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FAMILY REUNIFICATION IN THE FRAMEWORK OF THE COUNCIL OF EUROPE AND IN THE PRACTICE OF THE ECHR

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1. *Introduction*

As Art. 16 (3) of the UDHR declares "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State". The terms "family reunion" and "family reunification" are used interchangeably by international bodies and no specific scope has been identified for either. The Parliamentary Assembly of the Council of Europe uses "family reunion" [e.g. in Recommendation 1686 (2004)] but more often "family reunification" [e.g. in Rec 1703 (2005)].[1] Respect for and protection of family life are recognised as fundamental human rights in many international declarations. Family reunification refers to the situation where family members join another member of the family who is already living and working in another country in a regular situation. It has become a major cause for legal immigration.

Following separation caused by forced displacement, such as from persecution and war, family reunification is often the only way to ensure respect for a refugee's right to family unity.[2] Family reunification is regulated directly or indirectly by several international legal instruments at universal and regional level.[3]

On regional level the Council of Europe's documents and several conventions give general directions to the contracting States. The European Court of Human Rights was established by virtue of the ECHR, and has only jurisdiction with regard to the interpretation and application of the Convention and the Protocols, it is limited to its interpretation of the Convention and its case-law. Member States of the Council of Europe are obliged to respect the human rights of the Convention with regard to everyone within their jurisdiction, to ensure that all rights laid down in the Convention are respected and accessible on its territory. Parallel to this, Member States have margin of appreciation to interpret and implement the Convention.

The provisions on family reunification are subject to the limitations imposed by the ECHR and Union law on national law restrictions on family reunification rights of

[1] Linguistic Integration of Adult Migrants (LIAM) – Family reunification / reunion https://www.coe.int/en/web/lang-migrants/family-reunification-/-reunion.

[2] UNHCR, *Family Reunification in Europe*, UNHCR Brussels, October 2015, p.1.

[3] See the chapter MANCA, *Family Reunification in the United Nations Human Rights Law* and CADIN, *Family reunification in the EU framework, included the Jurisprudence of the European Court of Justice.*

international protection beneficiaries.[4] The Convention imposes clear limits on the approach of the States within which they have to apply their family life considerations. But the ECHR allows its contracting parties to adopt more extensive rights than the ones set out in the Convention. The article aims to build a frame around the term family reunification using the institution of the Council of Europe, the ECHR and the European Court of Human Rights. The structure of the paper is as follows. First, a general overview of the stance regarding family reunification of the Council of Europe is presented, followed by the ECHR and the practice of the European Court of Human Rights (ECtHR).

I. THE COUNCIL OF EUROPE

1. *Family Reunification in Recommendations and Conventions of the CoE*

The Council of Europe (CoE) passed and adopted several recommendations on family reunification, but it is important to stress that they are non-binding. Also, several conventions concerning the status of migrants and migrants' families have been adopted under the auspices of the Council of Europe where we should point out that they only apply to migrants who are nationals of States that have signed the relevant convention. Additionally, the conventions, either international or regional, have no system of enforcement in cases of breach by the State.

The European Social Charter, adopted in 1961 and revised in 1996, contains several provisions with rights and obligations regarding family reunification. Part I 16 underlines its main message that the family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.

In details, Arts. 2-4 of Protocol No. 4 and Art. 1 of Protocol No. 7 of the ECHR are covered by Arts. 18-19 of the Charter and Revised Charter on the right to engage in a gainful occupation in the territory of other Parties and the right of migrant workers and their families to protection and assistance. In the ESC we can find several articles in connection with discrimination[5] protected against by the ECHR: protection against discrimination based on property status[6], disability[7], nationality[8], sex and age[9], as well as family status[10]. Also, Art. E of the Revised Charter explicitly refers to the prohibition of discrimination. Art. 16 mentions the right of the family to social, legal and economic protection, and declares again the full development of the family, which is a fundamental unit of society. It holds the obligation for the Contracting Parties to promote the economic, legal and social protection of family life with social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly

[4] See more LAMBERT, *Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe*, in CHETAIL, BAULOZ (eds), *Research Handbook on International Law and Migration*, Edward Elgar, 2014, pp. 194-215; STAVER, *Family Reunification: A Rights for Forced Migrants*?, RSC Working Papers No.5, Oxford 2008; HATHAWAY, *The Rights of Refugees under International Law*, CUP, 2005, pp. 533-560; RAINEY, WICKS, OVEY, *The European Convention on Human Rights*, OUP, 2014, pp. 335-338.
[5] Art. 14 ECHR.
[6] Art. 13 ESC.
[7] Art. 15 ESC.
[8] Art. 19 ESC.
[9] Art. 1 of the Additional Protocol of 1988 to the 1961 Charter and Art. 20 of the Revised Charter.
[10] Art. 27 of the Revised Charter.

married, and other appropriate means. The right of migrant workers and their families to protection and assistance contains an obligation of the States to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory. [11]

The Appendix of the ESC contains several clarifications. Hence, regarding the scope of the Revised European Social Charter in terms of persons protected, it gives restrictions. Namely, in Art. 12 para. 4 and Art. 13 para. 4 the persons covered by Arts. 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Arts. 18-19. It also states that regarding Art. 19 para. 6 for the purpose of applying this provision, the term "family of a foreign worker" is understood to mean at least the worker's spouse (and not only wife sic.!) and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker.[12] According to the European Committee of Social Rights (ECSR) refugees also fall under the personal scope of the ESC, states' obligation undertaken are appropriate to promote and to firmly establish the prompt social integration of refugees in the host societies, and these obligations from the European Social Charter require a response to the specific needs of refugees and asylum seekers, among others the liberal administration of the right to family reunion.[13]

Another convention, The European Convention on the Legal Status of Migrant Workers European Convention on Migrant Workers[14] has several articles, namely Arts. 6 and 12 in connection with family reunification. There are requirements such as the housing arrangements and steady resources under Art. 12 (1) stating that the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the minor unmarried children to join the migrant worker in the territory of a Contracting Party. With Art.12 (3), the State whose housing, education and healthcare services may be under strain from the influx of migrants can derogate from the obligation of family reunification for certain parts of its territory. [15]

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[11] Art. 19 para. 6.

[12] Explanatory Report to the European Social Charter (Revised) Strasbourg, 3.V.1996.

[13] European Committee of Social Rights, 'Statement of interpretation on the rights of refugees under the European Social Charter' (elaborated during the 280th session of the European Committee of Social Rights in Strasbourg, 7-11 September 2015), 5 October, p.3.

[14] Adopted on 24 November 1977, ETS No. 93. European Convention on the Legal Status of Migrant Workers, Strasbourg, 24.XI.1977.

[15] Art. 6 – Information: 1. The Contracting Parties shall exchange and provide for prospective migrants appropriate information on their residence, conditions of and opportunities for family reunion.

Art. 12 – Family reunion: 1. The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months. 2. Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, which shall take effect one month after the date of receipt, make the family reunion referred to in paragraph 1 above further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family. 3. Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, which shall take effect one month after the

2. *Committee of Ministers of the Council of Europe*

In 1999, the Committee of Ministers of the CoE recommended that the country hosting the person to be returned ensures that the principle of family unity be taken into account. The country of origin of the person to be returned (country of which such person is a national or a non-national former habitual resident) shall take into account the principle of family unity, in particular as it concerns the admission of such family members of the persons to be returned who do not possess its nationality. The operative part of the recommendation contains four points: when the rejected asylum seeker is not willing to return voluntarily, States may resort to mandatory return. In such cases, the return should be implemented in a humane manner and with full respect for fundamental human rights of the person to be returned during all stages of the return process and without the use of excessive force. The host country should be also taking into consideration the principle of family unity. The country of origin should refrain from applying sanctions against returning persons on account of their having applied for asylum or having sought other forms of protection in another country and should take into consideration the admission of such family members of the persons to be returned who do not possess its nationality.[16]

The Commission also dealt with refugees, namely that member States hosting refugees and other persons in need of international protection, who have no other country than the country of asylum or protection in order to lead a normal family life together, should promote through appropriate measures family reunion, taking into account the relevant case-law of the European Court of Human Rights.

The applications for family reunion from refugees and other persons in need of international protection should be dealt in a positive, humane and expeditious manner. In order to verify family links, member states should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way. The absence of such documents should not per se be considered as an impediment to the application and member States may request the applicants to provide evidence of existing family links in other ways. Where applications for family reunion by such persons are rejected, independent and impartial review of such decisions should be available.

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date of its receipt, derogate temporarily from the obligation to give the authorisation provided for in paragraph 1 above, for one or more parts of its territory which it shall designate in its declaration, on the condition that these measures do not conflict with obligations under other international instruments. The declarations shall state the special reasons justifying the derogation with regard to receiving capacity. Any State availing itself of this possibility of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and shall ensure that these measures are published as soon as possible. It shall also inform the Secretary General of the Council of Europe when such measures cease to operate and the provisions of the Convention are again being fully executed. The derogation shall not, as a general rule, affect requests for family reunion submitted to the competent authorities, before the declaration is addressed to the Secretary General, by migrant workers already established in the part of the territory concerned.

[16] Recommendation No. R (99) 12 of the Committee of Ministers to Member States on the Return of Rejected Asylum-Seekers (and Explanatory Memorandum).

Particular attention should be paid to applications for family reunion concerning persons who are in a vulnerable position. In particular, with regard to unaccompanied minors, member States should, with a view to family reunion, co-operate with children or their representatives in order to trace the members of the family of the unaccompanied minor. Member States should facilitate the work of governmental and non-governmental organisations and other institutions active in the humanitarian field with a view to promoting family reunion of refugees and other persons in need of international protection.[17]

In Rec (1999) 23, the Committee of Ministers recommended that Member States should promote through appropriate measures family reunion, taking into account the relevant case law of the European Court of Human Rights.[18] In Rec (2002) 4 of the Committee of Ministers "on the legal status of persons admitted for family reunification", the Committee recognizing that the residence status and other rights granted to the admitted family members are important elements assisting the integration of new migrants in the host society, regulates the situation once family members join the migrant worker in a foreign country.[19]

3. *The Parliamentary Assembly (PACE)*

In 1997, the Assembly urged member States to interpret the concept of asylum seekers' families as including de facto family members (natural family), for example an asylum seeker's partner or natural children as well as elderly, infirm or otherwise dependent relations.[20]

The Assembly also recommended that the Committee of Ministers should initiate a study to review the implementation of Committee of Ministers Recommendation Rec (2000)15 of the concerning the security of residence of long-term migrants and Recommendation Rec (2002)4 on the legal status of persons admitted for family reunification, with special regard to protection against expulsion of migrants who were born or raised in Council of Europe member States or who are minors. The Assembly further recommended that the Committee of Ministers include in its working programme activities aimed at assisting member States to: facilitate the family reunification of separated children with their parents in other member States, even when parents do not have permanent residence status or are asylum seekers, in compliance with the principle of the best interests of the child; consider favourably requests for family reunification between separated children and family members other than parents who have a legal title to reside in a member state, are over 18 years of age and are willing and able to support them; facilitate the family reunification of separated young people with mental or physical disabilities, including those who are over 18 years of age, with their parents or other adult family members upon whom they were dependant

[17] Recommendation No. R (99) 23 on family reunion for refugees and other persons in need of international protection of 15 December 1999 adopted on 15 December 1999.

[18] The recommendation was adopted at the 790th meeting of the Ministers' Deputies on 26 March 2002.

[19] See more THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), *Family Reunification*, OHCHR MIGRATION PAPERS November 2005.
http://www2.ohchr.org/english/issues/migration/taskforce/docs/familyreunification.pdf

[20] Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe adopted by the Assembly on 24 April 1997.

in the country of origin or the country of habitual residence and who are legally residing in another member state.[21]

The Assembly repeatedly underlined that "the concept of 'family' underlying that of family reunion has not been defined at European level and varies in particular according to the value and importance attached to the principle of dependence", and also urges member States to "interpret the concept of 'families' as including de facto family members (natural family), for example […] a partner or natural children as well as elderly, infirm or otherwise dependent relations" (Rec. 1327(1997), Rec. 1686 (2004) and others) and *"*The right to respect for family life is a fundamental right belonging to everyone", as well as "reconstitution of the families of lawfully resident migrants [..] by means of family reunion strengthens the policy of integration into the host society and is in the interest of social cohesion".[22]

While welcoming the preferential treatment granted to refugees in the Familiy Reunification Directive (FRD), the Assembly expressed its regret that it does not recognise the right to family reunion for persons granted subsidiary protection, and urged European States to grant the right to family reunion to persons benefiting from subsidiary protection. The Assembly addressed its concerns on the tendency of certain member States to impose tighter restrictions than others on the right to family reunification. The Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe therefore is of the opinion "that a knowledge requirement (regarding for example the language or society of the host states) as a condition for family reunification is in itself discriminatory and a threat to family life, and therefore not in line with the purpose of the Family Reunification Directive."[23]

4. *Council of Europe Commissioner for Human Rights*

The Commissioner for Human Rights when dealing with the issue of family reunification prepared several country-monitoring/thematic reports and issued papers, recommendations and comments . These follow and are in conformity with the approach of the Commissioner , namely that "Member states have a legal and moral obligation to ensure family reunification. International human rights standards require that people seeking protection can reunify with their families in an effective and timely manner. States must lift the many obstacles to family reunification and treat all people seeking protection equally".[24] In 2011, the Commissioner published a comment titled "Restrictive laws prevent families from reuniting", where he concluded that immigrants and refugees, who are lawfully residing in a State, should be able to reunite with their family members as soon as possible, without going through laborious procedures. He stressed that being denied the human right to be with one's family makes life more

[21] Recommendation 1596 (2003) Situation of young migrants in Europe adopted by the Assembly on 31 January 2003.

[22] Recommendation 1686 (2004) Human mobility and the right to family reunion, adopted on 23 November 2004.

[23] Council of Europe Parliamentary Assembly Committee on Migration, Refugees and Displaced Persons Position paper on family reunifications AS/Mig (2012) 01 approved by the Committee on 24 January 2012.

[24] See the statement on https://www.coe.int/en/web/commissioner/family-reunification.

burdensome – and integration much more difficult.[25] In his 2016 report which addresses among others the migration-related challenges in some Council of Europe States, he stressed that other European countries must live up to their responsibilities, fulfil their solidarity commitments towards Greece and facilitate refugee relocation and family reunification.[26] In 2016 the Commissioner made a call to European States to act decisively on integration, and in his paper "Time for Europe to get migrant integration right" declared that family reunification is an urgent human rights issue and plays a vital stabilising role.[27] In 2017, the Commissioner has drawn up thirty-six recommendations for the States to realize which focused on the following:

- Ensure that family reunification procedures for all refugees (broadly understood) are flexible, prompt and effective
- Ensure that the definition of family members eligible for reunification is appropriately broad
- Strengthen the position of children in the family reunification process
- Establish clear limits on age assessment processes
- Ensure that family reunification is granted to extended family members, at least when they are dependent on the refugee sponsor
- Avoid discrimination between families formed before flight and after (pre- and post-flight families)
- Ensure that family reunification processes are not unduly delayed
- Allow refugees sufficient time to apply for family reunification
- Take measures to account for the particular (practical) problems refugees and their families face in reunification procedures
- Avoid routine use of DNA and other biometric assessments
- Ensure effective access to places where family reunification procedures can be initiated
- Reduce practical barriers to family reunification
- Ensure that residence permits for family members enable legal protection and autonomy
- For States bound by the Dublin Regulation: make full and flexible use of the family unity criteria.[28]

II. Family Reunification in the European Convention on Human Rights and in the practice of the ECtHR

1. *Family Reunification in the ECHR*

[25] The Council of Europe Commissioner for Human Rights, Human Rights Comment "Restrictive laws prevent families from reuniting" (2 February 2011).
[26] The Council of Europe Commissioner for Human Rights, "3rd quarterly activity report" (17 November 2015), p. 5.
[27] The Council of Europe Commissioner for Human Rights, "Time for Europe to get migrant integration right" (2016), p. 13.
[28] See the detailed recommendations in The Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, Issue Paper, Council of Europe, June 2017 p. 7-10. https://www.coe.int/en/web/commissioner/family-reunification.

Regarding family reunification, we should address those articles of the European Convention on Human Rights (furthermore ECHR) which go hand-in-hand with this principle. First of all, we should point out, that *expressis verbis* we cannot find the right to family reunification in the ECHR, or in its additional protocols. We can say that family reunification is more like a principle under the wide umbrella of the right of private and family life, stated in Art. 8.
Two more articles go hand-in-hand with the principle of family reunification, namely Arts. 14 and 25. These articles have strong links to each other. Art. 8 gives protection to family life, stating that everyone has the right to respect for his private and family life, his home and his correspondence. Para. 2 of the Art. creates obligations (negative and positive) with proclaiming that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
The importance of Art. 14 in connection with Art. 8 is that it provides for the prohibition of discrimination stating that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". This is particularly relevant in terms of the difference in treatment between family unity conditions for beneficiaries of international protection and refugees.
Furthermore, Art. 25 of the Convention give the right to all individuals to bring individual claims to the European Court of Human Rights, whose decisions are binding on the contracting States.

2. *Unfolding the Text: The Practice of the ECtHR*

2.1. *Respect for private and family life*

According to the ECtHR's case-law, Art. 8 can be applied in two life-situations. First, when a family members wanting to join for the purpose of family reunification another member of the family abroad, usually the breadwinner. Second, when a member of the family is expelled or threatened with expulsion – often as a result of sanctions resulting from criminal proceedings – from the country where he/she and the family live. In *Mackx v. Belgium*, the ECtHR clarified that there should be no interference by a public authority with the exercise of a person's right to respect for his private or family life. The court noted that there can be exceptions such as in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[29] The essential object of the article is to protect the individual against arbitrary interference by the public authorities, but in addition there are positive obligations

[29] ECtHR, *Marckx v. Belgium*, Application No. 6833/74, Judgement of 13 June 1979, para. 31.

regarding an effective "respect" for family life but the notion's requirements will vary considerably from case to case.

2.2. *Family – family Life*

According to the Court, by guaranteeing the right to respect for family life, Art. 8 presumes the existence of a family.[30] The expression of "family life", in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Art. 12 for it is scarcely conceivable that the right to found a family should not encompass the right to live together.[31] The cohabitation of the couple is important but not an absolute criterion.[32] The Court emphasised that family life is rooted in real connections, not only formal legal relationships. Family life exists in the case of relationships between married couples and non-married (stable) partners thus marriage is not a prerequisite to the enjoyment of family life, and an unmarried cohabiting couple may enjoy family life.[33] The ECHR institutions have, however, demonstrated a willingness, in more recent years at least, to construe these criteria more liberally to bring parents who have never married or even cohabited within the protective realm of Art. 8.[34]

The Court has long recognised that informal, religious marriages also fall under Art. 8 of the Convention as declared in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.[35] More recently, the Court has acknowledged that same-sex couples in stable relationships enjoy family life together, even if they are not cohabiting,[36] contrary to its past view that the emotional and sexual relationship of a same-sex couple could not constitute "family life".[37] These couples have instead been given the lesser protection

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[30] *Ibid*, para. 31.

[31] ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Application No. 9214/80, 9473/81, 9474/81, Judgement of 28 May 1985, para. 62.

[32] ECtHR, *Berrehab v. the Netherlands*, Application No. 10730/84, Judgement of 21 June 1988, para. 21; *Kroon and others v. The Netherlands*, Application No. 18535/91, Judgement of 27 October 1994.

[33] See ECtHR, *Marckx v. Belgium*, Application No. 6833/74, Judgement of 13 June 1979; ECtHR, *Berrehab v. the Netherlands*, Application No. 10730/84, Judgement of 21 June 1988; ECtHR, *Keegan v. Ireland*, Application No. 16969/90, Judgement of 26 May 1994; ECtHR, *Kroonand others v. The Netherlands*, Application No. 18535/91, Judgement of 27 October 1994; ECtHR, *X, Y and Z v. The United Kingdom*, Application No. 21830/93, Judgement of 22 April 1997; ECtHR, *Al-Nashif v. Bulgaria*, Application No. 50963/99, Judgement of 20 June 2002; ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgement 24 June 2010.

[34] STALFORD, *Concepts of Family under EU law – Lessons from the ECHR*, in *Int. Jour. Law, Policy Family* 16, 2002, 417, 410-434.

[35] ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Application No. 9214/80, 9473/81, 9474/81, Judgement of 28 May 1985, para. 63.

[36] ECtHR, *Pajić v. Croatia*, Application No. 68453/13, Judgement of 23 February 2016 citing ECtHR, *P.B. and J.S. v. Austria*, Application No. 18984/02, Judgement of 22 July 2010, paras. 27-30; ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgement of 24 June 2010, paras. 91-94. See also ECtHR, *Taddeucci v. Italy*, Application No. 51362/09, Judgement 30 June 2016, paras. 94-98.

[37] European Commission of Human Rights, *X and Y v. UK*, Application No. 9369/81, Decision of 3 May 1983; European Commission of Human Rights, *S v. UK*, Application No. 11716/85, Judgement of 14 May 1986 and ECtHR, *Mata Estevez v. Spain*, Application No. 56501/00, Judgement of 10 May 2001.

under "private life".[38]That is because the ECtHR established clearly that sexual orientation is one of the grounds covered by Art. 14 ECHR,[39] which approach continued later on.[40] Moreover, in the *Pajić* ruling[41] concerning immigration it statesthat the same concept of family and the same threshold of prohibition of discrimination are applicable. Thus, even without recognising, a se, a right to family reunification, this case-law will represent a strong limitation to national immigration – and asylum – policies.[42]

The case *Hode and Abdi v. the United Kingdom* is a good example for the different treatment between refugees' spouses who married post-flight and other migrants entitled to family reunification. Here, the Court held that refugees with post-flight spouses were similarly situated to migrant students and workers, who were entitled to family reunification irrespective of when the marriage was contracted. The similarity was rooted in the fact that as students and workers, whose spouses were entitled to join them were usually granted a limited period of leave to remain in the United Kingdom, the Court considers that they too were in an analogous position to the applicants for the purpose of Art. 14 of the Convention. Key elements in the Strasbourg Court's assessment of whether such a couple enjoys this protection are the stability and intention of the parties.[43]

As regards parents and their children, family ties are created from the moment of a child's birth and only cease to exist under "exceptional circumstances" as stated in *Gül v. Switzerland*.[44] As regards relationships between extended family members, such as those of parents and adult children, the Court accepts that they fall within the concept of "family life" provided that additional factors of dependence, other than normal emotional ties, are shown to exist as seen in *Senchishak v. Finland*[45]. As has already been noted, the case law of the ECHR indicates that it is *de facto* family ties that matter and regarding the issue of social parents, it requires evidence of genuine and dependent family life over and above a mere family relationship.[46]

2.3. *Best interests of the child*

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[38] ECtHR, *WJ and DP v. UK*, Application no 12513/86, Judgement of 13 July 1987; ECtHR, *ZB v. UK*, Application no 16106/90, Judgement of 2 October 1990. See also ECtHR, *C and LM v. UK*, Application No. 14753/89, Judgement of 9.10.1989.

[39] ECtHR, *Da Silva Mouta v. Portugal*, Application No. 33290/96, Judgement of 21 December 1999; ECtHR, *Fretté v. France*, Application No. 36515/97, Judgement of 26 February 2002 and ECtHR, *Karner v. Austria*, Application No. 40016/98, Judgement of 24 July 2003.

[40] ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgement of 24 June 2010.

[41] ECtHR, *Pajić v. Croatia*, Application No. 68453/13, Judgement of 23 February 2016.

[42] GIL ALMEIDA, *Family reunification for same-sex couples: a step forward in times of crisis – comments on the Pajić ruling of the ECtHR*.
http://eumigrationlawblog.eu/family-reunification-for-same-sex-couples-a-step-forward-in-times-of-crisis-comments-on-the-pajic-ruling-of-the-ecthr/

[43] TONER, *Partnership Rights, Free Movevment and EU Law*, ., Hart Publishing, Oxford, 2004.

[44] *Gül* para. 32.

[45] ECtHR, *Senchishak v. Finland*, Application No. 5049/12, Judgement of 18 November 2014, para. 55.

[46] STALFORD, *Concepts of Family under EU law -Lessons from the ECHR*, in *Int. J. of Law, Pol. and the Fam.* 16, 2002, 417, p. 410-434.

It is well-established that the principle of the best interest of the child is a generally recognised principle in international law. Although the ECHR[47] does not contain explicitly the best interest of the child principle (nor does it make any reference to the rights of children or vulnerable groups) references are made to the equality between spouses and their right to see the child (Art. 5),[48] to the right of respect for private life and family life (Art. 8)[49] and to the right of education (Art. 2)[50] thus their treatment is considered under these provisions.

The principles of best interest of a child and family reunification principle go hand in hand. The development of the best interest of a child principle can be followed through the case law, also creating basic outlines for cases concerning unaccompanied and accompanied children.[51] In *Mubilanzis and Kaniki Mitunga v. Belgium* in 2006, where the case involved the subjects of degrading, inhuman treatment, minors and respect for family life, the Court noted that since the child was unaccompanied, the State was under an obligation to facilitate the family's reunification.[52]

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[47] http://echr.coe.int/Pages/home.aspx?p=basictextsandc=#n1359128122487_pointer.

[48] Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

[49] 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[50] No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

[51] See more FRIEDERY, *UM's in the Jurisdiction of the ECtHR*, in ROSSKOPF: *Unaccompanied Minors in International, European and National Law*.

[52] The Court laid down the basis for principles regarding unaccompanied minors in ECtHR, *Mubilanzis and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgement of 12 October 2006. The case involved the subjects of degrading, inhuman treatment, minors and respect for family life. The short summary of the case is following. The two applicants, Ms Mayeka and her daughter were Congolese nationals. The mother arrived in Canada in 2000, where she was granted refugee status in the next year and obtained indefinite leave to remain in 2003. After being granted asylum, she asked her Dutch national brother living in the Netherlands, to collect her five-year-old daughter from the Democratic Republic of the Congo and to look after her until she was able to join her. On 18 August 2002 shortly after arriving at Brussels airport, her daughter was detained because she did not have the necessary documents to enter Belgium. The uncle who had accompanied her to Belgium returned to the Netherlands. On the same day a lawyer was appointed by the Belgian authorities to assist the child. The application for asylum that had been lodged on behalf of Tabitha was declared inadmissible by the Belgian Aliens Office which decision was upheld by the Commissioner-General for Refugees and Stateless Persons. Tabitha's lawyer asked the Aliens Office to place Tabitha in the care of foster parents, but did not receive a reply. The *chambre de conseil* of the Brussels Court of First Instance held that Tabitha's detention was incompatible with the New York Convention on the Rights of the Child ordering her immediate release, the Office of the High Commissioner for Refugees sought permission from the Aliens Office for Tabitha to remain in the country while her application for a Canadian visa was being processed and explained that her mother had obtained refugee status in Canada. However, the following day the child was removed to the Democratic Republic of Congo. She was accompanied by a social worker who placed her in the care of the police at the airport, and on board the aircraft she was looked after by an air hostess who had been specifically assigned to by the chief executive of the airline. She travelled with three Congolese adults who were also being deported. No members of her family were waiting for her when she arrived in the Democratic Republic of Congo. On the same day of her deportation her mother phoned to speak to her daughter, but was informed that she had been deported. At the end of October 2002 Tabitha joined her mother. See

The cases *Neulinger and Shuruk v. Switzerland* and *Nunez v. Norway* concerned children who were accompanied. In *Neulinger and Shuruk v. Switzerland*[53] the child's (future) well-being and development was taken into consideration when deciding on what was in the child's best interests and stated that the term best interests broadly describes the well-being, which is determined by a variety of individual circumstances, such as among others the absence of parents.[54] *Nunez v. Norway* concerned both family life and immigration. Here the Court applied explicitly the Convention on the Rights of the Child and stated that the particular circumstances of the involved persons and the general interest must be taken into consideration.[55] It also pointed out that the authorities shall strike a fair balance between public interest in ensuring immigration control and the need to remain in a position that is able to maintain contact with the children in their best interest.[56] Both cases touched upon the respect for family life and the best interest principle where the Court emphasised again that the best interest principle must be the primary consideration. In *Jeunesse v. the Netherlands* the Court for the first time held that Art. 8 of the Convention had been violated in a case concerning family reunification of a spouse.[57] In the above-mentioned cases, the Court referred specifically to the CRC, making clearer the weight that domestic authorities should give the best interests of the children in decisions and refining what the obligation entails. The cases *Mugenzi v. France* and *Tanda-Muzinga v. France* are also a good examples of the Court's opinion that the national authorities must give precedence to the best interests of the child in proportionality of the interference with family life. Also, the applicant were refugees, their application should have been dealt with speedily, attentively and with especial care, considering that the acquisition of an international protection status is proof that the person concerned is in a vulnerable

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http://www.asylumlawdatabase.eu/en/case-law/ecthr-mubilanzila-mayeka-and-kaniki-mitunga-v-belgium-application-no-1317803.

[53] The summary of the case *Neulinger and Shuruk v. Switzerland* is following. The first applicant, a Swiss national, settled in Israel, where she got married and the couple had a son. When she feared that the child (the second applicant) would be taken by his father to an ultra-orthodox community abroad, known for its zealous proselytising, the Family Court imposed a ban on the child's removal from Israel until he attained his majority. The first applicant was awarded temporary custody, and parental authority was to be exercised by both parents jointly. The father's access rights were subsequently restricted on account of his threatening behaviour. The parents divorced and the first applicant secretly left Israel for Switzerland with her son. At last instance, the Swiss Federal Court ordered the first applicant to return the child to Israel. See http://www.incadat.com/index.cfm?act=search.detailandcid=1001andlng=1andsl=1.

[54] ECtHR, *Neulinger and Shuruk v. Switzerland* (Application No. 41615.07), paras. 51- 52.

[55] The short summary of the case is following. The applicant, a Dominican Republic national, was deported from Norway in 1996 with a two-year prohibition on re-entry following a criminal conviction. Four months later she re-entered the country under a false identity and married a Norwegian national. She continued to reside and work there unlawfully, using permits obtained by deception. She subsequently divorced and cohabited with a settled non-national, with whom she had two daughters, who were born in 2002 and 2003. In April 2005 the immigration authorities, who had been aware since 2001 that the applicant's stay in the country was unlawful, decided she should be expelled and prohibited from re-entering for two years. Her appeals to the domestic courts failed. In the interim and following her separation from the children's father in October 2005 the applicant assumed the daily care of the children until May 2007, when the father was given custody after the court considering the case found that there was little prospect of the applicant obtaining a reversal of the expulsion order. The applicant was granted contact.

[56] ECtHR, *Nunez v. Norway*, Application No. 55597/09, Judgement of 28 September 2011, para. 84.

[57] ECtHR, *Jeunesse v. the Netherlands*, Application No. 12738/10, Judgement of 3 October 2014.

position. The Court noted that the need for a special procedure for family reunification of refugees was recognised in international and European law, and that the French procedure had failed to guarantee the flexibility, speed and efficiency to respect the right to family life.[58]

However, contrary to the Court's stance in the above-mentioned case, in case *I.A.A. and Others v. the United Kingdom* the Court held that the mother could relocate to Ethiopia, as there were no insurmountable obstacles or major impediments to her doing so and that although she was married to a refugee, and "neither she nor any of her children (including the applicants) [had] been granted refugee status and the applicants [had] not sought to argue that they would be at risk of ill-treatment were they to return to Somalia".[59]

2.4. *The Migration Aspect*

The European Court's jurisprudence turned out to be very limited in its protection of aliens, and developed its case law on family reunification step-by-step with contradicting cases as well and has sought to reconcile States' migration control prerogatives with the right to respect for family life.[60] Although we cannot find any provision specifically on immigration in the ECHR, the case law of ECtHR underlines that a right to family reunification flows from the right to respect of family life in Art. 8 ECHR.[61] The Court established several principles when unfolding a family reunification case with immigration aspects: fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation. Where immigration is concerned, Art. 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Particular circumstances of the persons involved and the general interest must be taken foremost.

Through its practice the Court has firmly established the requirements: effective and strong links between the family members concerned and the host country, actual

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[58] Both applicants were recognised refugees in France, who submitted family reunion applications in 2003 and 2007 respectively. In both cases, the children were in third countries. They both confronted insurmountable difficulties in the procedure. In the *Mugenzi* case, a cursory dental examination was used to cast doubt on the child's age as disclosed on his birth certificate. As a result, reunion was refused. All domestic appeals against this finding were refused and the children became adults with the passage of time. In the *Tanda-Muzinga* case, the authorities also questioned the authenticity of the identity documents. After several years of appeals and challenges, they were finally granted reunification.

[59] The case concerned the admission of five children of a Somali woman resident in the UK, the children were living in Ethiopia, having been previously in the care of an aunt. The mother had moved to the UK in 2003 to join her second husband, a refugee.

[60] Council of Europe Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe,, Council of Europe, June 2017 https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0

[61] ECtHR, *Gül v. Switzerland*, Application No. 23218/94, Judgement of 19 February 1996; ECtHR, *Boultif v. Switzerland*, Application No. 54273/00, Judgement of 20 December 2001; ECtHR, *Sen v. Netherlands*, Application No. 31465/96, (21.12.2001), paras. 40-41; ECtHR, *Jakupovic v. Austria*, Application No. 36757/97, Judgement of 6 February 2003 about the clear distinction between admission and expulsion.

existence of "family life", [im]possibility to reunite the family elsewhere. With immigration, the principal factors which should be taken into consideration where detailed in the case *Jeunesse* [62]:

- the extent to which family life would effectively be ruptured,
- the extent of the ties in the Contracting State (the Court has been reluctant to find a violation where there are no insurmountable obstacles to enjoying family life elsewhere)[63],
- whether there are factors of immigration control (for example, a history of breaches of immigration law),
- or considerations of public order weighing in favour of exclusion,
- the best interest of the child is of "paramount" importance and must be afforded "significant weight",
- whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious.[64]

There is a clearly noticeable trend towards a more liberal approach, and the latest judgments of the Grand Chamber show, family life can overcome the principle of State sovereignty if there are major obstacles hindering family life in the country of origin. As refugees and beneficiaries of subsidiary protection can hardly be expected to return, the Contracting State will frequently be obliged to allow children and spouses to join them on its territory.[65]

When migrants must demonstrate that family life cannot be enjoyed "elsewhere" in order to show that the refusal of family reunification will violate Art. 8 of the Convention, there is a difference between refugees and non-refugees. While earlier judgments set an extremely high standard for family reunification, requiring applicants to demonstrate that reunification was the only way to (re-)establish family life, the standard now is that applicants must show that reunion is the "most adequate" way to family life.[66]

As said before all individuals present in its territory, nationals or aliens can ask for respect for their family life. In the field of immigration, a State has the right to control the entry of non-nationals into its territory, allowed to put conditions on the entry and residence of new people to its territory in accordance with its obligations under international law (sees for example the abovementioned *Gül v. Switzerland*). In this

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[62] ECtHR, *Jeunesse v. the Netherlands*, Application No. 12738/10, Judgement of 3 October 2014, paras. 107-109 and 120.

[63] ECtHR, *Arvelo Aponte v. the Netherlands*, para. 60 and *Useinov v. the Netherlands*, para 9.

[64] See *Abdulaziz, Cabales and Balkandali v. UK*, Application No. 9214/80, 9473/81, 9474/81, Judgement of 28 May 1985, para. 68; ECtHR, *Mitchell v. the United Kingdom* (dec.), No. 40447/98, 24 November 1998; ECtHR, *Ajayi and Others v. the United Kingdom* (dec.), No. 27663/95, 22 June 1999; ECtHR, *M. V. the United Kingdom* (dec.), No. 25087/06, 24 June 2008; ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cited above, para. 39; ECtHR, *Arvelo Aponte v. the Netherlands*, cited above, paras. 57-58; ECtHR, *Butt v. Norway*, cited above, para. 78 and ECtHR, *Nunez v. Norway*, cited above, para. 70.

[65] CZECH, *A right to family reunification for persons granted international protection? The Strasbourg case-law, state sovereignty and EU harmonisation*, 17 Friday Jun 2016.
http://eumigrationlawblog.eu/a-right-to-family-reunification-for-persons-under-international-protection-the-strasbourg-case-law-state-sovereignty-and-eu-harmonisation-2/#comments.

[66]https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0.
Realising the right to family reunification of refugees, in Europe Issue paper published by the Council of Europe Commissioner for Human Rights, Council of Europe, June 2017, p. 21.

respect, the Court pointed out that there is no general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory, this will depend on the particular circumstances of the persons involved as well as the general public interest[67], with the emphasis put on the circumstances.

It is important to mention the first family reunification case which was in *Abdulaziz, Cabales and Balkandali v. UK*. The applicants were lawfully and permanently settled in the United Kingdom and in accordance with the immigration rules, Mr. Abdulaziz, Mr. Cabales and Mr. Balkandali were refused permission to remain with or join them in that country as their husbands. The applicants maintained that, on this account, they had been victims of a practice of discrimination on the grounds of sex, race and also, in the case of Mrs. Balkandali, birth, and that there had been several violations of Art. 3 and of Art. 8, taken alone or in conjunction with Art. 14 and Art. 8, and Art. 13 of the Convention.

The Court stated that there was no breach of Art. 8 taken alone but Art. 8 and 14 taken together had been violated by reason of discrimination on grounds of sex. The right of a foreigner to enter or remain in a country was not as such guaranteed by the ECHR but immigration controls had been exercised consistently with the obligations of the ECHR. The exclusion of a person from a State where members of his family were living might raise an issue under Art. 8. The Court also unanimously held that there had been a violation of Art. 13 as the UK had failed to provide an "effective remedy".

In the cases of *Abdulaziz,* the parties were effectively choosing between two states in which they would reside after marriage. But a refugee is necessarily outside of his or her country against his or her will. Thus, the rationale for finding a balance in favour of the State's control over its borders given in that case is not persuasive when applied to the refugee. A finding that Abdulaziz is inapplicable to the refugee situation is not sufficient to show a right to family reunification, though, because the standard was twice narrowed after that ruling. The subsequent narrowing of the Abdulaziz holding, however, has similarly not foreclosed the refugee's right to family reunification.[68]

It must be underlined that the ECtHR has made a clear distinction between cases concerning admission and those on expulsion. In the case of *Abdulaziz* among others, the ECtHR explains the different approach of admission and expulsion cases. Expulsion has in principle been found to be an interference with family life where a State seeks to expel a person who has established family life in that State. Such as in *Boultif v. Switzerland* where the ECtHR held that a Member State had a negative obligation not to expel non-nationals,[69] and a positive obligation, which seen as in *Gül v. Switzerland* and *Ahmut v. Netherlands*, is stricter. Couples arguing that a Member State has an obligation of admission have been much less successful than in cases where a member of a family stands the risk of expulsion.[70] The ECtHR follows the principle of international law that a sovereign State has a right to control the entry of non-nationals into its territory and states there is no general obligation to respect the married couple's choice of residence for the family and to accept the non-national spouse to settle in that country.

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[67] See ECtHR, *Gül v. Switzerland*, Application No. 23218/94, Judgement of 19 February 1996; ECtHR, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09, Judgement of 6 February 2013 and ECtHR, *Tuquabo-tekle v. the Netherlands*, Application No. 60665/00, Judgement of 1 March 2006.

[68] ROHAN, *Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence*, in *Chicago Jour. Int. Law* 347, 2014-2015, p. 370.

[69] ECtHR, *Boultif v. Switzerland*, Application No. 54273/00, Judgement of 20 December 2001.

[70] ECtHR, *Gül v. Switzerland*, Application No. 23218/94, Judgement of 19 February 1996, ECtHR, *Ahmut v. Netherlands*, Application No. 21702/93, (28.11.1996).

Member States have a wide margin of appreciation; a State's obligations to admit family members will vary according to the particular circumstances as seen in *Abdulaziz*. That is to say, the Court is on the opinion that when it comes to admission the case by case situation appears, and the Court requires the contracting States that they apply a balancing test in cases where expulsion threatens the continuation of family life.[71]

2.5. *Two Approaches– two Answers*

The distinctive approach to family reunification for refugees clearly emerges when contrasting two important cases, *Tuquabo-Tekle v. the Netherlands* and the earlier case of *Gül v. Switzerland*. In *Tuquabo-Tekle v. the Netherlands*, a mother left her daughter behind when she fled Eritrea to seek asylum, following the death of her husband. Her protection needs were recognised not as a 1951 Convention refugee, but rather with another form of (less secure) humanitarian protection. The Court remarked that it was questionable whether the mother left her daughter behind of "her own free will". Accordingly, it was held that the Netherlands was obliged under Art. 8 of the Convention to admit her daughter to the territory, so that they could enjoy family life together there. The other approach can be seen in *Gül v. Switzerland* where the Court found no violation in Switzerland's refusal to grant admission to a son to re-join his father in Switzerland. In that case, the father had sought asylum in Switzerland, but was merely granted a residence permit on humanitarian grounds. Considerable time had passed since then, and the father recently had made several visits to his son in Turkey. The Court held that there were no longer "strong humanitarian grounds" for the father to remain in Switzerland, so re-establishing family life in Turkey would be practicable. The Court – in a case which concerned the refusal of Swiss authorities to allow a 12-year-old Turkish boy to join his parents who were living in Switzerland – found no violation of Art. 8 because in view of the length of time Mr and Mrs Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. That possibility is all the more real because their son has always lived there and has therefore grown up in the cultural and linguistic environment of his country.[72]
But similar to *Gül*, the Court served another controversial case regarding immigration and family reunification in *Ahmut and Ahmut vs. the Netherlands*. The Court found that the decisions of the authorities to refuse to admit a 9-year-old child who lost his mother in Morocco - to live with his father - a well-established immigrant who at the time of application had acquired Netherlands' nationality - did not constitute a violation of Art. 8 of the Convention. The Court states that the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular

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[71] See more PEERS et al., *The Legal Status of Persons Admitted for Family Reunion*. *Comparative Studies of Law and Practice in Some European States.* Centre for Migration Law, University of Nijmegen, Council of Europe, The Netherlands, January 2000, and KEES, GUILD, DOGAN, *Security of Residence of Long-term Migrants.* A comparative study of law and practice in European countries, Council of Europe, Strasbourg, 1998.
[72] See ECtHR, *Gül v. Switzerland*, 53/1995/559/645, Judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 159 *Gül v. Switzerland*, 53/1995/559/645, para. 42.

circumstances of the persons involved and the general interest and where immigration is concerned, Art. 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory" and that "it may well be that Salah Ahmut would prefer to maintain and intensify his family links with Souffiane in the Netherlands. The Court emphasised that Art. 8 does not guarantee a right to choose the most suitable place to develop family life.[73]

3. *Conclusions*

Family reunification is one of the main forms of migration in nowadays Europe.
Because there is no definite mention of the right for family reunification in the ECHR, the Court has the task to give guidelines to the States. There are several developments e.g. *de facto* form should be taken into account when examining family relationship, the developments regarding its approach to same-sex relationship, the clear distinction between cases concerning admission and expulsion, and the primary place of the best interest of the child principle.
But in the light of ever growing trends, observing a significant increase in the flow of migrants to the European continent, although the ECtHR has milestone judgements, and the Council of Europe bodies give out regularly recommendations, opinions etc. to give guidelines to the States, the ever returning similar cases show the very different approach of the States and unwillingness to follow good faith.

[73] ECtHR, *Ahmut and Ahmut v. the Netherlands*, 21702/93, Judgement of 17 May 1995, paras. 67 and 71.