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Hearing of the Grand Chamber of the European Court of Human Rights in the case of M.A. v. Denmark

Oral submission by Dunja Mijatović
Council of Europe Commissioner for Human Rights

Strasbourg, 10 June 2020

Mr President, Distinguished members of the Court,

I have decided to intervene in this case because the issue of family reunification is key to the lives of many people receiving international protection in Europe. It is no exaggeration to say that, once their basic safety and immediate humanitarian needs are met, ensuring that families can be brought back together again is one of the central preoccupations of many of them. Indeed, there is ample research showing the devastating effects of concerns about the situation of family members who are left behind on the mental well-being of recipients of international protection. Such concerns have been found to get in the way of language learning, job market orientation, and other actions necessary for integration. In this way, family separation may both negatively affect recipients of international protection and their host societies. Furthermore, delays in family reunification may leave family members in a vulnerable situation in the country of origin, or in countries in the region to which they have fled. When family reunification is unduly restricted, this eliminates an important safe and legal route to Council of Europe member states, which may lead family members to seek dangerous and irregular routes to Europe.

From this perspective, it is a particular concern when member states introduce restrictions on the access to and enjoyment of family reunification for beneficiaries of international protection. One of the ways in which access to family reunification has been limited has been to introduce long waiting times before a recipient of international protection can file an application for reunification. In addition, I have been particularly concerned by situations in which different family reunification regimes were introduced for different protection statuses. Whilst those recognised under the 1951 Refugee Convention are usually exempt from such long waiting times – although they may also face restrictions – they have been increasingly applied to persons with either subsidiary or temporary protection status.

In Denmark, the restriction on family reunification at issue in the present case is a three-year waiting period, applied to persons at risk of the death penalty or torture or inhuman or degrading treatment or punishment when this is based on a generalised situation in the country of origin. This same restriction is not applied to those recognised as 1951 Convention refugees, or to those for whom risks upon return are not based on a generalised situation.

This Court, with regard to 1951 Convention refugees, has found that family unity is an essential right and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life. Certain elements have played a central role in this Court's considerations when reaching that conclusion. Firstly, refugees cannot be returned and as such they cannot be expected to re-establish family life in their country of origin. Secondly, the conferral of refugee status confirms that a person has not made a conscious or voluntary decision to leave family members behind and should therefore not be held responsible for the interruption of family life. And thirdly, refugee status constitutes evidence of vulnerability which should be taken into account in family reunification cases.

In my view, each of the elements I mentioned should apply in the same way to 1951 Convention refugees as they do to persons provided with international protection on other grounds. When a protection status is granted because a person would face serious human rights violations in his or her country of origin, this clearly marks an individual out as being unreturnable and therefore unable to re-establish family life in the country of origin. Also, such a protection status clearly acknowledges the threats faced by the person, which would mean they cannot be considered as having voluntarily left their country of origin, consciously leaving family members behind. In addition, as this Court has acknowledged, a person's status as an asylum seeker may be evidence of his or her vulnerability. If this is the case for asylum seekers, this would surely be the case for a person who, having undergone an asylum procedure, is recognised as being in need of international protection.

The main justification for the differences in family reunification rights between different status holders is that the need for protection of some of them is supposedly more temporary than that of others, such as 1951 Convention refugees. In this light, I have already submitted that a status that is formally more temporary, such as a one-year residence permit, invariably leaves open the possibility for renewal; this means that a person with such a status may be in need of protection for a significantly longer period than that covered by the initial permit.

Furthermore, it is noteworthy that certain national groups are disproportionately affected by the introduction of new "temporary" statuses and the subsequent waiting periods for family reunification. This is specifically the case for Syrian nationals. As I have underlined, the impact that these new rules have on certain groups is visible from statistics in various Council of Europe member states, including Denmark.

This is so despite the fact that, even at the time when many of these restrictions were introduced in 2015 and 2016, the conflict in Syria and the widely recognised impossibility of return in the vast majority of cases had already become protracted. Given the security situation at that time, it is, in my view, questionable that it could have been reasonably presumed that the protection status of Syrians could be ended after a one-year period, or even in the years following that. I note that even now, several years after this shift in legislation, the overwhelming majority of Syrians who apply for asylum in EU member states are still granted international protection.[1]

In many cases, restrictions on family reunification in Council of Europe member states have been introduced in the context of increasing arrivals in 2015 and 2016 and associated concerns about pressures on their integration and welfare systems. In this context, I again express my concern that specific national groups are particularly affected by such measures, as well as the fact that prolonging family separation is ultimately detrimental to integration efforts. Furthermore, in many cases restrictions have been maintained even after the pressures that led to their introduction have eased.

I would also like to share with the Court my concern over the length of the delays in family reunification. Considering the severe consequences of family separation for beneficiaries of international protection and their family members, the Issue Paper that my Office published in 2017 to address the increasing restrictions on family reunification recommended that member states consider waiting times of more than one year inappropriate. I further note that the Danish law's waiting period of three years is comparable to the length of time that the Court previously found to be excessive, particularly in the case of *Tanda-Muzinga v. France*. I also note that the period of family separation will likely be much longer than just the three-year waiting period established in Danish law: family separation will have already occurred from the moment of flight, and endures during the procedure to confer a protection status on the applicant. Once an application for family reunification can be submitted, its processing and the making of subsequent arrangements for the *de facto* reunification will take additional time. In any situation, therefore, family reunification typically takes a long time. Adding to this a three-year waiting period before an application can be made in the first place will therefore significantly prolong family separation and the hardship faced both by the beneficiary of international protection and any family members left behind.

To conclude, let me reiterate the importance of the ability of all those granted international protection, regardless of whether this is as a 1951 Convention refugee or under another status, to reunite with

[1] EASO figures show that 85% of Syrian asylum seekers were granted protection at first instances across the EU from January to November 2019 (https://easo.europa.eu/latest-asylum-trends).

family members left behind. In light of the similar situation of persons with such other statuses to 1951 Convention refugees, and the fact that their need for protection is in practice almost never temporary, I believe differential treatment with regard to family reunification, and in particular subjecting them to a waiting period, cannot be objectively and reasonably justified.

I hope my comments will be helpful to the Court and I thank you for your attention.