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FAMILY UNITY IN MIGRATION LAW: THE EVOLUTION OF A MORE UNIFIED APPROACH IN
EUROPE.

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*The bond that links your true family is not one of blood, but of respect and joy in each other's life.*¹

1. Introduction

Migration is generally triggered by armed conflicts and human rights violations, climate change, economic pressure and global opportunities, and the existence of kinship created by earlier migration. Many states have enacted restrictive laws on immigration and strengthened the enforcement of these laws, particularly to minimise their responsibilities under international law towards migrants and their families.

Principles of international law regarding the family emerged relatively recently. In the nineteenth and early twentieth centuries, issues concerning families and family law were dealt with by international law 'only insofar as it established the choice-of-law principles for cases in national courts involving immigrant families or families of mixed nationality.'² Back then, disputes relating to the personal status of individuals were

¹ Richard Back, *Illusions: The adventures of a reluctant Messiah*, New York: Delta Trade Paperbacks, 1998, at p.65.

² Sonja Starr & Lea Brilmayer, 'Family Separation as a Violation of International Law', *Berkeley Journal of International Law* 21 (2003), pp.213-287, at p.216.

governed by the law of the individual's domicile, under 'the domicile-based principle'.³ The rise in human rights treaties in the second half of the twentieth century led to the recognition of substantive principles relating to states' treatment of families and the protection of children.⁴ It is now generally recognised that the family 'is entitled to respect, protection, assistance, and support'.⁵

This chapter examines the centrality of the family, both nuclear and extended, in the international legal framework in a migration context. It focuses particularly on family unity and family reunification of persons in need of protection, that is, on already established families of refugees and asylum seekers and the resulting legal issues arising from the refusal to enter or the proposed deportation of a family member. This chapter does not therefore discuss families in formation or immigration for the purpose of marriage.⁶

It is divided into five sections. Section two examines the international legal framework that establishes the protection of the family as a human right. It argues that a subjective right to family clearly exists under international human rights law but that the status of a 'right' to family unity/reunification is less clear in international law for two main reasons: first, the lack of a universal definition of 'family' underlying the concept of family reunification, and two, the protection of family reunification requires positive steps on the part of states. Sections three and four explore the contributions of the European Court of Human Rights and the European Union, respectively, to the enjoyment of a right to family reunification, and discuss the relationship between the two courts in this context. In a concluding section five, this chapter draws on selective

³ Ibid, p.216.

⁴ Ibid, pp.216-218.

⁵ Kate Jastram, 'Family Unity: The New Geography of Family Life', Migration Policy Institute, May 1, 2003.

⁶ On these issues, see for instance, Helena Wray, *Regulating Marriage Migration into the UK*, Ashgate, 2011, and Nora V. Demleitner, 'How Much Do Western Democracies Value Family and Marriage: Immigration Law's Conflicted Answers', 32 *Hofstra L. Rev.* (2003-2004), pp.273-311. See also, in the UK, Damian Green Speech on Family Migration, 15 September 2011, available at <http://www.homeoffice.gov.uk/media-centre/speeches/family-migration?version=1>

comparisons with other regional legal systems and identifies areas of controversy that require further development in law and practice.

2. The international legal framework and protection of the family as a human right

2.1. International Human Rights Law

Respect for the *right* to family or family life⁷ against arbitrary or unlawful interference is expressly provided in several instruments of international human rights law.⁸ The family is generally defined as ‘the natural and fundamental group unit of society and is entitled to protection by society and the State’.⁹ In the context of the rights of the child, the UN Commission on Human rights has also consistently held that the ‘family is the basic unit of society and as such should be strengthened’.¹⁰

⁷ The Convention on the Rights of the Child also refers to the ‘family environment’ (Preamble, Recitals 6 and 7), whilst the UN Commission on Human Rights stresses ‘family rights and customs’ in its Resolutions condemning Israeli policies and practices in the occupied Arab territories, including Palestine. See, ICRC, Practice Relating to Rule 105, 2010, Section A. sub-section VII.

⁸ ECHR, article 8; 1969 American Convention on HR, article 11; CRC, article 16; African Charter on Human and Peoples’ Rights, article 18; ICCPR, article 17(1); ICESCR, article 10(1); UDHR, article 12; the 1990 Cairo Declaration on Human Rights in Islam, article 5(b) (society and the state ‘shall ensure family protection and welfare’); EU Charter of Fundamental Rights, article 7; the 1998 Guiding Principles on Internal Displacement, Principle 17.

⁹ Article 16(3) UDHR; Article 23(1) ICCPR; ICESCR, article 10(1); CRC, Preamble Recital 6; AmCHR, article 17(1); African Charter on Human and Peoples’ Rights, article 18; Additional Protocol to the AmCHR of San Salvador (1988), article 15(1).

¹⁰ ICRC, Practice Relating to Rule 105, 2010, referring to the preamble in Resolutions 2003/86, 2004/48, 2005/44.

These instruments protect both already existing families as well as future families through the right to marriage and to form a family.¹¹ Yet, none of these provisions constitute a right to family reunification as such.¹² Rather, in order to give effect to ‘the fundamental principle of preserving family unity’,¹³ international human rights law seeks to *facilitate* family reunification and family reunion, including the tracing of dispersed family members.¹⁴ The same applies under international humanitarian law and international refugee law.

2.2. International Humanitarian Law

Respect for family life (namely, ‘family honour’ and ‘family rights’) is generally protected under customary international humanitarian law and treaties of international humanitarian law.¹⁵ In addition, international humanitarian law requires states to *facilitate* the reunion of families dispersed as a result of armed conflicts.¹⁶

¹¹ Alice Edwards, ‘Human Rights, Refugees, and the Right ‘to Enjoy’ Asylum’, *International Journal of Refugee Law* 17 (2) 2005, pp.293-330, at p.312. See in particular, Article 16(1) UDHR, Article 23(3) ICCPR, and Article 19(1) ICESCR).

¹² Council of Europe’s Parliamentary Assembly’s Recommendation 1686 (2004) on human mobility and the right to family reunion, however, acknowledges the *right* to family reunion for lawfully resident migrants and refugees as a tool for strengthening the policy of integration into the host society and is in the interests of social cohesion (para.6). It recommends therefore the right to family reunion to be applicable as soon as possible to all lawfully residing immigrants and refugees.

¹³ Quoted from the Quadripartite Agreement on Voluntary Return of Refugees and IDPs in the Republic of Georgia, 1994. Kate Jastram and Kathleen Newland posit that ‘The right to family unity is inherent in the right to family life’, in Feller et al. *Refugee Protection in International Law*, CUP, 2003, at p.556.

¹⁴ CRC, article 10 and article 22(1) and 22(2); 2003 UN Convention on the Protection of Rights of all Migrant Workers and Members of their Family, article 44; European Social Charter (revised, 1996), article 19(6)); 1998 Guiding principles on Internal Displacement, principle 17; numerous UNGA Resolutions adopted annually since 1996, and UNGA Resolutions on the Rights of the Child adopted annually since 2004; UN Commission on Human Rights Resolutions calling, in particular, for states to protect refugees and internally displaced children and to give priority to family tracing and reunification.

¹⁵ The 1863 Lieber Code, or Instructions for the Government of Armies of the US in the Field, prepared by Francis Lieber, promulgated as General Order No.100 by President Abraham Lincoln, Washington DC,

2.3. *International Refugee Law*

In a migration context, particularly with regard to refugees and asylum seekers, the *right* to family or family life often clashes with states' power to expel or deny entry to members of their family, since refugees are not able to return to their country of origin in order to enjoy family life there. States' power to expel a member of an existing family to his/her country of origin raise issues of 'family unity'; states' power to deny entry to a family member in order to reunite with another family member(s) raises issues of family reunification or reunion. As indicated above, 'family unity' and 'family reunification' of refugees and asylum seekers, whether or not they are children, are protected under both international human rights law and international humanitarian law. However, Stevens insightfully observes that 'Despite the importance ascribed to the family ... once the family assumes the added descriptor of 'migrant' or 'asylum-seeking', there is an evident shift in approach by most states'.¹⁷

The right to family life is absent from the text of the 1951 Refugee Convention. Notwithstanding, the Final Act of the UN Conference of Plenipotentiaries on the States of Refugees and Stateless Persons unanimously endorsed the principle of family unity as 'an essential right of the refugee' and recommended governments

to take the necessary measures for the protection of the refugee's family especially with a view to: (1) Ensuring that the unity of the refugee's family is

article 37 provides: 'The United States acknowledge and protect, in hostile countries occupied by them, ... the sacredness of domestic relations'. Both Hague Regulations concerning the Laws and Customs of War on Land (1899) and (1907) provide in their article 46: 'Family honour and rights ... must be respected'. The 1949 Refugee Convention (IV) relative to the Protection of Civilian Persons in Time of War, article 27(1) provides: 'Protected persons are entitled, in all circumstances, to respect for their ... family rights'. See, for full details, ICRC, 'Practice Relating to Rule 105', 2010, available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule105

¹⁶ 1949 Geneva Convention IV, article 26; 1977 Additional Protocol I, article 74; 1977 Additional Protocol II, article 4(3)(b)

¹⁷ Dallal Stevens, 'Asylum-Seeking Families in Current Legal Discourse: A UK Perspective', University of Warwick, Legal Studies Research Paper 2009/10, at p.7. Available at <http://ssrn.com/abstract=1523092>

maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country, (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.¹⁸

In sum, the 1951 Refugee Convention does not recognize a right to family reunion for refugees, but the Final Act mentions positive steps ('necessary measures') that states should take to ensure the preservation of family unity. Jastram and Newland point out that 'its [Recommendation B] adoption as one of only five recommendations indicates its importance'.¹⁹

Over the years, UNHCR has extensively promoted family reunion or reunification through various soft-law instruments that have re-affirmed family unity as a fundamental principle. EXCOM Conclusions no.9 (XXVIII) on Family Reunion (1977) was the first to endorse explicitly the 'fundamental importance of the principle of family reunion' for refugees. EXCOM Conclusions no.24 (XXXII) on Family Reunification (1981) reiterates the principle of the unity of the family and provides that 'every effort should be made to ensure the reunification of separated refugee families'.²⁰ In particular, countries of origin 'should facilitate family reunification by granting exit permission to family members of refugees to enable them to join the refugee abroad', and countries of asylum should 'apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family'.²¹ Documentary proofs of marriage or of filiation of the children should not be an absolute requirement.²² Family members should be granted the same rights as the head of the family who has been recognised as a refugee.²³ And, in cases involving refugee children,

¹⁸ Refugee Convention, Final Act, section IV Recommendation B.

¹⁹ Kate Jastram and Kathleen Newland, 'Family Unity and Refugee Protection', in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law*, CUP, 2003, pp.554-603 at p.570.

²⁰ Para.1.

²¹ Paras. 4 and 5. See also EXCOM Conclusion no.85 (XLIX) 1998.

²² Para.6. See also EXCOM no.85 (XLIX).

²³ Para.7. See also EXCOM no.85 (XLIX).

a paramount principle, alongside family unity, is the principle of the best interests of the child given terms in the 1989 Convention on the Rights of the Child.²⁴ EXCOM Conclusion no.88 (L) on the Protection of the Refugee's Family (1999) offers a comprehensive view: 'the family is the natural and fundamental group unit of society and it is entitled to protection by the society and the State'.²⁵ Refugees have a right to family unity strongly anchored in international human rights law and international humanitarian law. The protection of this right implies the adoption of measures to reunify family members separated as a result of refugee flight, the application of liberal criteria in identifying family members who can be admitted for the purpose of reunification, and their recognition as refugees. The particular needs of unaccompanied children pending their reunification with their families should also be protected.²⁶

Finally, the UNHCR has also begun to acknowledge the importance of family unity and family reunification in promoting the smooth and rapid local integration of refugee families.²⁷ In determining whether local integration (namely, socio-economic integration) may be an appropriate solution, it recommends that the links between a refugee and his/her country of asylum be considered, including family, social, cultural and economic links.²⁸

It follows that a subjective *right* to family life (or family) clearly exists under international human rights law. Even though a strong argument can be made in favour of a right to family reunification, based on the recognition of family life as a human

²⁴ EXCOM Conclusion no.47 (XXXVIII) 1987. See also EXCOM Conclusion no.84 (XLVIII) on Refugee Children and Adolescents (1997), and EXCOM Conclusion no.103 (LVI) 2005.

²⁵ EXCOM Conclusion no.88 (L) on the Protection of the Refugee's Family (1999). Note also: Principle 17(2) of the 1998 Guiding Principles on Internal Displacement gives effect to the right to family life for internally displaced persons by providing that 'family members who wish to remain together shall be allowed to do so'.

²⁶ See also EXCOM Conclusions No.105 (LVII) on Women and Girls at Risk (2006) and No.107 (LVIII) on Children at Risk (2007).

²⁷ EXCOM Conclusion No.104 (LVI) on Local Integration (2005).

²⁸ Ibid.

right, the status of such a 'right' is less clear in international law. This lack of clarity is the result of a fragmented definition of 'family' underlying the concept of family reunification that 'varies according to the value and importance attached to the principle of dependence',²⁹ on the one hand, and the principle of state's sovereignty on the other hand. The various international legal instruments discussed above are evidence of myriad terminologies used in this context, namely, family, family life, family environment, family unity, family reunification etc., often without any definition. This is unfortunate for it creates uncertainty in this area, and allows states as key actors of protection to fail in their duties to take steps to reunite families. As shall be discussed below, in Europe at least, EU law now creates a positive obligation on the member states to authorise family reunification of certain members of the sponsor's family, based on care in intimate relations and the promotion of migrants' integration into the member states.³⁰ A similar obligation is imposed by the European Court of Human Rights on the 47 contracting parties to the European Convention on Human Rights (ECHR).

3. Unpacking terminologies and states' duty to *respect* family life under the ECHR

3.1. Unpacking terminologies: the 'family', the society and cultural values or traditions

Looking at 'family' first, some scholars consider that family or family life is synonymous with family unity; both are legal rights and family unity is simply 'a subset or characteristic of having a family life'.³¹ Notwithstanding, 'many commentators are careful to stress that 'family unity' is not to be confused with 'family life' nor with 'family

²⁹ Council of Europe's Parliamentary Assembly's Recommendation 1686 (2004), para.7.

³⁰ Member states should when regulating family migration, take into account their own resources and accommodation and the migrants' knowledge for the language of that country. See Commission Staff Working Paper, 24 May 2011 and Annual Report on Immigration and Asylum 2010.

³¹ Edwards, at p.311.

reunification’.³² According to Jastram, ‘family unity’ in its broad meaning ‘covers issues related to admission, stay, and expulsion’, hence, only this broad understanding of ‘family unity’ would encapsulate ‘family unity’ in a strict sense (namely, an ‘existing intact family’ which state’s action seeks to separate through the expulsion of one of its members) and ‘family reunification’ or reunion (namely, family members who are already separated by forced or voluntary migration and which state’s action seeks to prevent from regrouping in a country other than their country of origin).³³

More crucially, the question arises as to what kind of relationships constitutes ‘family’ defined as the ‘natural and fundamental group unit of society’ in international human rights law? The UN Human Rights Committee (HRC) considers that the objectives of the International Covenant on Civil and Political Rights (ICCPR) require that ‘the term “Family” [which appears in Article 17 ICCPR] ... be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned’.³⁴ Thus, according to the HRC, ‘*cultural traditions* [or cultural values] should be taken into account when defining the term ‘family’ in a specific situation’ (emphasis added).³⁵ In *Hopu and Bessert v France*, the claimants considered the relationship to their ancestors to be an essential element of their identity (namely history, culture and life) and to play an important role in their family life. The HRC therefore held the links between the claimants and their ancestors to constitute family life despite the lack of evidence of a direct kinship link, since the ‘burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti’.³⁶ However, four members of the Committee dissented because even if the term ‘family’ is to be interpreted differently in different societies, it does nonetheless have ‘a discrete meaning’. In particular, ‘[i]t does not include all members of one’s ethnic or cultural group. Nor does it necessarily include all one’s

³² Stevens, ‘Asylum-Seeking Families’, at p.3. Referring to Jastram and Newland 2003.

³³ Jastram, ‘Family Unity: The New Geography of Family Life’, p.1.

³⁴ General Comments No.16 (1988), para.5.

³⁵ HRC, *Hopu and Bessert v France*, Communication No.549/1993, views of 29 July 1997, para.10.3.

³⁶ *Ibid.*

ancestors, going back to time immemorial'.³⁷ For these four members, the 'cultural values' referred to by the Committee are protected under Article 27 ICCPR but not Article 17 ICCPR which is concerned with family and privacy. This linkage between society and cultural values or tradition is an important element in the views of the HRC.

UNHCR points to two different kinds of society: the first, to be found in many countries of origin, applies a 'customarily broad definition of the family'; the second, to be found mainly in countries of asylum, defines a 'narrower "nuclear family"'.³⁸ The latter would include the relationship between a minor child and parent/s as well as the relationship between parents, or, if no children are involved, the relationship between spouses or unmarried co-habitees. The former would also include, for example, the relationship with siblings, uncles, aunts, cousins, and grandparents or dependent parents of each spouse. It is this absence of a cross-societal definition of 'family' in international law that makes the right to family life (including family unity and family reunification) illusory for migrants,³⁹ and the right to respect for family life the subject of constant judicial intervention.

In Europe, the European Court of Human Rights (also known as the Strasbourg Court) stands as a prime example in judicial intervention. Following the landmark case *Marckx v Belgium*,⁴⁰ the Strasbourg Court has developed a robust understanding of 'family' and 'family life' in the context of Article 8 ECHR. Article 8 protects 'the right to respect for his private and family life, his home and correspondence'. The Strasbourg

³⁷ Dissenting opinion in *Hopu and Bessert v France*.

³⁸ UNHCR Note on International Protection 2001, para.78. Note that the Convention on the Rights of the Child (1989) protects the child's 'family' (Article 16) generally understood to be the parents and their children, but also 'where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child (Article 5). If no parents or other family members can be found, the child should be provided with the same protection as any other child deprived of his/her 'family environment' (Article 22(2)).

³⁹ Dallal Stevens uses the words 'capable of assuming chimerical qualities', in 'Asylum-Seeking Families in Current Legal Discourse: A UK Perspective', University of Warwick, Legal Studies Research Paper 2009/10, at p.3. Available at <http://ssrn.com/abstract=1523092>

⁴⁰ Judgment of 13 June 1979.

Court considers the nature of the ‘ties’ between family members as crucial for the recognition of family life; it requires strong or close personal ties between individuals for family life to exist. Thus, it has recognised family life between married couple, married couple and their children (from the moment the child is born),⁴¹ unmarried couple living together with their children where the relationship is stable.⁴² Indeed, from the moment a child is born, they enter into a family relationship with their parents (irrespective of marital status).⁴³ Cohabitation is not necessary for family life to be recognised in such a relationship; other factors may also serve to demonstrate that a relationship has ‘sufficient constancy to create *de facto* family ties’, such as the nature and duration of the parents’ relationship as evidenced in particular by the following elements: whether they had planned to have a child, whether the father subsequently recognised the child as his, the contributions made to the child’s care and upbringing, and the quality and regularity of contact.⁴⁴ Furthermore, the ties between a child and his/her parent may only be broken in ‘exceptional circumstances’.⁴⁵ Family life without the existence of blood ties is also recognised.⁴⁶ The requirement of ‘close personal ties’ also means that the Strasbourg Court recognises the existence of family life between members of the extended family, such as between children and their grandparents, since according to the Court, ‘such relatives may play a considerable part in family life’,⁴⁷ siblings both as children⁴⁸ and adults,⁴⁹ or between nephew/niece and his/her uncle/aunt.⁵⁰

⁴¹ *Berrehab v The Netherlands*, judgment of 21 June 1988; *Ciliz v The Netherlands*, judgment of 11 July 2000.

⁴² *Johnston and others v Ireland*, judgment of 18 December 1986.

⁴³ *Marckx v Belgium*, judgment of 13 June 1979; *A.W. Khan v United Kingdom*, application no.47486/06, judgment of 12 January 2010, para.34.

⁴⁴ *Berrehab v The Netherlands*, judgment of 21 June 1988; *Boughanemi v France*, judgment of 27 March 1996; *Chorfi v France*, judgment of 7 August 1996; *Ciliz v The Netherlands*, judgment of 11 July 2000; *A.W. Khan v United Kingdom*, judgment of 12 January 2010, para.34.

⁴⁵ *Ahmut v Netherlands*, 28 November 1996.

⁴⁶ *X, Y and Z v United Kingdom*, 1997 (female-to-male transsexual and his child born by artificial insemination); also in cases of adoption or fostering (these relationship may also constitute ‘private life’).

⁴⁷ *Marckx v Belgium*, judgment of 13 June 1979, para.45.

Other relationships may also be protected by the European Court of Human Rights under 'private life', such as the relationships between homosexuals and their partners with or without children, between adult siblings, and between parents and adult children. Of significance, the Strasbourg Court has recently held that 'there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence',⁵¹ rather such relationship may be considered under private life. The Court explained

[it] does not accept that the fact that the applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of dependence to result in the existence of family life.⁵²

The applicant in this case, Mr A.W. Khan, was not the sole carer for his mother and brothers, nor did the mother and brothers suffer from conditions that were 'so severe as to entirely incapacitate them',⁵³ hence such relationship did not amount to family life but constituted private life. This judgment confirms previous case law concerning long-term immigrants, most importantly *Üner v The Netherlands*, in which the Strasbourg Court held:

Regardless of the existence or otherwise of a "family life" ... the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the

⁴⁸ *Olsson v Sweden*, judgment of 24 March 1988.

⁴⁹ *Boughanemi v France*, judgment of 27 March 1996, a migration case, but see comments below.

⁵⁰ Note that the CRC too protects the extended family ('where applicable') in an effort to accommodate cultural differences. See, Sonja Starr & Lea Brilmayer, 'Family Separation as a Violation of International Law', *Berkeley Journal of International Law* 21 (2003), pp.213-287, at p.221.

⁵¹ *A.W. Khan v United Kingdom*, judgment of 12 January 2010, at para.32. See also, *Slivenko v Latvia*, GC, application no.48321/99, para.97.

⁵² *A.W. Khan v United Kingdom*, 2010, para.32.

⁵³ *Ibid*, para.32.

particular case whether it is appropriate for the Court to focus on the “family life” rather than the “private life” aspect.⁵⁴

The case law of the Strasbourg Court relating to ‘family life’ is therefore constantly evolving. From recognising ‘family life’ between a 34-year old and his parents and ten brothers and sisters living legally in France, even though he no longer lived with them,⁵⁵ the European Court of Human Rights is now clearly holding that such relationships would not qualified as ‘family life’ but could be found to constitute ‘private life’.⁵⁶ This re-conceptualisation of certain relationships as private life rather than family life must be seen as positive for it reflects social realities, at least in western democracies, where families are no longer as central to people’s lives and where friends may be ‘the new family’.⁵⁷

3.2. *The ‘enjoyment’ of family life*

The Strasbourg Court does not only look at ‘family’, namely the nature of the bond in the form of the closeness of the ties between the family members,⁵⁸ it also looks at what family *life* actually is. In several judgments, the European Court of Human Rights has held: ‘The *mutual enjoyment* of each other’s company constitutes a fundamental element of family life’.⁵⁹ According to Stevens, ‘it is this factor that distinguishes family

⁵⁴ *Üner v The Netherlands*, judgment of 18 October 2006, para.59. See also *Slivenko et al. v Latvia*, GC, judgment of 9 October 2003.

⁵⁵ *Boughanemi v France*, para.35.

⁵⁶ As in *A.W. Khan v United Kingdom*.

⁵⁷ Iseult Honohan, ‘Reconsidering the Claim to Family Reunification in Migration’, *Political Studies* 57 (2009), pp.768-787, at p.775.

⁵⁸ What Stevens considers being the ‘unity’ of family, in Dallal Stevens, ‘Asylum-Seeking Families’, at p.4.

⁵⁹ *Mehemi v France (No.2)*, *Application no. 53470/99*, judgment 10 April 2003, para.45. Referring to *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, para.59; *Johansen v. Norway*, judgment of 7 August 1996, para.52; *Bronda v. Italy*, judgment of 9 June 1998, para. 51.

life from family *unity* or the more mundane family ties'.⁶⁰ In the case of *Gül v Switzerland*, Judge Martens in his dissenting opinion explained:

According to the Court's well established case-law, "the *mutual enjoyment* by parent and child of each other's company constitutes a fundamental element of family life". Consequently, decisions of State authorities hindering such *enjoyment* in principle amount to an infringement of the State's obligation to respect the family life of those concerned.⁶¹

With such statement, the Strasbourg Court comes very close to recognising 'what is sometimes called affiliation' where the 'value of family life may be seen as a matter of personal intimacy as much as physical support, of giving and receiving 'care' in the broadest sense'.⁶² In this regard, Honohan argues, 'The right to family life may be thought of as a universal right to discharge special obligations, which recognizes the value of particular relations'.⁶³

3.3. States' positive obligations to respect family life, including reuniting families, keeping them united, and granting residence permits

In the Strasbourg Court's opinion, the right to *respect* for family life in Article 8(1) ECHR means, firstly, that 'the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2', and secondly that 'there may be positive obligations inherent in an effective "respect" for family life ... This means, amongst other things ... [the state] must act in a manner calculated to allow those concerned to lead a normal family life'.⁶⁴ This positive obligation, which is inherent in Article 8, has been further developed in a number of cases to the extent that

⁶⁰ Dallal Stevens, 'Asylum-Seeking Families', at p.4.

⁶¹ *Gül v Switzerland*, judgment of 19 February 1996, Dissenting Opinion by judge Martens and approved by Judge Rosso, para.6.

⁶² Iseult Honohan, 'Reconsidering the Claim to Family Reunification in Migration', *Political Studies* 57 (2009), pp.768-787, at p.771.

⁶³ *Ibid*, at p.772.

⁶⁴ *Marckx*, para.31.

the scope of the positive obligations entailed by Article 8 will depend on a 'fair balance' between community and individual interests, namely, a proportionality test. Family reunification remains disputed as a human right precisely because it requires states to take positive steps.

The case law of the Strasbourg Court under Article 8 provides 'the most elaborated concept of proportionality'.⁶⁵ However, it is in the application of the proportionality test that limitations on the family reunification of migrants are being imposed because the Court recognizes states a wide margin of appreciation in this area. Actually, the Strasbourg Court is more willing to protect family rights in relations to removal than in relation to refusal of entry.⁶⁶ The Court has indeed introduced a distinction between cases of removal of an alien from the territory of a contracting party, resulting in the break up of family unity, and cases of (refusal of) entry of aliens into the territory of a contracting party for the purpose of family reunification. In the case of the former (removal), the Court has been willing to tip the balance in favour of integrated aliens, including refugees and other beneficiaries of protection, provided they can show strong family (or private) ties with members in the country where the family lives⁶⁷ and they have not committed a serious criminal offence (e.g., drug trafficking, rape, murder). The legal or illegal status of the parent (e.g., s/he entered illegally or overstayed) does not seem to be important for the Court because 'by attaching such paramount importance to this latter element [residing illegally in the Netherlands at the time of the child's birth], the authorities may be considered to have indulged in excessive formalism'.⁶⁸ However, in the case of the latter (refusal of entry),

⁶⁵ Ulrike Davy, 'Article 32', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol – A Commentary*, OUP, 2011, at p.1312.

⁶⁶ H el ene Lambert, 'The European Court of Human Right and the Right of Refugees and Other Persons in Need of Protection to Family Reunion', *International Journal of Refugee Law* 11 (3) 1999, pp.427-450.

⁶⁷ *Ciliz v The Netherlands*, no offences committed, lost his right to stay in the Netherlands because of his divorce.

⁶⁸ *Rodrigues Da Silva & Hoogkamer v The Netherlands*, Appl. no.50435/99, judgment of 31 January 2006, para.44.

the Court will usually balance the individual's rights against the community's interest at the early stage of establishing whether it is reasonable to expect aliens to develop family life elsewhere. This approach has been criticized for 'its effect was to collapse the distinction between the interference with an individual's right and a State's violation of a Convention Article'.⁶⁹ As a result, only few cases of entry for the purpose of family reunification have succeeded.⁷⁰

The argument has been made that unless family unity is removed from considerations of state's immigration and border control and becomes recognized as a fundamental (in other words absolute) human right, on par with the prohibition against torture, inhuman or degrading treatment, its implementation in domestic law and practice will always remain imperfect.⁷¹ More pragmatically, the European Court of Human Rights has showed willingness to move beyond the right to 'family life', and to give content instead to the right to 'private life' of migrants (this is consistent with the Court's judgments in *Üner* and *A.W. Khan*). In *Aristimuño Mendizabal v France* 2006, it found state's refusal to grant (or excessive delay in granting) a residence permit to an immigrant (whether legal or illegal) who had been residing in the country for many years, to constitute unlawful interference with a migrant's right to private life under Article 8 ECHR, independently from issues of deportation, where such refusal or delay cannot be objectively justified. It follows, that the conditions for granting a residence permit fall within the scope of protection of Article 8 ECHR and as such they warrant

⁶⁹ John Arturo, 'Family Reunification for Migrants and Refugees: A Forgotten Human Rights?' (2003), available at www.fd.uc.pt/jgc/pdf/papers/arturojohn.pdf at p.12.

⁷⁰ E.g., *Gül v Switzerland*, 1996 (a seven-year old son living in Turkey and refused to join his parents in Switzerland) and *Ahmut v The Netherlands* (nine-year old son living in Morocco and refused to join his father in the Netherlands after his mother died) but *Sen v The Netherlands* (young daughter allowed to join her parents and two other siblings in the Netherlands). For a full discussion, see John Arturo, 'Family Reunification for Migrants and Refugees: A Forgotten Human Rights?' (2003), available at www.fd.uc.pt/jgc/pdf/papers/arturojohn.pdf

⁷¹ Andrea Bradley, 'Beyond Borders: Cosmopolitanism and Family Reunification for Refugees in Canada', *International Journal of Refugee Law* 22(3) 2010, pp.379-403.

protection as an autonomous human rights.⁷² Two weeks later, in *Rodrigues Da Silva & Hoogkamer v The Netherlands*, the Court, having acknowledged the importance of the best interests of a child as enshrined in Articles 3 and 40 of the UN Convention on the Rights of the Child (CRC), allowed a mother from Brazil to stay in the Netherlands with her daughter (a Dutch national from birth and whose father was Dutch). In effect, the Court was granting her a residence permit for the Netherlands, despite the Dutch authorities never having authorised her to remain in the country.⁷³ The Strasbourg Court has also emphasized the obligation to take the best interests of the child into account, including the obligation to facilitate her reintegration after having committed an offence, when considering expulsion measures against a juvenile offender.⁷⁴

Thus, the Strasbourg Court's approach to migrants under Article 8 ECHR is no longer limited to balancing 'the preservation of family unity and the maintenance of public order, but extends to the factual implications of a foreigner's legal status'.⁷⁵ In this new approach, the Court is much more aware of the importance of the best interests and well-being of children caught up in a situation which is their parents' making and not their own; for the Court the best interest of the child enshrined in Articles 3 and 40 CRC encompasses an obligation to facilitate the child's reintegration through the national juvenile justice system. This lack of formalism on the part of the European Court of Human Rights illustrates its long-standing position on the effective protection of human rights and its important role in promoting the ECHR as a

⁷² *Aristimuño Mendizabal v France*, Chamber judgment of 17 January 2006.

⁷³ *Rodrigues Da Silva & Hoogkamer v The Netherlands*, Chamber judgment of 31 January 2006. See also *Shevanova v Latvia*, Chamber judgment of 15 June 2006, subsequently struck out of the list by the Grand Chamber on 7 December 2007.

⁷⁴ *Maslov v Austria*, Grand Chamber judgment of 23 June 2008.

⁷⁵ Daniel Thym, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', *International and Comparative Law Quarterly* 57 (2008), pp.87-112, at p.98.

'constitutional instrument of European public order'.⁷⁶ Recent case law from the Court of Justice of the EU in Luxembourg shows similar reasoning in the context of EU citizenship.

4. The European Union and its court

4.1. The legislative framework and a right to family reunification in EU law

In the early days of the then European Economic Community (EEC), an effective and enforceable right to family reunification for nationals of the member states was essential in ensuring freedom of movement of workers within the EEC; this right was granted through Regulation 1612/68.⁷⁷ Since freedom of movement for workers did not cover third-country nationals and non-EEC immigration matters lay outside the scope of the Community institutions, family reunification rights of non-EEC migrants and refugees remained at the discretion of each individual member state (subject of course to the control of the European Court of Human Rights). However, plans to create of an area of freedom, security and justice, and the recognition of the right to move freely throughout the EU for all,⁷⁸ led to significant changes. The right to family life is now set forth in Article 7 of the EU Charter of Fundamental Rights as a fundamental right protected by law.⁷⁹ This provision 'must be fully applied by all EU institutions,

⁷⁶ *Loizidou v Turkey* (preliminary objections), para.75; *Soering v UK*, para.86; and more recently *Al Skeini and Others v UK* (2011), para.141. See also Lawrence Helfer, 'Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', *European Journal of International Law* 28(1) 2008, pp.125-159.

⁷⁷ Regulation 1612/68, OJ 19.10.1968, L257. Regulation 1612/68 was amended by Directive 2004/38.

⁷⁸ Tampere European Council, October 1999.

⁷⁹ Article 7 EU Charter corresponds to Article 8(1) ECHR, and so its meaning and scope shall be the same (as a minimum) as that laid down in the ECHR (Article 52(3) EU Charter). For a full commentary on family life under Article 7, see, the EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of the European Union', June 2006, pp.83-89. Available at http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm

agencies and by the Member States and their agencies when implementing EU law'.⁸⁰ However, a recent study highlights the limited application of Charter rights to individuals due to not enough attention being paid to access of justice, the enforcement of Charter rights and possible remedies for individuals whose fundamental rights have been breached.⁸¹ The last ten years also saw the adoption of common minimum standards relating to 'family' and 'family reunification' being adopted in the context of migration. Of particular relevance is Council Directive 2003/86/EC on the right to family reunification.⁸²

This Directive establishes family reunification as an independent right for citizens and their non-citizen nuclear family members.⁸³ It emphasizes that family reunification is 'a necessary way of making family life possible'⁸⁴ and that '[m]easures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life'.⁸⁵ In other words, the right to family life becomes meaningless in the absence of a member state's recognition of the right to family reunification, especially in cases where family reunification is necessary to establish a family life. It further sees family reunification as a contributor to economic and social cohesion by facilitating the integration of third country nationals in the member state. The Directive therefore has a dual purpose: one, to regulate the exercise of the right to

⁸⁰ Study to be presented at the LIBE meeting of 3rd October 2011, for 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office', PE 453.196, study authored by Elspeth Guild, Sergio Carrera, Leonhard den Hertog and Joanna Parkin.

⁸¹ Ibid.

⁸² OJ L 251, 3.10.2003, p. 12–18. The Commission is due to circulate its Green Paper before the end 2011; Parliamentary question to the Commission, 18 March 2011, Daniël van der Stoep.

⁸³ Preamble, Recital 7. Member states of the EU must apply the Directive in a manner consistent with the protection of fundamental rights, in particular the right to respect for family life, the principle of the best interests of the child or the principle of non-discrimination on grounds of age (ECJ, Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006).

⁸⁴ Preamble, Recital 4.

⁸⁵ Preamble, Recital 2.

family reunification for non-EU nationals, and two, to develop an integration policy that will grant non-EU nationals rights and obligations similar to those of EU citizens.

The Directive nevertheless provides limits to family reunification on grounds of public policy, public security or public health, or in situations where the sponsor lacks accommodation, sickness insurance or minimum length of residency.⁸⁶ In all such cases (i.e., rejection, withdrawal or refusal of renewal), the Directive requires the member states to carry out a proportionality test similar to that applied by the European Court of Human Rights in the context of Article 8 ECHR, namely to balance 'the nature and solidity of the person's family relationships and the duration of his residence in the Member State' against 'the existence of family, cultural and social ties with his/her country of origin'.⁸⁷

The Directive applies to all Union citizens who move or reside in a member state other than that of which they are a national, and to their family members who accompany or join them.⁸⁸ However, the Directive adopts a restrictive definition of 'family members, which is limited to the nuclear family, for the purpose of authorising entry and residence into a member state of the EU. The member states *shall* authorise the entry and residence of the spouse and unmarried minor children (of the 'sponsor') who are dependent and who do not enjoy proper family support in the country of origin.⁸⁹ In addition, member states *may* request that minor children be below 15 years

⁸⁶ Articles 6-8. The question has been put forward to the CJEU (Case C-155/11) as to whether Article 7(2) Dir 2003/86 allows a member state to refuse entry and residence to a family member exclusively on the ground that s/he has not passed the civic/integration examination abroad (case pending).

⁸⁷ Article 17. A right of appeal must be provided against the decision, in the conditions laid down by each member state (Article 18).

⁸⁸ Article 3(1). In the case of *Metock* (case C-127/08), the European Court of Justice held that the rights of accompanying or joining family members apply irrespective of whether the family member is already residing lawfully in another member state with the Union citizen (or was so residing prior to moving to the host member state).

⁸⁹ Article 4(1).

of age.⁹⁰ Member states *may* also choose to authorise the entry and residence of first-degree relatives (of the 'sponsor' or spouse) in the direct ascending line who are dependent on them and do not enjoy family support in the country of origin, as well as adult unmarried children who are 'objectively unable to provide for their own needs on account of their state of health'.⁹¹ Finally, member states *may* choose to authorise the entry and residence of unmarried partners, registered partners, and their unmarried minor children under a number of restrictive conditions.⁹²

In sum, Council Directive 2003/86/EC on the right to family reunification establishes a *right* to family reunification in EU law, albeit one that is limited to members of the nuclear family, namely, the spouse of the 'sponsor' and minor children solely dependent on the 'sponsor'. Other family members remain at the discretion of national immigration law or regulation and general norms of international law on family life.

There is also a certain amount of flexibility in the Directive particularly concerning evidence of an existing relationship for refugees where documentary evidence may be lacking. In such cases, any other evidence of that relationship may be taken into account.⁹³ Further specific provisions apply to refugees and their right to family reunification. In particular, unaccompanied minors who are refugees *shall* be authorised to be reunited with his/her parent without conditions of dependency being required.⁹⁴ In cases where there are no parents or these cannot be traced, unaccompanied refugee children *may* only be allowed to be joined by their legal guardian or other relatives of the family.⁹⁵ The scope of this Directive does not however cover beneficiaries of subsidiary protection.

⁹⁰ Article 4(6).

⁹¹ Article 4(2).

⁹² Article 4(3).

⁹³ Article 11.

⁹⁴ Article 10(3)(a).

⁹⁵ Article 10(3)(b).

Further EU requirements are provided in Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Article 12, in particular, offers protection against expulsion to long-term residents who do not constitute 'an actual and sufficiently serious threat to public policy or public security'. Economic considerations cannot be a ground for the expulsion of long-term residents. Decisions to expel must have regard to the duration of residence in the country of residence, the age of the person concerned, the consequences for the person concerned and family members, and the links with the country of residence or the absence of links with the country of origin. On 11 May 2011, the European Parliament and the Council adopted Directive 2011/51/EU which extends the scope of Council Directive 2003/109/EC to beneficiaries of international protection, namely, refugees and beneficiaries of subsidiary protection.⁹⁶

Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states is also relevant. This Directive provides that freedom of movement and residence of Union citizens and their family members (irrespective of nationality) may be restricted on grounds of public policy, public security or public health, but not for economic reasons.⁹⁷ Any such restrictions must conform to the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned which itself 'must represent a genuine, present and sufficiently serious threat

⁹⁶ OJ L132, 19 May 2011.

⁹⁷ Article 27(1). The Directive is more generous than its predecessor (Regulation 1612/68) in respect of the definition of family member (Article 3(1)(2)) in that it extends the definition of family member to include civil partners as well as unmarried heterosexual partners together with children and ascendants of such partners. However, this will only apply where the couple are in an established relationship where there is evidence of a 'durable relationship'." Pamela Fitzpatrick, 'New Rights of Residence for EU Nationals', *Welfare Rights Bulletin* 190, February 2006. See also the questions referred to the CJEU on the interpretation of Article 3(2) Dir 4002/38/EC by the UK Upper Tribunal in *MR and ors (EEA extended family members) Bangladesh* [2010] UKUT 449 (IAC) (Case pending).

affecting one of the fundamental interests of society'.⁹⁸ Any decision on expulsion of an EU citizen or their family members (irrespective of nationality) must take account of the length of residence of the individual concerned in the country in question, his/her age and state of health, family and economic situation, social and cultural in the country in question and the links (if any) with the country of origin.⁹⁹ Consistent with Directive 2003/109/EC, EU member states may not expel a long-term resident who is a EU citizen, or their family members irrespective of nationality, except on serious grounds of public policy or public security.¹⁰⁰ The Directive further restricts member states from expelling, except on imperative grounds of public security, a EU citizen who has resided in the host member states for the previous 10 years, or minors (unless by application of the best interests of the child's principle).¹⁰¹

Finally, limited rights for family members of refugees are provided in the Qualification Directive 2004/83/EC of 29 April 2004.¹⁰² The Directive recognizes the importance of family unity (Article 23(1)) but again it defines the 'family' in restrictive terms. First, the family must have already existed in the country of origin and its members must be present in the same member state as the person seeking protection and at the time that person seeks refugee status. Extension of protection to other family members is left entirely at the discretion of the member states. Furthermore, only

⁹⁸ Article 27(2).

⁹⁹ Article 28(1).

¹⁰⁰ Article 28(2).

¹⁰¹ Article 28(3).

¹⁰² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304, 30/09/2004, 12-23. Note also the 'humanitarian clause' in Article 15 of the Dublin Regulation (No 343/2003) allowing member states to bring family members or other dependent relatives together on humanitarian grounds based on family or cultural considerations. For a critical appraisal, see Marion Jaillard, Philippe de Bruycker et al., 'Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system', European Parliament, PE 425.622, at p.12.

family members of refugees - and not beneficiaries of subsidiary protection¹⁰³ - are entitled to a residence permit.¹⁰⁴ Article 23(2) in particular provides that 'In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits' (e.g., a residence permit valid for one year, renewable, instead of three years, renewable, for refugees).¹⁰⁵ Most of the EU member states applying the Qualification Directive do not however take advantage of this discretion. France, the Czech Republic, Ireland, Italy, and the Netherlands, for instance, provide the same rules on family reunification for refugees and beneficiaries of subsidiary protection; but family reunification is not guaranteed for beneficiaries of the subsidiary protection in Germany, and in Poland only after 7 years of uninterrupted residency.¹⁰⁶ In addition, EU member states have adopted grounds based on international obligations relating to family unity (complementary protection), in particular Article 8 ECHR. A 2009 ECRE study highlights five countries that adopted complementary protection related to family matters: Austria, the UK, Denmark, Ireland and Belgium.¹⁰⁷ In some countries, these persons are granted even less rights than those recognized to beneficiaries of subsidiary protection. For instance, in Austria, while beneficiaries of subsidiary protection have the right to family reunification at least in relation to family members outside Austria and seeking entry into Austria, the

¹⁰³ Note that neither the Reception Conditions for Asylum Seekers Directive (Council Directive 2003/4) nor the Family Reunion Directive (Council Directive 2003/86) apply to beneficiaries of subsidiary protection.

¹⁰⁴ Qualification Directive, Article 24(1). See further, Jane McAdam, *Complementary Protection in International Law*, OUP, 2007, at pp.93-99.

¹⁰⁵ Even though the words 'In so far as ... to such benefits' in Article 23(2) have been removed from the Recast Qualification Directive, Article 24(2) continues to provide less advantageous treatment to beneficiaries of subsidiary protection and their family members with regards to residence permits. Jean Lambert, Draft report, Proposal for a directive (COM(2009)0551) – C7-0250/2009 – 2009/0164(COD)), 30 June 2011, Article 24(2) recast.

¹⁰⁶ ECRE, *The Impact of the EU Qualification Directive on International Protection*, October 2008, pp.241-247.

¹⁰⁷ ECRE, *Complementary Protection in Europe*, July 2009, p.6.

complementary protection status does not allow any kind of family reunification.¹⁰⁸ In fact, the right to family reunification for persons recognized complementary protection is seriously limited in all but one country, Sweden.¹⁰⁹

In sum, EU legislation explicitly recognises a *right* to family reunification but the practical application of this right is considerably limited by a narrow definition of ‘family members’, i.e., the nuclear family of a sponsor or a refugee (excluding beneficiaries of subsidiary protection).

4.2. The ECJ/CJEU and its relationship with the European Court of Human Right: synergy or fragmentation?

In *Parliament v Council* (2006), the first case to have been decided in Luxembourg following the adoption of EU legislation on asylum and immigration, the European Parliament brought an action for annulment against certain provisions of the family reunification Directive 2003/86/EC. In this case, the ECJ clearly stated its readiness to follow the Strasbourg case law on Art 8 ECHR as the main source of EU human rights standards.¹¹⁰ The case law of the Strasbourg Court on Article 8 ECHR therefore constitutes the benchmark for the Luxembourg Court when interpreting provisions of EU law relating to family life and family reunification. But the EC Directive goes further than Article 8 ECHR in two respects: it sets forth procedures for how states should treat applications for family reunification, and it specifies the rights of family members living within the member state once the application is accepted.¹¹¹ As such, it is possible

¹⁰⁸ *Ibid*, p.9.

¹⁰⁹ *Ibid*, p.10.

¹¹⁰ Case C-540/03, *Parliament v Council*, judgment of 27 June 2006 [2006] ECR I-5769. See also Advocate General Kokott’s opinion in this case, which offers extensive analysis of the Strasbourg Court’s case law on Article 8 ECHR, for the Luxembourg Court to use.

¹¹¹ Council Directive 2003/86/EC, Chapters III and VI. Note that recent judgments from the European Court of Human Rights have recognized certain elements of procedures (e.g., the conditions for granting a residence permit) as falling within the scope of Article 8 ECHR (see discussion above, for instance, on *Mendizabal v France*).

(perhaps even likely) that the European Court of Human Rights will be influenced by the EC Directive when interpreting Article 8 ECHR in the context of family reunification and migrants. In the case *M.S.S. v Belgium and Greece*, the Grand Chamber of the Strasbourg Court re-interpreted Articles 3 and 5 ECHR in the light of Belgium and Greece's obligations under EU law, in particular the Dublin II Regulation and the Reception Directive, because the standards under EU law were found to be higher than under ECHR law.¹¹² Equally, the family reunification Directive and long-term residents Directive may serve as human rights standards to give added content to 'family life' and 'private life' under Article 8 ECHR in the member states of the EU. However, as things stand, the approach of the European Court of Human Rights to 'family life' (i.e., family members) and 'private life' is less restrictive than that of the Court of Justice of the EU, hence it is predicted that the Strasbourg Court case law will continue to remain the benchmark for the Luxembourg Court for many years to come.

In the recent case *Zambrano v Office National de l'Emploi*,¹¹³ two Colombian nationals, Gerard Ruiz Zambrano and his wife, were claiming a right to reside in Belgium on account of the Belgian nationality of their two younger children. Their son Diego and daughter Jessica were born in Belgium in 2003 at a time when their parents resided there after being granted a form of humanitarian protection. Both children acquired Belgian nationality because they would otherwise have been stateless. Their father obtained employment, but he and his wife subsequently lost their protective status in Belgium, and Mr Zambrano was prevented from working. His claim for unemployment benefits was rejected, and his appeal against that decision led to this referral to the CJEU.

The Court reaffirmed its earlier decision in *Zhu & Chen v Secretary of State for the Home Department*¹¹⁴ and the 'effet utile' of the residence right of the child, but went further in asserting the rights of children who are EU nationals by birth. Rejecting

¹¹² *M.S.S. v Belgium and Greece*, judgment of 21 January 2011.

¹¹³ *Zambrano v Office National de l'Emploi* (C-34/09), Grand Chamber judgment, 8 March 2011.

¹¹⁴ ECJ, C-200/02, 19 October 2004.

the argument that in order to benefit from the provisions of the EU Treaty, the Zambrano family had to have cross a EU border, the CJEU relied on Article 20 TFEU recognizing the right of EU citizens to move and reside freely within the territory of member states as a constituent element of European citizenship. The Court concluded that the refusal to grant a right of residence to Mr and Mrs Zambrano, and the refusal to allow Mr Zambrano to work, deprived their EU children from the *genuine enjoyment of the substance of their rights* (as EU citizens) for themselves and their parents.

In sum, this judgment suggests a requirement on states to regularize the stay of non-EU nationals residing in a EU member state who have a EU citizen child (which under EU law is anyone under the age of 21), through a right of residence and work permits.¹¹⁵ However, unlike in the recent jurisprudence of the Strasbourg Court, the Luxembourg only referred in passim to the UN Convention on the Rights of the Child.¹¹⁶ This judgment nonetheless removes one of the weaknesses of the Chen judgment, namely, the fact that non-EU parents were required to be self-sufficient and therefore were prevented from working in the member state where they lived.¹¹⁷

Two months later, in *McCarthy v Secretary of State for the Home Department*,¹¹⁸ the CJEU was faced with whether to apply the Zambrano's logic to a case involving a third country national spouse but no children. Shirley McCarthy, a dual UK and Irish national who was born in the UK and had always been resident there, had sought to rely on her Irish nationality and EU law to obtain a residence card for herself and her Jamaican husband. The CJEU found that she could not benefit from such EU right since she had never exercised her right to freedom of movement and had always resided in a member state of which she was a national. In reaching its decision, the CJEU considered

¹¹⁵ *Zambrano* judgment, paras.43-44. See also, Elspeth Guild, 'The Court of Justice of the European Union and Citizens of the Union: A Revolution Underway? The Zambrano judgment 8 March 2011', available at <http://cmr.jur.ru.nl/cmr/docs/Zambrano.pdf>

¹¹⁶ The Court referred generally and only once to Article 9(1) CRC as a relevant international provision, *Zambrano* judgment, para.10.

¹¹⁷ *Zhu and Chen* judgment, para.47.

¹¹⁸ Case C-434/09, Third Chamber of the CJEU, 5 May 2011.

two provisions of the TFEU, Article 20 and Article 21, both of which guarantee every citizen of the Union the right to move and reside freely within the territory of the member states. The Court found Article 21 not to be applicable to a Union citizen who, first, had never exercised her right of free movement, second, had always resided in a member state of which she was a national and, third, was also a national of another member state, unless the measure in question would have the effect of depriving her of the *genuine enjoyment of the substance of the rights* conferred by virtue of her status as a Union citizen. The Court also referred to Article 20 TFEU and the decision of the Grand Chamber in *Zambrano*, and found that no element of Mrs McCarthy's situation indicated that the national measure taken against her had the effect of depriving her of *the genuine enjoyment of the substance of her EU rights*. Essentially, she was an adult, and denial of access to her EU rights did not have the same effect as a similar measure did on the *Zambrano* children. The national decision did not "oblige her to leave the territory of the EU", as a negative decision would have done in *Zambrano*.

In sum, this judgment provides an illustration of the *Zambrano*'s decision in the case of an adult seeking to assert free movement rights to help her third country national husband. Since the national decision in this case would not have forced her to leave the territory of the EU, the CJEU found the denial of the right to move and reside freely within the territory of the member states not to have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen. This interpretation is reminiscent of the interpretation of the European Court of Human Rights in its recent case law (see discussion above on *Aristimuno Mendizabal*, *Rodrigues Da Silva*, and *Malsov*), but there are at least two important differences; first, the Strasbourg Court does not require a child to be involved, second, when a child is involved, the Strasbourg Court acknowledges in much clearer terms the importance of the best interests and welfare of a child.

5. Conclusion

This chapter has discussed the existence of a right to family (or family life) and states' duty to facilitate the reunification of families in international law. In Europe, both regional courts (the Strasbourg Court and the Luxembourg Court) have taken the view that depriving people of their *right* to family reunification is equal to interference with family life. Of particular interest is the fact that both courts have been focusing on the *enjoyment* of the right to family reunification rather than the existence of the right itself. Hence, in a number of recent cases, the two courts have sought to give content to a state's duty to respect family reunification through a right of residence and work permits; family life 'must not only be 'respected', it must also be 'protected'' within the meaning of 'a positive protective function'.¹¹⁹ However, in practice, their approach differ quite considerably as the Luxembourg Court finds itself constrained to operate within a stricter (more narrow) legislative framework (based on considerations of free movement and European citizenship) than the Strasbourg Court, hence, the Luxembourg Court's approach to granting a right of residence to foreign nationals may be said to be more restrictive than that of the Strasbourg Court. Notwithstanding, this chapter shows that the two courts are working in synergy (at least for now) in the protection of the right to family reunification of migrants living in Europe in that both courts are essentially concerned with issues of integration in society and care in intimate relations.

Like in Europe, in the Americas and in Africa, the right to family reunification has been affirmed and given substance following judicial intervention. The Inter-American system, like the European system, protects the right to family life¹²⁰ and imposes upon states both positive and negative obligations to ensure that these rights are enforced, including a positive obligation to actively facilitate the reunification of families,¹²¹ the

¹¹⁹ As recently stated by Advocate General Trstenjak when discussing human dignity (Article 1 EU Charter of Fundamental Rights) and the prohibition against torture and other ill-treatments (Article 4 Charter), in Case C-411/10, *N.S. v Secretary of State for the Home Department*, opinion delivered on 22 September 2011, at para.112.

¹²⁰ American Convention on Human Rights (1969), Articles 11 and 17.

¹²¹ See also, Articles V and VI of the non-binding American Declaration of the Rights and Duties of Man

tracing of relatives, and the full investigation of disappeared family members.¹²² The African legal system also recognizes the family as the fundamental unit of society, and requires states to protect the unity of the family.¹²³ In a case against Lybia,¹²⁴ the HRC interpreted the state's duty to facilitate family reunification (Articles 17 and 23 ICCPR) as including the right to leave one's own country in order to reunite (Article 12 ICCPR). Such a right, the HRC held, is given effect by the right not to have one's own passport confiscated. It follows that, as far as this case can tell, there is consistency between the views of the HRC and the case law of the European courts in their determination to give content to states' duty to respect or facilitate family reunification in order to improve the implementation of this obligation.

This chapter also identified key areas of controversy that require further development. Particularly noteworthy is the lack of a cross-societal definition of family and the resulting consequence of a lack of clear commitment to guaranteeing family reunification. Also worth noting is the fact that family life by its very nature concerns a particular group of individuals; the family or family life must be respected as a single entity for it to be meaningful. So, perhaps there is good reason for viewing family unity and family reunification as a group right rather than as an individual right. This is a view which the HRC took in *Hopu v France* but also the UK House of Lords (now the Supreme Court) when it recognized all members of a family to be 'victims' in Article 8 ECHR.¹²⁵ Finally, as discussed herein, the European Court of Human Rights recently chose to reconceptualise certain relationships as private life rather than family life. This also

(1948).

¹²² *Serrano-Cruz Sisters v El Salvador* (9 Sept 2005), Judgment of 9 September 2005 available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf, paras.184-5.

¹²³ Article 18(1) of the African Charter for Human and Peoples' Rights. For an application of this right by the African Commission, see *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000), Communication 97/93, decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual Activity Report, para.92.

¹²⁴ *El Dernawi v Lybia* (2007) AHRLR 35 (HRC 2007), Communication 1143/2002, decided at the 90th session, 20 July 2007, CCPR/C/90/D/1143/2002.

¹²⁵ E.g., *Beoku-Betts v SSHD* [2008] UKHL 39, para.43.

raises a number of questions. What do these choices tell us about the value of and right to family life? What are our reasons for respecting family life? And, crucially, will/should the Court of Justice of the EU follow the same path?