university, will count. Participation in full-time integration programs or care for children after birth are activities that qualify for fulfilment of the requirement. If the person receives sickness benefits, disability pension or retirement pension, this is considered as work. It is not a requirement that the work or education must have been completed for a continuous four-year period, or that it must have been completed immediately before the application for family immigration is processed. The requirement also applies to refugees that have received a permanent residence permit⁷¹, but not to Norwegian nationals.

71 Normally, a permanent residence permit requires three years of temporary residence permits, but for those who are granted refugee status, the period will be calculated from the time of application.

17 Housing requirements

All of the Scandinavian countries have a housing requirement, but the rules differ greatly in the three countries. In Norway, there is no requirement for housing in cases where the refugee's nuclear family comes to Norway. Housing is only a requirement in cases where:

- A single mother or father over the age of 60 apply for family reunification with a child in Norway that are over 18 years of age
- Parents who are applying for a short-time residence permit for a maximum of nine months to visit children in Norway
- An applicant who apply for a residence permit in order to be married in Norway, or
- If family immigration is granted on strong humanitarian grounds

In Sweden, the housing requirement is a general rule, but it can be exempted in the following situations:

- If the reference person is under 18 years of age
- If the reference person is a refugee or person in need of subsidiary protection and the family members apply within three months after the reference person received a residence permit or protection status, or
- If the reference person has a temporary residence permit as a person in need of subsidiary protection, following an application after 24 November 2015, and the family members apply for a residence permit before 19 October 2019.

The home has to be of sufficient size and standard for all the family to live in. For two adults without children, a home with a kitchen and one room is sufficiently big. If children are going to live in the home, more rooms are required. The home must not be owned by the refugee, renting or sub-letting a residence is accepted, but it must be at the refugee's disposal. If the refugee has a live-in arrangement at someone else's residence, or lives at home with one's parents, it is not viewed as an acceptable type of housing.

Danish authorities require the refugee to have an independent, residence at disposal. It is considered that the residence is at the refugee's disposal if it is owned, rented or sublet. It must have its own entrance and appear as one unit. The residence has to be reasonably sized, which means that the number of people living in the residence may not be more than double the number of rooms, or there must be at least 20 sq. metres of living space for each person living there.

Residences are only accepted if they are situated outside designated areas included in the so called housing requirement list (Boligkravslisten). These are areas that are placed on the list due to high levels of unemployment and crime, and low levels of education and income.

18 Attachment requirements

On 1 July 2017, a new provision in the Norwegian Immigration Act entered into force that makes it possible to reject an application for family immigration if family life can be pursued in a safe country to which the family as a whole has a stronger connection than it has to Norway. The provision only applies in cases where the reference person has refugee status pursuant to section 28 of the Immigration Act in Norway, but cannot justify a refusal in cases where the reference person has been granted permanent residence permit in Norway (which normally occurs after three years).

A comparison must be made of the family's connection to the relevant country against the connection to Norway. Elements considered include the family's duration of residence, the languages they master, education, work experience, relatives and networks. Living time as an asylum-seeker, both in Norway and the third country, will be relevant, and more emphasis will be placed on the attachment of children through residence time, than on the attachment of adults.

For the provision to apply, there is a requirement that the country in question must respect the fundamental rights of refugees and asylum-seekers. This also means that the country does not return persons to persecution in the country of origin. An indication that the country respects refugees and asylum-seekers' fundamental rights can be that it has signed and complies with the UN Refugee Convention and similar international law agreements, or that the national practice for a long time has demonstrated that these treaties are respected. The attachment requirement cannot be applied if family life must be spent in a refugee camp. The humanitarian situation in the country is not relevant to the assessment of whether the country can be regarded as safe, but can be a factor in the assessment of whether to make exceptions to the attachment requirement.

Rejection of an application on this ground is only possible where the applicant most likely has citizenship, a formal residence permit or equivalent status in the country the family is associated with. It is not a requirement that the applicant(s) have a formal residence permit. However, a referral to reunification in a third country presupposes that the family will be treated equally as immigrants with a residence permit, and that they have access to basic rights such as the right to work, health services, the rights to attend school on equal footing with the children in the country of residence etc. Furthermore, there must be a real possibility for family members living in Norway, both adults and children, to be able to settle in the country. This means that the regulations

in the country must allow the family members to be granted a formal residence permit or similar status in the country. It is not a requirement for refusal that Norwegian authorities can state that an application for family reunification will be granted in the third country, but in order for an application for family immigration to be rejected on this basis, Norwegian authorities must prove that it is a realistic alternative for the family to be able to continue family life in the country.

In a circular from the Ministry of Justice and Public Security⁷², it is clearly stated that exceptions to the attachment requirement can be made, but that residence permits must only be granted in special cases if the conditions for rejecting the application are fulfilled. Residence permits may, for example, be granted where a refusal will lead to clearly unreasonable consequences, or may be in conflict with Norway's international obligations. At the present time, the Norwegian authorities have only denied family immigration on the basis of the "attachment requirement" in very few cases.

The Norwegian provision on the attachment requirement was inspired by a similar provision in the Danish Immigration Act. The provision, introduced in 2000, stated that the spouses' aggregate ties with Denmark had to be stronger than the spouses' aggregate ties with another country. From 2003, the attachment requirement was lifted for persons who had held Danish citizenship for at least 28 years (the so-called 28-year rule). This was again changed through an amendment in 2012 to a 26-year rule. In a Grand Chamber judgement by the European Court of Human Rights⁷³, the Court held by a majority of twelve votes to five that Danish Laws on Family Reunification in part constituted indirect discrimination on the basis of ethnic origin. Moreover, in the Court's view, the justification advanced by the Government for introducing the 28-year rule was to a large extent, based on rather speculative arguments, in particular as to the time when, in general, it can be said that a Danish national has created such strong ties with Denmark that family reunion with a foreign spouse has a prospect of being successful from an integration point of view. The attachment requirement was in 2018 replaced by the new integration requirements.⁷⁴

A recent decision of the Norwegian Directorate of Immigration, clearly illustrates the complexity and dilemmas raised by the newly introduced attachment requirement. The case concerns a stateless Palestinian woman from Iraq who was granted refugee status in Norway. She had married in Iraq to a refugee who has lived in Italy for the past 10 years, before she left the country. When the spouse in Italy applied for family

72 G-2017-2

73 *Biao v. Denmark* – 38590/10, available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-163115"\]}](https://hudoc.echr.coe.int/eng#{)

74 See chapter 16

reunification, the application was rejected on the basis of the recently introduced “attachment requirement” as their attachment was deemed to be stronger to Italy than Norway as the spouse in Italy has resided there for ten years. The administrative authorities do not appear to have carried out a careful balancing exercise and take into account factors weighing in favour of family reunification in Norway when concluding that the couple had a stronger attachment to Italy than Norway. To illustrate, the administrative authorities omitted to take into account the fact that the spouse in Italy is seriously ill. The authorities have also omitted to take into account the situation of the refugee in Norway, her increased vulnerability as both stateless and refugee, and that the authorities’ refusal to allow her to be reunited with her spouse in Norway will disrupt her education to which she did not have access to prior to arriving in Norway.

Sweden does not have an explicit provision regarding family’s total attachment with Sweden compared to other countries, and this does not constitute a separate ground for rejecting an application for family reunification. It may however be of relevance for the issue of exemption from income requirement, as no exemption from this requirement is given if the family could reunite in a country outside the EU to which the family has a particular connection. The family’s aggregate ties to a country outside the EU could also be relevant for the assessment of whether it would violate international obligation to deny residence permit for family members.

19 Financial requirements

Although all requirements regarding family links, age, residence status and integration are met, many will still find it difficult to reunite with close family members because financial demands are set as a condition for obtaining family reunification that many refugees are not in a position to fulfil. Application fees, income requirements and expenses associated with traveling and obtaining documents create major problems for families who are initially entitled to be reunited. It is mainly the weakest families, with poor finances and few possibilities of getting assistance, who are affected. Many of these families have a difficult time meeting the high financial requirements and risk being denied family reunification that they are legally entitled to.

19.1 Application fees

In all the Scandinavian countries, applicants have to pay an administrative application fee to be reunited with their family members. Norway has by far the highest fee, while the fee in Sweden is clearly lower than in the two neighbouring countries. In Denmark and Sweden, in many cases, beneficiaries of international protection may be exempted from having to pay the administrative processing fee. Such an exemption is not possible in Norway. Norway, on the other hand, is the only country that does not charge fees for family immigration applications where the applicant is a child under 18 years of age, while the fee for children in Sweden is half the price for adults.

In Norway, the fee for family reunification is NOK 10,500, which is equivalent to about € 1,000. The fee has risen sharply since the first fee of NOK 600 was introduced in 2003. UNHCR pointed out in its law observations regarding the increase of the administrative fees that the measure may be at variance with international and regional human rights law, notably the ECHR and the CRC, in particular due to the fact that the proposed measure did not provide for specific exemptions. UNHCR noted in that regard *“that the excessive fees may leave vulnerable refugee families in a prolonged state of uncertainty and separated from one another over long periods of time, while impeding the successful and rapid integration of refugees in their host societies.”*

The political argument for introducing a fee has been that it would reduce the scope of inconclusive and manifestly unfounded applications, which would save time and

resources for the immigration authorities.⁷⁵ Over the past five years, the amount has been more than doubled from NOK 5,200 in 2014 to the current level. The latest increase occurred when the fee increased from NOK 8,000 to NOK 10,500 from 1 January 2018.

In the national budget presented for 2020, the Norwegian government proposes to reduce the fee for family immigration applications by 25 per cent, which will bring the fee back to the level it was before the last increase in 2018. However, the proposal for reduction only applies in cases where the family was established before the reference person entered Norway. In cases where a reference person establishes family life after being granted a residence permit in Norway, the fee will remain the same.

In Sweden, the fee for applying for a family immigration permit is 1.500 SEK (equivalent to approximately 140 Euros) for an adult, and 750 kroner for a child under 18 years. Exemptions are however made for spouses, cohabiting partners, registered partners and unmarried children under the age of 18 who are applying for a residence permit to live with a family member who has been granted a Swedish residence permit as a refugee, persons in need of subsidiary protection or otherwise in need of protection, due to exceptionally distressing circumstances or due to particularly distressing circumstances. Neither shall the fee be charged if international considerations or custom require it⁷⁶.

This means that parents and siblings of children who has refugee status, subsidiary protection or have been granted a residence permit due to particularly distressing circumstances are not included by the exemptions and normally will have to pay the fee.

The fee for applying for family immigration in Denmark is 6.380 DKK (approximately 850 Euros). There are however several groups that may be exempted from paying the fee. In accordance with Denmark's international obligation to protect the right to family life, an exemption from paying the fee may for instance be granted if the person living in Denmark is a refugee. The Danish Immigration Service has, however, assessed that the general situation in some countries has improved sufficiently enough that the reference person living in Denmark no longer risks persecution. In such cases, a fee would need to be payed when the application for family reunification is made. This could apply to, among others, individuals granted a residence permit as a refugee in connection with the civil war in Yugoslavia in the 1990s.

75 Ot. Prp. Nr. 19 (2002-2003), available at: <https://www.regjeringen.no/contentassets/91f3d5920e-4247e185100252c66cfe53/no/pdfs/otp20022003001900odddp.pdf>

76 Swedish Immigration Regulation, chapter 8, section 5, subsection 3

An exemption from paying the application fee can also be granted if the reference person is living with a child under the age of 18 who have an individual attachment to Denmark. Children who have lived in Denmark for more than 6-7 years without interruption, and who have been enrolled in Danish childcare or attended Danish schools, are normally considered to have formed such an attachment to Denmark. It is not necessary that the applicant is the parent of the child, the exemption would still apply if the child is a result of a previous relationship between the reference person and another person.

The application fee could also be waived if the reference person has children from a previous relationship living at home, even if they have not formed independent ties to Denmark. This does however require that the other parent in Denmark has regular and substantial contact with the child. The same applies if the reference person has regular and substantial contact with the child if it is living with the other parent. Visitation every second weekend will normally be considered as sufficient contact to meet this criterion.

Another ground for granting exemption from paying the application fee is if the reference person living in Denmark is seriously ill or has a disability that prevents him or her from paying the fee. Whether treatment for the illness or disability is available in the country of origin may be a relevant factor in such cases.

It should be noted that both the ECtHR and the CJEU have clarified in their jurisprudence that excessive administrative fees may lead to a violation of fundamental rights, in particular the right to family life and effective remedy. To illustrate, in *G.R. v. the Netherlands*⁷⁷ the applicant relying on Article 8 of the ECHR, complained that the financial threshold imposed by the authorities prevented him from seeking a residence permit for the purpose of residing with his wife and children. The ECtHR had to determine whether the procedure to reunify with the family was in fact “available in practice”, given the financial threshold of EUR 830 which the applicant (beneficiary of international protection) found insuperable. In the circumstances of the present case, in particular the disproportion between the administrative charge in issue and the actual income of the applicant’s family, the Court found a violation of Article 13 (the right to an effective remedy) of the ECHR.

The CJEU has also stressed in its judgment *European Commission v Kingdom of the Netherlands*⁷⁸, where it interpreted relevant provisions of Directive 2003/109/EC con-

77 *G.R. v. the Netherlands*, Application no. 22251/07, Council of Europe: European Court of Human Rights, 10 January 2012, available at: <http://www.refworld.org/cases,ECHR,4f193eac2.html>

78 *European Commission v Kingdom of the Netherlands*, C-508/10, 26 April 2012, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-508/10>

cerning the status of third country nationals, that Member States are prevented from imposing charges/administrative fees which are disproportionate. The CJEU concluded inter alia that the administrative charge/fee (EUR 830) imposed by the Netherlands on family members of third-country nationals (long-term residents) when applying for residence permits was excessive and disproportionate and liable to create an obstacle to the exercise of the rights conferred by the Family Reunification Directive. The Court concluded that the Netherlands had failed to fulfil its obligations under the Family Reunification Directive. Finally, the CJEU established in its judgment in case K & A C-153/14 that the principle of proportionality in Union law requires that level of test and fees does not systematically prevent reunification with family members.⁷⁹

It is important to note that the relevant Dutch provisions – unlike the provisions in Norwegian law – do provide for exemptions from the statutory administrative charges.

Application fees in family reunification cases

Norway: 10.500 NOK/1.000 Euro

Denmark: 6.380 DKK/ 850 Euro (exemption for refugees and subsidiary protection)

Sweden: 1.500 SEK/ 140 Euro (exemption for refugees and subsidiary protection)

19.2 Maintenance requirements

For many, income requirements⁸⁰ are the biggest obstacle to being reunited with their family members. For people who have recently come to one of the Scandinavian countries, it may take time to earn enough income to fulfil the requirement of supporting themselves and their family members. In all three countries, however, exemptions from the maintenance requirement are generally given for refugees. In Norway and Sweden, this is subject to the application being lodged within a set time limit.

In principle, the European Court of Human Rights does not consider unreasonable a

⁷⁹ See para 56 in K & A C-153/14, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-153/14>

⁸⁰ The terminology “income requirement”, “maintenance requirement” and “subsistence requirement” are used interchangeably.

herself and the family members. The requirement can be fulfilled through a variety of sources of income, for instance:

- Regular employment
- Unemployment benefits
- Sickness benefits
- Earnings-related retirement pensions

In a ruling by the Swedish Migration Court of Appeal in August 2019, it was established that the maintenance requirement can be fulfilled if the reference person at the time of decision either can prove a sufficiently large work-related income for a minimum of one year ahead, or, if this is not possible, if it appears likely that he or she will have sufficient income for at least the following year.⁸⁴

The requirement can also be fulfilled if the reference person has funds that are sufficient for supporting the whole family. The level of funds that is considered sufficient is not specified, but in a judgement by the Migration Court of Appeal in 2017⁸⁵, an elderly couple was not considered to meet the requirement despite having just over 2 million SEK in wealth, some rental income and a small pension. It can however not be established that the court by this has determined the amount of funds needed, as there were individual circumstances that contributed to the court's decision. Among other things, the couple had not disclosed how much debt they had, and had not shown that rental payment was a secure income over time.

The level of income that a reference person living in Sweden must reach to meet the maintenance requirement depends on the number of family members and the level of housing costs. The reference person must have an income that corresponds to what is called a 'standard amount' when housing cost has been deducted. This means that, after the housing has been paid each month, the person living in Sweden need to have enough money to cover, for example, food, clothing, hygiene, telephone, electricity, insurance and other outlays. For 2019 the standard amount needed per month is:

84 UM 16070-18, available at: https://www.domstol.se/globalassets/filer/domstol/kammarratten_stockholm/nyheter/um1607018.pdf

85 MIG 2017:8, available at: <https://lagen.nu/dom/mig/2017:8>

- SEK 4.923⁸⁶ for a single adult
- SEK 8.133 for spouses or partners living together
- SEK 3.007 for children aged 7 years or older
- SEK 2.612 for children aged 6 years or younger

There are no maintenance requirements in cases where the reference person is a child, or where the reference person is a refugee or person in need of subsidiary protection, and the family members apply within three months after the protection status was received. The requirement is also waived if family members apply to be reunited with a person living in Sweden who has a temporary residence permit as a person in need of subsidiary protection. To be exempted from the requirement, an application must have been submitted before 19 October 2019.

The maintenance requirement is practiced stricter after the temporary Aliens act was introduced, which means that exemptions from the maintenance requirements, apart from the ones mentioned here, are no longer made.

Denmark does not have an income requirement as such, and it is therefore not necessary for a reference person to reach a specific level of income in order to be reunited with family members. It is however a requirement that the reference person is able to support him- or herself. This means that if the reference person has received certain forms of social benefits at any time in the past three years before the application is lodged, the requirement will not be met. Even short periods on social benefits, such as cash benefits, in the past three years suffice to prevent the reference person from meeting the self-support requirement. After a residence permit is granted, it may still be revoked if either the reference person or the applicant receives social benefits before the applicant has been granted permanent residence.

The forms of social benefits that could prevent the approval of an application for family reunification are those made under the terms of the Active Social Policy Act or the Integration Act, such as:

- Integration benefits
- Start help benefits

⁸⁶ 1 Euro equals approximately 10 Swedish kroner

- Social security (cash benefits), including supplementary social security
- Rehabilitation benefits
- Resource course grants
- Educational grants

Not all kinds of received benefits will however disqualify a reference person from meeting the self-support requirement. Examples of such benefits are:

- Student grants
- Unemployment benefits
- Sickness benefits
- Maternity- or paternity leave
- Pension (including early aged pension and old aged pension).
- Housing assistance
- Wage subsidies
- Fully subsidised places for children in day-care

An additional requirement in most cases is that the reference person will need to set aside 102.000 DKK⁸⁷⁸⁸ in a period of ten years as a collateral guarantee. This guarantee will be used to repay the municipality if the applicant receives social benefits under the terms of the Active Social Policy Act or the Integration Act in this period. The amount can be reduced if the applicant passes the tests in Danish, and in special situations, the guarantee can be released entirely.

No self-support requirements apply where the reference person is a minor child, and normally this would also be the case if a child applies for family reunification with one or both parents. In special situations however, the applicant's parent will need to

87 Equals approximately 13.650 Euros

88 Amount for applications made in 2019. If the application was lodged before 1 July 2018, the amount is DK 55.375

be self-supporting. Among the reasons for enforcing the self-support requirement in such cases include voluntarily breaking contact with the applicant for an extended period of time.

It is important to note that a reference person who has a refugee status in Denmark, and who are considered to still have a need for protection, do not need to fulfil the self-support requirement. See more on the exemptions for refugees in Denmark and how this is assessed by Danish authorities in chapter 15.

In Norway, the reference person must as a main rule be able to show that he or she has had sufficient previous as well as future income, before family reunification is granted. The requirement for previous income was introduced when the current Immigration Act came into force in 2010. At the same time, it was demanded, among other things, that only the reference person could meet the maintenance requirement, and that the reference person cannot have received social assistance in the last year prior to the application. The restrictions in the legislation on maintenance requirements was justified by the wish to increase the probability of the applicant being supported by the reference person, and not being in need of public support, a desire to facilitate better conditions for integration by ensuring that the applicant is part of a self-supporting family, countering forced marriages by making young people more financially independent and reducing the number of asylum applications.

The level of the maintenance requirement is regulated every year in line with wage developments in the Norwegian society. For an application for family immigration delivered in 2019, there is a requirement that the reference person can document an income of NOK 260,744⁸⁹ in 2018, and that a total income of NOK 264,264 is likely in the following year. The level of income required is absolute, and no discretion is exercised. In several cases, the reference person has had an income that are very close to fulfilling the requirement, some less than 1,000 NOK under the required level, but the application is still rejected. It is important to note in this regard that such strict application of the income requirement, where no other factors apart from the fulfilment of the specific level of income is taken into account, raises issues under Article 8 of the ECHR and Article 13 which impose an obligation on Norway to carry out an individual assessment and refrain from formalistic attitudes.

The maintenance requirement can be met through several types of income sources. In addition to regular employment salary, the following will be considered as income:

- Sickness benefits

⁸⁹ Equals approximately 25,800 Euros

- Parental or pregnancy benefits
- Disability benefit or old-age pension
- Pension or other fixed periodic benefits except benefits under the Social Services Act
- Benefits under the Introduction Act
- An education loan or education grant

The requirement can also be fulfilled when the reference person receives a full retirement pension or disability pension. Benefits under the Social Services Act are not regarded as income in this context, and it is also a requirement that the reference person must not have received such benefits in the last 12 months before a residence permit is granted. As this condition can be resource-intensive to control, it is as a general rule sufficient that the reference person has had a tax-registered income for the last year of at least NOK 300 000, and declares not to have received social assistance or qualification benefits in the last year.⁹⁰ This requirement is practiced strictly. In a recent decision by the Immigration Appeals Board, an application for family reunification was rejected because the reference person received social benefits in the amount of 728 NOK, even if the reference person could show a yearly income of approximately 320.000 NOK. The Appeals Board gave weight to the fact that the reference person the year before had received 35.000 in social benefits. The fact that the payment from the year before was a loan to pay a deposit on an apartment, which had been repaid, and that the last payment was one that the reference person had not applied for, was not sufficient to exempt her from the requirement.

Exemptions to the maintenance requirement are made in cases where the reference person has refugee status, if further conditions are met.⁹¹ There is also no requirement for maintenance in cases where the reference person is a child under the age of 18, or where the applicant for family reunification is a child under the age of 15. In the latter case, it is a condition that the child does not have care persons in the home country.⁹²

In cases where there is no specific basis for exceptions to the maintenance requirement, exceptions can still be made if there are particularly strong human consider-

90 Circular GI-2011-009

91 See chapter 19.3

92 "Care person" is in these cases usually meant to be a parent who has a share in parental responsibility, but in certain cases others may also qualify as caregivers if they have had the child in their actual care over a long period of time.

ations which indicate that a residence permit should be granted. This could be the case, among other, where it is obvious that the reference person, or quite exceptionally others, is able to support the parties. However, the Norwegian authorities have made it clear in an instruction to the immigration authorities that a restrictive practice should be pursued in these cases, and exceptions to this requirement will only be made in very special cases.

19.3 Maintenance requirements in cases where the reference person is a refugee

All three countries give exemptions from the maintenance requirement in cases where the resident has refugee status or is a beneficiary of subsidiary protection, but specific conditions must be met for the exemptions to apply.

The maintenance requirement does not have to be met if the reference person in Sweden is a refugee or a person in need of subsidiary protection. But in order for this exception to apply, the application for family immigration must be lodged within three months after the reference person received a residence permit or protection status, in accordance with the Family Reunification Directive.⁹³ The three-month time limit only applies to the lodging of the application, necessary documentation may be submitted later. There is no fixed time limit to provide additional documents. The Migration Agency will normally set a time limit for the applicant, but this could be negotiated if strong reasons warrant it. However, these exceptions will only apply if the reference person does not have the possibility to be reunited with the family members in a country outside the European Union to which the family has a particular connection. The reference person and his or her family members must also have lived together outside Sweden for a long period of time, or for other reasons be considered to have a well-established relationship in order to benefit from the exemptions from the maintenance requirement.

In Norway, no requirement of maintenance can be set in cases where the applicant is a spouse, cohabitant or children under the age of 18 of a reference person who has been granted a residence permit as a refugee or pursuant to the provision on collective protection of the Norwegian Immigration Act. However, this only applies in cases where the reference person reunites with family that was already established in the country of origin before he or she arrived in Norway. If a refugee enters marriage or cohabitation, or has children, after arrival in Norway, the maintenance requirement must be met.

⁹³ The Family Reunification Directive (2003/86/EG), art. 12, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0086>

In order to be exempted from the maintenance requirement, the application must be submitted and the application fee paid within six months after the reference person was granted a residence permit in Norway. It is sufficient in order to fulfil this condition that the application is registered online within the deadline. In addition to the six-month requirement, applicants must meet the requirement of applying in person at a Norwegian representation abroad, and submit all necessary documentation. The application must be lodged within one year after the reference person was granted a residence permit in Norway. Exceptions to the deadline may be made if the applicant has been prevented from registering the application due to circumstances outside his or her control. This may be, for example, the case where the parties have been separated during their flight, and where they do not know the whereabouts of each other. The deadline will again run from the time the parties have resumed contact and the applicant is no longer prevented from applying.

The one-year deadline to submit all necessary documentation is strictly practiced and has created severe challenges for many applicants. Such practice does not appear to be in line with UNHCR's position which recommends Member States to not apply time limits on the use of the more favorable conditions granted to refugees in recognition of their specific situation. Moreover, the ECtHR has established in its jurisprudence, that States' timeframes for lodging an application for family reunification must take into account the refugees' vulnerability and specific circumstances.

In 2018, the Norwegian Parliamentary Ombudsman criticised a decision from the Immigration Appeals Board, where an application for family reunification was rejected because a woman and her son met at the Norwegian Embassy three weeks after the one-year deadline had expired. However, they had booked an appointment over two weeks before the deadline, but were then given an appointment more than a month later. The Ombudsman was of the opinion that the one-year deadline was interrupted when the applicants had registered the application electronically and paid the application fee. Following the criticism from the Parliamentary Ombudsman, the Grand Board of the Immigration Appeals Board ruled in a decision of 20 September 2018⁹⁴, that an application for family reunification could only be considered to have been lodged when the applicant meets in person at the Norwegian representation abroad, identifies him or herself and provides the necessary documentation. Regarding the question of whether the applicants were prevented from applying because of the waiting period at the embassy, the Appeals Board stated in this case that "*some waiting time must be expected*" and that the waiting time to get an appointment at the embassy was therefore not beyond the applicants control.

94 Summary of the decision is available at: <https://www.une.no/kildesamling/stornemndavgjorelser/stornemnd---ettarsfristen-i-familieinnvandringssaker/>

In another case, an Eritrean woman was denied family reunification with her husband who had been granted refugee status in Norway, on the grounds that the maintenance requirement was not fulfilled and the application was lodged after the one-year deadline. The applicant was arrested when she tried to escape Eritrea and was later imprisoned for six months before she managed to flee to Sudan in December of 2013. Upon arrival in Sudan, she was told that she had to leave the country immediately because she would risk deportation to Eritrea if she was staying outdoors. After staying in hiding for 19 days, she crossed the border to Uganda in January of 2014. The applicant was granted temporary stay in Uganda within few weeks after her arrival, but due to the requirement of legal stay for a minimum of six months, she had to wait before she could lodge the application at the Norwegian Embassy in Uganda. An application for family reunification was lodged in September 2014, nine months after the one-year deadline had expired.

The Norwegian immigration authorities rejected the application because it was lodged after the one-year deadline. It was argued that even if the applicant was prevented from submitting an application in the period before she fled Eritrea, she had not demonstrated that it was impossible for her to lodge the application at an earlier date once she had left the country.

The municipal court in Oslo made a judgement in the case on 26 June 2018⁹⁵, where it is stated that all applicants must be given an unrestricted and real one-year deadline to submit their application. This means that the applicant will be exempted from the maintenance requirement if he or she submits an application for family reunification within one year after the circumstances outside the applicant's control have ceased. This interpretation of the one-year requirement was considered to be in harmony with Norway's international obligations, in particular the principle of unity of refugee families. The court found that the spouse's separation was not a result of an active choice to live apart, and that it was not possible to continue the family life in the country of origin. Hence, the rejection of the application for family reunification was a violation of Article 8 of the European Convention on Human Rights.

If the reference person in Denmark is a refugee, he or she will not need to meet the self-supporting requirement as long as the need for protection still exists. See more on waived requirements for refugees in Denmark in chapter 15.

95 TOSLO-2018-6893

Deadlines to apply for family reunification with a person with refugee status in order to be exempted from maintenance requirement:

Norway: 6 months after reference person got residence permit

Sweden: 3 months after reference person got residence permit

Denmark: No deadline

19.4 Other economical and practical obstacles to family reunification

The family reunification process can often be a costly affair, even when fees and maintenance requirements are not considered. Many refugees in Scandinavia come from countries and regions that are strongly affected by conflicts and unrest. Because of this, traveling in these areas is often costly, practically difficult and extremely dangerous. The condition that the application should, as a main rule, be delivered in the country of origin is common to all three countries. However, it is often not possible to submit applications in the country where the refugee family members come from, as several countries are without foreign missions from the Scandinavian countries. This may be partly due to the security situation in the country, or the wish for a practical and efficient foreign service.

The requirement that applicants must meet personally at a foreign service or at an application centre to submit the application, and that it is impossible for a reference person to apply on behalf of their family members in most cases, means that many must undertake dangerous and costly journeys to get to the place of application. The costs of staying at the place of application will often be considerable. In several cases, it will be necessary to make more than one trip if additional documents or information is needed., In cases that involves children, DNA testing is in practice mandatory for citizens of several countries⁹⁶, which could require additional journeys.

For many, this also means that they have to engage repeatedly in illegal border crossing at serious risk of being detained, and travel through countries where they have no legal right to stay. In some cases, it will not be problematic to reside in a country without a formal residence permit, while in other cases such an illegal stay may be associated with severe risks threatening the physical and psychological well-being of the individual concerned. This means that a family reunification procedure which fails to afford

⁹⁶ Afghanistan, Syria, Iraq, Yemen and all African countries south of Sahara, except South Africa

refugees more favourable provisions for family reunification and take into account the specific circumstances of the refugee will fall short of the standards guaranteeing the right to respect for family life. An example of this is Eritreans who have to travel to Sudan to submit an application, and who are at risk of being arrested in Sudan for illegal residence. The same group will also be at risk of ill-treatment for having left Eritrea illegally. According to several reliable sources, Eritreans leaving the country unlawfully are not likely to be able to return to Eritrea and will be at risk of severe sanctions at the hands of the authorities. They must therefore remain at the place of application for long periods while they wait for their application to be processed, with the practical and financial challenges that come with long-term stays in a country where one does not have a legal right to stay or work.

Another challenge for many applicants in the process of applying for family reunification from a neighbouring country, is that they often have to go through time- and resource-consuming processes in order to obtain a valid passport or travel document. To illustrate, Syrian nationals in Turkey have to pay approximately 1.000 Euros for a passport, in a lengthy process that could take many months.

20 The application process

20.1 Who can apply

In Norway, an application for family immigration and the payment of the application fee must first be registered online. This can be done by either the applicant or the reference person. If an exemption from the maintenance requirement is to be granted, the registration must be completed and the application fee must be paid within six months after the reference person was granted refugee status in Norway. The applicant will then have to make an appointment with the police in Norway, or at a Norwegian foreign mission or an application centre abroad. The applicant must meet in person to deliver the required documents; the reference person cannot apply on behalf of the applicant. In principle, the requirement to apply in person at a foreign mission abroad will not automatically contravene Article 8 of the ECHR. However, this requirement, in combination with stringent timeframes for lodging an application and excessive processing fees, will as a result unjustifiably hinder the refugee and his/her family members from getting access to Convention's rights and freedoms.

In some cases, the reference person and / or the applicant will be called for an interview before the immigration authorities make a decision in the case.⁹⁷

A reference person in Sweden may initiate the application process, through the Migration Agency's website, if they adjoin a letter of attorney from the applicant. The applicant then has to present the necessary documentation and, in most cases, undergo an interview.

Denmark has somewhat more liberal rules for the application process. In Denmark, a parent can always apply on behalf of a child. The reference person may also apply on behalf of the applicant when the applicant is living in a conflict area.⁹⁸ If the applicant is not living in such an area, he or she needs to submit the application.

97 An Interview will be conducted in most cases where the applicant is either stateless or from Afghanistan, Pakistan, Turkey, Iran, Iraq, or from a country in Africa (except South Africa), and in some cases where the applicant is from Kosovo, China, Bangladesh, Dominican Republic, India, Indonesia, Vietnam or Sri Lanka

98 Currently, a reference person can apply on behalf of a spouse from Eritrea, Syria or Somalia.

20.2 Where should the application be submitted

According to the Norwegian Immigration Act section 56, a first-time residence permit must have been issued before the applicant enters the country. This means that the applicant, after the application is registered online, must attend a Norwegian foreign service mission or an application centre abroad. This must in accordance with the Norwegian Immigration Regulation⁹⁹ take place in the country in which the applicant is a citizen, or in a country where the applicant has had a residence permit for the past six months. However, in many cases it is not possible for applicants to meet this provisions, since many of the refugee producing countries do not have a Norwegian foreign service mission or an application centre where documentation can be delivered. Citizens of Afghanistan, Eritrea, Iraq, Libya, Syria and Yemen will for instance not have the possibility to apply from their home countries because there are no designated places of application within the territory. For many, it will also be difficult to obtain a residence permit in the country where the foreign service mission is situated, and they can thus not meet the six-months residence permit requirement.

The Norwegian Immigration Regulation authorizes the Directorate of Immigration to allow applications that are not submitted at the designated place of application.¹⁰⁰ This could be the case if the applicant would risk persecution in, or on the way to, the country where the designated application place is located, if it is impossible to reach the designated place because of e.g. a refusal on an application for an exit permit or if the applicant suffers from such severe health issues that it would be unjustifiable to require him or her to travel to the place of application. These exemptions are however practised strict, and the burden of proof is on the applicant in such cases.¹⁰¹

In some cases, the Norwegian authorities will accept applications that is submitted while the applicant resides in Norway. This applies, among other things, in cases where the applicant:

- has a residence permit in Norway,
- has a residence permit in a Schengen country, and has resided in Norway for less than three months,

⁹⁹ Immigration Regulation section 10-2

¹⁰⁰ Ibid

¹⁰¹ Circular GI-07/2018, available at: <https://www.regjeringen.no/no/dokumenter/gi-072018--behandling-av-soknader-om-familieetablering-gjenforening-som-ikke-er-fremmet-i-trad-med-utlendingsforskriften--10-2-tredje-ledd-jf.-niende-ledd/id2606383/?q=gi-07/2018>

- is a spouse, cohabitant, minor child or a minor adoptive child of a reference person in Norway, and is awaiting a decision on an asylum application¹⁰²

Besides the situations described above, it is possible to allow an application to be submitted from Norway, under exceptional circumstances. The most common reason for making such an exception is where a young child will be separated from a primary caregiver for an extended period of time, if an applicant has to return to the country of origin to apply for family immigration. In a 2016 Court of Appeal judgment¹⁰³, the court ruled that a rejection of an application for family immigration was invalid because it would result in two children being separated from their mother over a period of several years. The Court held that such a separation would cause severe problems for young children, and referred to the UN Committee on the Rights of the Child, General Comment No. 7 (2005), Section 18¹⁰⁴, where it is pointed out that small children under the age of 8 are particularly vulnerable to the negative consequences of separation from parents:

Young children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation. Situations which are most likely to impact negatively on young children include ... situations where children experience disrupted relationships (including enforced separations)...

Despite this judgment, a restrictive practice is generally conducted in such cases, and such applications from within Norway are only rarely allowed.

An alien who seeks to obtain a residence permit in Sweden must as a general rule have applied for, and been granted, such a permit before entering the country. There are however some exceptions to this rule. The issue will be assessed on the individual circumstances, but in general, it must be clear the application for family immigration would have been granted if the applicant had applied from abroad. There should also be particular circumstances that renders it unreasonable to require the applicant to leave Sweden and apply from abroad. A typical case for accepting an application would be when children would be separated from a parent for a long period of time.

If no exemptions apply, the application should be handed in to a Swedish mission in

¹⁰² If the application is finally rejected, or suspensive effect is not given after a first instance decision, an application for family immigration submitted from Norway will not be accepted.

¹⁰³ LB-2015-154940, available at: <https://www.udiregelverk.no/en/documents/court-decisions/lb-2016-05-27/>

¹⁰⁴ (GC-2005-7-CRC), available at: <https://www.refworld.org/docid/460bc5a62.html>

the country where the applicant is residing. For citizens of some countries, like Syria, it is possible to hand in an application for family immigration in a country outside the country of origin. This is also possible for citizens of countries where Sweden has no foreign mission. If the applicant hands in an application at another Swedish foreign mission, it is up to the discretion of the mission if they will accept the application for family immigration. Depending on embassy capacities and migration flows, some embassies have a more generous or more restrictive approach.

An application for family immigration could normally be submitted in Denmark if the applicant is residing legally in the country. This would be the case if the applicant e.g. holds a valid visa, does not require a visa to enter Denmark and is within the three-months period of visa-free stay, or is a EU residence permit holder. However, if it is obvious that the applicant does not meet the requirements for family reunification, or if he or she has previously applied for family reunification and were rejected for not meeting the requirements, making an application from Denmark will not be possible, unless the situation has changed in a way that enables the applicant to meet the requirements.

If this does not apply, the application can be submitted at a Danish embassy or consulate abroad, or at an outsourcing office in the country of origin. If there is no Danish mission or outsourcing offices in the country, applicants are referred to missions where Denmark shares a representation agreement with, e.g. Norway or Sweden. The applicant can however choose where the application should be submitted.

2I Documentation of identity and relationships

Proof of identity is a general requirement for obtaining residence permits in Scandinavia, and there is, as a main rule, a demand for the presentation of identity documents for everyone that intends to migrate to Denmark, Norway or Sweden. In family immigration cases, documentation of family links is an additional requirement. Many refugees, and thus their families, do however originate from countries where documentation of identity and family links can be hard to get hold of, because of a general lack of documentation in some countries or because a conflict or war situation renders it difficult to get access to existing documents.

The level of documentation needed in order to be allowed family immigration in Norway depends on the citizenship of the applicant. A passport is as a main rule always required as evidence of Identity in Norway, and the regulations provide grounds for refusing an application for a family immigration permit if no documentation of identity has been presented. An application may however still be granted if the applicant originates from a country where it is difficult to present documents that are approved by Norwegian authorities. This has been the case for many years in Norway for Somali nationals. In recent decisions however, family reunification applications from Somali citizens have been rejected due to the applicants' inability to present a Somali passport, following the recognition of some Somali passports since 1 August 2018.¹⁰⁵

In order to prove family links, an applicant who is a spouse is normally asked to present a marriage certificate, and a birth certificate if the applicant is a child or a parent. Applicants from some countries are also asked to provide supporting family documents, e.g. a family book. If it is impossible to present credible documentation because of the situation in the country of origin, interviews of both parties are given more weight in the assessment.

Applicants and reference persons originating from countries where documents have low evidentiary value, and where children are involved, will normally be requested to take a DNA-test to prove the family links. If the DNA report shows that the couple have common children, this is considered to be sufficient proof that a marriage exists. Such

¹⁰⁵ See <https://www.udi.no/viktige-meldinger/somaliske-statsborgere-som-ikke-har-flyktningstatus-ma-skafe-seg-somalisk-pass/>

tests should however only be conducted in cases where other requirements are met. Norwegian authorities cannot force the parties to undergo a DNA test, but refusal to do so will generally result in a rejection of the application. Applicants will not be charged for the test itself, but have to bear travel and accommodation expenses.

In cases where it is necessary for the granting of family reunification to prove that a reference person has parental responsibility alone, applicants may have to provide proof that the other parent is dead, has no custody of the child or does not exercise parental authority in any other ways. This is an important measure in order to avoid a separation between a parent and a child, in which the former has no influence. At the same time, it can create immensely difficult situations where a parent in Norway could be denied family reunification with a child because the necessary documentation is impossible to access due to conflict situations or lack of possibilities to trace or communicate with the other parent. The threshold for accepting an application for family reunification without providing a letter of consent, is that one must establish as credible that such letter is “impossible” to obtain.

As a main rule, family members are required to show passports and official documents as proof of identity and family relationship when applying for a family immigration permit in Sweden. However, due to the application of the principle of free consideration of evidence in administrative procedures, the family member has the right to send in whatever proof or documents he or she wishes. The Swedish Migration Agency does however urge all applicants to enclose:

- Copy of passport pages that show the identity and passport’s expiry date
- Documents that show the relationship status, such as marriage certificate or proof of the couple living together.

In cases involving children, the following should be enclosed:

- Copy of passport pages that show the child’s identity and the passport’s expiry date
- Birth certificate, or certificate showing who the child’s parents or guardian(s) are
- Possible copy of identity documents for the other guardian

In 2012 the Migration Court of Appeal held that where the applicant is from a country where it is difficult to obtain satisfactory identity documents to support his or her iden-

tity, less stringent evidentiary requirements can be acceptable in the individual case.¹⁰⁶ In light of this judgement, identity requirements may be lowered in cases where the applicants are citizens of countries where it is difficult to obtain documentation of identity and family relationships, or where such documentation is not considered reliable. Somali nationals are for these reasons generally exempted from the general strict requirement to present identity documents. In such cases, the parties may use other means to establish their identity and family relationship. It would normally be sufficient for the applicant to make his or her identity probable (*“sannolik”*), if possible in conjunction with DNA-tests which confirm family ties, and coherent information in interviews from both parties. If applicants originate from countries where reliable documentation generally could be provided, but fail to do so, the application will often be rejected.

It is a basic requirement for being granted residence in Denmark that the applicant’s identity can be considered documented or substantiated in relation to name, date of birth and citizenship. If this requirement is not met, a residence permit will normally not be granted. For all applicants, some kind of identity document, preferably a passport, must generally be presented. Exemptions can be made when reliable documentation of identity cannot be provided and family ties can be proved in another way.

In order to prove family links, spouses should present a marriage certificate, a civil registration or other relevant documents that makes the marriage legal in the relevant country. Spouses that cannot present proof of marriage, who have children together, can substantiate the family ties through DNA testing of children. Family ties between the reference person and the applicant can also be considered as established if all given information has been consistent throughout the process, e.g. in the reference person’s asylum interview.

In cases regarding children, a birth certificate or civil registration are required. And if one of the parents are remaining in the country of origin, documentation of custody and whether the custody is shared or the parent in Denmark is the only custodian, should be included.

106 MIG 2012:1

22 Best interests of the child in family reunification cases

Children are often most affected when families are torn apart from war or conflict situations. They are often unable to understand the reasons for why the family have to be separated in the country of origin and on what grounds they can or cannot be reunited in countries where they themselves or close family members are granted protection. The lack of possibility to influence decisions made by parents or authorities makes the situations even more dramatic and intimidating for many children.

According to the UN Convention on the Rights of the Child, article 3, the best interests of the child shall be a primary consideration in all decisions that involve children. Article 3 does not give an unconditional right to stay in a family immigration case, nor does it provide that the best interests of the child should always be given decisive weight. This follows from the wording of article 3 that the best interests of the child should be “a” primary consideration, and not “the” primary consideration. However, weighty reasons need to be established for the best interests of the child to be set aside.

The European Court of Human Rights has in many cases emphasised that the best interests of the child should be given precedence. In the report “*Realising the right to family reunification of refugees in Europe*”¹⁰⁷ the European Commissioner for Human Rights stated the importance of this principle in the Court’s case law:

A notable trend in the Court’s case law is the increased prominence and weight attached to the “best interests of the child” principle, as evidenced in Mugenzi v. France¹⁰⁸ and Tanda-Muzinga v. France¹⁰⁹. In these cases, the Court emphasised that where family reunification involves children, the national authorities must give precedence to the best interests of the child in the review of proportionality of the interference with family life. Similarly, Jeunesse v. the Netherlands¹¹⁰ and Neulinger and Shuruk v. Switzerland¹¹¹

107 From 2017, available at: <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724bao>

108 Application No. 52701/09, available at: <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80-%93mugenzi-v-france-application-no-5270109>

109 Application No. 2260/10, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-145653%22%5D%7D>}}

110 Application No. 12738/10, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-115732%22%5D%7D>}}

111 Application No. 41615/07, available at: <https://hudoc.echr.coe.int/FRE#%7B%22itemid%22:%5B%22001-99817%22%5D%7D>}}

(although not dealing with refugees) are also illustrative of the Court's great emphasis on "best interest" considerations in recent years. In Jeunesse v. the Netherlands this is in fact one of the main reasons why the Court for the first time held that Article 8 of the Convention had been violated in a case concerning family reunification of a spouse. In these cases, the Court referred specifically to the CRC and the UNCRC general comments.

Article 9 further stipulates that the child shall not be separated from his or her parents against their will, except when this, in accordance with applicable law and procedures, is necessary for the best interests of the child.

All three Scandinavian countries have ratified UN Convention on the Rights of the Child (CRC). Although not incorporated in Danish or Swedish law, the Convention has significant impact when Danish and Swedish authorities assess family reunification cases where children are involved. In the Swedish Aliens act chapter 1 section 10, it is stipulated that particular attention must be given to what is required with regard to the child's health and development, and the best interests of the child in general. The Swedish parliament voted in 2018 that CRC will be part of Swedish law as of 1 January 2020.¹¹²

The Danish authorities has decided not to incorporate into the national law the Convention on the Rights of the Child as it could shift the legislative power from the Parliament to the courts. The Government deemed it important to maintain the elected representatives' responsibility for compliance with international obligations.¹¹³ There are however a number of provisions in the Danish Aliens Act that refers to the best interests of the child.

The Convention on the Rights of the Child is incorporated in Norwegian law by the Human Rights Act. According to Article 104 of the Norwegian Constitution, the best interests of the child shall be a fundamental consideration in actions and decisions that affect children. The provision is based on Article 3 of the Convention and was introduced into the Constitution in 2014 as part of a larger constitutional amendment process intended to strengthen human rights. The provision takes precedence in the event of conflicts with other legislation.

In the so called "Maria judgment"¹¹⁴ the Norwegian Supreme Court emphasized the

112 Law 2018:1197, available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattnings-samling/lag-20181197-om-forenta-nationernas-konvention_sfs-2018-1197

113 Danish delegation at the examination of the situation of children in Denmark by the UN Committee on the Rights of the Child, 15 September 2017, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22086&LangID=E>

114 HR-2015-00206-A, available at: https://www.domstol.no/globalassets/upload/1_x-dokumenter-pa-rot/

UN Committee on the Rights of the Child's statements in General Comment no. 14¹¹⁵, and pointed out that:

“The Committee underlines that when weighed against other considerations, the best interests of the child should be of great importance - it is not just one of several aspects of an overall assessment: The child's interests should form the starting point, be especially emphasized and stand in the foreground”¹¹⁶

But even though the legislation ensures that the best interests of the child are taken into account, there are many examples where immigration policy considerations are given more weight. In Norway, many applications for family reunification have been rejected, although this would lead to separation between children and parents for several years, on the grounds that the child and his or her mother or father may have contact by telephone and skype. Child psychologists have criticized this practice and described how a separation from a primary caregiver could lead to mental and physical injuries. The younger the child, the more serious could the consequences be from a long-lasting separation. Contact over the telephone and through the internet will not be able to limit the harm to young children.

These assessments are in line with the views of the UN Committee on the Rights of the Child in its General Comment no. 7 (2005) section 18,¹¹⁷ where the Committee pointed out that young children, i.e. children under 8 years of age, are particularly vulnerable to the negative consequences of separation from parents. The committee here states, among other things, that:

Young children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation. Situations which are most likely to impact negatively on young children include ... situations where children experience disrupted relationships (including enforced separations),

But despite the Committee's statements, and the fact that these views were emphasised in a 2016 court case, where the court rejected the arguments put forward by the

saknr-2014-1583-anonymisert.pdf

115 General Comment No. 14 (2013): The right of the child to have his or her best interests taken as a primary consideration, available at: <https://www.refworld.org/docid/51a84b5e4.html>

116 This is not an authorised translation, the original text is: «komiteen understreker at ved avveiningen mot andre interesser skal hensynet til barnets beste ha stor vekt – det er ikke bare ett av flere momenter i en helhetsvurdering: Barnets interesser skal danne utgangspunktet, løftes spesielt frem og stå i forgrunnen.»

117 GC-2005-7-CRC, available at: <https://www.refworld.org/docid/460bc5a62.html>

State,¹¹⁸ it is still common for children to be separated from one or both parents in family reunification or deportation cases. In cases where it is considered whether an application for family reunification can be allowed to be delivered in Norway, it seems to be an exception from the general rule where very young children are at risk of being separated from a parent. The practice is not anchored in regulations or circulars, but the Immigration Appeals Board has stated that it is an established practice to accept applications from Norway in such cases. However, this only applies in cases where all of the following conditions are met:

- The child is under one year of age
- The child has refugee status or is a Norwegian citizen
- The applicant is the child's primary caregiver
- The applicant is not expelled

The Danish authorities have been widely criticized for the provision that prevents family members of persons with a temporary protection status from applying for family reunification until the reference person has had a residence permit for a minimum of three years. In 2017, The Committee on the Rights of the Child urged Denmark to repeal the provision in the Aliens Act stating that persons with temporary protection status cannot benefit from family reunification within the first three years after receiving their residence permit.¹¹⁹ At the same time, the committee urged Danish authorities to increase the age limit for children entitled to family reunification from 15 to 18 years.

Much criticism has also been directed at Sweden for removing the right to family reunification for persons with subsidiary protection under the Temporary Act, including in cases where the applicant or reference person is a child. In a decision by the Migration Court of Appeal in November 2018, a rejection of an application to be reunited with an eight-year-old Syrian boy with subsidiary protection in Sweden was considered contrary to the Convention on the Rights of the Child and the European Convention on Human Rights article 8.¹²⁰ It was undisputed that the family could

118 LB-2015-154940, available at: <https://www.udiregelverk.no/en/documents/court-decisions/lb-2016-05-27/>

119 Concluding observations on the fifth periodic report of Denmark, 26 October 2017, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsglK9tmnWXdx-aU%2FedXEEMqJrk8yrwetrUHAHlCuvk7lIb6C66JpZees7wvtcoJhlEgwEfyVfhCW5afo%2B6oAy5phC4Cg-9ZPD46%2F3NL1yVPqT3>

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not be reunited in Syria, and the family did not have the opportunity to live legally together in another country. The rejection of the application thus meant that it was impossible for the family to restore a family life. The court pointed out that the time of forced separation has a more serious effect on a child than on adults, since children and adults do not perceive time in the same way. Extended decision-making processes therefore have particularly adverse consequences for children who are in a developing stage. Although it is a matter of a temporary obstacle for the family to be reunited, the court concluded that it cannot be considered compatible with the child's best interests to be separated from his family in this context.¹²¹

When a renewal of the Temporary Act was adopted in the spring of 2019, persons with subsidiary protection were again granted the right to be reunited with family members. It is likely that the decision from the Migration Court of Appeal had an impact on the political decision to reintroduce the right of family immigration to beneficiaries of subsidiary protection.

22.1 Hearing of children

According to article 12 of the Convention on the Rights of the Child, every child has the right to be heard in all matters affecting them, and to have their views taken seriously. The views of the child should be given weight in accordance with its age and maturity. However, children are rarely allowed to participate in hearings concerning family reunification proceedings. Their right to be heard is hardly ever recognised, despite the fact that a refusal decision to reunite with his or her parents may severely affect the child's rights and development, hence raising issues not only regarding the family life limb of ECHR Article 8, but also the private life aspects which encompass physical and psychological integrity aspects.

In accordance to the Norwegian Immigration Regulation section 17-3, children who have reached the age of seven, and younger children who are able to form their own point of view, shall be informed and given the opportunity to be heard before a decision is made in cases concerning them under the Immigration Act. How the child is to be heard must be assessed in light of the nature of the case and the application situation. It may be interviewed orally or in writing or through his or her parents, representative or others who are qualified to make a statement on the child's behalf. Section 17-5 of the regulations stipulates that unless it is considered to be obviously unnecessary, the offer of an interview shall as a general rule be made to children over the age of seven in family immigration cases where:

121 See also chapter 6.1

- children are applying on their own,
- children are applying for reunification with one parent,
- children are applying for family reunification with foster parents in Norway,
- the case involves unaccompanied minors with refugee status in Norway, and
- children have a residence permit on humanitarian grounds, if the question has arisen of granting a residence permit to either or both parents due to strong humanitarian reasons.

Exceptions to this general rule can be made if the application will clearly be rejected, or where it is not justifiable or possible to hold a conversation due to the child's physical or mental health or because it will be necessary for the child to travel a long distance to conduct the interview. In such cases, parents or guardians can be informed that a written statement can be submitted.

In 2016, the Norwegian Parliamentary Ombudsman criticised the Immigration Appeals Board regarding a case where family reunification for a child was denied because a letter of consent from the father in the country of origin was not presented. The child was never given the possibility to substantiate through an interview that it was actually not possible to find his father, even though he was 16 years of age at the time of the last decision. After the criticism from the Ombudsman, an interview was conducted with the child in the country of origin, and the Immigration Appeals Board subsequently concluded that it was probable that it was impossible to obtain and submit a consent letter from the father.

The right for children to be heard is also enshrined in Swedish law. According to the Aliens Act section 11, children must be heard if it will be affected by a decision in the case, unless this is inappropriate. Children are generally heard in all cases where the child is the applicant, and in all cases where the child wishes to make its voice heard when the child is the reference person. The child is heard in person, or by the child's parents if the child is too young to make its voice heard. Additional documentation can always be sent in by the child and be accepted as proof.

In Denmark, children are heard to a much lesser extent. Cases regarding family reunification are generally being processed on a written basis. The child can add information to the application, but will not be independently heard by initiative of the authorities.