BRIEFING

European Parliament

Family reunification rights of refugees and beneficiaries of subsidiary protection

SUMMARY

Separation of family members can have devastating consequences on their well-being and ability to rebuild their lives. This is true for everybody, but especially so for persons who have fled persecution or serious harm and have lost family during forced displacement and flight. In the case of beneficiaries of international protection, family separation can affect their ability to engage in many aspects of the integration process, from education and employment to putting down roots, as well as harming their physical and emotional health. That is why family reunification is a fundamental aspect of bringing normality to the lives of such people. While EU law ensures refugees and holders of subsidiary protection – the two types of beneficiaries of international protection – equal treatment in most areas, differences remain, among others, as regards family reunification in accordance with the Family Reunification Directive. Unlike refugees, beneficiaries of subsidiary protection do not enjoy the favourable conditions associated with the right to family reunification.

After 2015, most EU Member States witnessed a significant increase in the number of asylum-seekers arriving in their territory, paralleled by an increase in the number of beneficiaries of international protection seeking reunification with their families. To establish some form of control over this unprecedented flow of people, Member States shifted away from awarding refugee status towards granting subsidiary protection, thus restricting the possibility of beneficiaries to reunite with their families. According to many legal experts, the fact that beneficiaries of subsidiary protection face stricter requirements regarding family reunification than do refugees disregards the particular circumstances related to their forced displacement and the corresponding difficulties they are likely to face in meeting these stricter requirements.

In this Briefing

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Status of beneficiaries of international protection in the EU

International protection under EU law is based on two types of status. The first, refugee status, was established by the 1951 Geneva Convention and its 1967 Protocol, while the second one, the complementary subsidiary protection status, was introduced by the 2004 Qualification Directive. Beneficiaries of both types of status are protected from *refoulement*. However, the refugee status granted to asylum-seekers who are facing persecution entails a broader set of rights, and examination of an application for a refugee status has to precede that of subsidiary protection granted to asylum-seekers, who, while being in need of protection because of risks of serious harm, do not qualify for refugee status. Furthermore, the subsidiary protection status is deemed to be more temporary than the refugee status.

The 2011 recast Qualification Directive ensures equal treatment of refugees and beneficiaries of subsidiary protection with regard to most of the associated rights, such as family unity, travel documents and access to employment, healthcare and integration. For example, as regards family unity, the directive ensures that family members of beneficiaries of subsidiary protection benefit from international protection under the same conditions as refugees' family members.

However, the two categories of beneficiaries are treated differently as regards the length of their residence permits and their access to social assistance, with beneficiaries of subsidiary protection being in a less favourable position. Thus, while refugees benefit from residence permits of at least three years, those issued to beneficiaries of subsidiary protection remain limited to a maximum of one year. Furthermore, while refugees are entitled to 'necessary' social assistance, Member States may limit that granted to beneficiaries of subsidiary protection to core benefits.

According to some experts, Member States insist on maintaining such different approaches for two reasons: 'the costs associated with a complete uniformisation of international protection statuses' and the 'more temporary nature of subsidiary protection'.

Refugees and beneficiaries of subsidiary protection are also treated differently as regards family reunification in accordance with the Family Reunification Directive (FRD). As discussed further below, beneficiaries of subsidiary protection, unlike refugees, are not entitled to family reunification.

Framework on family reunification for beneficiaries of international protection

International framework

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) both provide that the family is a fundamental group unit of society and should be respected and protected. The ICCPR also provides that 'no one shall be subjected to arbitrary or unlawful interference with his ... family', and that everyone 'has the right to the protection of the law against such interference or attacks'. Furthermore, in 2004 the United Nations Human Rights Committee, when referring to the ICCPR, stated that: 'Nor is the right to protection of family life necessarily displaced by geographical separation ...'.

Families with children are also protected under the UN Convention on the Rights of the Child, which states that states parties should take all appropriate measures to ensure that a child shall not be separated from his or her parents against his or her will, and that applications by a child or his or her parents to enter or leave a state party for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner.

The 1951 Geneva Convention does not refer to the issue of family reunification. However, the Final Act of the UN Conference of Plenipotentiaries states that 'the unity of the family ... is an essential right of the refugee'.

The right to respect for private and family life is guaranteed under Article 8 of the European Convention on Human Rights (ECHR). However, according to the case law of the European Court of Human Rights (ECtHR), the right to family life is not automatic, as in general migrants must demonstrate that family life cannot be enjoyed 'elsewhere', before it is concluded that refusal to grant them family reunification is in violation of Article 8. Furthermore, Article 14 of the Convention provides for the prohibition of discrimination, which is important when dealing with the different treatment of beneficiaries of subsidiary protection compared to refugees with regard to family unity conditions.

The European Social Charter in its Article 19 guarantees the right of migrant workers and their families to protection and assistance, and obliges states, among other things, 'to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory'. However, Article 19 is also applicable to refugees on the basis of the appendix to the Charter, which says that the Charter's provisions are to be applied to refugees and stateless persons insofar as states are bound under the Geneva Convention and the Convention on the Status of Stateless Persons.

EU law

The Treaty on the Functioning of the European Union (TFEU) states in its Article 79(2) that the European Parliament and the Council shall adopt necessary measures in the areas of 'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'.

The EU Charter of Fundamental Rights, only applicable to EU institutions and to Member States when they are implementing EU law, refers in its Article 7 to the right to respect for private and family life (along the same lines as Article 8 of the ECHR).

The main piece of secondary EU legislation dealing with family reunification rights of third-country nationals is the Family Reunification Directive (FRD), which applies in 25 of 27 EU Member States (excluding Denmark and Ireland). It sets minimum standards, allowing Member States to be more generous if they wish, and mainly concerns reunion of spouses and minor children with a non-EU sponsor, while the admission of further family members is optional in most cases. It thus sets the following standard rules:

- the sponsor (the person who has been granted the right to reside legally in the country) must have a residence permit valid for at least one year and have reasonable prospects of obtaining the right of permanent residence;
- the family members must reside outside the territory when the application is made;
- public policy, public security or public health are grounds for rejection;
- conditions relating to accommodation, sickness insurance and stable and regular resources may be imposed;
- Member States may require integration measures;
- a waiting period of two years of lawful stay of the sponsor may be imposed before family reunion takes place.

Special provisions for refugees

Special rules apply to a refugee who has been recognised as such by a Member State, meaning that his or her asylum application in that country was successful. As stated in a UNHCR paper, Member States:

- may limit the special rules to family relationships that predate entry to the Member State;
- may authorise family reunification of other family members not referred to in Article 4 if they are dependent on the refugee;
- shall authorise the entry and residence of an unaccompanied minor's first-degree relatives in the direct ascending line; his or her legal guardian; or any other family member where there are no relatives in the direct ascending line or such relatives cannot be traced;
- shall take into account other evidence, where a refugee cannot provide official documentary evidence of the family relationship;

- shall not require the refugee to have resided in their territory for a certain period of time before having his or her family members join him or her.

Furthermore, third-country nationals are required to provide evidence that they have accommodation, health insurance and resources (material conditions) that can support newly arrived family members. This requirement is not set out for refugees, although Member States may request this evidence if the application for family reunification is not made within three months of recognition of the refugee status.

However, while the directive applies to refugees, it explicitly does not apply to:

- asylum-seekers;
- applicants for or beneficiaries of temporary protection;
- applicants for or beneficiaries of 'a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States'.

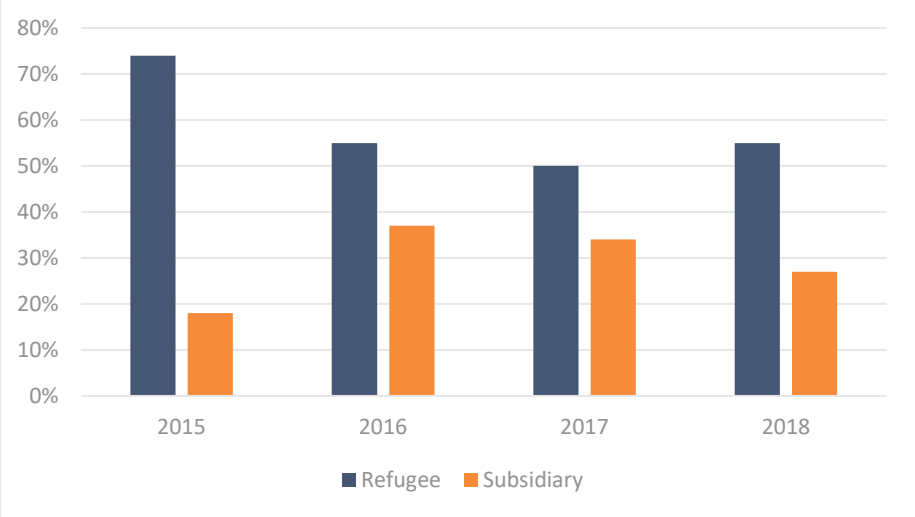
Some experts claim that, as regards beneficiaries of subsidiary protection with a status granted under EU law, 'it is at least arguable that they are covered by the FRD, as they are not explicitly excluded'. However, the European Court of Justice (ECJ) in case C-380/17, clearly stated 'that Directive 2003/86 must be interpreted as not applying to third-country national family members of a beneficiary of subsidiary protection, such as the applicants in the main proceedings'.

Family reunification in the EU

As the UNHCR points out, separation of family members can have devastating consequences on people's well-being and ability to rebuild their lives. While this holds true for everybody, it is especially relevant for persons who have fled persecution or serious harm and have lost family during forced displacement and flight. Furthermore, family separation can affect the ability of beneficiaries of international protection to engage in many aspects of the integration process, from education and employment to putting down roots, while also harming their physical and emotional health. Family reunification is therefore a fundamental aspect of bringing normality back to such persons' lives.

After 2015, most EU Member States witnessed a significant increase in the numbers of asylum-seekers arriving in their territory. During the peak migration flows to the EU from 2015 to 2017, the Member States issued more than 2 million first-instance decisions. One consequence has been an increase in the number of beneficiaries of international protection seeking reunification with their families. However, in order to establish some form of control over this unprecedented flow of people, Member States shifted from awarding refugee status towards granting subsidiary protection, thus restricting the possibility beneficiaries to reunite with their families.

Figure 1: First-instance decisions 2015-2018, by outcome



Source: Eurostat.

Situation in the Member States

As shown in the EU asylum information database, several Member States apply a different family reunification regime to beneficiaries of subsidiary protection compared to refugees. Some Member States, such as Greece, Cyprus and Malta, fully exclude beneficiaries of subsidiary protection from family reunification, while others, such as Austria, Germany, Sweden and Hungary, among others, impose restrictive conditions in this regard.

In Austria, the family members of a beneficiary of subsidiary protection can only submit an application at least three years after the sponsor's recognition. Requirements, such as sufficient income, health insurance and accommodation, are always applicable to beneficiaries of subsidiary protection, with the exception of unaccompanied children.

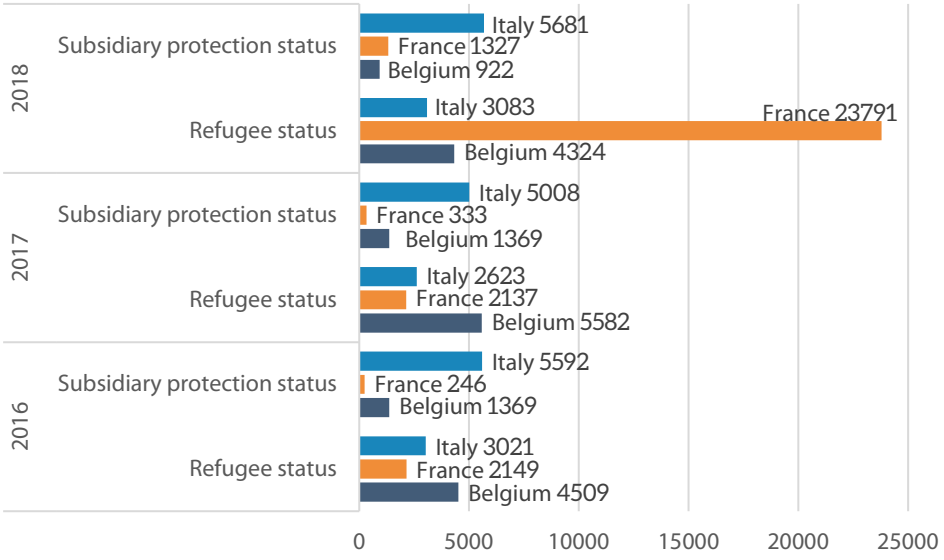
In Germany, a law of 16 March 2018 abolished the right to family reunification for beneficiaries of subsidiary protection as of August 2018. Instead, the right to family reunification was replaced with a provision, according to which 1 000 relatives shall be granted a visa to enter Germany each month. This means that the privileged conditions applying to family reunification have effectively been abolished for beneficiaries of subsidiary protection.

In Sweden, people assessed as having subsidiary protection status (a 13-month permit followed by a 2-year permit if protection grounds remain) have very limited possibilities for family reunification. Only people having applied for asylum after 24 November 2015 have a right to family reunification in exceptional cases, when denial of family reunification would breach Sweden's international obligations.

In Hungary, no preferential treatment is applied to beneficiaries of subsidiary protection and they hardly ever have the means to fulfil the strict material conditions for family reunification.

Eurostat data on first permits issued for family reunification with a beneficiary of protection status are generally very scarce; for several Member States they are not available at all. Nevertheless, some Member States do report on the decisions regarding first permits issued, although it needs to be taken into account that they all grant beneficiaries of subsidiary protection the right to family reunification under similar conditions as those applicable to refugees. Figure 2 below shows first permits issued for family reunification to a beneficiary of protection status in three Member States.

Figure 2: First permits issued for family reunification to a beneficiary of protection status 2016-2018



Source: Eurostat.

Compatibility of Member States' practices with their international and regional obligations

According to the European Legal Network on Asylum, the application of stricter conditions regarding family reunification to beneficiaries of subsidiary protection compared to refugees 'ignores their particular circumstances relating to their forced displacement and the corresponding difficulties they are likely to face in meeting more onerous requirements for family reunification'.

Along the same lines, a paper by Frances Nicholson, focussing on the right to family reunification, offers strong arguments explaining why beneficiaries of subsidiary protection should benefit from the right to family life and family unity on the same basis as refugees. The paper highlights the following issues:

1. States' positive obligations where family reunification is not possible in another state

According to the above-mentioned paper, taking into account the jurisprudence of the ECtHR, consideration must be given to whether family separation was voluntary or not and whether there are insurmountable obstacles to family life being enjoyed elsewhere. Member States thus have a positive obligation towards individuals who are unable to enjoy the right to family life and family unity in another state, which can be assumed in the case of refugees and beneficiaries of subsidiary protection.

Other experts also claim that, as long as the risk of persecution or of suffering serious harm persists and as long as there is no third country where the family could live together, assessing the interests of states and beneficiaries of subsidiary protection should generally lead to the acceptance of a right to family reunification.

2. States' obligations regarding the best interest of the child

Nicholson furthermore argues that restrictions introduced by states can have a particularly damaging effect on children with subsidiary protection and may not be in line with states' obligations to ensure that children's best interests are given primary attention.

While the ECtHR has noted that 'the best interests of the child cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State', it has also affirmed that domestic courts must place the best interest of the child 'at the heart of their considerations and attach crucial weight to it'. Where domestic authorities fail to undertake a 'thorough balancing of the interests in issue' that places the child's best interests 'sufficiently at the centre of the balancing exercise and its reasoning', the ECtHR concludes that there has been a violation of Article 8 of the ECHR.

3. The trend in EU law towards a uniform status for all beneficiaries of international protection

Nicholson further notes that the difference in treatment under the FRD as regards family reunification between refugees and beneficiaries of subsidiary protection must also be considered from the perspective of the gradual convergence of the status of refugees and that of beneficiaries of subsidiary protection in EU law.

Since 2003, when the FRD was adopted, EU legislation has aimed to establish a uniform status for all beneficiaries of international protection. This was confirmed by the 2009 Stockholm Programme and by Article 78(2) TFEU, which requires the European Parliament and the Council to 'adopt measures for a common European asylum system' including a uniform status for refugees and beneficiaries of subsidiary protection.

This is also acknowledged in the Long-term Residents Directive of 2011, which includes both categories of beneficiaries of international protection, as well as in the recast Asylum Procedures Directive and Qualification Directive. For instance, the latter states that the content of international protection granted must apply 'both to refugees and persons eligible for subsidiary protection unless otherwise indicated', and that Member States shall 'ensure that family unity can be maintained'.

Furthermore, the European Commission has noted that 'humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees', and that it encourages Member States 'to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection'.

The Council of Europe's Commissioner for Human Rights has further stated that, while the two types of status – that of refugee and that of beneficiary of subsidiary protection – are legally different, since by definition persons holding the latter status are not refugees within the meaning of the 1951 Convention, 'in practice, whether any given applicant is granted one status or another depends on a variety of institutional and political factors'. The resulting 'diverse patterns in recognition rates of the same nationalities … mean that similarly situated individuals may be recognised as 1951 Convention refugees or subsidiary protection beneficiaries (or granted some residual domestic status) depending on where and when they claim asylum, and whether they have the inclination or resources to appeal the granting of subsidiary protection'. Therefore, 'in light of those institutional practices, as a matter of human rights law, all beneficiaries of international protection ought to be regarded as similarly situated and generally entitled to equal treatment'.

4. States' obligations not to discriminate against similarly situated persons

The non-discrimination principle, set out in Article 14 of the ECHR and in Article 21 of the Charter of Fundamental Rights, requires states not to treat two groups of similarly situated persons and groups differently.

According to Article 14, discrimination can be challenged on different grounds, including sex, race colour and religion, as well as 'other status'. According to ECtHR case law, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. The Court has also explained that the margin of appreciation is restricted when discrimination is based on an immutable characteristic, and has suggested that the margin is similarly restricted where the difference of treatment is grounded on refugee status, since it does not entail an 'element of choice'.

According to Nicholson, 'the situation of people to whom some States have granted only subsidiary protection is thus not significantly different from that of refugees. Experience has shown that they are not able to return home more quickly given the continuing conflict and/or instability in key countries of origin such as Syria, Afghanistan or Iraq. If this is accepted, it falls to the State to prove the difference in treatment pursues a legitimate aim, is necessary and proportionate'.

Furthermore, Odysseus Academic Network author Philip Czech argues that 'if a state grants refugees a right to family reunification under certain conditions – be it in fulfilment of its obligations arising from the Directives or beyond – it must grant the same rights to beneficiaries of subsidiary protection unless there are good reasons not to do so. The mere fact that states are obliged to grant such rights to refugees under European Union law cannot in itself justify the exclusion of people granted subsidiary protection from also enjoying these rights. Whether the purportedly temporary nature of this form of international protection suffices as a justification, can be doubted. The nature of most contemporary armed conflicts indicates that those fleeing from indiscriminate violence will be unable to return in the foreseeable future'.

5. The requirement not to undermine the underlying purpose of the FRD

The purpose of the FRD is to 'determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States' (Article 1). Member States must also ensure that measures concerning family reunification are 'adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law'.

As Nicholson explains, the ECJ ruled in *Khachab v Subdelegación del Gobierno en Álava* that 'it is apparent … from recital 4 in the preamble to Directive 2003/86, that that directive has the general

objective of facilitating the integration of third-country nationals in Member States by making family life possible through reunification.' The CJEU's judgment in *Chakroun v Minister van Buitenlandse Zaken* further affirms that states' 'margin for manoeuvre … must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof', and that 'authorisation of family reunification is the general rule'.

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