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Subsidiary Protection in Germany – the Asylpaket II

To what extent does Germany's Asylpaket II, with regards to its family reunification ban for the beneficiaries of subsidiary protection, comply with international legal obligations, including the Convention on the Rights of the Child? How has this policy change affected Syrian refugees living in Germany?



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Date: July 2nd 2018
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*“Migration is an expression of the human aspiration for dignity, safety and a better future.
It is part of the social fabric, part of our very make-up as a human family”*
- Ban Ki-Moon -

ABSTRACT

In 2015 hundreds of thousands of refugees made their way into Europe to seek for asylum. In March 2016 Germany passed the so-called ‘Asylpaket II’ due to the unparalleled influx of Asylum seekers which challenged the State both financially and administratively, polarizing Germany’s government as well as its population. The adoption of the Asylpaket II effectively sped up the asylum process but granting applicants’ subsidiary protection instead of acknowledging refugee status also cut their rights. A subsidiary protection holder is qualified in the EU Qualification Directive:

“[a] person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm”

Originally the family reunification ban was in force until March 2018, then July 2018 and has recently been extended to August 2018 - with only 1000 family members allowed per month thereafter. Waiting periods are up to 18 months to file family reunification applications in the German embassies in Lebanon and Turkey and are expected to increase significantly after August 2018. The ban effectively separates families for up to 4 or 5 years – a grave violation of the right to family life.

This research will examine existing international treaties and conventions, secondary EU law as well as German legislation to establish whether Germany has violated its international and national obligations by enforcing the family reunification ban. This thesis aims to establish, that after March 2016 Syrian refugees were primarily granted subsidiary protection – effectively separating them from their families – significantly impacting their successful integration, and violating international law.

Based on the examination of international, EU and national law this thesis concludes, that there have been grave violations of a range of legislations. Most notably the European Convention of Human Rights, specifically Article 8 and 14, and the Convention on the Right of the Child. To illustrate the impact this policy has had on individuals, interviews with 10 Syrian protection holders will be introduced.

This research proves significant in light of recent political debates in Germany, in which an extension of the reunification ban until August 2018 has been passed in the context of the formation of a new government after the elections in 2017. There has been increased anti-immigration sentiment throughout Germany, potentially extending the ban even further. This could separate families for an unlimited period of time and significantly reduce the likelihood of successful integration into society of hundreds of thousand refugees living in Germany.

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LIST OF ABBREVIATIONS

| | |
|-------------------------------------|---|
| 1951 Convention | Convention relating to the Status of Refugees |
| Asylgesetz | Asylum Act |
| Aufenthaltsgesetz | Residence Act |
| BAMF | Ministry for Refugees (Bundesamt für Migration und Flüchtlinge) |
| CAT | The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEAS | Common European Asylum System |
| Charter | Charter of the United Nations |
| CJEU | Court of Justice of the European Union |
| CRC | Convention on the Rights of the Child |
| Directive | Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| Federal Administrative Court | Bundesverfassungsgericht |
| Grundgesetz | German Constitution |
| ICCPR | International Covenant on Civil and Political Rights |
| Protocol | Protocol relating to the Status of Refugees |
| Qualification Directive | 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 |

| | |
|-------------------------|--|
| Recast Directive | Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted |
| RP | Refugee protection |
| SP | Subsidiary protection |
| TFEU | Treaty of the Functioning of the European Union |
| UDHR | Universal Declaration of Human Rights |
| UNHCR | United Nations High Commissioner for Refugees |
| UNICEF | United Nations Children's Fund |
| UM | Unaccompanied minor |

I. PREFACE

1.1 INTRODUCTION

In 2015 and 2016 approximately one million refugees have fled to Germany – with a continued stream of refugees expected to arrive throughout 2017 and 2018. Climate change, civil wars and political instabilities are predicted to further increase migration to an unprecedented level. Germany has redefined itself as a country welcoming refugees, with Chancellor Merkel affirming its position in 2016 by opening Germany’s borders and stating, that there is “*no legal limit to the number of asylum seekers Germany will take in the coming years*”. Germany has adopted this position in light of demographic changes within the country. An increasingly aging population has put the German economic and social system at risk and is expected to only worsen in the next 20 years.

The European Union has described the current refugee crisis throughout Europe as “*the worst refugee crisis since the Second World War*”.¹ This statement comes amidst pictures, videos and stories of hundreds of thousands of refugees attempting to make their way across the Aegean Sea to Greece and along the previously-opened Balkan route – often with deadly consequences. The word asylum has its origins in the Greek vocabulary “*asylon*”, meaning freedom from seizure.² Essentially asylum refers to a sacred place, in which the pursuer cannot reach one.³ This concept is widely perceived to be as old as humanity itself, as “[*t*]he concept of asylum has been in existence for at least 3,500 years and is found, in one form or another, in the texts and traditions of many different ancient societies.”⁴ This concept has been included from the very beginning of the United Nations. It is declared in Article 14(1) of the Universal Declaration of Human Rights 1948 that every individual can “*enjoy in other countries asylum from prosecution*”.⁵

International law at its very core is based upon the principle of sovereignty. The 1951 Refugee Convention thus is founded upon a mere obligation to its ratifying States - currently

¹ European Commission – Speech by Dimitris Avramopoulos on the 14th of August 2015 “*A European Response to Migration: Showing solidarity and sharing responsibility*”.

² Grahl-Madsen, A. “*The Status of refugees in international law*”(1972).

³ Boed, R. “*The State of the Right of Asylum in International Law*”(1994).

⁴ UNHCR “*The State of The World’s Refugees 1993: The Challenge of Protection*” (1993).

⁵ *The Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

145 States.⁶ The principle of sovereignty is entrenched in the principle that it is within a States' discretion to grant or deny asylum applications. States are not obliged to grant asylum to each refugee meeting the prerequisites. They do however have an obligation not to return asylum seekers to their country of origin under the principle of *non-refoulement*.

Refugees have the right to seek asylum in a State. Whether they are granted this right, however, is determined by the host State. The exclusive competence of a State in deciding who has the legal right to be present on its territory is an essential component in ensuring the international cooperation of States. International law and the obligations from the 1951 Refugee Convention however does oblige States not to endanger asylum seekers. Returning them to a State in which they fear for their lives or fear prosecution, for example, is not allowed because of the principle of *non-refoulement*. How this is applied in action however can be chosen freely by the State in question. This is a principle incorporated into the 1951 Refugee Convention, the : “*generally accepted principle that no State shall expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*” The supervising body of the 1951 Convention, the UNHCR, cannot however penalize violations of the 1951 Convention.

International legal instruments are entirely based upon State consent and cooperation; they hence do not include a function to reprimand States, which do not adhere to the standards. States thus can alter national legislation without much more than ‘a slap on the wrist’ from the international community and the UNHCR.

⁶ United Nations “*History of UNHCR: The 1951 Refugee Convention*”.

1.2 RESEARCH QUESTION

1. To what extent does Germany's Asylpaket II, with regard to its family reunification ban for beneficiaries of subsidiary protection, comply with international legal obligations, including the Convention on the Rights of the Child? How has this policy change affected Syrian refugees living in Germany?
 - i. What are Germany's international obligations towards beneficiaries of international protection?
 - ii. What does the Asylpaket II entail?
 - iii. Are these regulations in line with the Convention on the Rights of the Child and other international legal obligations?
 - iv. How has this ban affected Syrian refugees living in Germany?

1.3 THESIS STRUCTURE

This thesis aims to discuss and analyse Germany's obligations under international, European Union and national law in order to establish whether the implemented ban is in violation of international law. In order to present the reader with a holistic view, the researcher decided to interview Syrian refugees living in Germany, who directly experience the consequences of the family reunification ban.

- I. In Chapter I of this research project background information and the research question, including sub-questions, will be stated. This research aims to establish, whether Germany's family reunification ban for subsidiary protection holders is contrary to international law, specifically the principle of non-discrimination and the best interest of the child.
- II. Chapter II will discuss the applicable international legal framework. On an international level, this will specifically include the 1951 Refugee Convention, the Convention on the Right of the Child, the Covenant on Civil and Political Rights, the prohibition of *non-refoulement* and the European Convention on Human Rights.
- III. Chapter III will introduce relevant secondary EU law, specifically the Qualification Directive and the distinction between refugee and subsidiary protection, which is in place in Germany. It will furthermore examine the Family Reunification Directive and the arising obligations for Germany.

- IV. The Asylpaket II and its position in German law will be introduced in Chapter IV. It will specifically examine recent national and European case law relating to subsidiary protection and the consequent ban on family reunification.
- V. Chapter V will discuss the results of the interviews conducted with 10 Syrian protection holders in Germany. This research aims to reflect upon the difficulties Syrians have faced concerning family reunification, violations against the Convention on the Rights of the Child and the arbitrary distinction between subsidiary and refugee protection status in Germany and most importantly examine the impact the Asylpaket II has on refugees living in Germany.
- VI. In Chapter VI, the compatibility between German practice and international and EU law will be analysed. This will include the prohibition of discrimination based on migrations status, the need to take into account the best interests of the child, and lastly the aim of the EU legislature to move towards a unified system.
- VII. The research conclusion will be stated in Chapter VII, assessing to which extent Germany is in violation of international and EU law and the impact its practice had, and continues to have, on refugees on its territory.

II. THE INTERNATIONAL LEGAL FRAMEWORK

2.1. INTRODUCTION

The issue of family reunification is not addressed in any specific international convention or treaty. It is however mentioned explicitly and implicitly in a number of international legal instruments.⁷ The Second World War and the millions of people displaced in its aftermath can be observed as the starting point for individual rights and their protection in international law. This goal was set out in the Charter of the United Nations, stating that its purpose was “*to promote and encourage the respect for human rights.*”⁸ The Universal Declaration of Human Rights (UDHR), adopted in 1948, does not make any explicit reference to family reunification. It does however explicitly state, that the family is of fundamental importance, stating that “*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State*”⁹ and that there cannot be arbitrary interference with family life.¹⁰ This Chapter will examine the relevant international legal instruments concerning refugee rights, specifically the right to family reunification.

⁷ M.K. Klaassen, *The right to family unification – Between migration control and human rights* (E. M. Meijers Instituut 2015) p. 21.

⁸ *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (Charter) Art. 1(3).

⁹ UDHR Art. 16(3).

¹⁰ UDHR Art. 12.

2.2. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

The 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Protocol (Protocol) is the most significant legal instruments in international refugee law.¹¹ The Convention is the most relevant international legal instrument concerning the rights of refugees and to date has 145 signatories.¹² It defines a ‘refugee’ under Article 1(A) (2) of the 1951 Convention:

*“[A refugee is] any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country”*¹³

The 1951 Convention primarily focuses on the rights of refugees, which States should guarantee, it does however not impose obligations and duties on States towards asylum-seekers.¹⁴ Notwithstanding its significance and the circumstances of its creation, with millions of people readjusting to life post World War II, it lacks any reference to the right to family reunification. The Final Act of the Conference of Plenipotentiaries is the only reference to family unification, stating, that *“the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee.”*¹⁵ It furthermore gives the following recommendation to States:

*“take the necessary measures for the protection of the refugee’s family, especially with a view to ensuring that the unity of the family is maintained ... [and] the protection of refugees who are minors, in particular unaccompanied children and girls[...].”*¹⁶

The Executive Committee on the International Protection of Refugees has passed a variety of conclusions, most notably conclusion No. 24 and 84, which directly relate to the issue of family

¹¹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

¹² See United Nations Treaty Collections: *Convention relating to the Status of Refugees (1951 Convention)*.

¹³ 1951 Convention Article 1(A) (2).

¹⁴ This thesis will use the term ‘refugee’ who satisfy the conditions laid out in the 1951 Convention and ‘asylum-seeker’ to describe all those who have requested protection.

¹⁵ *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, Recommendation B.

¹⁶ *Ibid.* Recommendation B.

reunification.¹⁷ Conclusion No. 24 calls for the “... *application of the Principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.*” Conclusion No. 84 calls upon “*the principle of the best interests of the child and the role of the family as the fundamental group of society concerned with the protection and well-being of children and adolescents.*”

The Executive Committee urges States to “*implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without undue delay.*”¹⁸ Conclusion No. 22 furthermore affirms, that even during mass influx of refugees, the respect for family unity is a ‘minimum basic human standard’.¹⁹

The 1951 Convention and its protocol have thus provided significant normative guidance on the treatment of refugees and their families. Nonetheless, it has not created binding obligations on States concerning family reunification and, as is mostly the case in international law, there are no significant consequences to a breach of the 1951 Convention. States are not bound to any specific procedure when determining, whether an asylum-seeker is protected by the 1951 Convention and hence can create laws, which effectively diminish its effectiveness. States are merely bound by the Article 33 principle, the principle of *non-refoulement* and other substantive rights.²⁰

¹⁷ Sztucki J, “*The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*” (1989) 1 International Journal of Refugee Law 285.

¹⁸ Executive Committee Conclusion No. 85 (XLIX) – *Conclusion on international protection* (1998) Conclusion w.

¹⁹ Executive Committee Conclusion No. 22 (XXXII) – *Protection of Asylum-seekers in situations of large-scale influx (1981)* Conclusion 2(h).

²⁰ P.V. Sainz-Pardo (2002) *The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees*, The International Journal of Human Rights, 6:2, 23-34, p.26.

2.3. THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (CRC) was adopted in 1989 and entered into force in 1990. It is the most rapidly and widely ratified treaty in history, with all States being signatories except Sudan, Somalia and the United States of America.²¹ The Convention does include a complaint mechanism, which was created through an Optional Protocol adopted in 2011 and has been in force since 2014.²²

The CRC is especially relevant considering the impact the German family reunification ban has had, and continues to have, on unaccompanied minors and children who are indefinitely separated from their parents. Unaccompanied minors who have entered Germany since 2015 and have been granted subsidiary protection lose their right to family reunification once they turn 18, which is likely to happen while the ban is still in place. Parents who have entered Germany without their children, counting on the right to family reunification to grant their offspring safe passage to Europe and have left their children behind in a war-torn country are separated from them for an unspecified time. The CRC thus plays a crucial role in the family reunification process, especially since Germany has ratified the Optional Protocol and claims can hence be brought against it before the Committee.

The CRC contains several relevant provisions concerning the issue of family reunification. The umbrella provision of the CRC can be found in Article 3(1), which states, that “*in all actions concerning children, (...) the best interests of the child shall be a primary consideration.*”²³ It furthermore urges States to “*take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*”²⁴ Article 9 of the CRC urges States to ensure, that a child will not be separated from their parents against their will.

In Article 10 the CRC specifically addresses the issue of family reunification. Article 10(1) obliges States to deal with applications for family reunification in a **positive, expeditious and humane** manner and Article 10(2) provides the right for children to maintain contact and

²¹ '25th Anniversary of the Convention on the Rights of the Child' (Human Rights Watch, 2018).

²² Germany has ratified this Optional Protocol.

²³ *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 1990) 1577 UNTS 3 (CRC).

²⁴ CRC Art. 2(2).

personal relations with their parents.²⁵ Article 16(1) prohibits arbitrary interference in the family life of the child and Article 22(2) requires States to “*trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.*” The lack of an explicit article concerning the right to family reunification is reflective of the reluctance of many member States to explicitly grant the right to reunification and its possible long-term repercussions.

Germany, under Article 44 of the CRC, is obliged to submit reports every five years to the Committee, with the latest report being submitted in 2013. In its concluding observations the Committee has made it clear, that it is concerned regarding Germany’s strict rules on family reunification.²⁶ It has explicitly pointed out the fact that Germany has not yet integrated the principle regarding the best interests of the child in all areas of the legislative, executive and judicial branches, especially the interests of refugee and asylum seeking children.²⁷ This essentially creates a protection gap for unaccompanied refugee children.²⁸ In a legal analysis for the German Lower House of Parliament in 2016 it was concluded, that the Asylpaket II essentially violates the CRC, as the national law does not give administrative discretion to the German migration office to grant family reunification and thus a large number of cases are to be expected before German courts.²⁹

The next report from Germany is due in 2019 and it will be interesting to explore the observations of the Committee regarding the Asylpaket II and connected issues regarding family reunification. These observations are not legally binding. The Convention however has had far reaching influence on an EU level, such as the EU family unification law, reflecting its significance.³⁰

²⁵ Klaassen (n 7), p.33.

²⁶ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 February 2014, CRC/C/DEU/CO/3-4, §44.

²⁷ *Ibid.* §26.

²⁸ Council of Europe, *Realizing the right to family reunification for refugees in Europe*, Issue Paper, p. 19.

²⁹ Deutscher Bundestag, “*Vereinbarkeit der Regelungen des Asylpakets II betreffend die Aussetzung des Familiennachzugs für unbegleitete minderjährige Flüchtlinge mit der VN Kinderrechtskonvention (KRK)*”, (19 February 2016).

³⁰ Klaassen (n 7), p.34.

2.4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The right to family unification for all persons within a State's jurisdiction is also granted through the International Covenant on Civil and Political Rights (ICCPR). These rights are granted "to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons...".³¹ The right to family reunification in the ICCPR is derived from Article 17 and 23. Article 17 forbids States to arbitrarily interfere with family life. Article 23 protects the family as the "natural and fundamental group unit of society."³² There is however no obligation on States to admit asylum-seekers and grant them protection status.³³ They do however have to ensure that asylum-seekers can access family reunification without being subject to discrimination, especially when they have been separated due to economic, political or similar reasons.³⁴

The Human Rights Committee is the competent authority to rule on State violations of the ICCPR. However its rulings are not binding, hence the European Court of Human Rights (ECtHR) is the principal judicial body for complaints filed against EU Member States.³⁵

2.5. THE PRINCIPLE OF NON-REFOULEMENT

Non-refoulement is the foundation of the 1951 Convention. It was originally included in Article 33 of the 1951 Convention, an article to which no reservation is permitted under Article 42(1), which states

*"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*³⁶

³¹ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, §10.

³² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 (ICCPR).

³³ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, §5.

³⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, §5.

³⁵ Case law before the ECtHR will be discussed in 2.6.

³⁶ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 33.

This principle has developed since 1951. States are now not only prohibited from returning refugees in fear of prosecution but also those who face the risk of inhumane, cruel or degrading treatment or punishment, torture, arbitrary deprivation of life, a flagrant denial of the right to a fair trial and the denial to the right to liberty and security.³⁷ *Non-refoulement* has now been established as a norm of customary international law, which was confirmed by UNHCR in response to questions posed by the Federal Constitutional Court of the Federal Republic of Germany.³⁸

The protection principle applies to everyone who meets the criteria contained in in Article 1(A) (2) of the 1951 Convention. If a person does fulfil the criteria contained in this article, he becomes a refugee as the status determination is declaratory in nature – a refugee is not recognized because a State has recognized him but is recognized due to his circumstances.³⁹ It can thus be deduced that the principle of *non-refoulement* does not only apply to refugees who have been recognized but even those whose status has not yet been determined by the respective authorities. This has been confirmed by Executive Committee conclusion No. 6, which “*reaffirms the fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.*”⁴⁰

2.5.1. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The principle of *non-refoulement* is also included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 3 explicitly forbids the return or expulsion of persons who have substantial grounds to fear that they will be tortured upon their return.⁴¹ The CAT and its provisions are absolute, non-derogable and

³⁷ Jane McAdam, ‘*The Enduring Relevance of the 1951 Refugee Convention*’ (2017) 29 International Journal of Refugee Law 1–6, p. 3.

³⁸ UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law*. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, §8.

³⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, para. 28.

⁴⁰ Executive Committee Conclusion No. 6 (XXVIII) – *Non-refoulement* (1977) Conclusion w.

⁴¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

form customary international law.⁴² Although the CAT does impose the obligation of *non-refoulement* on State parties, it does not automatically extend any other form of protection, such as refugee protection. In *Aemei v Switzerland*, the Committee against Torture confirmed this by stating, that “*article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum. The finding of a violation of article 3 has a declaratory character.*”⁴³ Article 3 CAT can therefore extend protection to asylum-seekers who fall outside of the scope of the 1951 Convention, particularly subsidiary protection holders.

2.5.2. International Covenant on Civil and Political Rights and non-refoulement

The International Covenant on Civil and Political Rights (ICCPR) is another international legal instrument, which grants specific protection under the umbrella principle of *non-refoulement*. In Article 7 the ICCPR states, “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*”⁴⁴ As in the case of the CAT, this provision is absolute and non-derogable, and extends to all forms of harm specified in Article 6 and 7. This international instrument extends protection to all, including subsidiary protection holders, refugees and asylum-seekers, as long as they are within the substantive scope of the ICCPR.⁴⁵

2.5.3. Conclusion

The principle of *non-refoulement* is not only a cornerstone of international refugee protection, but a *jus cogens* norm and a principle of customary international law. It consequently obliges States which have not ratified the 1951 Convention to adhere to its protection principle. It is especially relevant in this context, as many Syrian asylum-seekers who do not satisfy the 1951 Convention requirements cannot be returned due to the current situation in Syria.

Syrian asylum-seekers in Germany are entitled to protection on the same legal basis – the principle of *non-refoulement*. Considering the situation that asylum-seekers from Syria have

⁴² Committee against Torture, ‘*General Comment No 2*’ (2008) UN Doc. CAT/C/GC/2 §1.

⁴³ *Aemei v Switzerland*, Communication No 34/1995 (1997) UN Doc. CAT/C/18/D/34/1995, para. 11.

⁴⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴⁵ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, §10.

found themselves in and given that Germany is obliged to grant protection due to the concept of *non-refoulement*, which is absolute and non-derogable, the distinction between refugee and subsidiary protection appears arbitrary.⁴⁶

2.6. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights (ECHR), as other international legal instruments, does not contain any specific reference to the right to family reunification. It does however include provisions which are essential for the right to family reunification and especially the discriminatory distinction between refugee protection (RP) and subsidiary protection (SP).⁴⁷ In Article 1 it lays out, that the rights and freedoms it grants are given to all within States parties' jurisdiction⁴⁸, effectively including asylum-seekers, refugees and other nationals.⁴⁹ The ECHR lacks reference to refugees and migration and is static, yet the ECtHR has confirmed, that "*the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.*"⁵⁰ The ECHR was not drafted with the intent to shift the responsibility of implementing the rights and freedoms granted to the EU, but rather calls upon States parties to implement the rights on a national level.⁵¹

The ECHR and its associated judicial body, the European Court of Human Rights (ECtHR), will only intervene when a State has failed to provide rights, the applicant has exhausted local remedies and the State has consequently violated its obligations.⁵²

2.6.1. Article 8 - Right to respect for private and family life

Article 8 of the ECHR affirms the following,

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

⁴⁶ Jane McAdam, *Complementarity Protection in International Refugee Law*, (OUP 2007), p. 251.

⁴⁷ Refugee protection refers to the status convened on asylum-seekers through the 1951 Convention. Subsidiary protection holder refers to the status given by Directive 2011/95/EU.

⁴⁸ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR).

⁴⁹ *Klaassen* (n 7), p.39.

⁵⁰ *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978, §31.

⁵¹ *Klaassen* (n 7), p.39.

⁵² ECHR, Art. 35(1).

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

This article however does not grant the right to family reunification. This has been established in a variety of ECtHR case law such as *Tuquabo-Tekle and Others v. the Netherlands*, which explicitly stated “*Article 8 cannot be considered to impose on a State a general obligation ...to authorise family reunion in its territory*”.⁵³ The Court however has also affirmed that refugees are a vulnerable group and hence should be granted more favourable family reunification procedures.⁵⁴ The case law before the ECtHR concerning Article 8 and its applicability for refugees is sparse, yet a trend towards a liberal approach can be observed.⁵⁵ In cases of extreme hardship and significant obstacles to resuming family life in the country of origin, the ECtHR has shown compassion for RP and SP holders – which is an argument to be made for Syrian SP holders living in Germany.⁵⁶

2.6.2. Article 14 – Prohibition of Discrimination

People living within the territory of the EU enjoy the right not to be discriminated against. The ECHR has included this in Article 14, which reads:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The most significant ground for the purpose of this thesis is ‘*other status*’ as the distinction between RP and SP effectively imposes a *status* upon asylum-seekers in Germany. The ECtHR

⁵³*Tuquabo-Tekle and Others v. the Netherlands*, 60665/00, Council of Europe: European Court of Human Rights, 1 December 2005, §43(c).

⁵⁴*Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, §75.

⁵⁵ ‘*A Right To Family Reunification For Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty And EU Harmonisation – EU Immigration And Asylum Law And Policy*’ (*Eumigrationlawblog.eu*, June 2016).

⁵⁶ This argument will be explored in Chapter V.

has confirmed that ‘*immigration status*’ can be considered as part of the non-exclusive wording of Article 14.⁵⁷

In the present scenario, RP holders benefit from the Family Reunification Directive whereas SP holders do not enjoy these rights. SP holders can merely benefit from rights granted to them under the Qualification Directive.⁵⁸

The ECtHR has discussed this distinction in *Hode and Abdi v. UK* and stated that “*Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, 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 realized [emphasis added]*”.⁵⁹ The situation of Syrian RP and SP holders in Germany is arguably similar,⁶⁰ and hence the difference in treatment in a ‘*relevantly similar*’ situation is a violation of Article 14.⁶¹ This has been adopted by the Council of Europe Committee of Ministers which state, that family reunification should be the same for “*a refugee or another person in need of international protection*”⁶² This has further underlined the argument, that the distinction is arbitrary.

Concluding, it can be said that the ECHR and its judicial body, the ECtHR, have not given much indication on the obligations States have regarding refugees and their right to family reunification. It has however affirmed that no definite right can be deduced from Article 8 concerning family reunification of refugees, but that according to Article 14 there cannot be arbitrary discrimination according to immigration status. It will be interesting to see, how the Court views the ban imposed by Germany on SP holders, as it is likely to be entrusted with deciding the fate of Syrian SP holders living in Germany in the future.

⁵⁷ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, §48.

⁵⁸ The Family Reunification and Qualification Directive will be discussed in 3.3. and 3.4. respectively.

⁵⁹ *Hode and Abdi* (n 57) §44.

⁶⁰ Relevant German case law reflecting the similarity will be introduced in Chapter IV.

⁶¹ *Hode and Abdi* (n 57) §50.

⁶² Council of Europe: *Committee of Ministers, Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, 15 December 1999, Rec(99)23, §3.

2.7. SUB-CONCLUSION

The lack of specific, binding provisions concerning family reunification is notable. Although various international treaties and conventions do entail reference to family reunification, none of them have made explicit reference to the right to family reunification. It can be observed that the mobility of individuals and the phenomenon of mass international refugee migration were not been adequately taken into account 60 years ago. The lack of specific reference thus arises on the one hand from vastly different circumstances when the treaties were developed and on the other hand from the reluctance of States to grant an explicit right to family reunification.⁶³

None of the discussed provisions oblige States to grant family reunification. They do however provide much-needed guidelines when assessing family reunification applications. An unaccompanied minor for example can rely on the CRC and so can a parent who has left behind his/her child. The current situation in Germany however does not allow for an assessment of individual circumstances; nor does the procedure encourage assessment of Germany's obligations under international law.⁶⁴ The non-ability of the German government to take into account the best interest of the child in the context of the Asylpaket II is effectively out of the question.⁶⁵

⁶³ *Klaassen* (n 7), p.35.

⁶⁴ Interview with Rebecca Einhoff, Appendix I.

⁶⁵ *Ibid.*

III. THE EUROPEAN UNION – TOWARDS REGIONAL HARMONIZATION?

3.1. INTRODUCTION

In chapter II, international legal instruments were discussed, specifically the CRC, the 1951 Convention and the ECHR. As previously examined, there is no enforcement mechanism in place to ensure the adherence of States to the 1951 Convention. The European Union (EU) has embraced the spirit of the 1951 Convention in a variety of secondary legislation. These are enforceable by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).⁶⁶ Article 78(1) of the Treaty of the Functioning of the European Union (TFEU) expressly requires the EU to:

“...develop a common policy on asylum, subsidiary protection and temporary protection (...) This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”⁶⁷

The CJEU hence has the ability to enforce refugee protection and can ‘*truly be characterized as a refugee law Court*’ if it has jurisdiction over a specific case.⁶⁸ The EU consequently has the capacity to reshape practices of refugee protection on an EU level through its policy and judiciary, and hence is significant for refugees residing within its jurisdiction. The following chapter will discuss the Family Reunification Directive (Directive), the EU Qualification Directive (Qualification Directive), and lastly discuss the distinction between refugee and subsidiary protection.

3.2. THE FAMILY REUNIFICATION DIRECTIVE

The Family Reunification Directive directly concerns family reunification and is currently the only EU legislative instrument to do so. It has been drafted with the spirit of Article 78(1) TFEU in mind, in order to harmonize asylum law in Europe in the future. The reluctance of States however to implement a common asylum system has led to the Directive being non-

⁶⁶ Costello C, *The Human Rights of Migrants in European Law* (Oxford University Press 2016) p. 172.

⁶⁷ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, (TFEU) 13 December 2007, 2008/C 115/01.

⁶⁸ Costello (n 66) p.228.

binding on member States.⁶⁹ It does nevertheless impose a positive obligation on States to grant family reunification without the margin of appreciation typically granted to States.⁷⁰ The Directive applies to non-EU nationals who lawfully reside in its territory and have an expectation of long-term residence. The Directive defines the family as primarily consisting of the spouse and minor children.⁷¹ The Directive states that, “*family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion ...*”⁷² The CJEU has confirmed that family reunification is the rule and not the exception.⁷³

The Directive and its provision should be applied in line with international legal obligations as well as the fundamental rights granted by the ECHR. It furthermore calls upon States to implement the principle of the best interests of minor children as laid down in the CRC.⁷⁴ The Directive applies to refugees, as defined in the 1951 Convention, and grants them preferential rights compared to other forms of migrants, such as SP holders.⁷⁵ There are a variety of EU States however who do apply the Directive to SP holders, and the Commission stated that it is working to amend the Directive to apply to SP holders.⁷⁶ In 2014, it affirmed this by stating, that “*the Commission considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages MSs to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection*”.⁷⁷

⁶⁹ *Klaassen* (n 7) p. 102.

⁷⁰ *European Parliament v. Council of the European Union*, C-540/03, European Union: Court of Justice of the European Union, 27 June 2006, §60.

⁷¹ Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, (Family Reunification Directive) Preamble (9).

⁷² *Ibid.* Preamble (4).

⁷³ *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, European Union: Court of Justice of the European Union, 4 March 2010, §43.

⁷⁴ *Family Reunification Directive* (n 71), Art. 5(5).

⁷⁵ *Family Reunification Directive* (n 71), Art. 3(2)(c).

⁷⁶ Report from the commission to the European parliament and the council on the application of directive 2003/86/EC on the right to family reunification *COM(2008) 610*, §3.2.

⁷⁷ Communication from the Commission to the European Parliament and the Council on guidance for application of directive 2003/86/EC on the right to family reunification, *COM(2014) 210*, §6.2.

Since the Treaty of Amsterdam in 1998, the EU has sought to establish a common asylum-system, with the TFEU incorporating the vision of the EU to harmonize asylum procedures.⁷⁸ The recast of the Qualification Directive has confirmed this, marking the beginning of RP and SP convergence in EU law.

3.3. THE QUALIFICATION DIRECTIVE

Council Directive 2004/83/EC was adopted on the 29th of April 2004 and is the first legislative instrument to set minimum standards to qualify persons in need of international protection. The Qualification Directive's preamble points out that the 1951 Convention is the cornerstone of refugee protection. Its purpose is to harmonize the various protection statuses for asylum-seekers in Europe and to work towards a common asylum-system; as such it functions as a 'supranational legal instrument' within the EU.⁷⁹ The creation of a uniform status for asylum-seekers, whether RP and SP, is essential to move towards a Common European Asylum System (CEAS) as envisioned in Article 78 of the TFEU.⁸⁰

To move towards harmonizing eligibility for protected statuses, the Qualification Directive was recast in 2011.⁸¹ The recast Directive expands on the rights granted in the original Qualification Directive such as making SP holders eligible for family reunification without further requirements.⁸² It is the only binding instrument so far, which defines the complementary protection status discussed in this thesis – subsidiary protection. Article 2(f) of the recast Directive defines subsidiary protection holders as follows:

“‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to

⁷⁸ TFEU, Art. 78 and 79.

⁷⁹ Guy S Goodwin-Gill, Jane McAdam, *The refugee in international law* (3rd edn, OUP 2007), p. 296.

⁸⁰ ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, p. 1.

⁸¹ *Ibid.* p. 1.

⁸² *Klaassen* (n 7) p. 196.

whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;”⁸³

In its preamble it points out that rather than being two different statuses, subsidiary protection is additional and complimentary to refugee protection.⁸⁴ The Qualification Directive in Article 20(5) furthermore refers to the CRC’s call for the best interests of the child to be the primary consideration. Article 23(2) moreover grants family members of SP holders the same rights as those granted to refugees under Chapter VII.

Article 15(c) of the Qualification Directive states that “*serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*” qualifies a person for SP. The wording of this provision however is narrow, and the United Nations High Commissioner for Refugees (UNHCR) has called upon States to interpret this provision in light of the spirit of the Qualification Directive.⁸⁵ It has furthermore argued that asylum-seekers with a well-founded fear of prosecution fall within the definition of the 1951 Convention and a narrow interpretation of 15(c) is ill-founded, since the Article should provide protection from situations rather than individual circumstances⁸⁶ – which arguably is the case in Syria. At the end of 2017, there were 51,068 pending appeals from Syrians against their SP status before the German Ministry for Refugees.⁸⁷ The distinction between RP and SP protection has become a literal matter of ‘life and death’ for Syrian SP holders living in Germany due to the ban on family reunification and it is hence important to further explore its significance.

⁸³ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, (Recast Directive) Art. 2(f).

⁸⁴ European Union: Council of the European Union, *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*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC (Qualification Directive) Preamble (24).

⁸⁵ UNHCR *Annotated Comments on the EC 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*, 28 January 2005, comment on Recital 26 and Article 15(c), p. 7.

⁸⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR public statement in relation to Elgafaji v. Staatssecretaris van Justitie before the Court of Justice of the European Union*, January 2008, p. 6.

⁸⁷ Deutscher Bundestag, *Antwort auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Dr. André Hahn, Gökay Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE.* – Drucksache 19/635 – p. 43.

3.4. REFUGEE VS. SUBSIDIARY PROTECTION

The Qualification Directive is the first of its kind to establish the meaning of the two protection statuses relevant for this thesis – refugee protection and subsidiary protection. The recast Qualification Directive in Article 13 states, that “*Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee*”. Article 18 on the other hand addresses subsidiary protection; “*Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection*”. In order to fully grasp the differentiation for the purpose of this thesis it is therefore essential to examine the implications of each protection status.

3.4.1. Refugee Protection

In accordance with Article 78 TFEU, EU law provides protection for RP holders in line with the 1951 Convention. The Qualification Directive defines a refugee as follows:

*“‘refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.”*⁸⁸⁸⁹

The Qualification Directive in Article 2(d) states that an asylum-seeker becomes a refugee through the recognition of a Member State. It has been established previously, that this is contrary to the 1951 Convention⁹⁰ as well as the Qualification Directive itself, which states that it “*is a declaratory act.*” in its recital.⁹¹ The wording of the Qualification Directive however has made it clear, that the mere declaration is insufficient to claim refugee status.

A refugee, once recognized by a Member State, acquires a variety of benefits and rights. These rights and benefits have been conferred upon refugees through the 1951 Convention.

⁸⁸ Article 12 lists the reason for exclusion from refugee protection such as having committed a serious crime.

⁸⁹ *Qualification Directive* (n 84), §2(c).

⁹⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, para 28.

⁹¹ *Qualification Directive* (n 84), Recital 14.

Family reunification, although not an explicitly granted right, has been addressed in the context of refugee protection. The 1951 Convention states, that the family is the ‘*natural and fundamental*’ group of society and that it is an ‘*essential right of the refugee*’.⁹² This has been stressed by the Conference of Plenipotentiaries, which recommended that States “*take the necessary measures for the protection of the refugee’s family.*”⁹³ These recommendations have, over the years, been complemented by guidelines published by UNHCR, which although not binding constitute ‘soft law’.⁹⁴

The Family Directive explicitly applies to RP holders, with Chapter V being entirely dedicated to the right of family reunification of refugees. It excludes refugees from the minimum stay otherwise necessary to apply for family reunification, and exempts refugees from providing proof of adequate finances, accommodation and health insurance. The Family Directive hence recognizes refugees and their circumstances, granting them favourable conditions in comparison to other third country nationals. An asylum-seeker who is granted refugee protection in a Member State is consequently in a promising position to access family reunification under international law as well as EU law. A SP holder on the other hand faces a variety of obstacles to the right of family reunification.

3.4.2. Subsidiary protection

In Chapter II the principle of *non-refoulement* and its position in international law was discussed. Its non-derogable nature has led to States being unable to send back persons who fall within this category, yet do not qualify as refugees under the 1951 Convention. In response States have moved towards different protection statuses with less or more rights and benefits attached to them according to the needs identified. The Qualification Directive recognizes the trend towards a variety of protection statuses and hence specifically addresses SP, which it views as supplementary to RP.⁹⁵ This is in order to ensure that common criteria are applied by Member States when assessing asylum applications.⁹⁶

⁹² 1951 Convention (n 12), recommendation B.

⁹³ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, B.

⁹⁴ Council of Europe (CoE) ‘Issue Paper: Realising the rights to family reunification of refugees in Europe’ (2017) p. 20.

⁹⁵ Qualification Directive (n 82) Recital 5.

⁹⁶ Ibid. Recital 6.

A SP holder is defined in Qualification Directive as:

“‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;”⁹⁷⁹⁸

The bases for SP are outlined in Article 15 of the Qualification Directive, which lists the grounds that give rise to protection. SP can hence only be claimed by those, who are in danger of experiencing human right violations as defined in Article 15:

*“(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”*

The Family Directive in Article 3(2)(c) states that the Family Directive does not apply to persons who have been granted a ‘*subsidiary form of protection*’.⁹⁹ In a recent report however, the Council of Europe Commission for Human Rights has questioned this assumption as for: “*subsidiary protection beneficiaries 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*”.¹⁰⁰ In the case of Germany however, this argument has not been accepted as evident through German State practice.

SP holders are thus not covered by the Family Directive and are not extended the same rights and benefits as refugees through the Qualification Directive and its 2011 recast.

⁹⁷ Article 17 lists the reasons for exclusion from refugee protection, such as having committed a serious crime.

⁹⁸ *Qualification Directive* (n 82) §2(e).

⁹⁹ Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, §3(2)(c).

¹⁰⁰ Council of Europe (n 94), p. 28.

It can however be argued, that the humanitarian intention to provide refugees with favourable conditions to access family reunification should equally apply to SP holders, as their needs are in essence the same.¹⁰¹ This difference in treatment becomes especially problematic without a reasonable justification for differential treatment of persons in similar situations, as established by the ECtHR.¹⁰² This discrepancy between secondary EU Law, ECtHR judgments and State practice could lead to an increased fragmentation of protection statuses within the EU, ultimately undermining harmonization of EU law as well as the equality of persons.

3.4.3. Towards a fragmentation of international protection?

The principle of *non-refoulement* in addition to other obligations of States under international law, as well as primary and secondary EU law, has led many States to adopt a protection regime which recognizes a variety of protection needs. It has been argued that this differentiation finds its roots in political motivation rather than legal reasoning.¹⁰³ The strict interpretation of ‘refugee’ as encompassed in the 1951 Convention can arguably be interpreted as incorrect, not supported by the spirit and purpose intended by the drafters.¹⁰⁴ The concept of *non-refoulement* furthermore attaches to persons in a very similar situation and it is thus arguable whether a distinction between the two is necessarily justified.¹⁰⁵ It proved to be an effective tool in limiting the rights of all those who have not been granted refugee protection, as their rights are not binding on Member States as the rights of refugees are. The practise of States such as Germany is reflective of this effect of fragmenting protection statuses. The Qualification Directive could have embodied a vision towards a Common European Asylum-System (CEAS), yet it has further intensified the fragmentation amongst States.¹⁰⁶

¹⁰¹ European Commission, *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, 3 April 2014, COM/2014/0210, p.24.

¹⁰² *H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 13 November 2007, §175.

¹⁰³ T Spijkerboer, ‘*Subsidiarity in Asylum Law. The Personal Scope of International Protection*’, in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels, Bruylant, 2002) 28-29.

¹⁰⁴ *Ibid.*

¹⁰⁵ *McAdam*, (n 46) p. 251.

¹⁰⁶ UN High Commissioner for Refugees (UNHCR), *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, 20 November 2006, p. 13.

3.5. SUB-CONCLUSION

UNHCR, which according to the Treaty of Amsterdam¹⁰⁷ has a supervisory responsibility, has confirmed that “*the humanitarian needs of persons granted subsidiary protection are not different from those of refugees*”.¹⁰⁸ It furthermore pointed out:

*“there is also no reason to distinguish between the two as regards their right to family life and access to family reunification. There is thus no reason to treat beneficiaries of subsidiary and temporary protection less favorably and apply the new rules retroactively on them.”*¹⁰⁹

The concept of complementary protection, such as SP, is meant to be “*implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime*”.¹¹⁰ The current procedure in Germany is a violation of the intention and spirit of the Directives and accordingly in violation of EU law, at the very least because it does not take into account the best interests of the child at any stage of the protection status assessment.

¹⁰⁷ European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, Art. 17.

¹⁰⁸ Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the draft Law Proposal amending the Aliens Act of the Republic of Finland (2016) §18.

¹⁰⁹ *Ibid.* §18.

¹¹⁰ UNHCR’s Executive Committee, Conclusion No. 103 (LVI) of 2005, (k).

IV. GERMAN LEGISLATION

4.1. INTRODUCTION

The German Constitution (*Grundgesetz*) is one of the few constitutions internationally which grants a legally enforceable claim to asylum to politically persecuted persons in Article 16a. The Article reads, “*Persons persecuted on political grounds shall have the **right** of asylum [emphasis added]*”¹¹¹, a clear reference to history and the National Socialist regime.¹¹² A person who is persecuted for political reasons is anyone who, because of his race, religion, nationality, affiliation with a social group or political persuasion, is subject to persecution with danger to life or restrictions to his personal freedom.

Germany consists of sixteen states, but immigration issues fall within the exclusive competence of the Federal government. It is the respective state however which deals with an asylum application and the subsequent procedure, which in some cases has led to vast differences in outcomes for asylum-seekers.¹¹³ The changing political climate and increasing asylum applications have led Germany to amend the *Grundgesetz* in 1993, and to adopt a variety of increasingly restrictive laws concerning the right to asylum.¹¹⁴ This chapter will provide an overview of German legislation concerning the right to asylum and the right to family reunification in the GG. It will then analyse the *Asylpaket II* of 2016 and its ban on family reunification and introduce subsequent case law before German courts.

4.2. GERMAN REFUGEE LAW

4.2.1. Overview

Germany has found itself in a difficult position since the 1990’s, with increasing numbers of asylum seekers entering its territory. In response, it has amended its *Grundgesetz* in 1993 to exclude asylum seekers from European countries and countries which apply the 1951 Convention (Art. 16(a)(3) *Grundgesetz*) as well as asylum seekers from safe third countries (Art. 16(a)(4) *Grundgesetz*), and has amended the *Grundgesetz* to include a right to terminate

¹¹¹ *Basic Law for the Federal Republic of Germany* (amended 23 December 2014).

¹¹² Bundeszentrale für Politische Bildung, Lexika: Asylrecht.

¹¹³ An example is the recent BAMF scandal see: Wall Street Journal, *Asylum Scandal Jolts Germany, Unsettling Merkel Government*, 31 May 2018, available at: <https://www.wsj.com/articles/asylum-scandal-jolts-germany-unsettling-merkels-government-1527768001> [accessed 6 June 2018].

¹¹⁴ Bundeszentrale für Politische Bildung: *Asylum Law, Refugee Policy and Humanitarian Migration in the Federal Republic of Germany*, 2.6.2015.

the stay of an applicant if it has been determined that they have no right to asylum (Art. 16(a)(5) Grundgesetz).¹¹⁵ It has since passed a variety of legislation such as the Residence Act and most recently the Asylpaket II. This section will analyse the right to refugee protection under German law in line with the 1951 Convention, subsidiary protection in accordance with the Qualification Directive and the right to family reunification in German law.

4.2.2. Refugee protection

Germany has included a generous right to asylum under the 1951 Convention, with Article 16(a)(1) of the Grundgesetz granting every political refugee the right to asylum. This is significant in light of most international, EU and national law, which merely gives the right to claim asylum but does not entail a legally enforceable claim. The most important legislation in German national law concerning refugee protection is the *Asylgesetz* or Asylum Act.¹¹⁶ Section 3 defines a refugee in line with the 1951 Convention and specifies the acts, grounds and agents of persecution that give rise to refugee protection. It defines a refugee as the following:

“(1) A foreigner is a refugee as defined in the Convention of 28 July 1951 on the legal status of refugees if he,

1. owing to well-founded fear of persecution in his country of origin on account of his race, religion, nationality, political opinion or membership of a particular social group,

2. resides outside the country (country of origin)

a) whose nationality he possesses and the protection of which he cannot, or owing to such fear does not want to avail himself of, or

b) where he used to have his habitual residence”

Asylum-seekers who have been granted refugee protection in Germany can access a large variety of benefits such as financial assistance, health care, and the right to family reunification. The right to family reunification can be accessed without having to prove income or sufficient living space, if the application is filed within the first three months after the refugee status has

¹¹⁵ Ibid.

¹¹⁶ Die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration: *Rechtsgrundlagen des Asyl- und Aufenthaltsrechts*.

been granted. This procedure makes it relatively simple for refugees and unaccompanied minors to have their family join them in Germany.

4.2.3. Subsidiary protection

In section 4 of the Asylgesetz subsidiary protection is introduced. It provides that the following grounds give rise to subsidiary protection:

“A foreigner shall be eligible for subsidiary protection if he has shown substantial grounds for believing that he would face a real risk of suffering serious harm in his country of origin. Serious harm consists of:

- 1. death penalty or execution,*
- 2. torture or inhuman or degrading treatment or punishment, or*
- 3. serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”*

The German Government on the 1st of August 2015 passed the so-called *Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung*, which granted subsidiary protection holders the same rights as refugees concerning family reunification.¹¹⁷ This step was in response to a continuous claim by the Commissioner of the Federal Government for Migration, Refugees and Integration to award subsidiary protection holders’ the same unification rights as refugees due to the similarity in the circumstances which have forced them to flee.¹¹⁸ This law however was almost immediately changed with the addition to the Residence Act Article 104(13), which enforced the Asylpaket II and its restriction on family reunification.¹¹⁹

¹¹⁷ Die Bundesregierung: *Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung* (2 July 2015).

¹¹⁸ Bundesregierung, Beauftragte Für Migration, Flüchtlinge und Integration: *11. Bericht der Beauftragten der Bundesregierung für Migration, Flüchtlinge und Integration - Teilhabe, Chancengleichheit und Rechtsentwicklung in der Einwanderungsgesellschaft Deutschland* (9 Dezember 2016) p. 467.

¹¹⁹ Article 104(13) reads: *Up until 16 March 2018 the subsequent immigration of dependants shall not be granted to persons who were granted a temporary residence permit pursuant to Section 25 (2).*

4.2.4. Family Reunification in Germany

Article 6 of the Grundgesetz provides “*marriage and the family [with] special protection of the state*”. It is derived from Article 8 of the ECHR and provides for basic legislation concerning family life. This protection is granted to refugees under the *Aufenthaltsgesetz* or residence act §29.¹²⁰ In a landmark decision from 1987 however, the Federal Administrative Court asserted that this does not grant a constitutional right to family reunification, which has been reaffirmed various times since.¹²¹ The absence of current national legislation stating that the right to family is a constitutional right has paved the way for a new law. The Asylpaket II was passed in order to limit the right to family reunification, which according to established practise is within the legal realm of national law.¹²² The law does however require Germany to examine the application on a case-by-case basis rather than dismissing a whole category of applications, as is the current practise.¹²³

4.3. ASYLPAKET II

4.3.1. Overview

In 2015 476.649 asylum-seekers applied for refugee protection in Germany, an increase of 135% compared to 2014.¹²⁴ This increase became even more apparent in 2016, after many asylum-seekers who were unable to file an application due to the backlog were able to file their request for protection. In 2016 745.545 people applied for asylum, another 63,5% increase compared to 2015.¹²⁵ This notable spike has led to a political push to limit migration to Germany, especially since the Ministry for Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) was unable to process the large amounts of applications.¹²⁶ Syrian asylum-seekers during 2015, for example, were granted refugee protection without BAMF having examined the applications on a case-by-case basis, leading to 95,8% being awarded refugee protection in 2015 and 0,1% subsidiary protection.¹²⁷ This has led to a political push to adapt a variety of legislative changes – collectively referred to as Asylpaket II. It includes

¹²⁰ Article 29 concerns *the subsequent immigration of dependants to join a foreigner*.

¹²¹ BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 08. Dezember 2005 - 2 BvR 1001/04 - Rn. (1-40), §16.

¹²² Deutsches Institut fuer Menschenrechte: *Stellungnahme zur öffentlichen Anhörung am Montag, dem 29. Januar 2018*, p. 10.

¹²³ Ibid. p. 11.

¹²⁴ Bundesamt für Migration und Flüchtlinge: *Das Bundesamt in Zahlen 2015*, p. 5.

¹²⁵ Bundesamt für Migration und Flüchtlinge: *Das Bundesamt in Zahlen 2016*, p. 5.

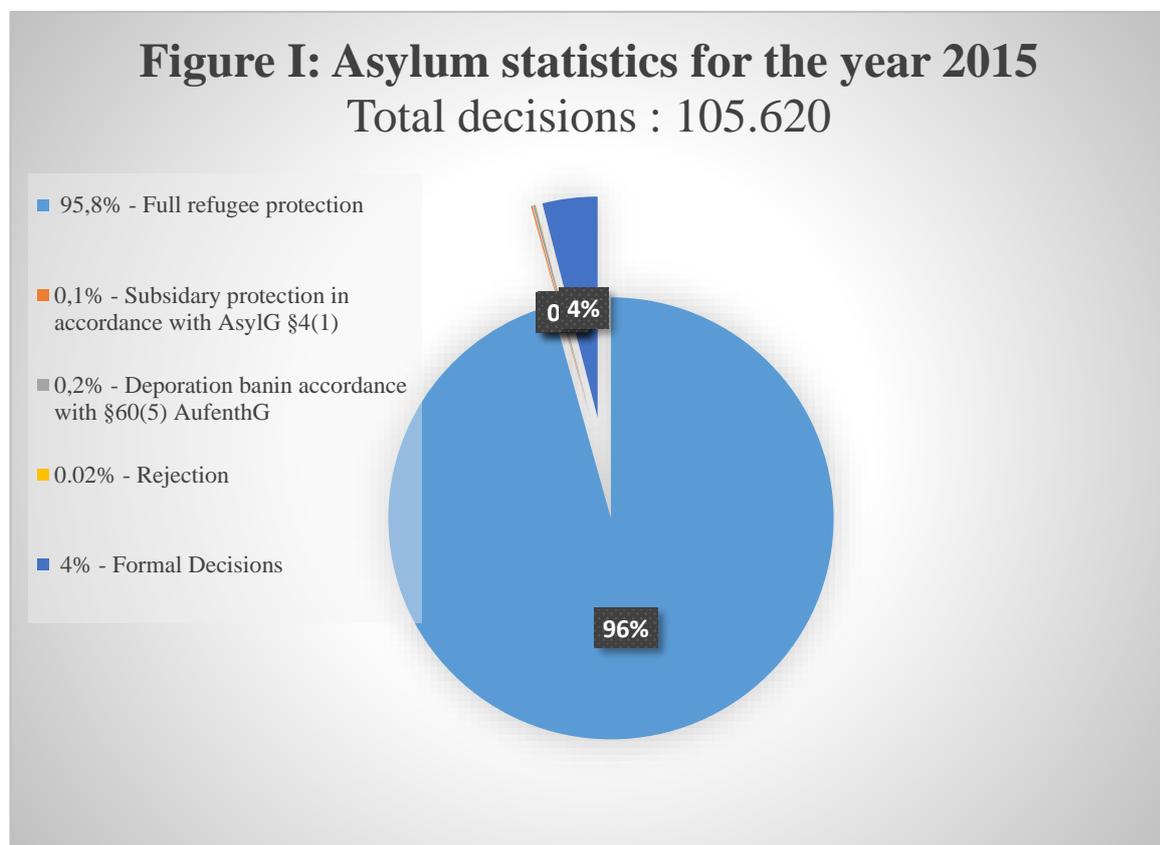
¹²⁶ ProAsyl *Memorandum Für Faire und Sorgfältige Asylverfahren in Deutschland*, 1. August 2016, p. 8.

¹²⁷ Bundesamt für Migration und Flüchtlinge: *Das Bundesamt in Zahlen 2015*, p. 50.

accelerated procedures and permits deportations, as well as a ban on family reunification for subsidiary protection holders, amongst other changes.¹²⁸

4.3.2. Statistics

The implementation of Asylpaket II has had a significant impact on the statistics for Syrian asylum-seekers. After the implementation of Asylpaket II, when the differentiation between refugee protection and subsidiary protection became highly significant, there was an extreme spike in subsidiary protection permits. This section will provide a brief overview to ensure that the full impact can be holistically presented, with statistics being highly relevant to the current situation.¹²⁹



¹²⁸ Die Bundesregierung: *Asylpaket II in Kraft*, 17. März 2016.

¹²⁹ All numbers apply specifically to Syrian asylum-seekers not asylum-seekers in Germany as a whole. The source for these statistics can be found in the figure table. The author did the text translation.

Figure II: Asylum statistics for the year 2016

Total Decisions: 295.040

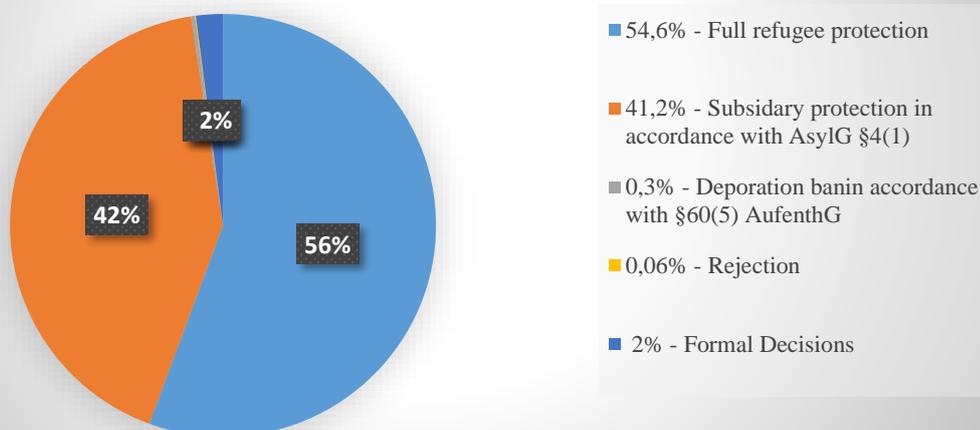
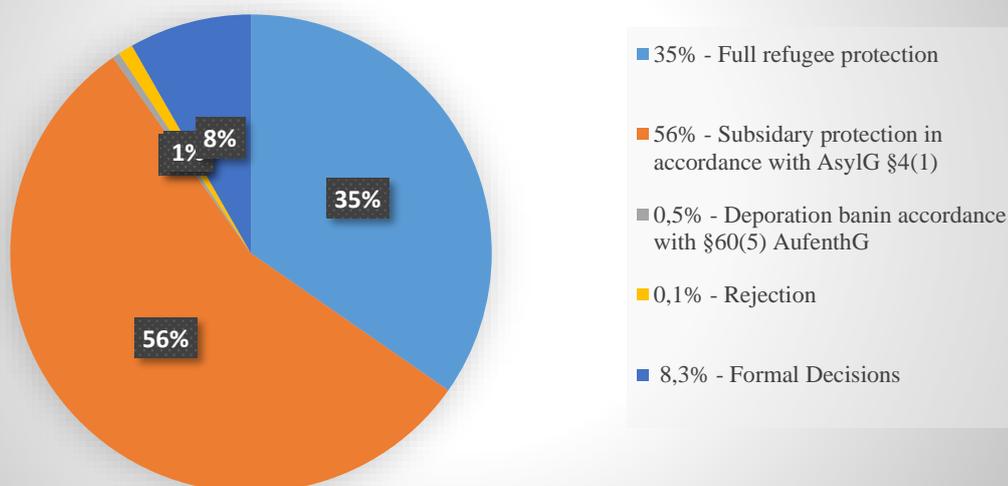


Figure III: Statistics for the year 2017

Total Decisions: 99.527



These charts, provided by BAMF itself, very clearly reflect a significant change in the refugee protection statuses awarded to Syrian nationals. In light of the current situation in Syria and the increased use of chemical weapons it seems highly unlikely that the situation has changed significantly enough to warrant such a significant difference in the protection status awarded to asylum-seekers.¹³⁰ The government has argued that this change is due to the large influx of asylum-seekers in 2015, which forced it to process applications in written form and not through

¹³⁰ VG Osnabrück 7. Kammer, Urteil vom 05.12.2016, 7 A 35/16, §112.

a hearing at the BAMF. Individual assessments have led them to determine that a much smaller number of Syrians fall within the scope of the 1951 Convention definition of a refugee.¹³¹ In 2016 9.051 Syrians appealed their subsidiary protection status, 70,3% of which have been granted full refugee protection by the courts.¹³² As of 31.05.2017, 56,725 Syrians are waiting for a decision by the courts concerning their protection status. The effect these procedures have on an already strained court system are not to be disregarded: reinstating family reunification could positively influence German courts and their efficiency.¹³³

The family reunification ban is however subject to a hardship clause, should the government decide that a particular case falls within the scope of §22 of the Residence Act. This provisions calls for exemptions “*on urgent humanitarian grounds*”. This rule can for example be applied to grant parents of an unaccompanied subsidiary protected minor family reunification in extreme circumstances. §22 was furthermore utilised during the negotiations for the Asylpaket II to justify the limitations on family reunification. Parties in favour of the ban argued that Article 22 allows for exemptions to the norm and hence it would be a sufficient ‘compromise’ between human rights and the law.¹³⁴ However by December 2017 only 66 such visas have been granted, with 230 applications still being processed.¹³⁵

4.3.3. The ban on family reunification

The right to family life is entrenched in German national law as discussed in part 4.2.4. In August 2015 Germany had even granted this right to subsidiary protection holders in the Aufenthaltsgesetz, stating that “*For the purpose of subsequent immigration to join a foreigner [family unification can be requested] within three months of final recognition as a person entitled to asylum or final granting of refugee status or subsidiary protection.*”¹³⁶ In March 2016 however §104(13) was added, enforcing a ban on family reunification for all subsidiary protection holders until March 2018. On the 15th of June the Bundesregierung voted to extend this ban until the 1st of August, allowing merely 1.000 family members to enter each month after that.¹³⁷

¹³¹ Deutscher Bundestag, *Drucksache 18/9992*, 10. Oktober 2016, p. 6.

¹³² Deutscher Bundestag, *Drucksache 18/13551*, p. 27.

¹³³ Deutscher Bundestag, *Drucksache 18/13551*, p. 26.

¹³⁴ Spiegel Online, *Gabriel will über Familiennachzug "nach Nächstenliebe" entscheiden*, 9. Februar 2016

¹³⁵ Deutscher Bundestag, *Antwort des Auswärtigen Amtes vom 06. Dezember 2017 auf die Schriftliche Frage 14 auf Bundestagsdrucksache 19/189*, p. 11.

¹³⁶ *Residence Act* in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), last amended Article 10 (4) of the Act of 30.10.2017, §29(2)(1).

¹³⁷ Der Spiegel: *Bundestag beschließt Gesetz zu Familiennachzug* (15.06.2018)

In 2013 the Federal Administrative Court issued a judgement concerning family reunification for unaccompanied minors.¹³⁸ The Court held that parents are entitled to join their child in Germany, as long as it is a minor. This right however ceases as soon as the child has reached 18 years.¹³⁹ The newly implemented ban and the significantly downscaled family visa quota starting from August 2018 would effectively prevent many unaccompanied minors from accessing family reunification. Their ‘turn’ would likely only come after they had turned of legal age – at which time they do not enjoy a right to family reunification under German law.

The Asylgesetz in Article 78(3)(1) does however grant the explicit right to challenge the protection status awarded to the asylum seeker. This right has shown to be significant in light of the subsidiary protection status being awarded to Syrians on a large scale – a ‘positive’ decision, which takes away their right to family reunification. The German Grundgesetz and Asylgesetz do allow subsidiary protection holders to challenge the award before a court, which has led to a variety of emerging case law in recent months.

4.4. CASE LAW

4.4.1 The right to legal remedy

In November 2016 the Bundesverfassungsgericht (Federal Administrative Court) held, that Syrians who sue against their subsidiary protection status have the right to do so under Article 19(4) Grundgesetz. Article 19(4) reads “*Should any person’s rights be violated by public authority, he may have recourse to the courts.*” In this case a Syrian woman, who had been granted subsidiary protection, sued before regional courts against this decision by BAMF. The regional court of Dusseldorf and Nordrhein-Westfalen denied her the right to sue against this ‘positive’ decision. She then proceeded to the Federal Administrative Court, arguing that this was a case where legal clarification was needed. The Federal Administrative Court granted her the right to appeal the subsidiary status decision due to Article 19(4) and the inherent right to challenge the granted protection status.¹⁴⁰ This has given Syrians a chance to appeal against a protection status which prohibits them from accessing family reunification. The issue has

¹³⁸ BVerwG, Urt. v. 18.4.2013 – 10 C 9/12.

¹³⁹ Ibid. §17.

¹⁴⁰ BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 14. November 2016 - 2 BvR 31/14 - Rn. (1-14), §10.

been discussed in regional courts with a variety of outcomes, some Syrians being granted refugee protection and some claims being rejected by the courts.

4.4.2. A positive perspective

There has been a range of cases where regional German courts have decided in favour of Syrian subsidiary protection holders. In August 2016 the regional court in Dusseldorf decided in favour of a 20-year-old Syrian male, who had fled to Germany via the Balkan route.¹⁴¹ The court stated that due to the political climate in Syria and widespread torture, the applicant would face serious danger upon his return to Syria.¹⁴² It went on to point out that the situation in Syria had become worse, and fleeing the country and filing for asylum in the West was considered as opposing the Assad regime, meaning the applicant would face torture upon his return.¹⁴³ This led to court to conclude that his political stance, which is a ground for refugee protection in the 1951 Convention, granted him the right to refugee protection.¹⁴⁴

A case from December 2016, which was decided by the Cologne Regional Court, granted two Syrian parents refugee protection but did not revoke the subsidiary protection for their young children. The court argued that it was likely that the plaintiffs would face persecution upon their return to Syria, possibly due to their opposing political opinion.¹⁴⁵ It furthermore argued that due to the fact that the male plaintiff was of military age, he faced the risk of being forcefully recruited into the Syrian army.¹⁴⁶ The court hence concluded that both parents fulfil the prerequisites for refugee protection.¹⁴⁷ They did however state, that their 7 to 12 year old children did not flee persecution nor would they face any upon their return. Their subsidiary protection status was hence justified.¹⁴⁸

¹⁴¹ VG Düsseldorf, Urt. v. 10.08.2016 – 3 K 7501/16.A §14.

¹⁴² Ibid. §18.

¹⁴³ Ibid. §20.

¹⁴⁴ Ibid. §22.

¹⁴⁵ VG Osnabrück 7. Kammer, Urteil vom 05.12.2016, 7 A 35/16, §110.

¹⁴⁶ Ibid. §117.

¹⁴⁷ Ibid. §144.

¹⁴⁸ Ibid. §146.

4.4.3. Negative decisions

Although there have been a range of positive decision, some German courts have not granted the appeal of Syrian subsidiary protection holders. Two higher courts in December 2016 have denied applicants refugee protection.

The higher administrative court of Rheinland-Pfalz held that merely fleeing the conflict did not constitute sufficient grounds to establish refugee protection.¹⁴⁹ It argued that the regime did not consider seeking asylum in the West as opposing the regime but rather as fearing the civil war.¹⁵⁰ It furthermore held that the mere fear of being sanctioned for not joining the Syrian army upon his return did not constitute a right to political asylum.¹⁵¹ The higher administrative court hence concluded that the applicant did not meet the conditions set out in the 1951 Convention, and thus did not have a right to refugee protection.

In a case before the higher administrative court of Schleswig-Holstein the court held that a prior decision by the regional court to grant the applicant refugee protection was invalid.¹⁵² The court held that the applicant had left the country without being persecuted by the government.¹⁵³ It furthermore held that it was unreasonable to believe that the Syrian government would persecute every returning asylum-seeker.¹⁵⁴ It stated that a mere theoretical fear of political persecution was not sufficient to entitle a person to refugee protection.¹⁵⁵ It held that merely fleeing the country does not constitute political protection as granted under the 1951 Convention.¹⁵⁶ The higher administrative courts have thus taken a position that fleeing to a western country, applying for asylum and residing within this country does not constitute sufficient grounds for political protection under the 1951 Convention.

4.4.4. Conclusion

The four introduced cases are a reflection of the fragmented judicial environment in Germany. The courts have clearly different stances on the issue of refugee protection, leading to legal uncertainty for Syrian subsidiary protection holders. The Federal Administrative Court

¹⁴⁹ OVG Rheinland-Pfalz, Urteil vom 16. Dezember 2016 – 1 A 10922/16 §170.

¹⁵⁰ Ibid. §159.

¹⁵¹ Ibid. §170.

¹⁵² OVG Schleswig 23.11.2016 – 3 LB 17/16 §1.

¹⁵³ Ibid. §34.

¹⁵⁴ Ibid. §37.

¹⁵⁵ Ibid. §39.

¹⁵⁶ Ibid. §40.

has stated that this issue constitutes a legal issue, which needed further clarification by the Federal Administrative Court.¹⁵⁷ It stated that the unclear judgements by regional courts and higher administrative courts called for clarification by the Federal Administrative Court, and hence subsidiary protection holders can access the legal system in order to reach clarification.¹⁵⁸ There has however not been a decision by the Federal Administrative Court on the factual situation of Syrian asylum seekers living in Germany which would clarify the situation. It can however be expected that an appeal will eventually reach the Federal Administrative Court, and it will be interesting to see which stance the highest court in Germany will take concerning political persecution and the consequent protection status.

4.5. SUB-CONCLUSION

This Chapter has introduced German law, specifically the legal foundation for refugee and subsidiary protection and family reunification. The recent Asylpaket II was introduced, and the subsequent ban on family reunification for subsidiary protection holders. There has however been a variety of case law in which Syrians have challenged their subsidiary protection status before German regional and higher courts. Unfortunately, however, the courts are yet to reach a consensus on whether fleeing Syria and applying for asylum in the West constitutes a ground for political protection, as envisioned in the 1951 Convention. The Federal Administrative Court has held that subsidiary protection holders can access the court system to challenge their protection status, a right granted under the Grundgesetz Art. 19(4). The Federal Administrative Court however has not been tasked with deciding this issue definitely, as appeals continue to work their way through regional and higher courts to reach the final German judicial body. As of now it has merely stated that stringent examination is needed to establish whether the law is unconstitutional, which has to be scrutinized to ensure the separation of legislature and judiciary.¹⁵⁹ A judgment would be significant for all asylum seekers living in Germany who have been granted subsidiary protection. The impact these legal challenges have on the German legal system as well as Syrians living in Germany is significant, with the latter being discussed in the following Chapter to illustrate the experiences subsidiary protection holders are facing in Germany.

¹⁵⁷ BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 14. November 2016 - 2 BvR 31/14 - Rn. (1-14), §11.

¹⁵⁸ Ibid. §11.

¹⁵⁹ BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 11. Oktober 2017 - 2 BvR 1758/17 - Rn. (1-21), §19.

V. INTERVIEWS

5.1. INTRODUCTION

In order to gain an understanding of the direct impact the Asylpaket II has had and continues to have on the Syrian refugee community in Germany, the author conducted interviews with 10 different protection holders. The interviewees were all located in Nordrhein-Westfalen, a German state. All had been in Germany since 2015, had entered Germany via the Balkan route, and hold either SP or RP status.¹⁶⁰ The interviews took place individually at first and then in a group setting, to assess whether there had been an arbitrary distinction between SP and RP in direct comparison, highly significant in light of the consequences this assessment has for the asylum-seeker and the State. This chapter will analyse the issue of [1] family reunification; [2] the principle of the best interests of the child; and [3] whether decisions to grant subsidiary as opposed to refugee protection have been arbitrarily taken after the Asylpaket II entered into force, from the interviewees' perspective.

5.2. FAMILY REUNIFICATION

All interviewees have struggled emotionally with the issue of family reunification due to their protection status. This has become especially evident in cases where the interviewee's family remains in Syria. This section will recount the individual stories of some men who have fled to Germany, and who due to Asylpaket II are unable to be reunited with their families.

Respondent 3 travelled to Germany with his 15 year old son in order to avoid the son being forced to join the military. He left his wife and 2 sons, aged 9 and 7 behind. It was his assumption that due to Germany's 'welcome culture' his family would be able to join him within, at most, 1 year. When the Asylpaket II was passed he did not yet hold a protection status but firmly believed that the family reunification ban would not apply to him. He did however receive subsidiary protection shortly after. Respondent 3 has stated that he feels that it is challenging to attend German classes and integrate into German society due to his depression, as he does not see a solution to his situation. He furthermore has pointed out, that he has nightmares, depression, and is 'paralyzed' by fear for his wife and children.

¹⁶⁰ Appendix II includes a table of all respondents and their current situation as well as individual interview transcripts. Individual claims could not be verified besides examining the respective visas and viewing photographs and videos.

Respondent 6 has travelled to Germany via Turkey, where he has left his children to stay with their aunt due to a lack of financial resources. His wife was killed in 2014 whilst they were living in Homs, ultimately causing him to flee in search for a 'better life' for his three children. It was his assumption that once he entered Germany he would be given housing and financial assistance as well as the right to family reunification with his three children. Respondent 3 was not aware of the Asylpaket II and the subsequent family reunification ban until he had received subsidiary protection and tried to apply for family reunification. He has described this experience as 'devastating' and is currently considering returning to Turkey, especially after he has learnt of the extension of the ban.

Respondent 8 has had a similar experience, with his wife being killed during the Syrian conflict. He left his child behind with his parents in order to flee to Germany and bring his parents and child there in the future. He received subsidiary protection and has learned that even if he has a right to family reunification, this would not enable him to bring his parents to Germany. He has therefore decided to return to Syria, a decision which is increasingly being made by other subsidiary protection holders due to the fact that he cannot access family reunification.¹⁶¹ He is currently saving to pay smugglers to return him back to Damascus.

Respondent 5 stated that he and his wife had discussed fleeing to Germany, and had come to the conclusion that traveling by boat would be too dangerous for their 3 year old son. They hence decided that Respondent 5 would travel to Germany via the Balkan route, and upon receiving refugee status would apply for family reunification. He stated that he neither suspected that the German government would implement a family reunification ban nor that he would not qualify for refugee protection. According to the respondent, he had previously worked for the Syrian government and considered himself 'valuable' to the regime. Respondent 5 pointed out that he could be highly beneficial for the German society, due to his profession, but that the 'stress and anxiety' he experiences prevent him from being successful in his German classes, as all he can think about is the situation 'back home'. He furthermore stated that he feels it is impossible for his German neighbours to understand his situation, ultimately preventing him from successfully interacting with them. He stated that he mainly chooses to

¹⁶¹ Die Zeit: *Der Weg zurück nach Syrien* (10 December 2017) available at: <https://www.zeit.de/politik/ausland/2017-12/syrien-fluechtlinge-rueckkehr> [accessed 20 June 2018].

be by himself or to interact with the three other men he was placed with due to their similar circumstances.

5.3. BEST INTERESTS OF THE CHILD

As discussed in Chapter II the CRC Article 3(1) that “*in all actions concerning children ... the best interests of the child shall be a primary consideration...*” It furthermore in Article 9(1) states that “*States Parties shall ensure that a child shall not be separated from his or her parents against their will*”. This section will share the stories of individuals where there has been a clear disregard by the State for the best interests of the child in the context of the Asylpaket II.

Respondent 1 fled to Germany at the end of 2014 by himself. During his stay at an emergency refugee camp he states that there were in early 2015 increasing rumours that Germany might close its borders. According to respondent 1, he was frightened by the mass influx and did not believe that the German government would accept such amounts of refugees in the long-term. With this in mind he spoke to the local government, which has a presence in each emergency camp, where he was told that the chance for family reunification were diminishing. Respondent 1 states that he was directly told by the government representative to bring his family ‘as quickly as possible’. Respondent 1 then proceeded to bring his family to Turkey and ultimately to Germany via the Balkan route. His children at that time were aged 1, 4 and 6. Crossing the Mediterranean caused a record number of deaths in 2015/2016, especially during the winter months during which the family of respondent 1 had travelled.¹⁶² Asylpaket II has essentially forced many families to travel via the Balkan route rather than being able to enter Germany in a safe way. This has caused numerous deaths of children, such as Alan Kurdi.¹⁶³

Respondent 2 is related to respondent 1 and hence obtained the same information from his uncle, respondent 1, concerning the possible issues with family reunification. Respondent 2 however stated that due to a lack of financial resources, he was unable to bring both his wife and son to Germany.¹⁶⁴ Respondent 2 thus had to make a choice ‘which ripped his heart out’

¹⁶² Information concerning the dangers of travelling the Balkan route can be found here: UNHCR: *Desperate Journeys* (February 2017) available at: <http://www.unhcr.org/58b449f54.pdf> [accessed 20 June 2018].

¹⁶³ Times: *Alan Kurdi's Story: Behind The Most Heartbreaking Photo of 2015* (29 December 2015) available at: <http://time.com/4162306/alan-kurdi-syria-drowned-boy-refugee-crisis/> [accessed 20 June 2018].

¹⁶⁴ The price was estimated by respondent I and II to be around 4000 US Dollars.

in order to 'save one of them'. His wife and he decided to send their 11 year old son to Germany with two acquaintances who also fled to Germany. The boy was present during the interview and spoke almost fluent German. He stated that in Hungary he got separated from the men he had been traveling with and was arrested by the Hungarian police. Due to his age, however, they eventually had to let him go and he continued his journey with others he met on the way. He reunited with his father in the emergency camp where he was staying at the time. He goes on to state that although he enjoys his new life in Germany, he feels guilty for leaving his mother behind, and is traumatized by his journey. The psychological consequences of traveling alone, being held by police and treated like a criminal, and most importantly of having to leave his mother are incalculable.

The Asylpaket II has taken away the opportunity for children to travel to Europe in a safe way. Whilst it was still possible, it has forced them to travel via the Balkan route and face the dangers that have been associated with it, such as drowning, freezing or being assaulted. After the closing of the border in Serbia, it has become impossible to enter Germany via the Mediterranean. There are no estimates of how many Syrian children are stranded at the border, in devastating conditions.¹⁶⁵

5.4. ARBITRARY DISTINCTION

This subsection will consider whether the distinction between SP and RP can be considered arbitrary or based on actual facts, which have become clear through individual assessments, as argued by BAMF. In order to do so, two interviewees who have received refugee protection will be introduced and compared to four others in similar situations who have received subsidiary protection.

Respondents 4 and 7 both received full refugee protection. Upon asking them why they believe they had received full refugee protection rather than subsidiary protection, both participants stated that they also had been rather surprised by the outcome in light of 'almost

¹⁶⁵ UNHCR: *Hungary: UNHCR concerned about new restrictive law, increased reports of violence, and a deterioration of the situation at border with Serbia* (15 July 2016) available at: <http://www.unhcr.org/en-us/news/briefing/2016/7/5788aae94/hungary-unhcr-concerned-new-restrictive-law-increased-reports-violence.html> [accessed 20 June 2018] or National Geographic: *Thousands of Refugee Children Are Stranded on Europe's Doorstep* (23 October 2017) available at: <https://www.nationalgeographic.com/photography/proof/2017/10/unaccompanied-minors-refugees-serbia-afghanistan-pakistan-children-migration/> [accessed 20 June 2018].

everyone' receiving SP. Respondent 4 was able to bring his wife and 2 children to Germany after receiving RP. Prior to fleeing to Germany, he worked as a waiter in a restaurant in Homs. He did not have any previous affiliation with the Assad regime, the military, or the resistance. Respondent 4 was also not active on social media regarding the conflict.¹⁶⁶ In his opinion, his living situation in Homs as well as his financial inability to bring his family to Europe or to move them to the safer Damascus region could have been factors in the decision to grant him refugee protection. He furthermore stated that by the time he had his interview, he had been in the country for over one year, and had done his best to make himself 'at home' and integrate in the community. In his opinion, this could have constituted another ground for the refugee protection status. Respondents 1 and 3, however, spoke close to fluent German and were able to converse with the researcher: according to their statements they were able to do so at the time of their interviews. It is hence hard to follow the logic of the BAMF as to why neither respondent 1 or 3 received RP, but respondent 4 did.

Respondent 7, on the other hand, had clear political affiliations. This respondent was previously a part of the military and feared he would be recruited again to fight for the Assad regime. He furthermore pointed out that in his function as a dentist he had assisted, as much as possible, during shelling and other attacks in his home town of Aleppo. Respondent 7 thus considered himself and his family under imminent threat: as he stated, the regime persecuted regime opponents. He feared that they would face imprisonment and most likely torture. Respondent 8 was in a similar position, he stated that he was a part of the resistance and initially joined the 'fight' in Aleppo. The same applies to respondent 6, who prior to his wife's death was part of the resistance. Respondents 6 and 8 both expressed anger over the fact that they did not receive RP, as they both stated they would surely face persecution upon their return.

On the basis of these interviews, it appears that men who have had to leave their families behind in Syria receive subsidiary protection as a governmental strategy to prevent family reunification. The researcher contacted 2 additional refugees (respondent 9 and 10) to establish whether there had been sufficient basis to grant them RP. The researcher asked whether they have family members who do not fall within the scope of family reunification. The researcher also asked whether the respondents were legally of adult age, and therefore unable to use the right to family reunification to bring their parents. The researcher asked these questions in order

¹⁶⁶ These reasons are most likely to give ground to political protection as envisioned in the 1951 Convention.

to test her theory that the granting of subsidiary instead of refugee protection is a strategic governmental policy. Neither one of respondents 9 and 10 had been affiliated with the government. One of the two respondents stated that he had travelled to Turkey from Jordan, where he had been living for the past 2 years.

The arbitrary distinction between RP and SP in all its complexity cannot be analysed in this Master thesis. It is however clear that there is a discrepancy between the different awarded protection statuses. Factors relevant to the differential treatment of asylum seekers appear to include how well integrated they are into German society, their ability to speak German, and their political affiliations prior to fleeing to Germany. However, these factors do not shed light on why the BAMF draws the distinctions that it does.

5.5. SUB-CONCLUSION

The Asylpaket II not only prevents asylum seekers from reuniting with their families in Germany, a significant component of successful integration, but also violates the CRC. The family reunification ban had two major consequences for children: [1] they were forced to take the Mediterranean route to join their fathers in Germany, possibly drowning or freezing on the way, or [2] forced to remain in Syria. The United Nations Children's Fund (UNICEF) published a report calling 2016 the most deadly year for children in Syria.¹⁶⁷ They face a variety of dangers, such as being forcibly recruited, risks to their health, and traumatization.¹⁶⁸ The distinction between SP and RP made by BAMF furthermore appears to be highly arbitrary, worsening the issues arising from the Asylpaket II.

¹⁶⁷ UNICEF: *Hitting Rock Bottom - How 2016 Became The Worst Year For Syria's Children* (March 2017).

¹⁶⁸ *Ibid.* p. 4.

VI. ANALYSIS

6.1. INTRODUCTION

This chapter will analyse the Asylpaket II in light of previously introduced international law and secondary EU law. On an international level, it will discuss whether the family reunification ban is in line with the 1951 Convention and the CRC. It will then proceed to examine whether the Asylpaket II effectively constitutes discrimination under ECHR Article 14 when read in conjunction with ECHR Article 8. Lastly it will discuss whether the distinction is based on actual factual differences, or whether it is an arbitrary distinction which merely serves as a political tool in a time when migration has become highly politicised.

6.2. IS THE ‘ASYLPAKET II’ IN CONFORMITY WITH INTERNATIONAL LAW?

6.2.1. The 1951 Convention and the principle of non-refoulement

The 1951 Convention, as discussed in Chapter II, does not itself grant refugees a right to family reunification.¹⁶⁹ It is rather its interaction with a variety of other international legal instruments that gives rise to family reunification. It can however be said that entirely prohibiting family reunification would constitute a violation of Article 12.¹⁷⁰ The 1951 Convention forms the basis of refugee protection, but a variety of other international legal obligations form the basis of complementary protection such as subsidiary protection. The concept of *non-refoulement* and asylum-seekers’ inability to return home due to the potential dangers have been respectively included and recognised in a variety of legislative instruments, and forms customary international law. The obligation not to return the asylum-seeker because of *non-refoulement* applies, even if no individual right to refugee protection exists.¹⁷¹

Scholars such as McAdam have argued that the circumstances on which all forms of protection are founded – and the derived protection under the principle of *non-refoulement* – reflect that there is no valid justification for the differentiation.¹⁷²

¹⁶⁹ Cambridge University Press, *Family Unity and Refugee Protection*, June 2003, available at: <http://www.refworld.org/docid/470a33be0.html> [accessed 26 June 2018], p. 581.

¹⁷⁰ Ibid. p. 581.

¹⁷¹ Ibid. p. 587.

¹⁷² *McAdam*, (n 46), p. 251.

6.2.2. The Convention on the Right of the Child

The Asylpaket II has far reaching consequences for unaccompanied minors (UM) who have received subsidiary protection and seek family reunification. Between 2015 – 2018 68.537 UM have entered Germany, in 2015 alone there has been an increase of 400%.¹⁷³ In 2017 4.139 UM have received subsidiary protection, compared to 1.578 who have received refugee protection.¹⁷⁴ There is no data available how many of these UM SP holders are Syrian or how many have received family reunification under the §22 hardship clause. It is however important to point out once more that in 2017 only 66 such hardship visas were granted, as discussed in Chapter 4.3.2.¹⁷⁵

The German State's determination of which point an applicant 'ages out of' the right to family reunification has changed in the past three years. In November 2016 BAMF sent an email to a German Refugee Council, stating that the age at the time of application was relevant for the assessment.¹⁷⁶ In November 2018, however, BAMF notified another German Refugee Council that this policy was no longer applicable and instead the age at the time of the decision was relevant. This is due to AsylG §26(3)(5) and the fact that the need to care for the unaccompanied minor does not exist anymore, due to the applicant's reaching legal age.¹⁷⁷ This change of rules has made family reunification impossible for those who have aged out whilst waiting for a decision on family reunification, which is effectively on hold due to the imposed ban. This practice has furthermore been declared unlawful by the administrative court in Hamburg.¹⁷⁸ The ECtHR in a March 2018 decision declared this practice invalid in *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, which stated that such practice goes against 'the principles of equal treatment and legal certainty.'¹⁷⁹

¹⁷³ BAMF "Zahlen, Daten, Fakten zu unbegleiteten Minderjährigen (UM)" 1. Quartal 2018, p.1.

¹⁷⁴ BAMF "Unaccompanied Minors in Germany Challenges and Measures after the Clarification of Residence Status" (2018), p.21.

¹⁷⁵ Deutscher Bundestag (n 135), p. 11.

¹⁷⁶ BAMF schreiben vom 16.11.2016 zu dem Niedersaechsischen Fluechtlingsrat attn: Kai Weber available at https://www.nds-fluerat.org/wp-content/uploads/2018/03/BAMF_Schreiben_Nov2016.pdf [accessed 24 June 2018].

¹⁷⁷ Fluechtlingsrat Niedersachsen: Ablehnung von Familienasyl nach Erreichen der Volljährigkeit? Flüchtlingsrat rät zur Klage (1. March 2018) available at: <https://www.nds-fluerat.org/30915/aktuelles/ablehnung-von-familienasyl-nach-erreichen-der-volljaehrigkeit-fluechtlingsrat-raet-zur-klage/> [accessed 24 June 2018].

¹⁷⁸ VG Hamburg, Urteil vom 05.02.2014 - 8 A 1236/12 §2.2.

¹⁷⁹ ECtHR: Judgment of the Court (Second Chamber) of 12 April 2018 *A and S v Staatssecretaris van Veiligheid en Justitie* §55.

In October 2017 a Syrian unaccompanied minor argued before the German Federal Constitutional Court that his subsidiary status and the current family reunification ban constitute a disproportionate interference with his rights, as by the time the ban would have expired he will be of legal age and hence can no longer enjoy family reunification. The court thus had to indirectly rule on the family reunification determination procedure, and concluded, that due to the fact that he was almost an adult he did not need to be cared for by his parents. It hence denied his appeal by arguing that granting it would effectively suspend the law, a decision which can only be made in exceptional circumstances, which did not apply to this case.¹⁸⁰

Another important observation of German practice is the fact, that even if an UM has received full refugee protection in line with the 1951 Convention, family reunification is in many cases not possible. This is due to the fact that unless there is enough living space and financial resources, which is almost never possible straight away, it is only the parents who can join their child in Germany. The child's minor siblings, who are also in Syria, are unable to receive a family reunification visa on the basis that one sibling has received refugee protection abroad. It is not difficult to understand the burden this places on parents: they effectively have to decide whether they join their child in Germany and leave behind their other children, or remain with them in Syria.¹⁸¹

Germany has not implemented the recent ruling of the ECtHR in *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, nor has it provided any further guidance on how to proceed in the case of unaccompanied minors who have been granted subsidiary protection. A legal paper issued by the Bundestag concerning the compatibility between the Asylpaket II and the CRC has reaffirmed that rather than taking into account the best interests of the child in line with Article 3 of the CRC, the government had merely been guided by the need to control migration.¹⁸² The law furthermore has effectively disabled administrative discretion when assessing a case and whether the best interests of the child had been met, which constitutes a violation of the rights granted in Article 9 and 10 CRC. The only way to apply Aufenthaltsgesetz §104(13) in line with the CRC would hence be to apply §22(1) frequently,

¹⁸⁰ *BvR 1758/17, 1758/17*, Germany: Bundesverfassungsgericht, 11 October 2017, §18.

¹⁸¹ Interview with UNHCR representative Rebecca Einhoff – Appendix I.

¹⁸² Deutscher Bundestag, “Vereinbarkeit der Regelungen des Asylpakets II betreffend die Aussetzung des Familiennachzugs für unbegleitete minderjährige Flüchtlinge mit der VN Kinderrechtskonvention (KRK)”, (19 Februar 2016) p. 9.

which would go against the object and purpose of the Asylpaket II and effectively make it obsolete. It can hence be concluded that in order for Germany to meet its obligations under the CRC, the ban should not be applied for unaccompanied minors, and moreover a new family reunification determination procedure has to be put in place, in line with the recent ECtHR ruling.

6.3. THE ASYLPAKET IN AN EU FRAMEWORK – A MOVE AWAY FROM CEAS?

6.3.1. Discrimination based on ‘status’

Chapter 2.6 discussed the European Convention of Human Rights (ECHR), specifically Article 8 and 14. Although Article 8 ECHR does not grant a specific right to family reunification, the ECtHR stated that special attention has to be paid to the family reunification needs of refugees. In a variety of case law, it has stated that where there are major obstacles to developing family life outside the country of refugee, the discretion of the State in regards to family reunification is limited.¹⁸³ The current situation in Syria is shown almost daily on the news; there cannot be an assumption that family life would be possible in the country of origin. This applies especially in cases where the disruption of the family life is due to fear of persecution¹⁸⁴ or in cases where family members were left behind not out of free will. In *Tuquabo-Tekle and Others v. the Netherlands* the court has remarked, “*that it is questionable to what extent it can be maintained in the present case, as the Government did, that Mrs. Tuquabo-Tekle left Mehret behind of “her own free will”, bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad*” – a situation remarkably similar to that of many Syrian asylum-seekers.¹⁸⁵

This is significant in light of the differentiation between subsidiary and refugee protection statuses and the consequences the respective status has for asylum-seekers. The ECtHR in *Hode and Abdi v. The United Kingdom* ruled that Article 14 does provide protection on the basis of immigration status as, although it is not explicitly mentioned, it does fall within the meaning of ‘*other status*’.¹⁸⁶ According to the ruling it is furthermore essential that the differentiation between the protection statuses has an ‘*objective and reasonable justification*’

¹⁸³ ECtHR, *Mengesha Kimfe v. Switzerland*, Application No. 24404/05, 29 July 2010, §68.

¹⁸⁴ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006, §75.

¹⁸⁵ ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, Application No. 60665/00, 1 March 2006, §4, the interviews in Chapter 5 reflect the situations, which forced them to flee.

¹⁸⁶ *Hode and Abdi* (n. 57) §48.

and is in the pursuit of a legitimate aim.¹⁸⁷ The Court has stated that “*where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the State’s international obligation will not in itself justify the difference in treatment*”.¹⁸⁸ It can hence be argued that if students and workers are in a similar position as refugees, as found in *Hode and Abdi* by the ECtHR, subsidiary protection holders are most certainly in a similar position as refugees. In light of the Qualification Directive and its inclusion of subsidiary protection holders, this severe differentiation appears even more discriminatory.

The differentiation between subsidiary and refugee protection and the consequent ban is not proportional. Nor does it allow for an individual assessment of cases, and it is not based upon a reasonable justification and objective. It rather is a comprehensive ban which takes away the right to family reunification because of a protection status given by a government which is actively aiming to limit migration by all means. The significant change in the respective statuses given, as reflected upon in section 4.3.2., and the arbitrary distinction discussed in Chapter 5 is contribute to the argument that subsidiary protection has been given to Syrians merely in order to limit family reunification.

6.3.2. Political vs. factual difference

An argument to be brought forward is that the differentiation between subsidiary and refugee protection is merely of political nature, and that in reality both statuses overlap extensively. States have argued that subsidiary protection is temporary in its nature, and thus differentiation is justified. Upon closer examination, however, it becomes evident, that both statuses are ‘designed’ to be extended while the situation remains the same and cease when the situation has improved.¹⁸⁹ They both furthermore lead to permanent residence within 5 years in accordance with Directive 2003/109/EC.¹⁹⁰ The differentiation hence appears to be merely formal as both require the situation to persist in order to be renewed.¹⁹¹ The Explanatory Memorandum to the recast Directive has furthermore stated, that “*when subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the*

¹⁸⁷ *Hode and Abdi* (n. 57) §50.

¹⁸⁸ *Hode and Abdi* (n. 57) §55.

¹⁸⁹ Jürgen Bast: *Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff*, Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR) 2/2018, 41-46, p. 44.

¹⁹⁰ EU: *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.*

¹⁹¹ Jürgen Bast (n 189) p. 44.

*Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified. Such an approximation of rights is necessary to ensure full respect of the principle of non-discrimination, as interpreted in recent case law of the ECtHR and of the UN Convention on the Rights of the Child.*¹⁹² In light of these arguments it becomes increasingly difficult to regard the family reunification ban as an objectively justifiable limitation.

Another argument brought forward by States such as Germany is that a refugee in line with the 1951 Convention is fleeing individual persecution, and hence is ‘higher’ in the protection rank. This is the basis for the German argument that after individual interviews had resumed less cases were identified where this was applicable, and hence there was a significant increase of subsidiary protection holders. In August 2015, Germany granted the family reunification right to subsidiary protection holders, but revoked it in March 2016.¹⁹³ The German Commissioner for Migration has long argued that due to the similar reasons for their fleeing, both statuses should be granted the right to family reunification.¹⁹⁴ This view has already been reflected in a 2001 communication by the European Commission to the European Parliament:

*“Beneficiaries of subsidiary protection form an increasing percentage of the persons protected in the EU, but they enjoy fewer rights than the Convention refugees. Given the fact that in practical terms the situation of the two groups is comparable, their level of rights should also be (close to) equivalent. A clear example is the lack of provisions in EU law on family reunification for subsidiary protection beneficiaries. A higher level of rights for these persons is necessary if the EU wants to **avoid creating a subclass of protected persons** ... From a subsidiarity point of view, common action is justified in order to avoid a 'race to the bottom [emphasis added]’.”¹⁹⁵*

¹⁹² Explanatory Memorandum to COM(2009)551 - *Minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, para 13.6.

¹⁹³ Ibid.

¹⁹⁴ Die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration: *Rechtsgrundlagen des Asyl- und Aufenthaltsrechts*, p. 467.

¹⁹⁵ Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions:

The similarity of circumstances and the overall situation in Syria make it incomprehensible that the government differentiates between ‘more’ or ‘less’ legal rights.¹⁹⁶

6.4. SUB-CONCLUSION

Both statuses share more similarities than differences. They lead to permanent residence within the same time frame, are revoked when the conflict ceases, and by and large grant the same rights. Subsidiary protection, however, can be limited, as it does not fall within the 1951 Convention. States thus have the ability to amend the rights of asylum seekers according to current political needs. It appears that the differentiation between statuses is an attempt by Germany to maintain a level of sovereign discretion by circumventing international and EU law on refugee protection. However, the blurring of lines between the different protection statuses together with States’ giving and revoking rights makes it impossible not to consider the difference in treatment of refugees and subsidiary protection holders a merely political phenomenon.

Policy Plan on Asylum — An Integrated Approach to Protection across the EU — Impact Assessment, Commission Doc SEC(2008) 2029, p. 20.

¹⁹⁶ The argument of ‘more’ vs. ‘less’ and its arbitrariness has been derived from Jürgen Bast (n 189) p. 45.

VII. CONCLUSION

The main aim of this research was to establish whether Germany's Asylpaket II violates international law as well as secondary EU law. It further aimed to give the reader an understanding of the effect this reunification ban has had on Syrians in Germany as well as the arbitrariness of the distinction. The extent to which Germany now grants subsidiary protection to Syrian asylum-seekers purely to limit family reunification, rather than because that is the status the asylum-seekers are legally qualified for, would require more research than the limits of this thesis provide for.

In Chapter I, international legal instruments relevant to this topic were introduced. The 1951 Convention was discussed in length as well as the Convention on the Rights of the Child. Chapter I further introduced the principle of *non-refoulement*, which has been recognized as customary international law, and is included in the CAT and ICCPR. It then proceeded to examine the ECHR, most importantly Articles 8 and 14. This section made the argument that international law does not *per se* differentiate between RP and SP, but simply grants rights to refugees as defined by the 1951 Convention. SP holders are only protected by the principle of *non-refoulement*. It is important to point out that even though family unity is described as a cornerstone of society, no international legal instrument imposes an *obligation* on States to grant family reunification.

Chapter II discussed secondary EU law, such as the Family Reunification and Qualification Directive. It then proceeded to introduce extensive definitions of RP and SP and the respective rights that may or may not attach to the respective protection status. It then considered whether there has been an increase in fragmentation of refugee protection in the EU. This Chapter reinforced the observations made in Chapter I – international law gives States clear guidelines in order to protect refugees, but the protection of SP holders is entirely up to States. This concept, irrespective of the various Directives, continues to apply within the EU as the Directives are not Regulations. They can thus be interpreted and implemented by States on a national level, ultimately leading to vast differences in the rights attaching to SP in different EU Member States.

Chapter III examined national German law such as the Grundgesetz, Asylgesetz und Aufenthaltsgesetz. It continued to introduce the notion of 'family reunification' in German law, and how family unity is protected.

After examining the foundation of German law, the Chapter proceeded to introduce the ‘Asylpaket II’. Important components of this section are the statistics of SP grants vs. RP grants, and the evident drastic increase in SP grants to Syrians after Asylpaket II entered into force. Case law is introduced to reflect the current legal climate in Germany, where there has been an increase in fragmentation of judgements and legal uncertainty concerning the possibility of ‘upgrading’ SP to RP, without a definite judgement from the highest court.

Chapter V introduced the interviews the researcher has conducted in order to reflect the impact the Asylpaket II has had on family reunification and the best interests of the child. In this Chapter, the extent to which Syrians have been affected by the law was made clear. Many have complained about emotional trauma, issues of integration, and overall depression. It has furthermore become evident that many children are suffering from the consequences of the law, a clear violation of the CRC. Many interviewees have described their wish to return home to be with their families as they ‘would rather be with them than live here alone’.

Finally, Chapter VI analysed the legal instruments introduced in Chapter II – IV in light of the interviews conducted in Chapter V. The 1951 Convention does not entail specific family reunification provisions, but forms the basis of the *non-refoulement* principle, on which all protection statuses are based - and hence arguably applies to all asylum-seekers. The CRC is extensively violated by the Asylpaket II with many UM ‘aging out of’ the right to family reunification whilst the ban is in place. Germany furthermore has implemented a family reunification determination procedure, which is in violation of the ECHR law, as seen in the recent *A. and S.* judgment of the ECtHR. The justification it has given for applying the legislation in cases of UM, the hardship clause, has not been implemented on a significant scale, reflecting German State reluctance to grant family reunification to even the most vulnerable group of asylum-seekers.

The Chapter then proceeded to examine whether the law does constitute discrimination when reading ECHR Art. 8 in conjunction with Art. 14. Previous case law, specifically *Hode and Abdi*, have confirmed the presumption of this thesis that due to the lack of an objective and reasonable justification the law does violate the ECHR. Lastly, it was established that there is no actual difference between the two protection statuses: the different statuses have rather served as a convenient tool for States to limit the rights of asylum-seekers without violating the 1951 Convention.

It can be concluded, that the Asylpaket II constitutes a violation of international legal norms, which although not binding, Germany has ratified. On an EU level, it has not directly violated specific directions or regulations. Case law, however, has established that the practice does constitute discrimination and a grave violation of human rights, specifically legal certainty and equality. At the time of writing, subsidiary protection holders continue to sue the BAMF before German courts, likely until local remedies have been exhausted. This will most likely lead to the ECtHR or the CJEU rendering a final judgement in the coming years. It will be interesting to see how the Courts as well as the Human Rights Commission, which will issue its report on Germany in 2019, view this issue, and whether this will lead Germany to amend its discriminatory procedure.

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