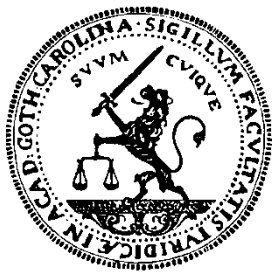

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Down to the Minimum

An analysis of the family reunification rights under the Temporary Law

JURM02 Graduate Thesis

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Contents

Summary

In July 2016, the Law on temporary limitations to the possibility of being granted residence permit in Sweden (the Temporary Law) came into force. The Temporary Law heavily restricted the right to family reunification for subsidiary protection beneficiaries. According to Section 7 Temporary Law, subsidiary protection beneficiaries were excluded from the right to reunite with their family for the three year duration of the law. Refugees nevertheless maintained a right to family reunification. A safety clause was introduced in Section 13 Temporary Law in order to avoid incompliance with obligations under international human rights law. The Temporary Law became an object of major criticism. The critique primarily concerned the restrictions' potential conflict with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).

This thesis examines if the Temporary Law restrictions on the right to family reunification for subsidiary protection beneficiaries complied with the requirements under Articles 8 and 14 ECHR. The restrictions are thus examined in relation to the right to respect for family life and the prohibition of discrimination. According to the analysis, the Temporary Law restrictions raised concerns regarding the positive obligations under Article 8 ECHR. The Temporary Law failed to recognise the particular vulnerability of subsidiary protection beneficiaries. This vulnerability, which is shared by refugees, is expressed by the involuntary family separation and the inability to reunite with the family in the country of origin. The Temporary Law also raised concerns regarding the procedural obligations under Article 8 ECHR.

Regarding Article 14 ECHR taken together with Article 8 ECHR, the analysis concludes that the Temporary Law restrictions most likely failed to comply with the Convention requirements. Since subsidiary protection beneficiaries and refugees have similar protection needs and accordingly also a similar need for family reunification, the examination suggests that the two protection categories are comparable in the context of family reunification rights. While

the government argued that the differential treatment was justified, the analysis concludes that the arguments presented failed to meet the standard of being reasonable and objective. Accordingly, the examination shows that the restricted right to family reunification for subsidiary protection beneficiaries arguably amounted to unjustified discrimination under Article 14 ECHR taken in conjunction with Article 8 ECHR.

In conclusion, this thesis argues that the Temporary Law restrictions fell below the minimum level of protection under the ECHR. The thesis hereby highlights the issue of equal access to human rights protection under international law. The failure to recognise the human rights protection of immigrants is primarily explained by the immigration control prerogative. This statist assumption, which creates a protection gap in human rights law, is upheld by the European Court of Human Rights. Ensuring effective human rights protection in the context of immigration accordingly remains a challenge.

Sammanfattning

I juli 2016 introducerades lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (den tillfälliga lagen). Ikraftträdandet av den tillfälliga lagen innebar att rätten till familjeåterförening för alternativt skyddsbehövande begränsades avsevärt. Enligt 7§ den tillfälliga lagen exkluderades alternativt skyddsbehövande från rätten att återförenas med sin familj under de tre år den tillfälliga lagen skulle gälla. Flyktingar behöll dock en rätt till familjeåterförening. Den tillfälliga lagen innehöll en säkerhetsventil i 13§ för att undvika att begränsningarna skulle hamna i strid med det internationella konventionsskyddet av mänskliga rättigheter. Den begränsade rätten till familjeåterförening väckte skarp kritik. Kritiken gällde primärt begränsningarnas potentiella konflikt med rättigheter enligt Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (EKMR).

Följande arbete undersöker om begränsningarna enligt den tillfälliga lagen gällande rätten till familjeåterförening för alternativt skyddsbehövande uppfyllde kraven enligt artikel 8 och artikel 14 EKMR. Uppsatsen undersöker alltså den tillfälliga lagen i relation till rätten till respekt för familjeliv och förbudet mot diskriminering. Analysen uppmärksammar att de tillfälliga begränsningarna var problematiska i relation till de positiva skyldigheter som följer av artikel 8 EKMR. Den tillfälliga lagen saknade hänsyn till den särskilda sårbarhet som alternativt skyddsbehövande har. Denna särskilda sårbarhet, vilken också innehas av flyktingar, kommer till uttryck i den ofrivilliga familjeseparationen samt avsaknaden av möjligheten att återförenas i ursprungslandet. Den tillfälliga lagen innebar även potentiella problem gällande de processuella skyldigheterna som innefattas i artikel 8 EKMR.

Analysen av artikel 14 tillsammans med artikel 8 EKMR ger stöd åt slutsatsen att den tillfälliga lagen innebar otillåten diskriminering. De båda skyddsgrupperna, alltså alternativt skyddsbehövande och flyktingar, har likartade skyddsbehov och därav även ett likartat behov att återförenas med sin

familj. Alternativt skyddsbehövande och flyktingar kan därav betraktas som jämförbara fall avseende rätten till familjeåterförening. Regeringen ansåg att särbehandlingen var berättigad. De argument som framfördes kan emellertid inte anses uppfylla kravet att vara objektivt godtagbara. Begränsningen av rätten till familjeåterförening för alternativt skyddsbehövande innebar alltså otillåten diskriminering enligt artikel 14 EKMR.

Uppsatsen leder sammanfattningsvis fram till slutsatsen att den tillfälliga lagen sänkte skyddsnivån under EKMR:s minimumnivå. Analysen uppmärksammar den negativa särbehandling som påverkar immigranters tillgång till mänskliga rättigheter. Principen om statens suveräna rätt att reglera invandringen förklarar varför immigranter har ett svagare skydd under internationella mänskliga rättigheter. Denna princip, vilken oundvikligen förhindrar ett jämlikt skydd av mänskliga rättigheter, upprätthålls av Europeiska domstolen för de mänskliga rättigheterna. Det är därav en fortsatt utmaning att säkerställa ett effektivt skydd av mänskliga rättigheter för immigranter.

Preface

I want to take the opportunity to say a special thank you to my dear family. You have been there for me all along. For you it did not matter if I enrolled in law studies and aimed for what many consider a fancy degree, or if I suddenly moved abroad to work as a childminder in the middle of the Irish countryside, or if I happened to do both. You supported me nonetheless and let me pave my own unique way. You have been a part of this journey, and I am so thankful for that.

As I now, finally, seem to end many years of studying in Lund, it can't go without saying that I'm so grateful for all the wonderful people that I have been lucky to share this student experience with. Near and far, you know who you are. Thank you for making these years so fun, enriching and memorable.

I also want to say thank you to my encouraging supervisor Vladislava Stoyanova. You motivated me to raise the bar and you helped me on the way to complete this thesis. Thank you.

Matilda Nilsson
Lund, 8 January 2020

Abbreviations

CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU-Charter	Charter of Fundamental Rights of the European Union, 2000/C 364/01
Family Reunification Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
Refugee Convention	1951 Convention Relating to the Status of Refugees
SPB	Subsidiary protection beneficiary
Temporary Law	Law on temporary limitations to the possibility of being granted residence permit in Sweden (2016:752)
UNHCR	United Nations High Commissioner for Refugees
Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of the 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)

1 Introduction

1.1 Background: An unfamiliar setting

In November 2015, when Sweden since the summer had seen a substantial rise in the number of arriving asylum seekers, the Swedish government made public a controversial legislative proposal.[1] The new Law on temporary limitations to the possibility of being granted residence permit in Sweden[2] (the Temporary Law) withdrew the right to family reunification for subsidiary protection beneficiaries (SPBs).[3] While refugees also were affected by the restrictions, this protection category maintained a right to reunite with family.[4] The differentiation between the two categories of international protection was, according to the government, in compliance with EU-law and international law.[5]

The Temporary Law contained a safety clause in Section 13. This clause held that SPBs would be granted family reunification in situations which otherwise might be in conflict with applicable international conventions. The safety clause particularly referred to Article 8 in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).[6]

The Temporary Law restrictions on family reunification came into force on the 20th of July 2016 and applied to all SPBs who had their asylum application registered after the 24th of November 2015.[7] In 2019, the Temporary Law was revised and amendments were made.[8] The right to family reunification for

[1] Regeringskansliet, [https://www.regeringen.se/artiklar/2015/11/regeringen-foreslar-atgarder-for-att-skapa-andrum-for-svenskt-flyktingmottagande/], accessed 16 October 2019; Stern, 2019, p. 234 f.
[2] Law on temporary limitations to the possibility of being granted residence permit in Sweden (2016:752).
[3] Section 7 Temporary Law.
[4] According to Section 6 Temporary Law, refugees only maintained a right to reunite with the core family. Strict requirements of maintenance and housing also indirectly limited refugees' right to family reunification, see Section 9-10 Temporary Law.
[5] Prop. 2015/16:174, p. 42 f.
[6] Ibid, p. 79.
[7] Section 7 Temporary Law
[8] See SFS 2019:481, a revision of the Temporary Law.

SPBs accordingly became reopened and this amendment came into force on the 20th of July 2019.[9] In the preparatory works of the revised Temporary Law, the government explained that the purpose of the 2019 amendments was to avoid situations that might amount to a violation of the rights under the ECHR. The government specifically referred to the right to respect for family life in Article 8 and the prohibition of discrimination in Article 14.[10]

The Temporary Law restrictions on family reunification for SPBs constituted a legal protection gap for three years. Critique against the restrictions was raised by prominent human rights institutions such as the United Nations High Commissioner for Refugees (the UNHCR) and the Commissioner for Human Rights of the Council of Europe (the CoE).[11] Numerous consulting bodies likewise expressed serious concerns about the Temporary Law restrictions. The critique particularly referred to the obligations under Article 8 ECHR[12] and the prohibition of discrimination under Article 14 ECHR.[13] In MIG 2018:20, the Swedish Migration Court of Appeal found that refusing family reunification for the SPB in question would amount to a violation of Article 8 ECHR. Relying on Section 13 Temporary Law, the Court thus granted residence permits to the family members of the SPB sponsor.[14] This decision highlights the flaws of the Temporary Law restrictions and questions whether the legislation provided effective protection of the right to respect for family life under Article 8 ECHR.

[9] Section 6, Revised Temporary Law.
[10] Prop. 2018/19:128, p. 41 ff.
[11] See for instance UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: Utkast till lagrådsremiss")*, 2016, para 44 f, 52 f and CoE, *Report by Nils Muiznieks: Commissioner for Human Rights of the Council of Europe*: *Following his visit to Sweden from 2 to 6 October 2017*, 2018, p. 9 f.
[12] See comments on the draft proposal made by the Swedish Refugee Advice Centre, Ju2016/01307/L7, p. 8 ff. and the Swedish Bar Association, Ju2016/01307/L7, p. 14 ff.
[13] See for instance CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p. 23 f.
[14] Note that the sponsor was a minor and that this was of substantial importance for the outcome of the case. In addition to Article 8 ECHR, the Court's reasoning referred to Article 3 Convention on the Rights of the Child which contains the principle of the primacy of the best interests of the child.

1.2 Purpose and research questions

The main purpose of this thesis is to examine the Temporary Law restrictions of SPBs' right to family reunification. My aim is to analyse whether these restrictions were in compliance with the requirements under Articles 8 and 14 ECHR. The thesis accordingly aspires to assess how the Temporary Law restrictions relate to the right to respect for family life and the prohibition of discrimination under the ECHR. The analysis will address the question of whether there is a general right to family reunification for SPBs under Article 8 ECHR. The question of whether SPBs and refugees are comparable in the context of family reunification rights will also be discussed. While the Temporary Law restrictions are no longer in force, similar restrictions could be reintroduced. It is consequently of fundamental importance to clarify the actual protection scope of Articles 8 and 14 ECHR regarding the right to family reunification, and hereby find the minimum level of protection under the Convention.

Within this main purpose, it is my aim to unveil the strengths and weaknesses encompassed in Articles 8 and 14 ECHR within the field of immigration. The immigration control prerogative of the state and the margin of appreciation are principles of central importance in the decisions of the European Court of Human Rights (the ECtHR). The analysis aspires to illuminate how these principles address the very heart of the human rights regime, namely the fundamental question of who is entitled to human rights protection.[15]

The main research questions for the following thesis are hereby:
Are the restrictions in the Temporary Law regarding the right to family reunification for SPBs in compliance with

- *Article 8 ECHR (the right to respect for family life)?*
- *Article 14 ECHR (the prohibition of discrimination) taken in conjunction with Article 8 ECHR?*

[15] Costello, 2016, p. 9 ff.

1.4 Delimitations

This thesis does not engage Article 3 of the Convention on the Rights of the Child in the analysis. The principle of the best interests of the child is unquestionably of key importance for the right to family reunification under Article 8 ECHR.[16] Meanwhile, this principle opens the door to a large number of child specific questions which unfortunately are not practically possible to involve in this study. My focus is furthermore on understanding Article 8 ECHR in its own capacity, and not merely in conjunction with the protection regime of children's rights.

Considering that my focus is on the ECHR provisions, I do not involve EU-legislation in my analysis except when this is necessary in order to complete the understanding of the rights under the ECHR. Consequently, the case law of the Court of Justice of the European Union (the CJEU), is not of key importance for the analysis. I do specifically address the Family Reunification Directive[17] and the Qualification Directive[18], since the Swedish government relied on these acts of legislation in order to justify the restrictions on family reunification for SPBs.[19] The main reason for my focus on the ECHR, instead of EU-legislation, is the Convention's paramount importance as a human rights instrument within Swedish law. The rights under the ECHR are protected under Swedish constitutional law.[20] The ECHR is also a human rights instrument with considerably longer history than the relatively recent Charter of Fundamental Rights of the European Union (the EU-Charter).[21] Furthermore, the preparatory works of the Temporary Law particularly

[16] See for instance MIG 2018:20, Mugenzi v France, para 45 and Tanda-Muzinga v France, para 67.
[17] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
[18] Directive 2011/95/EU of the European Parliament and of the Council of the 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).
[19] Prop. 2015/16:174, p. 42 f.
[20] Chapter 2, Section 19 Instrument of Government.
[21] Charter of Fundamental Rights of the European Union, 2000/C 364/01. The ECHR entered into force in 1953 while the EU-Charter became legally binding in 2009 by the Treaty of Lisbon (2007/C 306/01).

addressed the ECHR in the analysis of the family reunification restrictions.[22] Despite the focus on the ECHR instead of EU-law, it is important to note that the relationship between the two regimes of European law is complicated at times. This is particular true within the area of immigration law where the ECHR and EU-law often overlap.[23]

1.5 Methodology

The analysis of the research questions is guided by traditional legal method. Accordingly, I analyse the legal questions with the aid of the legislative framework, preparatory works, case law and relevant legal research.[24] The outline of the analysis is constructed with inspiration from ECtHR case law.[25] The analysis of Articles 8 and 14 ECHR thus follows two main steps. The first step entails assessing whether the Temporary Law restrictions fall within the scope of the Convention right concerned. The second step discusses whether the government failed to fulfil its obligations under the examined Convention right. Concerning Article 8 ECHR, the second step of the analysis is focused on the balancing assessment between the interests of the state and the interests of the individual.[26] The second step of the examination of Article 14 ECHR is primarily centred on the issue of comparability, analysing the situation of SPBs in relation to the situation of refugees.[27] The margin of appreciation holds a vital role in the analysis of both Articles 8 and 14 ECHR.[28]

It is important to highlight that the ECtHR examines individual cases and thus only assesses the practical application of the Convention in a specific case.[29]

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[22] Prop. 2015/16:174, p. 42 f.
[23] Costello, 2016, p. 41 ff.
[24] Åhman, 2019, p. 20.
[25] The methodology of the ECtHR often varies according the particular circumstances of the case examined. I have nevertheless identified the key steps of the Court's reasoning in family reunification cases and adapted this methodology according to my research questions.
[26] Tuquabo-Tekle and Others v the Netherlands, para 42.
[27] Hode and Abdi v the United Kingdom, para 45; CoE and European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, 2018, p. 47 f.
[28] Tuquabo-Tekle and Others v the Netherlands, para 42; Hode and Abdi v the United Kingdom, para 45.
[29] Article 34 ECHR.

The ECtHR has nevertheless clarified that "the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it"[30]. Every SPB who were covered by the Temporary Law ran a "risk of being directly affected"[31] by the restricted family reunification rights. While this thesis is not centred on an individual case, the purpose is to analyse the key questions that most likely would arise if the ECtHR would examine the Temporary Law restrictions in relation to Articles 8 and 14 ECHR.

The main sources of this analysis are relevant national legislation, international conventions and EU-regulations, and preparatory works in combination with applicable case law. In addition to the preparatory works of the Temporary Law and the Aliens Act, authoritative interpretative guidelines from the UNHCR and the CoE have functioned as tools to analyse the research questions. Case law from the ECtHR has been of paramount importance in the interpretation the rights and obligations under both Articles 8 and 14 ECHR. Literature by a number of prominent researchers in the field have furthermore served as key material for the analysis. The legal scholars complement the primary sources by providing interesting ideas and perspectives on the legal issues.

The analysis is notably inspired by Cathryn Costello's contributions within research on human rights and immigration. Costello's work, which engages both European law and international law, highlights the inevitable tension between immigration control and the human rights protection of immigrants. The statist assumption, which is endorsed and reinforced by the ECtHR, contradicts the aspiration of universality in human rights protection by giving priority to the sovereign powers of the state. This contradiction is embedded in international human rights law and the protection of immigrants' rights remains an exception to the statist assumption.[32]

[30] Marckx v Belgium, para 27.
[31] Ibid.
[32] Costello, 2016, p. 9 ff.

Despite this allegedly unsolvable conflict, Costello refers to the work of Seyla Benhabib and recognises a route to mediate within the current international legal framework.[33] According to Seyla Benhabib, "the challenge is to think beyond the binarism of the cosmopolitan versus the civic republican; democratic versus the international and transnational; democratic sovereignty versus human rights law"[34]. This approach can be attained if we recognise the different aspects of sovereignty. State sovereignty and popular sovereignty are different, and a restricted state sovereignty does not necessarily imply a restricted popular sovereignty. In order to strengthen the human rights protection of marginalised groups, such as immigrants, state sovereignty might need constraining while popular sovereignty might be enhanced.[35]

This thesis recognises and aims to involve the perspective of Costello and Benhabib. The statist assumption, which reveals the relationship between human rights law and sovereignty in the immigration context, is accordingly of central importance for the analysis of the research questions.

1.7 Structure

The analysis is structured according to three main chapters. Firstly, Chapter 2 focuses on the object of analysis, namely the Temporary Law restrictions regarding family reunification for SPBs. In this chapter, the Temporary Law restrictions are presented with a brief background of the previous legislation, and an outline of the relevant international legal framework. The next two chapters, namely Chapters 3 and 4, separately examine if the Temporary Law restrictions were in compliance with Articles 8 and 14 ECHR. After this analysis has been conducted, Chapter 5 provides a more in-depth discussion of key questions that have been addressed in the analysis. Finally, Chapter 6 presents a synthesis of the whole thesis and accordingly summarises the conclusions that follow from the previous examination of the research questions.

[33] Costello, 2016, p. 11.
[34] Benhabib, 2016, p. 109.
[35] Ibid.

2 Mind the Gap: A Restricted Right to Family Reunification

The Temporary Law marked a drastic turn in Swedish asylum legislation. Sweden, that previously was considered one of the most generous asylum countries in Europe, suddenly restricted rights down to the minimum of EU-law. The restricted right to family reunification for SPBs was one of the most significant amendments.[36] This chapter introduces and explains the Temporary Law restrictions. In order to complete the picture of the Temporary Law, it is of importance to contrast it with the prior national legislation on family reunification and to clarify how the legislation is connected to international law and EU-law.[37] Accordingly, this chapter describes the Temporary Law restrictions placed in the context of previous national legislation and the framework of international law and EU-law.

This chapter is divided into three main sections. The first section provides an outline of relevant legislation before the Temporary Law came into force. After this background has been explained, the Temporary Law restrictions are presented. The third section turns focus to the framework of international law and EU-law. Conclusions are presented in a separate last section.

2.1 Family reunification before the changes

In Swedish immigration law there is a fundamental principle of family unity.[38] This legal principle is also widely recognised in international law.[39] The right for beneficiaries of international protection to reunite with their family derives

[36] Prop. 2015/16:174, p. 1 f; Stern, 2019, p. 234 f.
[37] Prop. 2005/06:72, p. 17 f, 68; Prop. 2015/16:174, p. 42 ff.
[38] Prop. 2005/06:72, s. 68; MIG 2018:20.
[39] In addition to Article 8 ECHR, see also Article 23 Qualification Directive and Article 23(1) International Covenant on Civil and Political Rights, 1966. See furthermore UNHCR, Geneva Expert Roundtable, *Summary Conclusions on Family Unity*, 2001 and UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2019, para 181-188.

in part from this principle.[40] The right to family reunification is regulated in Chapter 5, Sections 3 and 3a Aliens Act[41]. The first provision, namely Section 3, establishes a right to reunite with the core family.[42] Section 3a has a wider scope and thus recognises a right to reunite with an extended family. Sections 3b-3e in the same chapter contain requirements of maintenance that apply to the sponsor. Beneficiaries of international protection are however excluded from these requirements.[43]

The two main provisions regulating the right to family reunification, namely Sections 3 and 3a, differ in some key aspects. The provision in Section 3, which concerns family reunification for the core family, derives from the Family Reunification Directive. These rights accordingly correlate to binding minimum requirements under EU-law[44], and more favourable provisions are permitted.[45] The clause regarding family reunification for extended family, which is found in Section 3a, does not derive from the Family Reunification Directive. Contrary to Section 3, family reunification according to Section 3a is not framed as a right. Swedish authorities are thus under no general obligation to grant family reunification for extended family.[46]

Family reunification for extended family according to Section 3a could be granted given that two key requirements are fulfilled. Firstly, the sponsor and the family member must have shared a household previously. Secondly, there must be a relationship of particular dependency. The particular dependency between the sponsor and the family member must have existed while living in the country of origin.[47] Another possibility for family reunification under Section 3a exists if there are *exceptional reasons*.[48] The application of this clause is

[40] Prop. 2005/06:72, s. 68. See also MIG 2018:20.
[41] Aliens Act (2005:716).
[42] Core family in this context refers to spouse or partner and minor children, see Chapter 5, Section 3 Aliens Act. In certain situations it also applies to an adult who have the equivalent role of a parent, see Chapter 5, Section 3, Paragraph 1(4) and Paragraph 1(5) Aliens Act.
[43] Andersson, Diesen, Lagerqvist Veloz Roca, Seidlitz & Wilton Wahren, 2018, p. 58, 60 f.
[44] Wikrén & Sandesjö, 2017, p. 268 ff; Article 4 Family Reunification Directive.
[45] Article 3(5) Family Reunification Directive.
[46] Wikrén & Sandesjö, 2017, p. 278 ff.
[47] Prop. 1996/97:25, p. 113; Andersson, Diesen, Lagerqvist Veloz Roca, Seidlitz & Wilton Wahren, 2018, p. 60; Chapter 5, Section 3a, Paragraph 1(2) Aliens Act.
[48] Chapter 5, Section 3a, Paragraph 3 Aliens Act.

restrictive and subsidiary to the other provisions of the same section. The clause nevertheless contains a last resort to family reunification in cases which otherwise would not have fallen under any of the other provisions in Sections 3 and 3a.[49]

In order to qualify as a sponsor for the purpose of family reunification, the person must be either a resident or hold a residence permit.[50] Non-Nordic and non-EU-citizens are thus required to hold a residence permit before they can apply for reunification. As a main rule, the residence permit should be permanent.[51] This standard applies equally for family reunification under Sections 3 and 3a.[52] The sponsor's requirement of having a permanent residence permit is however not without exceptions. Under some circumstances, family reunification can be granted to a sponsor that only holds a temporary permit.[53]

In MIG 2007:29, the Migration Court of Appeal clarified that a temporary permit could suffice for the sponsor given certain circumstances. The decision concerned a sponsor who held a residence permit with a duration of five years. At the time of application for family reunification, less than one year had passed since the residence permit was granted. The application concerned the core family and thus engaged Chapter 5, Section 3 Aliens Act. According to the reasoning of the court, the decisive factor for the outcome of the case was that the sponsor had a *reasonable prospect* of being granted a permanent residence permit. This requirement refers to standards under the Family Reunification Directive. Article 3(1) Family Reunification Directive provides that the permit of the sponsor at least must be one year, in addition to the requirement of a reasonable prospect of obtaining a permanent residence permit. The option nevertheless remains for each member state to have more generous provisions.[54]

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[49] Prop. 2004/05:170, p. 183 f.
[50] Chapter 5, Section 3-3a Aliens Act.
[51] Prop. 2005/06:72, p. 27 f.
[52] Prop. 1999/00:43, p. 62.
[53] See MIG 2007:29.
[54] Article 3(5) Family Reunification Directive.

SPBs and refugees are as a rule granted *permanent* residence permits prior to the Temporary Law. The duration of the residence permit is thus not an obstacle to being granted family reunification. The clause that determines the duration of the residence permit, Chapter 5, Section 1, Paragraph 3 Aliens Act, upholds no distinction between the different protection categories SPB and refugee. The right to family reunification for SPBs and refugees is thus equal under the Aliens Act.[55] The Temporary Law, which came into force in June 2016, changed this standard by introducing a sharp distinction between the rights of SPBs and refugees. The protection status of the sponsor hereby became of key importance for the right to family reunification.[56]

2.2 The Temporary Law

The Swedish government introduced the Temporary Law as a response to the exceptionally high number of asylum seekers that arrived in 2015.[57] The restricted right to family reunification for SPBs was one among several measures introduced. Border controls were also enforced with the aim of reducing the number of asylum applications. The objective of the new law was to level down the Swedish legislation to the minimum requirements of EU-law and international law. More favourable provisions under the Aliens Act was hereby temporarily withdrawn. The purpose of these measures was that Sweden would receive a significantly reduced number of asylum seekers. The Temporary Law was intended to apply for a duration of three years, limiting its scope from July 2016 to July 2019.[58]

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[55] Prop. 2013/14:248, p. 61.
[56] Section 5-7 Temporary Law.
[57] In 2015 the number of new asylum applications in Sweden was 162 877 and the sharp increase in arrivals was primarily visible from August. The years before the peak showed a steady increase in received asylum applications. In 2014 Sweden registered 81 301 new asylum applications, in 2013 it was 54 259, in 2012 it was 43 887 and in 2011 it was 29 648. See Swedish Migration Agency, *Statistics – Applications for Asylum Received 2011-2015*, [https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum], accessed 1 November 2019.
[58] Prop. 2015/16:174, p. 1 f, 21. The right to family reunification for SPBs was reintroduced in July 2019 by amendment 2019:481. The Temporary Law was however extended until July 2021 by the same amendment 2019:481. See Prop. 2018/19:128, p.1.

Prior to the Temporary Law, SPBs and refugees were as a main rule granted permanent residence permits. The two protection categories were accordingly treated equally with regards to the duration of the residence permit.[59] The Temporary Law changed this order. Temporary residence permits became the new standard for both SPBs and refugees. Refugees were however granted longer permits than SPBs. While refugees were granted residence permits that lasted for three years, SPBs' permits were limited to a duration of 13 months.[60] The Temporary Law accordingly introduced a differentiation between the two protection categories and assigned SPBs a significantly lower standard of protection.

The temporary nature of the residence permits affected the possibility of being granted family reunification. As mentioned previously, family reunification under Chapter 5, Sections 3 and 3a Aliens Act were as a rule only granted persons with a permanent residence permit. In MIG 2007:29 the Migration Court of Appeal nevertheless clarified that the key factor for the assessment was that the sponsor had a reasonable prospect of being granted a permanent residence permit. Considering that SPBs' temporary permit only lasted 13 months while refugees held a three year permit, SPBs were less likely to have a reasonable prospect for being granted a permanent residence permit than refugees. According to the Temporary law, refugees were *as a rule* likely to fulfil the criteria of having a reasonable prospect of being granted a permanent residence permit. The standard of temporary permits under the Temporary Law hereby affected the right to family reunification. SPBs' right to reunite with family members was significantly weakened in comparison to the family reunification rights of refugees.[61]

The Temporary Law did not only contain these indirect restrictions on family reunification through the duration of permits. SPBs were, according to Section 7 Temporary Law, explicitly excluded from the right to reunite with their family. SPBs were hereby not even granted family reunification with the core

[59] Chapter 5, Section 1, Paragraph 3 Aliens Act.
[60] Section 5 Temporary Law.
[61] Prop. 2015/16:174, p. 39.

family under Chapter 5, Section 3 Aliens Act.[62] In 2016, SPBs constituted a significant majority of the asylum seekers that were granted a residence permit in Sweden. Out of 71 571 residence permits granted on the grounds of asylum in 2016, 48 355 were granted SPBs and 17 913 were granted refugees.[63] The restrictions on the right to family reunification for SPBs thus affected a substantial number of people.

The right to family reunification for refugees was also restricted by the Temporary Law. Their possibility of family reunification under Chapter 5, Section 3a Aliens Act was withdrawn. Refugees hereby only maintained a right to reunite with their core family according to Chapter 5, Section 3 Aliens Act.[64] Strict maintenance requirements for the sponsor were also introduced by the Temporary Law, and these applied regardless of whether your protection status was SPB or refugee.[65] The maintenance requirements received criticism from a number of consulting bodies. The critique highlighted that the maintenance requirements were an obstacle to the practical realisation of family reunification.[66]

The restrictions introduced by the Temporary Law, which have been outlined above, was intended to meet the minimum requirements of EU-law and international law. The Family Reunification Directive was thus of key importance for the drafting of the Temporary Law. As mentioned earlier, the Family Reunification Directive entails a right to reunite with the core family[67], and this provision correlates to Chapter 5, Section 3 Aliens Act. Granting family reunification for extended family is however not an obligation under the Directive.[68] Refugees' right to family reunification is explicitly recognised in the

[62] Section 7 Temporary Law only permitted minor exceptions to the main rule that SPBs were excluded from the right to family reunification, see Chapter 5, Section 3, Paragraph 1(5) Aliens Act.
[63] Swedish Migration Agency, *Statistics - Granted Residence Permits 2016*, [https://www.migrationsverket.se/download/18.2d998ffc151ac387159ee19/1485556064263/Beviljade%20uppeh%C3%A5llstillst%C3%A5nd%202016.pdf], accessed 23 October 2019.
[64] Section 6, Paragraph 2 Temporary Law.
[65] Section 9-10 Temporary Law.
[66] Prop. 2015/16:174, p. 44 f.
[67] Article 4(1) Family Reunification Directive.
[68] Article 4(2-3) Family Reunification Directive.

Directive.[69] SPBs are in contrast, according to Article 3(2c) Family Reunification Directive, not covered by the Directive. In the drafting of the Temporary Law, the government hereby concluded that the right to family reunification for SPBs lacked protection under EU-law. According to the reasoning of the government, SPBs were not entitled to the same family reunification rights as refugees.[70]

It was however not only the Family Reunification Directive that was used as an argument for the withdrawal of SPBs' family reunification rights. The government held that the two protection categories, namely SPBs and refugees, were not comparable. The government argued that essential differences existed between SPBs and refugees, and these differences implied that the less favourable treatment of SPBs not amounted to unlawful discrimination. Consequently, the government maintained that the Temporary Law restrictions raised no concerns regarding Article 14 ECHR.[71] The fact that the restrictions were limited to a period of three years was also an argument stressed by the government. The temporary nature of the restrictions implied that family reunification merely was postponed and not permanently withdrawn.[72]

While the government maintained that the Temporary Law was in harmony with EU-law and international law, the government was nonetheless well aware of the potential conflict that could arise between the rules on family reunification and the right to respect for family life under Article 8 ECHR. The government accordingly decided to include a safety clause in Section 13 Temporary Law. This clause established a last resort to grant family reunification in cases which otherwise might interfere with Sweden's international obligations. The safety clause particularly referred to the requirements under Article 8 ECHR and explicitly addressed the rights of SPBs.[73] The government clearly abstained from recognising a general right to

[69] Article 3(1) and Chapter 5 Family Reunification Directive.
[70] Prop. 2015/16:174, p. 42; Section 7 Temporary Law.
[71] The comparability of SPBs and refugees is analysed further in Chapter 4.
[72] Prop. 2015/16:174, p. 41 ff.
[73] Ibid, p. 79.

family reunification for beneficiaries of international protection under Article 8 ECHR. The safety clause was considered to cover the supposedly exceptional cases which otherwise would fall in the protection gap of the Temporary Law.[74]

The Council on Legislation raised particular concerns regarding the safety clause in Section 13 Temporary Law.[75] The safety clause implied a shift of responsibilities where the Swedish legislative tradition of dualism was ignored. The Migration Agency and the Migration Courts were assigned the task of assessing the Temporary Law's compliance with international obligations, and this is a task which traditionally would fall upon the government according to the dualist model.[76] The responsibility to ensure that Swedish asylum legislation is in harmony with international obligations was hereby not upheld by the government but delegated to the Migration Agency and the Migration Courts.[77]

Another point of criticism, which was highlighted by the Migration Agency, concerned the applicability of the Temporary Law. The proposed Temporary Law was made public by the government on the 24th of November 2015.[78] Although the law only entered into force on the 20th of July 2016, the rules regarding family reunification applied, with some minor exceptions, to all individuals who had their asylum application registered on the 25th of November 2015 or of a later date.[79] Hereby, there was a sharp distinction between the right to family reunification for individuals who got their application registered on the 24th and the 25th of November 2015. The Migration Agency highlighted the fact that many asylum seekers wanted to have their application registered before the 25th of November, but due to the Migration Agency's lack of capacity to register new applications at the time, this was not possible. The date of the asylum application might hereby not correlate to the date the individual in fact contacted the Migration Agency to

[74] Prop. 2015/16:174, p. 43, 54 f.
[75] Lagrådet, *Utdrag ur protokoll vid sammanträde 2016-04-20: Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*, p. 11 f.
[76] Prop. 2015/16:174, p. 50.
[77] Stern, 2019, p. 258.
[78] Prop. 2015/16:174, p. 21, 42.
[79] Section 7, Paragraph 2 Temporary Law.

have their application registered. This critique points to the lack of analysis behind the Temporary Law and exemplifies one among several concerns that were raised by the consulting bodies.[80]

2.3 The international framework

As clarified in the previous sections, SPBs' right to reunite with family members is not merely a question of national law. The Swedish legislation on family reunification is linked to international law and EU-law.[81] In order to proceed with the analysis of Articles 8 and 14 ECHR in the following chapters, it is hereby firstly of value to introduce key principles of interpretation that apply to the ECHR, and to explain the origin of the protection statuses SPB and refugee.

2.3.1 European Convention for the Protection of Human Rights and Fundamental Freedoms

The Temporary Law particularly raised concerns regarding the right to respect for family life in Article 8 ECHR, and the prohibition of discrimination in Article 14 ECHR. The Convention holds a special status in Swedish national law. Sweden became a party to the ECHR in 1953[82], and in 1995 the Convention was incorporated into national law.[83] While not recognised as constitutional law per se, the ECHR is protected under constitutional law. According to this special status, all national legislation must be in compliance with the ECHR.[84] The primary responsibility to ensure this compliance is on the government, and the obligation is normally fulfilled within the drafting process of new legislation. The compliance with the ECHR is as a rule also examined by the Council on Legislation in the review process of new

[80] Prop. 2015/16:174, p. 38, 42 f.
[81] Prop. 2005/06:72, p. 24 f.
[82] Prop. 1951:165, p. 11.
[83] Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994:1219).
[84] Chapter 2, Section 19 Instrument of Government.

legislation. Furthermore, national courts and authorities are under an obligation to interpret and apply legislation in harmony with the ECHR.[85]

The rights under the ECHR are as a general rule not limited to citizens. The Convention rights do, as a starting point, apply to all persons within the state's jurisdiction.[86] The ECtHR has however clarified that citizens generally not are comparable with non-citizens. This implies that the state in certain situations legitimately can treat non-citizens less favourably than citizens.[87] The premise behind this reasoning is the state's immigration control prerogative. The state's sovereign right to control its borders is, according to the ECtHR, a well-established principle in international law.[88] Non-citizens can however under some circumstances be in a situation comparable to the situation of citizens. In the assessment of complaints under Article 14 ECHR, the ECtHR has found that non-citizens can be in an objectively similar situation to citizens.[89]

The margin of appreciation is a key principle of interpretation that apply to the ECHR. This principle, which is connected to the principle of subsidiarity, implies that the state can adapt the application of the ECHR to the national context. The extent of the margin varies depending on which interests that are concerned. A number of the rights under the ECHR, such as Articles 8 and 14, are qualified rights that encompass a proportionality assessment. The margin of appreciation has an important function in this assessment, affecting the balancing exercise between the interests of the individual and the interests of the state.[90] Despite this margin of appreciation, each Convention right has a core content that the must not be interfered with. The interpretation of the ECHR must imply a practical and effective realisation of the Convention rights.[91]

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[85] Åhman, 2019, p. 56 ff.
[86] Article 1 ECHR; Åhman, 2019, p. 74 f.
[87] Danelius, 2015, p. 561 f; Observer and Guardian v the United Kingdom, para 73 f.
[88] Tuquabo-Tekle and Others v the Netherlands, para 43.
[89] Andrejeva v Latvia, para 87-90; CoE and European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, p.205, 208 f.
[90] Danelius, 2015, p. 56 ff.
[91] Marckx v Belgium, para 31; Danelius, 2015, p. 55 f.

2.3.2 Subsidiary protection status and refugee status

It is of importance to explain where the international protection categories SPB and refugee originally derive from. With these connections clarified, an explanation is provided to why the allocation of rights could differ between the two groups. Both protection categories have roots in international law or EU-law.[92] The subsidiary protection status originates from the Qualification Directive,[93] and the refugee status emanates from the Refugee Convention.[94]

Sweden signed the Refugee Convention in 1951 and subsequently became party to the 1967 Protocol Relating to the Status of Refugees.[95] The current refugee definition in Chapter 4, Section 1 Aliens Act corresponds to the definition in the Refugee Convention.[96] The Convention's definition of refugee status is also incorporated in EU-law through the Qualification Directive.[97] The Qualification Directive offers additional interpretative guidelines to the refugee definition.[98] The Refugee Convention definition was introduced in Swedish asylum legislation by the 1980's Aliens Act. Prior to these changes, a slightly different protection category existed in Swedish asylum law under the label *political refugee*.[99]

In order to qualify as a Convention refugee, it must be established that the individual has a *well-founded fear* of *being persecuted* on the basis of a certain *persecution ground*.[100] The persecution requirement implies a risk of serious harm if returned to the country of origin. According to the human rights approach,

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[92] Prop. 1979/80:96, p. 40 f; Prop. 2013/14:248, p. 17 ff
[93] Article 2(f) Qualification Directive.
[94] Article 1(A2) 1951 Convention Relating to the Status of Refugees.
[95] United Nations Treaty Collection, *Convention relating to the Status of Refugees,* [https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en], accessed 28 October 2019; United Nations Treaty Collection, *Protocol relating to the status of Refugees,* [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en], accessed 28 October 2019.
[96] Article 1(A2) Refugee Convention; Article 1 1967 Protocol Relating to the Status of Refugees.
[97] Article 2(d) Qualification Directive.
[98] See for instance Article 6 Qualification Directive on actors of persecution and Article 9-10 Qualification Directive on acts of and reasons for persecution.
[99] Prop. 1979/80:96, p. 39 ff.
[100] Article 1(A2) Refugee Convention.

serious harm could be interpreted as a sustained or systemic "risk of denial of a broadly accepted international human right"[101]. This risk must be individually oriented by a nexus to a persecution ground. A general risk for serious harm is thus not sufficient.[102] The Refugee Convention contains a list of persecution grounds that include *race, religion, nationality, membership of a particular social group* or *political opinion*. The Aliens Act explicitly adds *gender* and *sexual orientation* to the list of persecution grounds.[103] The requirement of an individual risk marks an important difference between the refugee status and the SPB status.

Subsidiary protection status is secondary to refugee status. Accordingly, only a person failing to qualify for refugee status is eligible for subsidiary protection.[104] This protection ground derives from the Qualification Directive and is incorporated in the Aliens Act.[105] The first Qualification Directive is from 2004 and the current Directive entered into force in 2012. Accordingly, the subsidiary protection status is significantly newer than the refugee protection regime. The subsidiary protection status was intended to harmonise complementary protection within the EU by setting out a minimum standard.[106]

A SPB is, according to Article 2(f) Qualification Directive, a person who faces a *real risk* of suffering *serious harm* if returned to the country of origin. The requirement of serious harm is crucial. Serious harm is defined in Article 15 Qualification Directive and this definition is also found in the Aliens Act.[107] Serious harm has three alternative definitions. The first two only concern an individual risk, while the third covers situations of *indiscriminate violence* in armed conflicts where a certain *severity threshold* is reached. This third definition differs from the refugee definition since it lacks the requirement of an individual risk

[101] Hathaway & Foster, 2014, p. 195.
[102] Ibid, p. 362.
[103] Chapter 4, Section 1 Aliens Act; Article 1(A2) Refugee Convention.
[104] Article 2(f) Qualification Directive. See also preamble Qualification Directive, para 33.
[105] Chapter 4, Section 2 Aliens Act; Article 2(f) Qualification Directive.
[106] Article 1 Qualification Directive; McAdam, 2005, p. 466 f.
[107] Chapter 4, Section 2, Paragraph 1(1) Aliens Act.

of harm.[108]

The preamble of the Qualification Directive explains that refugees and SPBs as a rule should equally enjoy the rights and benefits under the Directive. Meanwhile, exceptions that are necessary and can be objectively justified are permitted.[109] According to the Qualification Directive, refugees are entitled to a residence permit for a minimum of three years while SPBs only are entitled to a minimum of one year.[110] The Qualification Directive is nevertheless a minimum directive which implies that more favourable standards are allowed.[111] As clarified in previous sections, Swedish asylum legislation essentially entitled SPBs and refugees with the same rights before the Temporary Law. The amendments that entered into force in 2016 introduced a clear hierarchy between SPB status and refugee status by substantially limiting the rights of SPBs.[112]

2.4 Conclusions

Prior to the Temporary Law, SPBs and refugees equally enjoyed a right to family reunification according to Chapter 5, Sections 3-3a Aliens Act. Accordingly, SPBs had a right to reunite with the core family and, in situations of particular dependency, with the extended family. The Aliens Act contained no differentiation between SPBs and refugees with regards to the duration of the residence permits granted. Before the Temporary Law, the standard was hereby to equally grant permanent residence permits to SPBs and refugees.

When the Temporary Law came into force in 2016, refugees were allocated more favourable rights than SPBs. Refugees received residence permits for a duration of three years while SPBs' permits were limited to 13 months. Refugees furthermore maintained a right to reunite with the core family. The right to

[108] C-465/07 Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie, para 35; Prop. 2009/10:31, p. 260.
[109] Preamble Qualification Directive, para 39.
[110] Article 24 Qualification Directive.
[111] Article 3 Qualification Directive.
[112] Section 6-7 Temporary Law.

family reunification for SPBs under Chapter 5, Sections 3-3a Aliens Act was however withdrawn. With the exception of the safety clause in Section 13 Temporary Law, SPBs were hereby not even entitled to reunification with the core family. The safety clause held a last resort to family reunification, given that the situation otherwise might amount to a violation of Sweden's international obligations. In the preparatory works of the Temporary Law, the government explained that the safety clause was intended to ensure compliance with Articles 8 and 14 ECHR. A primary justification of the Temporary Law restrictions was the Family Reunification Directive. The government argued that the situation of SPBs was non-comparable with the situation of refugees.

The Temporary Law and the prior legislation on family reunification is linked to international law and EU-law in several respects. The right to family reunification for SPBs specifically engages the right to respect for family life under Article 8 ECHR, and the prohibition of discrimination under Article 14 ECHR. The margin of appreciation is a principle of key importance in the interpretation of the Convention rights. The definitions of the international protection categories, namely the SPB and refugee definitions, are also linked to international law and EU-law. The SPB status derives from the Qualification Directive, and the refugee status correlates to the definition in the Refugee Convention. The key difference between the protection categories is that refugees have a more individualised risk for harm than SPBs.

3 Family Reunification in Crisis: Discovering the Minimum of Article 8 ECHR

The restrictions regarding the right to family reunification for SPBs were introduced as a response to the extraordinary high number of asylum seekers that arrived to Sweden in late 2015.[113] The Temporary Law would, according to the government, adapt the Swedish asylum legislation to the minimum level of protection under international law and EU-law. The legislation regarding family reunification was nevertheless criticized for its potential violation of the right to respect for family life under Article 8 ECHR.[114] This chapter examines whether the Temporary Law restrictions on family reunification for SPBs were in compliance with the requirements of Article 8 ECHR.

Firstly, the scope of Article 8 ECHR is clarified in order to see whether the discussed legislation falls within its definitional scope. In order to do this, it is necessary to elucidate which positive state obligations that Article 8 ECHR encompasses. This first section thus answers the question of whether there is a general right to family reunification under Article 8 ECHR.[115] Secondly, the analysis moves on to specifically address the right to family reunification for SPBs. In this second section I examine whether Article 8 ECHR implies a positive obligation for the state to grant family reunification for SPBs. This analytical stage entails a balancing exercise, weighing the interests of the state against the interests of the individual in the specific context of family reunification for SPBs. In the balancing act, key principles from ECtHR case law are engaged.[116] The principles are applied to the particular circumstances of the Temporary Law restrictions. The outcome of the balancing assessment determines whether the Temporary Law restrictions met the minimum level of protection under Article 8 ECHR.

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[113] Prop 2015/16:174, p. 21.
[114] Ibid, p. 42 ff.
[115] Grabenwarter, *Article 8: Right to Family Life*, 2013, p. 219.
[116] Ibid, p. 219, 233.

3.1 A human right to family reunification?

As a first step of the analysis, it is necessary to clarify the scope of Article 8 ECHR. In order to determine if the Temporary Law restrictions fall within the definitional scope of Article 8 ECHR, we must ask the question of whether the right to respect for family life encompasses a right to reunite with the family. It is hereby of key importance to understand the concepts of *family* and *family life*. The ECtHR has developed on these concepts in its case law.

In *Marckx v Belgium*, the ECtHR found that *family* is defined by de facto family ties. Formal recognition of the family life, such as marital status, is thus not necessary.[117] The core family, namely spouses or partners and children under the age of 18, are as a main rule covered within the concept of family. The definition of family can however be more extensive in situations such as cohabitation. Additionally, in situations where *special dependency* exists between the family members, a wider range of family ties can be accepted.[118] The key factor is however, as mentioned previously, the existence of de facto family ties.[119] The interpretation of *family life* was explained by the ECtHR in *Mehemi v France*. The Court found that "the mutual enjoyment of each other's company constitutes a fundamental element of family life"[120]. The right to live together with your family is accordingly at the heart of the right to family life.[121]

The corresponding obligations of the state under Article 8 ECHR are primarily negative. The state must respect, and thus refrain from interfering with, the family life. Article 8 ECHR does however also imply positive obligations for the state. The state must ensure *effective respect* for family life. This implies both positive and negative aspects.[122] Domestic laws must provide conditions to fulfil the obligations.[123] Procedural requirements are also encompassed in the

[117] Marckx v Belgium, para 31.
[118] Danelius, 2015, p. 394 ff, 397.
[119] Wagner and J.M.W.L. v Luxembourg, para 117.
[120] Mehemi v France, para 45.
[121] Danelius, 2014, p. 396.
[122] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67.
[123] Marckx v Belgium, para 31.

positive obligations under Article 8 ECHR,[124] and these procedural aspects are vital for ensuring an effective realisation of the right to family life.[125] Article 8 ECHR lacks an explicit recognition of a right to family reunification. The positive obligation to ensure effective respect for family life will nonetheless, in certain situations, imply an obligation to authorise the entry of a family member.[126] Article 8 ECHR will hereby, given certain circumstances, encompass a right to family reunification.[127]

Abdulaziz, Cabales and Balkandali v the United Kingdom (the Abdulaziz case) was a decision of key importance for family reunification under Article 8 ECHR. The sponsors in this case had permanent residence permits in the United Kingdom, and their applications for family reunification concerned husbands that they had married after coming to the United Kingdom. In this decision, the ECtHR clarified that Article 8 ECHR applies in the immigration context[128], and that positive obligations are inherent in the effective respect for family life. The Court nevertheless highlighted the context-specific nature of these obligations. The ECtHR also emphasized the importance of the immigration control prerogative of the state and clarified that the margin of appreciation is wide in the immigration context.[129] In a more recent decision by the ECtHR, the Court stated that "Article 8 does not impose on the Contracting States any general obligation to respect immigrants' choice of the country of residence and to authorise family reunion in its territory"[130]. Meanwhile, the particular circumstances of the case will determine the state's positive obligations under Article 8 ECHR. In order to conclude if there is a right to family reunification in the specific case, a balancing assessment must hereby be conducted between the interests of the applicant and the interests of the state.[131]

[124] Tanda-Muzinga v France, para 68, 73.
[125] Lundqvist, 2018, p. 788 f.
[126] Lambert, 2014, p. 198 f.
[127] Danelius, 2014, p. 415; Mehemi v. France, para 45.
[128] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 59.
[129] Ibid, para 67.
[130] Tanda-Muzinga v France, para 65.
[131] Ibid, para 66.

The analysis above demonstrates that the Temporary Law restrictions clearly fall within the definitional scope of Article 8 ECHR. The right to respect for family life implies a right to live together. This right correlates to positive obligations for the state to ensure effective respect for family life. Under certain circumstances, effective respect will entail an obligation to grant family reunification. While Article 8 ECHR encompasses no general right to family reunification, the particular context might give rise to such a right. In order to determine if the Temporary Law restrictions implied a violation of Article 8 ECHR, we must hereby assess the special circumstances of the case by conducting a balancing exercise.[132] This assessment will be developed further in the next section and is focused on the specific situation of SPBs.

3.2 A fine balance: The specific situation of subsidiary protection beneficiaries and the crisis context

As clarified above, Article 8 ECHR entails no general obligation on the state to grant family reunification. Given certain circumstances, the right to effective respect for family life will nevertheless entail a right to reunite with your family. The positive obligation on the state to grant family reunification is hereby dependent on the particular context of the case. A balancing exercise will determine the obligations of the state in the specific case. This balancing act weighs the interests of the state against the interests of the individual and takes the margin of appreciation into consideration.[133]

The overarching question addressed in the following analysis is whether the specific situation of SPBs generates a right to family reunification under Article 8 ECHR. In this analysis, the particular vulnerability of beneficiaries of international protection will be of crucial importance. SPBs have alike refugees a special vulnerability that derives from being a victim of forced

[132] Tanda-Muzinga v France, para 64 ff.
[133] Ibid, para 64 ff.

displacement.[134] The first stage of the following analysis outlines relevant principles from ECtHR case law. These principles determine the frame of the balancing exercise in cases of family reunification. In the second stage of the analysis we apply the ECtHR principles to the particular situation of SPBs. Finally, the Temporary Law restrictions are examined. The conclusions from the previous sections are then applied in the balancing exercise between the interests of the Swedish state and the individual SPB.

3.2.1 Principles from relevant case law of the European Court of Human Rights

The ECtHR generally emphasizes the context-specific nature of the proportionality analysis when assessing the state's obligations under Article 8 ECHR. This is particularly the case in the immigration context.[135] Despite this apparent methodological inconsistency, which is partly explained by the wide margin of appreciation in cases regarding immigration[136], the Court's case law establishes certain principles which serve as a framework for the balancing of interests.

In the Abdulaziz case, the ECtHR clarified two main requirements that must be fulfilled in order to conclude that there is a positive obligation on the state to grant family reunification. The first one regarded the sponsor's responsibility for the family separation. The Court took into consideration whether the applicant was aware of, or should have been aware of, the high likelihood that the application for reunification would be rejected. The applicants in the Abdulaziz case had established family life *after* being granted residence permits. They were hereby aware of, or should have been aware of, the risk that they might not be able to reunite in the United Kingdom.[137] This requirement, which could be called the *unwilling requirement*, addresses whether the family separation was voluntary or not. The ECtHR has developed on this

[134] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p. 25; Tanda-Muzinga v France, para 75.
[135] Tanda-Muzinga v France, para 66; Tuquabo-Tekle and Others v the Netherlands, para 42; Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67.
[136] Costello, 2016, p. 112 f., 130.
[137] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 68.

requirement in more recent case law.[138] The sponsors in the Abdulaziz case were not beneficiaries of international protection, the decision did thus not concern forced displacement and involuntary family separation. This context had affected the outcome of the decision, where the ECtHR found no violation of Article 8 ECHR.[139] The importance of the unwilling requirement has been confirmed by the ECtHR in its more recent decisions *Ahmut v the Netherlands* and *Gül v Switzerland*.[140]

The second requirement in the Abdulaziz case, which we hereafter refer to as the *unable requirement*, concerned if the family reunification could take place in the country of origin.[141] The ECtHR found that, if there are no obstacles preventing that family life is established elsewhere, then the host state is under no obligation to grant reunification. In other words, family reunification will only be granted if there are obstacles to reunite in the country of origin.[142]

In *Gül v Switzerland*, the ECtHR found no violation of Article 8 ECHR since the family could reunite elsewhere. The Court found that insufficient obstacles to reunification in the country of origin existed, and the applicant was hereby denied family reunification in the host country. The state's interests outweighed the individual's interests since the family could reunite elsewhere.[143] In *Ahmut v the Netherlands*, the ECtHR likewise concluded that the unable requirement was not fulfilled.[144] The ECtHR has in the more recent decision *Tuquabo-Tekle and Others v the Netherlands* applied a lower threshold of the unable requirement. In this decision it was sufficient that reunification in the host country was the *most adequate* option.[145]

[138] Tanda-Muzinga v France, para 74.
[139] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 68 f.
[140] Ahmut v the Netherlands, para 70; Gül v Switzerland, para 41.
[141] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 68.
[142] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 68; Gül v Switzerland, para 42.
[143] Gül v Switzerland, para 39, 42 f.
[144] Ahmut v the Netherlands, para 70.
[145] Tuquabo-Tekle and Others v the Netherlands, para 47.

A number of additional factors may also be taken into consideration in the balancing act. The ECtHR has payed particular attention to the level of attachment between the individual and the host state. Likewise, the ECtHR has taken into consideration the level of attachment between the individual and the country of origin.[146] If children are involved, the principle of the best interests of the child, which is codified in Article 3 Convention on the Rights of the Child, is engaged.[147] Another relevant factor in the balancing assessment is the state's aim behind the interference with Article 8 ECHR. Finally, the margin of appreciation holds a vital role. The ECtHR maintains the statist assumption as a starting point for the analysis of the state's positive obligations regarding family reunification under Article 8 ECHR. The margin of appreciation is thus wide regarding positive obligations under Article 8 ECHR.[148]

While maintaining that the particular circumstances of the case determine the outcome of the balancing exercise[149], the ECtHR case law nevertheless refers to the unable and unwilling requirements, as outlined above, as crucial steps in the balancing assessment. The two key principles, namely the question of whether the family separation was involuntary and the question of whether family reunification can be realised in the country of origin, are accordingly decisive for determining the positive obligations under Article 8 ECHR.[150] An obligation to grant family reunification can as a rule only arise if the separation was involuntary and if the individual is unable to reunite in the country of origin.[151] The ECtHR principles addressed above concern family reunification within the immigration context, but they do not specifically address the situation of beneficiaries of international protection. The following section turns to the specific situation of SPBs and accordingly applies the ECtHR principles to the context of international protection.

[146] Osman v Denmark, para 66; Ahmut v the Netherlands, para 69.
[147] El Ghatet v Switzerland, para 46.
[148] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67.
[149] Tuquabo-Tekle and Others v the Netherlands, para 43.
[150] Ibid, para 45, 47 f.
[151] Rohan, 2013, p. 374.

3.2.2 A right to family reunification for subsidiary protection beneficiaries?

In order to answer the question of whether Article 8 ECHR entails a right to family reunification for SPBs, the above mentioned unable and unwilling requirements must be applied in the specific context of international protection. Furthermore, the margin of appreciation must be taken into account in the particular context of forced displacement. While the ECtHR has not directly addressed the right to family reunification for SPBs under Article 8 ECHR, the Court has examined the right to family reunification for refugees. Refugees and SPBs are equally beneficiaries of international protection, and as such they share a particular vulnerability. Both protection categories have left their country of origin involuntarily, and they have protection needs which prevent them from returning to their country of origin.[152] In the balancing assessment which engages the ECtHR unable and unwilling requirements, these special circumstances of the SPB must be taken into consideration.[153]

In *Tanda-Muzinga v France*, the ECtHR examined the positive obligation to grant family reunification under Article 8 ECHR. The applicant in this case was a refugee. Both the unwilling and the unable requirements were assessed by the ECtHR. The Court clarified that "the applicant could not be held responsible for the separation from his family"[154]. Furthermore, the Court explained that the applicant's vulnerability as a beneficiary of international protection supported the conclusion that the reunification could not take place elsewhere. In fact, the ECtHR held that merely "obtaining such international protection constitutes evidence of the vulnerability of the parties concerned"[155]. The Court explained how the right to family unity is essential for refugees and recognised "the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens"[156]. The

[152] Pobjoy, 2010, p. 213.
[153] Rohan, 2013, p. 372; UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 49 f.
[154] Tanda-Muzinga v France, para 74.
[155] Ibid, para 75.
[156] Ibid, para 75.

applicant's vulnerability as a refugee was a decisive factor for the outcome of the case. In the proportionality assessment, the Court weighed the state's public order interests and the margin of appreciation against the applicant's interest to reunite with his family. The Court concluded that the applicant's interests outweighed the immigration control interests of the state in this particular case. By refusing family reunification, the state accordingly failed to fulfil its positive obligations under Article 8 ECHR.[157]

Although *Tanda-Muzinga v France* concerned refugees and not SPBs, the situation of SPBs can be considered relevantly similar to the situation of refugees, since their vulnerable position as a beneficiary of international protection is shared. SPBs and refugees have both involuntarily separated from their family through forced displacement. Furthermore, their protection needs, which engage the principle of non-refoulement under Article 3 ECHR, prevent reunification in the country of origin.[158] It is thus arguable that SPBs and refugees equally by definition fulfil the unwilling and unable requirements. According to this reasoning, the specific situation of the SPB implies a presumed right to family reunification under Article 8 ECHR.[159]

It is nevertheless of vital importance to emphasize that the particular circumstances of each individual case determine the outcome of the balancing assessment. The right to control immigration remains the starting point of the ECtHR's reasoning in the assessment of positive obligations under Article 8 ECHR.[160] The basis of this reasoning is the state's wide margin of appreciation, and this margin derives its legitimacy from the *principle of subsidiarity*. The backbone of this principle is that the state is presumed to "have the primary legitimacy, knowledge, and expertise to carry out the delicate balancing of competing interests"[161]. The consequence of this premise is that the balancing

[157] Tanda-Muzinga v France, para 75, 82.
[158] Rohan, 2013, p. 371 f; Tanda-Muzinga v France, para 75; CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p. 25; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 149 f.
[159] Czech, *A Right to Family Reunification for Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty and EU Harmonisation,* 2016.
[160] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67.
[161] Stoyanova, 2018, p. 119.

assessment becomes very unpredictable and to a wide extent determined by the individual circumstances of the particular case.[162]

3.2.3 The Temporary Law restrictions examined

We will now turn to the specific examination of the Temporary Law restrictions. With the above outlined background on the relevant principles from ECtHR case law, this section conducts a proportionality analysis of the Temporary Law restrictions. In the balancing exercise, the interests of the state will be weighed against the interests of the individual. The outcome of the analysis will determine if the Temporary Law restrictions regarding family reunification rights for SPBs were in compliance with Article 8 ECHR.

As a first stage of the analysis, we will examine the interests of the individual SPB that wants to apply for family reunification. ECtHR case law confirms SPBs' particular vulnerability as beneficiaries of international protection. This vulnerability implies that SPBs should have more favourable family reunification rights than other migrants.[163] The CoE Commissioner for Human Rights has likewise described the right to family life as "a fundamental element in enabling persons who have fled persecution to resume a normal life"[164]. In MIG 2018:20, the Migration Court of Appeal assessed the right to family reunification for a SPB under the Temporary Law. In the decision, the Court highlighted the vulnerable position of the SPB, and linked this vulnerability to a stronger right to reunite with family. The UNHCR has confirmed this view.[165] The Swedish Refugee Advice Centre has also highlighted the link between the separation of families and impeded integration as well as mental illness.[166] In sum, SPBs possess a particular vulnerability which is of key

[162] Stoyanova, 2018, p. 118.
[163] Tanda-Muzinga v France, para 75.
[164] CoE, *Report by Nils Muižnieks: Commissioner for Human Rights of the Council of Europe*: *Following his Visit to Sweden from 2 to 6 October 2017*, 2018, para 27.
[165] UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 44.
[166] Swedish Refugee Advice Centre, 2016, p. 1.

importance in the assessment of family reunification rights under Article 8 ECHR.

This vulnerability has been recognised by the ECtHR through the unwilling and unable requirements, since the principles imply a stronger right to family reunification for SPBs than other categories of migrants. These principles, which firstly were introduced by the Abdulaziz case, assess whether the family separation was involuntary, and whether reunification is possible elsewhere.[167] SPBs fulfil the unwilling requirement by being a victim of forced displacement. The family separation is hereby involuntary. Furthermore, SPBs are unable to reunite with family in their country of origin due to their protection needs and the principle of non-refoulement.[168] Since SPBs by definition fulfil the unwilling and unable requirements, there is a presumed right to family reunification for SPBs under Article 8 ECHR. The particular vulnerability of the SPB, which is recognised by the ECtHR through the unwilling and unable requirements, weighs heavily in favour of SPBs' right to family reunification.[169]

Let us now address the interests of the state. In the preparatory works of the Temporary Law, the government made clear that the aim of the restrictions was to decrease the number of arrivals by making Sweden a less attractive destination country for asylum seekers. According to the government, the capacity of reception and integration of the newly arrived would hereby improve. It is clear that the restrictions in the Temporary Law were introduced with the aim of immigration control.[170] Immigration regulations are as a rule considered to fall within the margin of appreciation of the state. Considering that the ECtHR's starting point is the statist assumption, the interest of immigration control should weigh heavily in favour of the state in the balancing exercise.[171]

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[167] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 68.
[168] Tanda-Muzinga v France, para 74 f.
[169] Czech, *A Right to Family Reunification for Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty and EU Harmonisation,* 2016.
[170] Prop. 2015/16:174, p. 1 f.
[171] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67; Tanda- Muzinga v France, para 64 f.

The government argued that the extreme situation motivated the restrictions on family reunification. Sweden's asylum system was under severe pressure due to the high number of arriving asylum seekers in late 2015. Although a decrease in arriving asylum seekers was clear in the beginning of 2016, the government still stressed the challenges of the situation.[172] In 2015 the number of new asylum applications in Sweden was 162 877. Out of these, 35 369 applications concerned unaccompanied minors.[173] In 2014, Sweden registered 81 301 new asylum applications, and in 2013 the corresponding number was 54 259.[174] Accordingly, the number of asylum seekers that arrived to Sweden in 2015 was unquestionably extraordinary high.

While admitting the extraordinary nature of the situation, it could be argued that the Temporary Law restrictions lacked proportionality in relation to the aim of immigration control. By questioning the *suitability* of limited family reunification rights, it is possible to argue that the crisis context lacks fundamental relevance for the outcome of the balancing assessment. Restricting the right to family reunification does not necessarily contribute to a diminished number of new asylum seekers.[175] Instead, other measures of immigration control, such as border checks, could lead to the aspired results.[176] It could hereby be argued that more suitable means were available, and that these means would have implied less harm for the individuals affected.[177] This argument would however most likely not find support from the ECtHR, since the Court adheres to the statist assumption.[178] The ECtHR tends to assume suitability when immigration control is the objective of an interference with

[172] Prop 2015/16:174, p. 22, 43.
[173] Swedish Migration Agency, *Statistics: Applications for Asylum Received 2015*, [https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum], accessed 1st November 2019.
[174] Swedish Migration Agency, *Statistics: Applications for Asylum Received 2014*, *Statistics: Applications for Asylum Received 2013,* [https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum], accessed 1st November 2019.
[175] Stern, 2019, p. 246.
[176] Ibid, p. 252 f.
[177] UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 43.
[178] Tuquabo-Tekle and Others v the Netherlands, para 43; Tanda-Muzinga v France, para 66.

Article 8 ECHR.[179] Consequently, recognising the extraordinary nature of the situation, the crisis context inevitably weighs in favour of the state's interest to control immigration.[180] It could nevertheless be argued that the situation was not severe enough to support the proportionality of the restrictions on family reunification, considering the particularly vulnerable situation of SPBs.[181]

Another aspect that could be of interest in the balancing exercise is the fact that the restrictions were limited to a period of three years. In the preparatory works of the Temporary Law, the government stressed the temporary nature of the restricted family reunification rights.[182] The temporary nature could however lack central relevance for the compatibility with Article 8 ECHR. During the three year interval within which the restrictions were in force, a minor of 15 years old could turn 18 and accordingly lose the right to reunite with family. Accordingly, the fact that the restrictions were temporary did not prevent the restrictions from being in conflict with Article 8 ECHR. Delayed family reunification could imply that the state fails to comply with its positive obligations under Article 8 ECHR.[183]

Summarising the balancing of interests is not an easy task. While the balancing assessment suggests a presumed right to family reunification for SPBs under Article 8 ECHR, the immigration control prerogative of the state might restrict this right. Under certain circumstances, such as the extraordinary situation in Sweden in late 2015, restricted family reunification rights for SPBs might be in compliance with Article 8 ECHR. The vulnerability of the SPB, which is expressed by the recognition as a beneficiary of international protection, must

[179] Stoyanova, 2018, p. 108 ff.
[180] Tanda-Muzinga v France, para 65 f.
[181] Stern, 2019, p. 258 f; UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 43.
[182] Prop 2015/16:174, p. 43.
[183] Hathaway, 2005, p. 538; UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 45.

be weighed against the state's interest of immigration control in the particular context.

The Temporary Law clearly failed to recognise the particular vulnerability of SPBs, since SPBs were categorically excluded from the right to family reunification. The Temporary Law neglected that SPBs are victims of forced displacement, and accordingly disregarded of a presumed right to family reunification for SPBs under Article 8 ECHR. The SPB's particular vulnerability is a weighty reason in favour of the individual SPB's right to family reunification. My conclusion is nevertheless, considering the extraordinary situation of 2015, that ECtHR case law suggests that the interests of the state would outweigh the interests of the individual. This conclusion is based on the fundamental role of the statist assumption in ECtHR decisions. This premise, which upholds the rule that the state has a sovereign right to control immigration, could be criticized for illegitimately undermining the human rights protection of immigrants under the ECHR. Article 8 ECHR, as a qualified right, risks becoming void of content in the immigration context when the statist assumption is upheld.[184]

The safety clause in Section 13 Temporary Law must also be involved in the balancing exercise. This provision entailed a right to family reunification in situations that otherwise would imply a violation of Article 8 ECHR. Relying on the safety clause, it is difficult to conclude that the Temporary Law restrictions violated Article 8 ECHR. The safety clause accordingly supports the conclusion that the ECtHR would find that the Temporary Law restrictions were in compliance with Article 8 ECHR.

The safety clause in Section 13 Temporary Law nevertheless implied procedural issues regarding Article 8 ECHR. The right to respect for family life encompasses positive obligations regarding procedural aspects. In order to effectively ensure respect for family life, the state must ensure a certain procedural standard.[185] Since Section 7 Temporary Law categorically excluded

[184] Lambert, 2013, p. 205 f.
[185] Tanda-Muzinga v France, para 68, 73.

SPBs from the right to family reunification, it could be argued that this legislation risked that no individual assessment would be made.[186] The safety clause in Section 13 Temporary Law did, according to the government, guarantee that an individual assessment would be conducted in every case in order to assure no violation of Article 8 ECHR.[187] It could however be argued that Section 13 Temporary Law was not sufficient to ensure compliance with Article 8 ECHR on procedural grounds. The Temporary Law restrictions did accordingly raise concerns regarding the procedural requirements encompassed in the positive obligations under Article 8 ECHR.[188]

3.3 Conclusions

This Chapter has analysed the Temporary Law restrictions in relation to the right to respect for family life under Article 8 ECHR. The right to respect for family life implies no general right to family reunification. The right to reunite with your family is dependent on a number of factors and accordingly depends on the particular circumstances of the case. There are however key principles that the ECtHR applies in order to determine if Article 8 ECHR entails a positive obligation on the state to grant family reunification.

As a starting point, the state has a right to control immigration. Determining rules on immigration is an expression of the sovereign powers of the state. Provided that the applicant involuntarily separated from the family, and is unable to reunite elsewhere, there is however a presumed obligation on the state to grant family reunification. Considering that SPBs by definition fulfil the unwilling and unable requirements, by being victims of forced displacement and by their protection needs preventing a reunification in the country of origin, Article 8 ECHR should presume a right to family reunification for SPBs. The particular vulnerability of the SPB generates a

[186] Swedish Refugee Advice Centre, 2016, p. 10.
[187] Prop 2015/16:174, p. 43.
[188] Prop 2015/16:174, p. 37 f; Tanda-Muzinga v France, para 82; UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 52.

stronger right to family reunification than other migrants. It is however important to highlight that the individual circumstances of the case can imply a different outcome, particularly since the ECtHR has clarified that the margin of appreciation generally is wide in cases regarding family reunification under Article 8 ECHR.

In applying the general ECtHR principles to the current case of the Temporary Law, we can conclude that the family reunification restrictions raised some concerns regarding the compliance with Article 8 ECHR. The balancing exercise weighed the state's interest against the individual SPB's interests and hereby assessed the proportionality of the Temporary Law restrictions. The ECtHR case law suggests that Article 8 ECHR presumes a right to family reunification for SPBs, due to their particular vulnerability as beneficiaries of international protection. The Temporary Law restrictions could be criticized for not recognising this particular vulnerability and presumed right to family reunification. Furthermore, the Temporary Law restrictions arguably lacked suitability for the aspired aim.

Meanwhile, the extraordinary circumstances of the situation in 2015 weighed heavily in favour of the state's interest of immigration control. The statist assumption, which is dominant in the decisions of the ECtHR, supports the conclusion that the interest of immigration control would outweigh the interests of the individual. This conclusion is further supported by Section 13 Temporary Law. This safety clause, which entailed a last resort to family reunification in cases which otherwise might impede with obligations under Article 8 ECHR, arguably prevented a clear conflict with Article 8 ECHR. It is nevertheless highly problematic that Section 7 Temporary Law categorically excluded SPBs from the possibility of reuniting with their family. Considering that Article 8 ECHR also encompasses positive obligations regarding *procedural* aspects, the analysis above suggests that the Temporary Law restrictions on the right to family reunification for SPBs not were in compliance with Article 8 ECHR.

4 Similar but Different: Exploring the Potential of Article 14 ECHR

The Temporary Law restrictions introduced a clear distinction between SPBs and refugees. This distinction had not existed in previous asylum legislation. The right to family reunification for SPBs was withdrawn while refugees maintained a right to reunite with the family.[189] The government claimed to justify the Temporary Law restrictions by referring to arguments alleging that SPBs were not in a situation comparable to refugees' situation.[190] This rigid distinction between refugees and SPBs has been criticized as discriminatory. The inequality between the different international protection statuses was described as "legally suspect"[191] and "difficult to reconcile with Article 14 of the Convention, read in conjunction with Article 8 of the Convention"[192] by the CoE Commissioner for Human Rights. The UNHCR has also commented the Temporary Law restrictions and then held that "delaying a holder of temporary subsidiary status the right to reunite simply due to his or her status would be inconsistent with international law"[193]. ECtHR case law confirms the conclusion that Article 14 ECHR can limit the state's margin to determine its family reunification regime.[194] This chapter examines whether the Temporary Law restrictions on family reunification for SPBs were in compliance with Article 14 ECHR taken together with Article 8 ECHR.

This analysis is divided into two main sections. The first section examines whether the Temporary Law restrictions fall within the scope of Article 14 ECHR taken together with Article 8 ECHR. This stage of the analysis determines if the situation concerns one of the Convention rights, and if the less favourable treatment was connected to a recognised discrimination

[189] See previous Chapter 2.2 *The Temporary Law*.
[190] Prop. 2015/16:174, p. 42 f.
[191] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 23.
[192] Ibid, p. 25.
[193] UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 45.
[194] See Pajic v Croatia; Novruk and Others v Russia.

ground. The second section is focused on the central question of whether SPBs and refugees are in a comparable situation. This comparability test, which assesses whether SPBs are in a relevantly similar situation to refugees, is at the heart of the examination of Article 14 ECHR.[195] The second stage of the analysis also examines whether the differential treatment was justified by the state. In order to justify the less favourable treatment, the state must show that a legitimate aim was pursued and that there was a proportionate relationship between the measures and the aim.[196] Conclusions are presented in a separate section after the analysis.

4.1 Clarifying the scope of Article 14 ECHR

The first stage of the analysis concerns the applicability of Article 14 ECHR. The initial analytical step is accordingly to examine if the Temporary Law restrictions fall within the scope of Article 14 ECHR. The prohibition of discrimination presupposes differential treatment in relation to a group in a comparable situation. The Temporary Law indisputably contained a less favourable treatment of SPBs in comparison to refugees.[197] The less favourable treatment must however also concern an area protected by a Convention right, such as the right to respect for family life under Article 8 ECHR. Furthermore, the differential treatment must be connected to a discrimination ground.[198] These last two questions are separately examined in the two sub-sections below.

The ambit of Article 8 ECHR

Article 14 ECHR contains a prohibition of discrimination that concerns the substantive rights of the Convention. The prohibition of discrimination is thus accessory and can only be invoked together with one of the areas covered by a

[195] CoE and European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, p. 29, 43.
[196] Biao v Denmark, para 90, 92.
[197] Sections 6-7 Temporary Law; See more in previous Chapter 2 *Mind the Gap: Limiting the Right to Family Reunification*.
[198] CoE and European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, p. 44.

Convention right. In order to establish that there has been a violation of Article 14 ECHR it is however not a prerequisite that the substantive right has been violated in itself.[199] Since the current analysis concerns the right to family reunification, we must thus assess if the Temporary Law restrictions fall within the ambit of the right to respect for family life under Article 8 ECHR. Regardless of whether the Temporary Law restrictions implied a violation of Article 8 in itself, the restrictions can still amount to discrimination under Article 14 ECHR together with Article 8 ECHR.

Previous Chapter 3 clarified that Article 8 ECHR contains the principle of family unity. The right to respect for family life accordingly encompasses a right to live together, and family reunification is an expression of this right. In *Hode and Abdi v the United Kingdom*, the ECtHR concluded that the immigration rules examined had a clear impact on the right to enjoy family life for the applicant. Accordingly, the examined case fell within the ambit of Article 8 ECHR.[200] The Temporary Law restrictions on family reunification rights for SPBs have an obvious effect on the right to enjoy family life. It is hereby unproblematic to conclude that the restrictions of the Temporary Law are covered by the scope of Article 8 ECHR.[201] The fact that Article 8 is a qualified right is no obstacle to this conclusion.[202]

Identifying a discrimination ground

Another necessary step of the analysis is to confirm that the differential treatment was based on a discrimination ground. We must thus examine if there is a link between a recognised discrimination ground and the differential treatment. Article 14 holds a non-exhaustive list of discrimination grounds. Other discrimination grounds than those listed could thus be accepted by the ECtHR.[203] The listed grounds are sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,

[199] Hode and Abdi v the United Kingdom, para 42.
[200] Ibid para 43.
[201] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p. 23.; Abdulaziz, Cabales and Balkandali v the United Kingdom, para 71.
[202] Danelius, 2015, p. 550.
[203] Danelius, 2015, p. 566; Hode and Abdi v the United Kingdom, para 44.

property, birth or other status. *Other status* implies the open-endedness of the discrimination grounds. In order to qualify as a discrimination ground the ECtHR has confirmed that the difference in treatment must be based on an "identifiable, objective, or personal characteristic, or "status""[204]. There is no requisite that the discrimination ground must be innate or inherent.[205] It must however be possible to distinguish the two groups from each other based on the characteristic or status.[206] Examples of non-listed discrimination grounds previously accepted by the ECtHR are fatherhood[207], place of residence[208] and former KGB officer status[209]. The jurisprudence of the ECtHR thus establishes a relatively generous interpretation of discrimination grounds. The individual circumstances of the case are decisive for the assessment of the discrimination ground.[210]

The differential treatment regarding family reunification rights under the Temporary Law was based on the protection status. According to Sections 6-7 Temporary Law, SPBs were neglected the right to family reunification while refugees maintained that right. The less favourable treatment was thus directly based on the SPB status.[211] SPB status, which is a legal status, is not explicitly recognised as a discrimination ground in the Convention. SPB status could nevertheless qualify as other status.[212]

The ECtHR has held that other status generally could be interpreted widely.[213] Immigration status was recognised as a discrimination ground in *Bah v the United Kingdom*.[214] In this decision, the ECtHR held that immigration status fell within the scope of other status under Article 14 ECHR. Immigration status

[204] Novruk and Others v Russia, para 90.
[205] Biao v Denmark, para 89.
[206] Bah v the United Kingdom, para 41.
[207] Weller v Hungary, para 29.
[208] Carson and Others v the United Kingdom, para 66.
[209] Sidabras and Others v Lithuania, para 106.
[210] Danelius, 2015, p. 566.
[211] Prop. 2015/16:174, p. 42; CoE and European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, p.144; CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p.43.
[212] Grabenwarter, *Article 14: Prohibition of Discrimination*, 2013, p. 358; Bah v the United Kingdom, para 45.
[213] Hode and Abdi v the United Kingdom, para 46.
[214] Bah v the United Kingdom, para 44.

was recognised as a discrimination ground although this status entails an element of choice.[215] Even residence status has been accepted as a discrimination ground by the ECtHR.[216] In *Hode and Abdi v the United Kingdom*, the Court recognised refugee status as a discrimination ground.[217] The case concerned less favourable treatment of refugees in comparison to students and migrant workers with temporary residence permits.[218] The ECtHR case law outlined above suggests that SPB status, which is significantly similar to refugee status and immigration status, should be accepted as a discrimination ground. Furthermore, it is reasonable to conclude that SPB status fulfil the criteria of being an "identifiable, objective, or personal characteristic, or "status""[219], considering that the SPB status "captures a distinct group of individuals who share a common status"[220]. Referring to the Court's reasoning in the case law above, it is thus plausible to conclude that SPB status could be considered an accepted discrimination ground under Article 14 ECHR.[221]

4.2 The issue of comparability

Concluding that the Temporary Law restrictions fall within the ambit of Article 8 ECHR, and that the differential treatment was connected to a recognised discrimination ground, the next step of the analysis concerns the comparability test. The issue of comparability is crucial for outcome of the analysis of Article 14 ECHR.[222] The following two sub-sections examine the question of comparability between SPBs and refugees with regards to the right to family reunification. Firstly, focus is on the question of whether SPBs and refugees are in a relevantly similar situation. The second analytical stage examines if the government could justify the differential treatment. The government claimed to justify the differential treatment of SPBs with arguments referring to the

[215] Bah v the United Kingdom, para 45 f.
[216] Carson and Others v the United Kingdom, para 70 f.
[217] Hode and Abdi v the United Kingdom, para 47 f.
[218] Ibid, para 30 f.
[219] Novruk and Others v Russia, para 90.
[220] Pobjoy, 2010, p. 214.
[221] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p. 23 ff.
[222] Grabenwarter, *Article 14: Prohibition of Discrimination*, 2013, p. 345 f.

non-comparability of SPBs and refugees.[223] These two sub-sections accordingly circle around the same issue, namely the question of comparability.

4.2.1 The comparability test: Are subsidiary protection beneficiaries and refugees in a relevantly similar situation?

In order to determine that there has been a violation of Article 14 ECHR taken together with Article 8 ECHR, we must come to the conclusion that the situation of SPBs and the situation of refugees are comparable.[224] The groups must be in "analogous, or relevantly similar, situations"[225]. It is thus sufficient to show a *relevantly similar* situation.[226] The groups compared must only be in a similar situation with regards to the specific context, such as the right to family reunification. Which right that is concerned is crucial for the comparability test. The right concerned determines which aspects that are relevant, thus the requirement of a *relevantly* similar situation.[227]

In order to determine if SPBs are in a relevantly similar situation to refugees, we accordingly need to examine relevant aspects of SPBs' situation and compare these to the situation of refugees. Firstly, we must consequently determine which aspects that are relevant for the right to family reunification. In the preparatory works of the Temporary Law, the government addressed the issue of discrimination under Article 14 ECHR and presented arguments advocating the non-comparability of SPBs and refugees.[228] The analysis below examines these arguments and contrasts them with critique raised by different human rights organisations. The critique suggests an alternative reasoning which argues that SPBs and refugees are in a relevantly similar situation.[229] The comparability test below is accordingly structured according to two core

[223] Prop. 2015/16:174, p. 42 f.
[224] Hode and Abdi v the United Kingdom, para 45.
[225] Biao v Denmark, para 89.
[226] Varnas v Lithuania, para 112.
[227] Ibid, para 113 f.
[228] Prop. 2015/16:174, p. 42 ff.
[229] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, p. 24 f; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 158.

aspects. The first relevant aspect concerns the protection needs of SPBs and refugees, and the second aspect concerns the need to reunite with family.

Similar protection needs?

According to the government, refugees have longer protection needs than SPBs.[230] The definitions of the protection statuses refugee and SPB have been outlined in previous Chapter 2. These status definitions do not necessarily imply a difference in duration of protection needs. The protection needs of SPBs and refugees are equally dependent on the specific circumstances in the home country. These conditions might change or remain the same irrespective of whether it regards well-founded fear of persecution or the risk of serious harm due to indiscriminate violence in an armed conflict. Refugee protection needs might thus cease in the same manner as SPB status depending on the situation in the country of origin. While the Qualification Directive introduces a clear hierarchy between the statuses by assigning SPBs shorter residence permits than refugees, this difference is not necessarily embedded in the definition of the *protection needs* of SPBs and refugees.[231] The UNHCR has also highlighted that the 'temporary argument' lacks empirical support.[232] Furthermore, prior to the Temporary Law, the Aliens Act contained no differentiation between the duration of permits for refugees and SPBs. Sweden has accordingly, until the Temporary Law was introduced, upheld a tradition of equal treatment between the two groups with regards to the length of the permit. This tradition goes against the statement that the protection needs are shorter for SPBs than refugees.[233]

Another difference raised by the government was that the protection grounds for SPBs are less individual than the protection grounds for refugees. [234] Accurately, the refugee definition entails a more individually oriented protection need than the SPB definition. In order to qualify as a SPB there is

[230] Prop. 2015/16:174, p. 42 f.
[231] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 24 ff; Pobjoy, 2010, p. 220.
[232] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 158.
[233] Chapter 5, Section 1, Paragraph 3 Aliens Act.
[234] Prop. 2015/16:174, p. 42 f.

no need to establish an individual threat in certain situations of indiscriminate violence where a severity threshold is reached.[235] This argument of the government, which highlights that SPB status lacks the individuality encompassed in the refugee status, could nevertheless be rejected as irrelevant for the comparability of SPBs and refugees in relation to the right to family reunification. The comparability test is conducted in relation to the specific context of family reunification rights. The right to family reunification is arguably equally important for SPBs and refugees, irrespective of a more or less individually oriented protection ground.[236] SPBs and refugees are equally recognised as in need of international protection, and this similarity remains regardless of "whether they left their home country for reasons of persecution relevant under the Geneva Convention or whether they did so for reasons that make them qualify for subsidiary protection."[237]

In conclusion, the government's arguments referring to the duration and individuality of the protection needs do not seem incontestable.[238] In contrast to the government's argumentation, the protection needs of SPBs and refugees could be considered similar. SPBs are, like refugees, victims of forced displacement and recognised as deserving of international protection under international law and EU-law. Due to the risk of serious harm if sent back, SPBs and refugees cannot return to their country of origin. A common core in the SPB status and refugee status can thus be identified in the similar need to escape serious human rights violations. The principle of non-refoulement, which applies irrespective of status, supports this similarity of protection needs.[239] The essence of the protection needs, which is shared by SPBs and refugees, is accordingly "international movement to avoid the risk or furtherance of serious human rights violations"[240].

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[235] Article 15(c) Qualification Directive.
[236] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 23 f; Pobjoy, 2010, p. 220 f.
[237] Czech, *A Right to Family Reunification for Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty and EU Harmonisation,* 2016.
[238] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 25.
[239] Pobjoy, 2010, p. 221 f; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 157 f.
[240] Pobjoy, 2010, p. 213.

Similar need for family reunification?

The protection needs are linked to the need to reunite with family. Accordingly, recognising that SPBs' and refugees' protection needs are similar reasonably implies that both protection categories also have a similar need to reunite with their family. SPBs and refugees share a vulnerability that follow from their protection needs. This vulnerability is linked with a need to reunite with family in order to enhance well-being and improve integration.[241] In the UNHCR's observations on the draft proposal of the Temporary Law, the UNHCR emphasized the equal humanitarian need to reunite with family for all categories of international protection, due to the particular vulnerability of victims of forced migration.[242] In *Tanda-Muzinga v France*, the ECtHR explained how international protection status "constitutes evidence of the vulnerability of the parties concerned"[243]. This vulnerability, which has been recognised by the ECtHR through the unable and unwilling requirements that were explained in previous Chapter 3, is equally possessed by SPBs and refugees.[244]

In *Varnas v Lithuania*, the ECtHR examined the question of discrimination with regards to Article 8 EHCR. The case concerned detainees' right to receive visits. In the decision, the Court examined the comparability in relation to the particular nature of the complaint, namely the right to family life. This examination led to the conclusion that all detainees, regardless of the different purposes of their deprivation of liberty, were in a similar situation in relation to visiting rights in prison. The Court hereby clarified that the right to receive visits were of relevance to all detainees.[245] This reasoning could support the conclusion that refugees and SPBs are comparable, since the right to reunite with their family arguably is of the same relevance regardless of protection

[241] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 158 f.
[242] UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 49.
[243] Tanda-Muzinga v France, para 75.
[244] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 17 f., 20.
[245] Varnas v Lithuania, para 112 ff.

status.[246] The shared vulnerability as a beneficiary of international protection, which have been clarified above, correlates to a shared need for family reunification.[247]

In sum, the comparability analysis above provides substantial support for the conclusion that SPBs and refugees are in a relevantly similar situation for the purpose of family reunification. SPBs and refugees have similar protection needs, and hereby also a shared vulnerability. This particular vulnerability correlates to a similar need to reunite with their family.[248] The comparability of SPBs and refugees finds further support in the ECtHR's reasoning in *Hode and Abdi v the United Kingdom*. In this decision, which examined the question of discrimination regarding the right to family reunification for refugees, the ECtHR accepted that refugees were in an analogous position to migrant workers and students with a temporary residence permit. The named groups were accordingly considered comparable for the purpose of family reunification.[249] The situation of SPBs and refugees is clearly more similar than the situation of refugees and migrant workers or students with a temporary residence permit, since SPBs and refugees share the status as beneficiaries of international protection. *Hode and Abdi v the United Kingdom* hereby supports the conclusion that SPBs and refugees are in a relevantly similar situation with regards to the right to family reunification.[250]

4.2.2. Justified differentiation?

Even if we conclude that SPBs are in a relevantly similar situation to refugees with regards to family reunification rights, the Temporary Law restrictions will

[246] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 158 f.
[247] UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Draft Law Proposal on Restrictions on the Possibility to Obtain a Residence Permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige: utkast till lagrådsremiss")*, 2016, para 49.
[248] Czech, *A Right to Family Reunification for Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty and EU Harmonisation,* 2016¸ UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 158.
[249] Hode and Abdi v the United Kingdom, para 50.
[250] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 25.

not result in discrimination under Article 14 ECHR if the government can *justify* the less favourable treatment. The justification provided by the government must be reasonable and objective. A legitimate aim must hereby be established, and a proportionality between the pursued aim and the means used. The margin of appreciation is of key importance for the outcome of the assessment of the justification. The extent of the margin is determined by the particular circumstances of the case and the general interests involved.[251] The analysis below firstly addresses the question of a legitimate aim. Secondly, we turn focus to the proportionality assessment and accordingly examine the government's arguments referring to the privileged status of refugee protection.

Legitimate aim?

In 2015, Sweden faced a drastic increase in the number of arriving asylum seekers.[252] The government wanted to limit this immigration by making Sweden a less attractive asylum destination. Introducing the Temporary Law, and more specifically restricting the right to family reunification for SPBs, was a part of this project. The aim of the Temporary Law restrictions was hereby in essence *immigration control*. The government emphasized the public interests of national security and order in its justification for the Temporary Law restrictions.[253]

The ECtHR has clarified that the margin of appreciation generally is wide when the situation concerns "general measures of economic or social strategy"[254]. Immigration control is often accepted as a legitimate aim under Article 8 ECHR by the Court[255], and this aim is considered to serve "the

[251] Hode and Abdi v the United Kingdom, para 51 f; Abdulaziz, Cabales and Balkandali v the United Kingdom, para 78.
[252] In 2015, 162 877 asylum applications were registered in Sweden. In 2014, the corresponding number was 81 301, and in 2013 it was 54 259. See Swedish Migration Agency, *Statistics – Applications for Asylum Received 2013-2015*, [https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum], accessed 1 November 2019.
[253] Prop. 2015/16:174, p. 1 f, 21.
[254] Hode and Abdi v the United Kingdom, para 52.
[255] See Zakayev and Safanova v Russia, para 40; Osman v Denmark, para 58; J.M. v Sweden, para 40.

general interests of the economic well-being of the country"[256]. In *Hode and Abdi v the United Kingdom*, the Court accepted the aim of "offering incentives to certain groups of immigrants"[257] as legitimate. This aim was thus, at heart, immigration control. The case of *Abdulaziz, Cabales and Balkandali v the United Kingdom* follows the same reasoning. In this decision the ECtHR accepts the aim of "protecting the domestic labour market"[258] as legitimate. Managing immigration was thus considered as a legitimate aim.[259]

With reference to the above outlined ECtHR case law, which confirms that "the legitimate aim pursued has only little limiting function"[260], it is reasonable to conclude that the aim of the Temporary Law restrictions, namely immigration control in the interest of national security and order, would be accepted as legitimate by the ECtHR. The wide margin of appreciation in the immigration context supports this conclusion. The ECtHR would accordingly arguably accept that the Temporary Law restrictions had a legitimate aim.[261]

Proportionality: The superiority of the refugee status examined

While we can conclude that providing a legitimate aim seemingly would be unproblematic for the government, the proportionality assessment remains. The state must show a proportional relationship between the measures used, thus the Temporary Law restrictions particularly directed to SPBs family reunification rights, and the aim pursued, namely immigration control. The margin of appreciation has a key role in this assessment.[262] According to ECtHR case law, the margin of appreciation is small when the discrimination is based on an immutable or inherent characteristic. Cases where the discrimination ground entails no element of choice are hereby difficult to justify for the state.[263] The ECtHR has found that refugee status as a

[256] Biao v Denmark, para 117.
[257] Hode and Abdi v the United Kingdom, para 53.
[258] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 78.
[259] Ibid, para 85.
[260] Grabenwarter, *Article 14: Prohibition of Discrimination*, 2013, p. 350.
[261] Costello, 2016, p. 127.
[262] Biao v Denmark, para 90, 93; Grabenwarter, *Article 14: Prohibition of Discrimination*, 2013, p. 352.
[263] Bah v the United Kingdom, para 47; Biao v Denmark, para 93 f.

discrimination ground implies no element of choice. Discrimination based on refugee status must accordingly imply a small margin of appreciation for the state.[264] SPB status is, alike refugee status, a legal status of international protection that entails no element of choice. The margin of appreciation should hereby, relying on the reasoning of the ECtHR in previous case law[265], be strict when examining discrimination based on SPB status.[266]

The primary justification presented be the government referred to the non-comparability of SPBs' and refugees' protection needs. According to the government's reasoning, refugees have unique protection needs, and hereby also a stronger need for family reunification than SPBs.[267] In other words, the arguments that were examined in the previous comparability test also apply in the proportionality assessment of the justification. There is accordingly a certain overlap between the comparability test and the proportionality assessment.[268] The government claimed that refugees generally have longer protection needs than SPBs, and that this difference is explained by the refugee definition's more individually orientated protection grounds.[269]

Relying on the conclusions of the analysis in the previous section[270], the protection needs of SPBs are similar to the protection needs of refugees. SPBs and refugees share the condition of having left their home country "to avoid the risk or furtherance of serious human rights violations"[271], and both categories have been recognised as in need of international protection.[272] The shared protection needs furthermore generate a shared need for family

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[264] Hode and Abdi v the United Kingdom, para 47; Bah v the United Kingdom, para 45, 47.
[265] Ibid.
[266] Grabenwarter, *Article 14: Prohibition of Discrimination*, 2013, p. 358; CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 23.
[267] Prop. 2015/16:174, p. 42 f.
[268] Stubbings and Others v the United Kingdom, para 73; Grabenwarter, *Article 14: Prohibition of Discrimination*, 2013, p. 351.
[269] Prop. 2015/16:174, p. 43.
[270] See previous Chapter 4.2.1 *The Comparability Test: Are Subsidiary Protection Beneficiaries and Refugees in a Relevantly Similar Situation?*.
[271] Pobjoy, 2010, p. 213.
[272] *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 158 f.

reunification in the host country.[273] Relying on this conclusion, the government's justification concerning the superior protection needs of refugees cannot arguably meet the requirements of being reasonable and objective.[274]

The government also claimed to justify the differential treatment by referring to minimum standards under EU-law. This argument is, alike the previous argument regarding the protection needs, connected to the assumed privileged position of the refugee status. The government argued that EU-law implies a stronger right to family reunification for refugees than SPBs, and that this differential treatment under EU-law justify the differential treatment under national law.[275] As clarified in previous Chapter 2, the Family Reunification Directive excludes SPBs from its scope.[276] Furthermore, the Qualification Directive grants SPBs shorter residence permits than refugees.[277] Accordingly, both the Family Reunification Directive and the Qualification Directive seem to establish a status hierarchy which affects the right to family reunification.[278]

The minimum level of protection under EU-law can however not reasonably serve as a justification for a the Temporary Law's less favourable treatment of SPBs. If the state decides to provide more favourable rights than the compulsory minimum under the ECHR, then these rights must be provided for without distinctions that don't meet the requirements of being reasonable and objective.[279] In *Hode and Abdi v the United Kingdom*, the Court found 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 it itself justify the difference in treatment."[280] Simply referring to minimum rights

[273] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 17 f., 20.
[274] Pobjoy, 2010, p. 221.
[275] Prop. 2015/16:174, p. 42.
[276] Article 3(2c) Family Reunification Directive.
[277] Article 24 Qualification Directive.
[278] Article 3 Family Reunification Directive, Article 24 Qualification Directive.
[279] Biao v Denmark, para 90.
[280] Hode and Abdi v the United Kingdom, para 55.

under EU-law can accordingly not *in itself* serve as a reasonable and objective justification for the less favourable treatment of SPBs.[281]

The analysis above shows that the government failed to provide a reasonable and objective justification for the differential treatment of SPBs. While the government provided a legitimate aim for the differential treatment, the justifications put forward arguably failed to meet the requirement of proportionality. Neither the argument regarding the protection needs, nor the argument referring to EU-law justified the discriminatory nature of the Temporary Law restrictions. The narrow margin of appreciation in the current case supports this conclusion. In sum, there is a lack of proportionality between the aim of immigration control and the measure of restricting the right to family reunification for SPBs.[282] Accordingly, it is plausible to conclude that the Temporary Law restrictions regarding family reunification rights for SPBs would amount to a violation of the prohibition of discrimination under Article 14 ECHR taken in conjunction with Article 8 ECHR.[283]

4.3 Conclusions

The analysis above addresses the Temporary Law restrictions in relation to the prohibition of discrimination in Article 14 ECHR taken together with Article 8 ECHR. The two groups compared are SPBs and refugees, and the question of discrimination is analysed in relation to the right to family reunification. The examination initially clarifies that SPBs' right to family reunification falls within the scope of Article 8 ECHR. The Temporary Law restrictions are thus covered by the prohibition of discrimination under Article 14 ECHR. The analysis continues by clarifying that the differential treatment is linked to the SPB status. With reference to ECtHR case law, the analysis concludes that SPB

[281] Czech, *A Right to Family Reunification for Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty and EU Harmonisation,* 2016.
[282] CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 25 f.
[283] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 162 f; CoE, *Realising the Right to Family Reunification of Refugees in Europe*, p. 25 f.

status reasonably would be accepted as a discrimination ground under Article 14 ECHR as *other status*.

The second step of the analysis concerns the issue of comparability. The situation of SPBs is compared to the situation of refugees in the specific context of family reunification rights. In order to amount to discrimination under Article 14 ECHR, the groups compared must be in a *relevantly similar situation*. Two core aspects are analysed in order to determine if SPBs and refugees are comparable. The first aspect concerns the protection needs, and the second aspect examined is the need for family reunification. While the government highlighted a number of differences between the situation of SPBs and refugees, the examination provides substantial support for the conclusion that SPBs and refugees are comparable in these two key aspects. The two groups have a similar need for international protection due to their particular vulnerability as victims of forced displacement. This vulnerability is connected to a similar need to reunite with family. In sum, the analysis supports the conclusion that SPBs and refugees are in a relevantly similar situation for the purpose of family reunification rights. This conclusion finds further support in the *Hode and Abdi v the United Kingdom* decision, where the ECtHR found that refugees were in an analogous position to migrant workers and students with a temporary residence permit.

While the comparability test confirms the relevantly similar situation of SPBs and refugees, the less favourable treatment can still be justified by the government. The Temporary Law restrictions can be in compliance with Article 14 ECHR taken in conjunction with Article 8 ECHR if a legitimate aim is pursued and if the differential treatment is proportional in relation to the aim. The government's justification must accordingly be reasonable and objective.

The analysis initially concludes that the government's aim of immigration control is likely to be accepted as legitimate by the ECtHR. Secondly, two main arguments which claim to justify the differential treatment are examined. Both arguments essentially refer to the non-comparability of the two protection

categories SPB and refugee. The first justification concerns the protection needs. This first argument accordingly engages the same issues that were examined in the previous comparability test. Provided that the comparability assessment accurately concluded that SPBs and refugees have similar protection needs, this first justification cannot convincingly fulfil the criteria of being reasonable and objective.

The second justification, which also boils down to the same issue of non-comparability between SPBs and refugees, regards the framework of EU-law. This argument referred to minimum requirements under EU-law as a justification for the differential treatment of SPBs and refugees. The less favourable treatment of SPBs under EU-law can nevertheless not in itself be considered a reasonable and objective justification. Neither of the justifications presented by the government can thus suffice to rebut the presumption of discrimination. In conclusion, the analysis above suggests that the Temporary Law restrictions on family reunification rights for SPBs would amount to a violation of Article 14 ECHR taken together with Article 8 ECHR.

5 Discussion

5.1 Finding the bottom line: A right to family reunification for beneficiaries of international protection?

The government claimed that the Temporary Law restrictions corresponded to the minimum level of protection under EU-law and international law. This thesis suggests that the restrictions regarding family reunification rights for SPBs in fact not only adjusted protection down to the minimum, but even fell below the bottom line.[284] While the analysis in Chapter 3 clarifies that Article 8 ECHR encompasses no general right to family reunification, the examination suggests that beneficiaries of international protection as a starting point are entitled to family reunification under Article 8 ECHR. This conclusion follows from an analysis of ECtHR case law regarding family reunification. The unwilling and the unable requirements are the two key aspects that generate this conclusion, since beneficiaries of international protection by definition fulfil both requirements.[285]

Recognising a right to family reunification for beneficiaries of international protection under Article 8 ECHR goes against the immigration control prerogative of the state. Neither the government nor the ECtHR are thus inclined to support this conclusion. Instead, the individual circumstances of each case would be emphasized, thus preventing a general recognition of a presumed right to family reunification for beneficiaries of international protection.[286] This resistance towards recognising the positive obligations of the effective protection of Article 8 EHCR originally derives from the statist assumption. Human rights in the immigration context are bound to be restricted according to the state's immigration control prerogative. This tension

[284] See previous Chapter 3 *Family Reunification in Crisis: Discovering the Minimum of Article 8 ECHR.*
[285] Rohan, 2013, p. 372; Tanda-Muzinga v France, para 74 f, 82; Czech, *A Right to Family Reunification for Persons Granted International Protection? The Strasbourg Case-Law, State Sovereignty and EU Harmonisation,* 2016.
[286] Dembour, 2015, p. 122 f.

between the state's sovereignty and the protection of human rights remains embedded within the international human rights regime.[287]

A right to family reunification under Article 8 ECHR implies positive obligations on the state. Positive obligations encompassed in international human rights protection are contested to a higher degree than negative obligations. The absent recognition of a right to family reunification for beneficiaries of international protection is partly explained by this reluctance.[288] The ECtHR has granted a wide margin of appreciation with regards to the positive obligations under Article 8 ECHR in the context of family reunification.[289] The immigration control prerogative of the state thus remains the starting point in the assessment of obligations under Article 8 ECHR within the immigration context.[290]

Limiting the powers of the state in favour of the individual's interests is at the heart of international human rights law. The international human rights regime thus inherently limits the sovereignty of the state.[291] In the immigration context, the perspective however seems to be the opposite. The ECtHR upholds this flipped starting point where the protection of individuals' rights becomes the exception.[292] The question of family reunification under Article 8 ECHR, which was highlighted by the Temporary Law restrictions, particularly illuminates this statist assumption. The Temporary Law restrictions merely confirms the conclusion that ensuring effective protection of the rights of immigrants remains a challenge.[293]

[287] Costello, 2016, p. 9 ff.
[288] Rohan, 2013, p. 359 ff.
[289] Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67.
[290] Stoyanova, 2018, p. 104 f.
[291] Costello, 2016, p. 10 f.
[292] Dembour, 2015, p. 118 f; Abdulaziz, Cabales and Balkandali v the United Kingdom, para 67.
[293] Costello, 2016, p. 112 f.

5.2 Moving beyond the status hierarchy

The government's reasoning in the preparatory works of the Temporary Law refers to a supposedly self-evident status hierarchy within the international protection regime.[294] The privileged position of the refugee status is however by no means self-evident within the framework of international human rights law. Costello recognises the "analogous needs and situation"[295] of SPBs and refugees, and she describes the unequal treatment as "an egregious differentiation"[296]. The principle of non-discrimination, which is an essential component of the framework of international human rights law, necessarily questions the legitimacy of the differential allocation of rights between SPBs and refugees.[297]

The refugee status definition, in similarity with the subsidiary protection status, is built around the core of "movement to avoid the risk of serious human rights abuse"[298]. These protection needs, rather than the assigned protection status, should be decisive for the allocation of rights.[299] International human rights law in general, and Article 14 ECHR in particular, is founded on the premise that "like cases must be treated alike, and unlike cases unalike, proportionate to the differences between them"[300]. Considering the similar situation of SPBs and refugees, a less favourable treatment of SPBs is in disharmony with the prohibition of discrimination. The protection gap of the Temporary Law, which supposedly in part derived its legitimacy from EU-law, could accordingly be approached as primarily politically motivated rather than legally. Adhering to a status hierarchy, which ultimately seems to be embedded in the Family Reunification Directive and the Qualification Directive, consequently disregards for the prohibition of discrimination in the specific context of family reunification rights.[301]

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[294] Prop. 2015/16:174, p. 42.
[295] Costello, 2016, p. 131.
[296] Ibid, 2016, p. 200.
[297] Pobjoy, 2010, p. 201 f, 221 f.
[298] Hathaway, 2007, 352.
[299] Pobjoy, 2010, p. 222.
[300] Ibid, p. 184.
[301] Pobjoy, 2010, p. 194 f; McAdam, 2005, p. 461 f, 500 f.

Allowing a hierarchical distinction between the right to family reunification for SPBs and refugees reinforces the statist assumption. The status differentiation essentially boils down to a resistance towards recognising that human rights law necessarily limits the sovereign powers of the state, even in the context of immigration law. The resistance is generally upheld by the ECtHR case law, wherein the statist approach to immigration control as a rule seems to pervade the Court's reasoning when examining the positive obligations under Article 8 ECHR.[302]

The prohibition of discrimination under Article 14 ECHR has however an inherent potential to challenge the otherwise well-established statist assumption in the human rights protection of immigrants. According to Article 14 ECHR, differential treatment is only permitted if it has an objective and reasonable justification.[303] Given that the hierarchical distinction between SPBs and refugees lacks basis in differing protection needs, an objective and reasonable justification for a differential allocation of rights is difficult to find. The prohibition of discrimination in Article 14 ECHR thus paves the way for moving beyond the status hierarchy in the international protection regime.[304] The principle of non-discrimination also entails the potential to question the exclusiveness of human rights protection, recognising that migrants are equally entitled to the protection of human rights.[305]

[302] Costello, 2016, p. 315 f; Stoyanova, 2018, p. 104 f, 124 f.
[303] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p. 157 ff.
[304] UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, p.161 ff; Hode and Abdi v the United Kingdom, para 50-54.
[305] Dembour, 2015, p. 123 f, 127 f.

6 Conclusions

The Temporary Law implied a sharp turn in Swedish Asylum legislation. The right to family reunification, which previously had been granted SPBs and refugees on a similar basis, was suddenly heavily restricted for SPBs. The government claimed that the changes corresponded to the minimum requirements of EU-law and international law. The examination of the Temporary Law restrictions in relation to the requirements of Articles 8 and 14 ECHR nevertheless suggests otherwise. In the analysis, where the Temporary Law restrictions are examined in relation to the right to respect for family life and the prohibition of discrimination, a number of problems are identified.

Although Article 8 ECHR encompasses no general right to family reunification, the positive obligations inherent in the effective protection of the right to respect for family life may result in a right to reunite with family. The particular circumstances of the individual case do however ultimately determine the obligations of the state. ECtHR case law has clarified that the state as a rule is entitled to control immigration. The margin of appreciation is accordingly wide in the assessment of family reunification under Article 8 ECHR.

The situation of SPBs is nevertheless special. SPBs have, alike other beneficiaries of international protection, a particular vulnerability which derives from their situation as victims of forced displacement. The particular vulnerability is demonstrated by the recognition as deserving of international protection. ECtHR case law establishes two key principles that are of relevance for the assessment of the positive obligations under Article 8 ECHR. These principles, namely the so called unwilling and unable requirements, generate a right to family reunification in situations where the family separation was involuntary, and where the individual is unable to reunite with the family in the country of origin. The particular vulnerability of SPBs implies that the unwilling and unable requirements necessarily are fulfilled. Accordingly, it is plausible to conclude that Article 8 ECHR encompasses a presumed right to

family reunification for SPBs. The particular circumstances of the individual case can nevertheless rebut this presumed right. The wide margin of appreciation in cases regarding family reunification reaffirms the statist assumption in the ECtHR's reasoning.

Concluding that Article 8 ECHR holds a presumed right to family reunification for SPBs, the categorical exclusion of SPBs in the Temporary Law is clearly problematic. The Temporary Law fails to recognise the particular vulnerability of SPBs, a vulnerability that is shared by refugees. The restrictions introduced by the Temporary Law must nevertheless be assessed in the particular context of the exceptionally high number of arriving asylum seekers in Sweden in 2015. The crisis context weighs in favour of the state's interest of immigration control. With reference to the wide margin of appreciation, and the ECtHR's tendency to uphold the statist assumption in its case law, the analysis concludes that the ECtHR most likely would find that the state's interests would outweigh the individual's interests. The safety clause in Section 13 Temporary Law supports this conclusion. Meanwhile, Article 8 ECHR additionally entails positive obligations regarding procedural aspects. The Temporary Law restrictions' categorical exclusion of SPBs would reasonably raise concerns regarding these procedural obligations. Accordingly, it remains difficult to conclude that the Temporary Law in fact met the minimum requirements of Article 8 ECHR.

Irrespective of whether the Temporary Law restrictions implied a violation of Article 8 ECHR separately, the restrictions could imply a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR. The analysis of the prohibition of discrimination initially concludes that the Temporary Law restrictions fall within a Convention protected area, namely the right to respect for family life. Furthermore, the discrimination ground identified is SPB status. Considering previous ECtHR case law, the analysis concludes that it is likely that the Court would accept SPB status as a discrimination ground.

The next stage of the analysis under Article 14 ECHR concerns the comparability test and the potential justification. Discrimination under Article

14 ECHR presupposes differential treatment of comparable groups, provided that no objective and reasonable justification can be presented. While it is clear that the Temporary Law restrictions implied a less favourable treatment of SPBs in comparison to refugees, the comparability between the two protection categories, namely SPBs and refugees, is a more difficult step of the analysis. The government maintained the non-comparability of the two protection categories in the context of family reunification rights. Meanwhile, the comparability test in Chapter 4 leads to a different outcome. SPBs and refugees have a similar need for international protection, and a similar need to reunite with their family. This similarity follows from SPBs' and refugees' particular vulnerability as victims of forced displacement. Accordingly, the analysis suggests that SPBs and refugees are in a relevantly similar situation for the purpose of family reunification rights.

Although the comparability test confirms the relevantly similar situation of SPBs and refugees, the Temporary Law's differential treatment can be still be justified. A justification will be accepted by the ECtHR provided that a legitimate aim is pursued and that the less favourable treatment is proportional in relation to the aim. In other words, the justification must be reasonable and objective in order to rebut the presumed discriminatory situation.

The aim behind the Temporary Law restrictions was immigration control, and the analysis concludes that this aim most likely would be accepted as legitimate by the ECtHR. Two main arguments, which claim to justify the differential treatment of SPBs, are then examined. Both of these arguments, which the government claimed to ensure the proportionality of the restrictions, referred to the non-comparability of SPBs and refugees. According to the analysis in Chapter 4, neither of the arguments seemingly met the requirements of being reasonable and objective as justifications. The first argument concerned the protection needs of SPBs and refugees. This argument was analysed in the previous comparability test, and this assessment concluded that the protection needs of SPBs and refugees are similar. Considering that SPBs and refugees share a particular vulnerability as beneficiaries of international protection, the argument referring to different protection needs cannot be considered a

reasonable and objective justification for the differential treatment. The second argument claimed to justify the differential treatment by referring to minimum requirements under EU-law. EU-law can however not serve as a reasonable and objective justification in itself. In sum, the analysis suggests that the government failed to provide a justification for the differential treatment of SPBs under the Temporary Law restrictions. Accordingly, the Temporary Law restrictions were arguably not in compliance with Article 14 ECHR taken in conjunction with Article 8 ECHR.

The immigration control prerogative, which is an expression of the statist assumption, is an obstacle to the protection of human rights in the immigration context. A flipped starting point seems to dominate the case law of the ECtHR, where human rights protection in the context of immigration is the exception rather than the rule. This premise prevents the recognition of a presumed right to family reunification for beneficiaries of international protection under Article 8 ECHR. The status hierarchy within the international protection regime is also a reflection of the statist assumption. The resistance towards recognising the similar situation of SPBs and refugees in the particular context of family reunification is essentially a resistance towards recognising that human rights necessarily limit the powers of the state. The prohibition of discrimination in Article 14 ECHR challenges this resistance, and accordingly undermines the influence of the statist assumption in the protection of human rights. Article 14 ECHR consequently has the potential to promote an equal human rights protection, even in the context of immigration.

In sum, this thesis suggests that the Temporary Law restrictions failed to meet the minimum level of protection under the ECHR. Accordingly, the Temporary Law not merely adjusted the right to family reunification down to the minimum of EU-law and international law, the Temporary Law fell below the minimum and hereby failed to comply with the obligations under Articles 8 and 14 ECHR. The failure to meet the minimum standards of the ECHR could be explained by the influential role of the immigration control prerogative in the context of human rights protection of immigrants. The Temporary Law

restrictions hereby illuminate a wide protection gap in human rights law, namely the situation where "humans become migrants"[306].

[306] Dembour, 2015, see title page *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*.

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