Third party intervention to the case of M.T. and others v Sweden (App. no. 22105/18)

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The Migration Law Clinic of the VU University Amsterdam provides legal advice to lawyers, Non-Governmental Organisations, and other organisations on complex legal questions of European migration law. Top students in the last years of their study at the Law Faculty of the VU University Amsterdam carry out research and write legal advice at the Clinic. The Migration Law Clinic is the responsibility of the Foundation (Stichting) Migration Law Expertise Centre (No. 59,652,969 Chamber of Commerce).

I Introduction

1. This amicus curiae letter is submitted by the Migration Law Clinic of the Vrije Universiteit Amsterdam (hereinafter: the intervener) in the case of *M.T. and others v. Sweden* (Appl. no. 22105/18), in accordance with Article 36(2) of the European Convention on Human Rights (hereinafter: ECHR or the Convention). The intervener submits that the decision of the Swedish authorities to deny the applicants' request for family reunification amounts to a violation of Article 14 ECHR read together with Article 8 ECHR. The intervener submits that:

- as a beneficiary of subsidiary protection, the second applicant was treated differently from other persons in analogous or relevantly similar situations, in particular persons with refugee status, beneficiaries of subsidiary protection who are not subject to the Act on Temporary Restrictions of the Possibility to Obtain Residence Permits in Sweden (2016:752) (hereafter: the Temporary Act) and other third-country nationals with a temporary right to remain;

- the difference in treatment experienced by the second applicant is linked to his status as a forced migrant and indirectly to his being a Syrian national and of Syrian national origin; differences in treatment based on these discrimination grounds need very weighty reasons in order to be justified;

- such very weighty reasons have not been put forward by the Swedish government. In particular, the government has not substantiated that the aims of the Temporary Act could not be achieved without effectively and permanently denying the possibility of family reunification to the second applicant, who arrived in Sweden as an unaccompanied minor asylum seeker.

II The complaint concerning Article 14 read together with Article 8 ECHR

1. The facts

2. The case concerns a minor with subsidiary protection status, who was denied the right to family reunification due to this right being suspended under the Temporary Act.[1] This Act, originally effective for a three-year period between 20 July 2016 and 19 July 2019, suspends this right for beneficiaries of subsidiary protection (hereinafter: BSPs) who applied for asylum after 24 November 2015. The measure leaves the right to family reunification intact for other relevant groups. The validity of the Temporary Act has recently been prolonged to 19 July 2021 and the rules on family reunification for BSPs will be the same as for refugees as of 20 July 2019.[2] BSPs who were denied the right to family reunification under the Temporary Act, will have the chance to introduce a request for family reunification –without additional conditions relating to housing and subsistence- within three months.[3] However, this will not benefit the second applicant, who has in the meantime reached the age of majority and is therefore no longer eligible for family reunification.

[1] Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (2016:752), available at <www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av_sfs-2016-752> accessed 18 June 2019.

[2] Swedish Migration Agency, *Tillfälliga lagen förlängs efter beslut i riksdagen*, 18 June 2019, <www.migrationsverket.se> accessed 25 June 2019. Further information on the Swedish legislation is provided in the *AIDA Country Report Sweden - 2018 Update* published by the European Council on Refugees and Exiles (ECRE), available at <http://www.asylumineurope.org/reports/country/sweden> accessed 8 July 2019, pp 85-86.

[3] European Council on Refugees and Exiles (ECRE), *AIDA Country Report Sweden - 2018 Update*, p 86.

2. Applicability of Article 14 read together with Article 8 of the Convention

3. Article 14 must be invoked in conjunction with another Convention right.[4] In the present case, the Swedish Temporary Act clearly affects the family life of the applicants. The Court's case law has demonstrated that the inability to set up a family home or actually live together as a family unit, results in the inability to enjoy family life under Article 8 ECHR.[5] For these reasons, the case falls within the ambit of Article 8 ECHR.

3. Difference in treatment based on an identifiable characteristic or 'status'

4. This intervention demonstrates that in this specific case, the ground for the difference in treatment consists of the protected characteristics of immigration status, nationality and national origin. According to the settled case law of the Court, 'only differences in treatment based on an identifiable characteristic, or 'status' are capable of amounting to discrimination within the meaning of Article 14 ECHR'.[6] Firstly, this intervention will discuss the difference in treatment based on immigration status, which constitutes a direct difference in treatment. Secondly, it will argue that the second applicant is subject to indirect differential treatment based on his nationality and national origin.

3.1 Direct difference in treatment based on immigration status

5. The intervener submits that the status of 'subsidiary protection' amounts to 'other status' for the purposes of Article 14 ECHR. As the Court has clarified, the list of grounds which can constitute 'other status' according to Article 14 ECHR is non-exhaustive.[7] The provision thus leaves room for comparisons of 'other status', which generally has been subject to a wide interpretation.[8] It is apparent from this Court's case law that distinctions based on immigration status fall within the meaning of 'other status'.[9] As a type of immigration status, 'subsidiary protection' is therefore a type of 'other status'.

Persons in relevantly similar situations

6. According to the Court's consistent case law, Article 14 of the Convention applies to differences in treatment between persons in analogous or relevantly similar situations.[10] In this section the intervener will demonstrate that the restriction on the right to family reunification of BSPs under the Temporary Act amounts to a difference in treatment compared to three other groups of individuals in analogous or relevantly similar situations, namely: 1) refugees; 2) BSPs who applied for international protection before 24 November 2015 or who do so after 19 July 2019; and 3) third country nationals (hereinafter: TCNs) with a limited leave to remain.

7. This Court has stated that comparable groups need not be identical in order to be in an analogous situation for the purpose of Article 14 ECHR. Rather, it is sufficient for applicants to demonstrate 'that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently'.[11] The intervener submits that this is the case with regard to BSPs as compared to each of the groups below.

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[4] *Eg Abdulaziz, Cabales and Balkandi v UK* Appl no 92140/80 and 9473/81, 9474/81 (ECtHR 28 May 1985) para 71.
[5] *Eg Hode and Abdi v UK* Appl no 22341/09 (ECtHR 16 March 2010) para 43.
[6] *Eg Carson ao v UK* Appl no 42184/05 (ECtHR 16 March 2010) para 61.
[7] *Eg Hode and Abdi v UK* Appl no 22341/09 (ECtHR 16 March 2010) para 44.
[8] Ibid. para 46.
[9] *Bah v UK* Appl no 56328/07 (ECtHR 27 September 2011) para 46; ECtHR, Application no.22341/09, *Hode and Abdi v UK* Appl no 22341/09 (ECtHR 16 March 2010) para 47.
[10] *Eg British Gurkha Welfare Society ao v UK* Appl no 44818/11 (ECtHR 15 September 2016) para 62.
[11] *Eg Carson ao v UK* Appl no 42184/05 (ECtHR 16 March 2010) para 61; *D.H. ao v Czech Republic* Appl no 57325/00 (ECtHR 13 November 2007) para 175

BSPs v Refugees

8. The intervener observes that BSPs and refugees are in a relevantly similar situation, since both have a form of protection status granted to individuals, who are forced to leave their countries due to a real risk of persecution or ill-treatment. Regarding the particular nature of their circumstances, both groups have fled their countries of origin, are separated from their family members and can only continue their family life in the host country.[12]

9. The Swedish government argues that refugees generally have a longer lasting need for protection than beneficiaries of subsidiary protection. In this regard, the Government points out that a differentiation between refugees and persons eligible for subsidiary protection is made in the Qualification Directive.[13] Indeed, the European Commission has stated that at the time when the status of subsidiary protection was first introduced, it was presumed that this status would be of a more temporary and short-term nature than that of refugee status. However, as the Commission observed in its proposal for the recast Qualification Directive, in practice it appears that this assumption is not accurate. Accordingly, the Commission concluded that it was necessary to remove any limitations on the rights of BSPs, 'which can no longer be considered as necessary and objectively justified'.[14] Therefore, the intervener submits that the argument that refugees often have longer-lasting grounds for protection than persons eligible for subsidiary protection, is based on a false presumption. In the light of this, the fact that both groups enjoy protection with different temporal effect does not take away the fact that they are comparable groups in an analogous situation.

10. Where BSPs with Syrian nationality are concerned, the difference in treatment compared to refugees is even more salient, given that Syrian nationals should arguably have been granted refugee status. In light of the situation in Syria during recent years and the current state of affairs, those fleeing Syria are prime examples of individuals eligible for a longer lasting refugee status. This is supported by the practice of other EU Member States. In general, the majority of Syrian nationals seeking protection in EU Member States are granted refugee status rather than subsidiary protection.[15] In 2016, only Cyprus, Spain, France, Hungary, and Malta had similar practices to Sweden, in the sense that Syrian nationals were more often granted subsidiary protection status than refugee status. However, in those aforementioned States, the total number of protection decisions was far smaller than in Sweden - merely in the hundreds or single thousands as opposed to the 45,113 decisions made in Sweden in 2016. In those Member States with a comparable number of protection decisions to Sweden in 2016, such as Austria and Germany, the overwhelming majority of Syrian nationals were granted refugee status.[16] This would indicate that the Swedish government is overusing the subsidiary protection category for Syrians in a way that is not comparable to any other EU Member State. The intervener's concern is supported by the Council of Europe's Commissioner for Human Rights, who recently observed that the increase in the number of Syrian nationals granted subsidiary protection status rather than refugee status, does not follow a substantive change in protection needs.[17] The Commissioner for Human Rights has repeatedly called upon the

[12] European Legal Network on Asylum, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, June 2016, available at <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf> accessed on 8 July 2019, para 23.
[13] Ministry for Foreign Affairs Department for International Law, Human Rights and Law, *Statement of facts and observations of the government of Sweden on admissibility and merits*, in Case *M.T. and others* Appl no 22105/18, UDFMR2R2019/1/ED, Stockholm, 6 May 2019, para 78.
[14] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (Recast)*, COM(2009) 551 final, 21 October 2009, p 8; see also European Commission, *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210 final, p 24.
[15] European Council on Refugees and Exiles, *Refugee rights subsiding? Europe's two-tier protection regime and its effect on the rights of beneficiaries*, 2016, available at <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_refugee_rights_subsiding.pdf> accessed 8 July 2019, Annex III, p 31.
[16] Ibid.
[17] Council of Europe Commissioner for Human Rights, Third party intervention in the case of *M.A. v Denmark, Appl no 6697/18* (COmmDH(2019)4), 31 January 2019, available at < https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-cas/1680920cba> accessed 8 July 2019, para 24.

Council of Europe Member States to grant BSPs the same rights to family reunification as refugees.[18] In particular, the Commissioner expressed the view that

> drawing arbitrary distinctions between different categories of refugees and other international protection beneficiaries will often violation Article 14 of the Convention (read together with Article 8 of the Convention). The inequality of status between 1951 Convention refugees and subsidiary (and other protection) beneficiaries as regards the apparent coverage of EU family reunification law does not justify that difference in treatment.[19]

BSPs who applied for international protection between 24 November 2015 and 19 July 2019 v BSPs who applied/will apply for international protection before/after this period

11. The intervener further submits that the group of BSPs who were or will be able to enjoy the right to family reunification before and after the introduction of the temporary legislation restricting this right, and those deprived of this right due to the introduction of the aforementioned legislation, are in a relevantly similar situation. Both groups have exactly the same immigration status and have leave to remain in Sweden for a limited time period. They are, in fact, one group divided by the introduction of an immigration measure. The only difference between both groups is the date on which the sponsor applied for international protection in Sweden. This difference exposes the arbitrary nature of the measure: by introducing the temporary legislation and establishing a decisive date, namely 24 November 2015, one group of people with exactly the same immigration status was suddenly divided between those who applied before the deadline and those who were not so fortunate. The similarity between both groups of applicants is further underlined by the fact that the Swedish authorities decided to reinstate the right to family reunification for BSPs as of 20 July 2019. However, as mentioned, this possibility does not resolve the difference in treatment faced by the applicant who, because of having reached the age of majority, is no longer eligible for family reunification. The second applicant, who introduced his request for international protection on 9 March 2016, is therefore still denied the enjoyment of a fundamental right, that he would have had access to if he had applied for asylum five months earlier.

BSPs v other third country nationals with limited leave to remain

12. Lastly, the intervener observes that BSPs are in an analogous situation to TCNs with limited leave to remain in Sweden. In the case of *Hode and Abdi,* this Court found that students and workers entitled to family reunification were in an analogous position to applicants with a 'temporary refugee status', due to the fact that they were also granted permits for a limited period of time.[20] Similarly to the facts in that case, BSPs are granted a temporary leave to remain. However while TCNs with a temporary residence right in Sweden (*e.g.* students or people with a work permit) generally have the right to apply for family reunification, this right is not available to BSPs due to the application of the Temporary Act.[21]

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[18] Council of Europe Commissioner for Human Rights, *Time for Europe to get migrant integration right*, May 2016, available at < https://book.coe.int/en/commissioner-for-human-rights/6999-pdf-time-for-europe-to-get-migrant-integration-right.html> accessed 8 July 2019, p 5; Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, June 2017, available at < https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0> accessed 8 July 2019, pp 47-48.

[19] Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, June 2017, p. 47.

[20] *Hode and Abdi v UK* Appl no 22341/09 (ECtHR 16 March 2010) para 50.

[21] See for an overview of which TCNs are entitled to the right of family reunification the homepage of the Swedish Migration Agency <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Family-reunification.html> accessed 18 June 2019.

3.2 Indirect difference in treatment based on nationality and national origin

13. It is well established in the Court's case law that Article 14 of the Convention covers both direct and indirect discrimination.[22] In the case of *Biao*, the Grand Chamber stated that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[23] The intervener submits that the Temporary Act results in indirect differential treatment, based on nationality and national origin of Syrian nationals and Syrian-born residents in Sweden.

14. The Grand Chamber has acknowledged that a disproportionate effect can be proven by means of statistical evidence.[24] The intervener submits that there is a presumption of indirect discrimination against Syrian nationals, which can be deduced from the official statistics of the Swedish Migration Agency. In the last three years, Syrian nationals constituted the largest group of applicants for international protection in Sweden.[25] In 2017 and 2018 the group of Syrian applicants was around double the number of the second largest group of applicants and constituted 18,38% and 12,56% of all applicants (in 2017 and 2018 respectively).[26] In most cases, Syrian nationals applying for international protection were granted subsidiary protection. In 2016, 85,57% of all first instance applications for international protection from Syrian nationals resulted in the granting of subsidiary protection status, while in 2017 the percentage was 76,94% and in 2018 it was 70,24%.[27] Additionally, Syrian nationals constituted the largest proportion of BSPs in Sweden during the time when the measure was in place. In 2016, 88,06% of those granted subsidiary protection in a first instance decision were Syrian nationals. In 2017 this number was 47,51%, while in 2018 it was 65,61%.

15. The statistics above indicate that at the time the Temporary Act was put in place, it affected the rights of Syrian nationals far more than any other national group of applicants for international protection in Sweden. The intervener therefore submits that the measure has disproportionate prejudicial effects on Syrian BSPs, resulting in a presumption of indirect discrimination on the grounds of nationality. Additionally, the intervener observes that there is a close relationship between nationality and national origin, as usually immigrants of a certain nationality will also share a national origin. In the present case, this correlation is buttressed by the Swedish population statistics, which show that, as of 2012, the number of Syrian-born residents living in Sweden has increased at a parallel rate with the number of resident Syrian nationals.[28] It follows that the Temporary Act disproportionality affects both Syrian nationals and persons of Syrian national origin.

4 Objective and reasonable justification

16. Having demonstrated the existence of a difference in treatment on the grounds of immigration status, nationality and national origin, the intervener submits that this difference in treatment did not have any

[22] *Eg D.H. ao v Czech Republic* Appl no 57325/00 (ECtHR 13 November 2007) para 175; *Biao v Denmark* Appl no 38590/14 (ECtHR GC 24 May 2016) para 91.
[23] *Biao v Denmark* Appl no 38590/14 (ECtHR GC 24 May 2016) para 103; *D.H. ao v Czech Republic* Appl no 57325/00 (ECtHR 13 November 2007) para 184.
[24] *D.H. ao v Czech Republic* Appl no 57325/00 (ECtHR 13 November 2007) para 180. See also *Di Trizio v Switzerland* Appl no 7186/09 (ECtHR 2 February 2016) para 62.
[25] Swedish Migration Agency, Applications for Asylum received 2016, 2017, 2018, available at <https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum.html> accessed 18 June 2019.
[26] European Council on Refugees and Exiles, *AIDA Country report on Sweden 2017*, available at <https://www.asylumineurope.org/reports/country/sweden> accessed 8 July 2019, p 8; European Council on Refugees and Exiles, *AIDA Country report on Sweden - 2018 Update*, p 7.
[27] Swedish Migration Agency, Asylum Decisions 2016, 2017, 2018, available at: https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum.html [last accessed 18 June 2019].
[28] Statistics Sweden, *Table: Foreign citizens by country of citizenship, age and sex. Year 1973-2018* and *Table: Population by country of birth, age and sex. Year 2000-2018*, available at <http://www.statistikdatabasen.scb.se> accessed 27 June 2019.

objective and reasonable justification. The following subsections provide an in-depth analysis of the different steps in the justification assessment.

4.1 Margin of appreciation

17. The intervener submits that the Contracting State's margin of appreciation in this case must be narrow when compared to cases concerning similar subject matters. According to this Court's case law, Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify differential treatment, which will vary according to circumstances, subject matter and background.[29] The Swedish Government has relied on the wider margin of appreciation, which exists when it comes to immigration measures and general measures of economic or social strategy.[30] However, this case does not merely concern general issues of immigration policy but rather the family reunification rights of a person in need of international protection, who has been subject to a difference in treatment based on his nationality and national origin and finds himself in a situation of vulnerability. Each of these elements is discussed in the subsections below.

Forced Migration

18. The Court has previously established that immigration status is not an inherent or immutable personal characteristic, and is rather subject to an element of choice.[31] Therefore, there are in general no very weighty reasons required to justify a difference in treatment based on immigration status. However, it follows from the *Bah* judgment that this element of choice is not present, where the applicant is a beneficiary of international protection.[32] This lack of choice is illustrated by the Court's case law in *non-refoulement* cases, where the risk of return to face treatment contrary to Article 3 ECHR amounts to a non-derogable obligation on the part of States.[33] The intervener therefore submits that in cases of forced migration the margin of appreciation must be narrow.

Very weighty reasons for difference in treatment based on nationality or national origin

19. As demonstrated above, the Temporary Act disproportionately affects Syrian nationals and persons of Syrian national origin. According to settled case law of this Court, differential treatment on the grounds of nationality requires 'very weighty reasons' to be justified.[34]

20. The intervener further wishes to draw attention to Article 1(3) of the Convention on the Elimination of All Forms of Racial Discrimination (hereafter: CERD), which forbids States Parties from targeting or differentiating against any particular nationality.[35] General Recommendation XXX of the Committee on the Elimination of All Forms of Racial Discrimination encourages all States Parties to 'ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin'.[36] Read together, Article 1(3) CERD and General Recommendation XXX do not allow for a situation in which an immigration measure such as the Swedish Temporary Act, has disproportionately prejudicial effects on people of one particular nationality, in this case Syrian nationality.

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[29] *Eg Burden v UK* Appl no 13378/05 (ECtHR 29 April 2008) para 60.
[30] Ministry for Foreign Affairs Department for International Law, Human Rights and Law, *Statement of facts and observations of the government of Sweden on admissibility and merits* in the Case of *M.T. and others* Appl no 22105/18 UDFMR2R2019/1/ED, Stockholm, 6 May 2019, para 88.
[31] *Bah v UK* Appl no 56328/07 (ECtHR 27 September 2011) para 47.
[32] Ibid, para 47. See also *Hode and Abdi v UK* Appl no 22341/09 (ECtHR 16 March 2010) para 47.
[33] *Eg Soering v UK* Appl no 14038/88 (ECtHR 7 July 1989).
[34] *Eg Gaygusuz v. Austria* Appl no 17371/90 (ECtHR 16 September 1996) para 42; *Andrejeva v. Latvia* Appl no 55707/00 (ECtHR GC 18 February 2009) para 87; *Biao v Denmark* Appl no 38590/14 (ECtHR GC 24 May 2016) para 93.
[35] Article 1(3) CERD reads as follows: 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality'.
[36] CERD General Recommendation XXX on Discrimination Against Non-Citizens, 1 October 2002, para 9.

21. Lastly, the intervener observes that the Grand Chamber accepted in the case of *Biao* that a measure with disproportionately prejudicial effects on persons of foreign (non-Danish) national origin qualified as 'indirect differential treatment on grounds of ethnic origin', requiring very weighty reasons in order to be justified.[37] The intervener submits that the same test would apply to a measure that differentiates against persons of Syrian national origin.

Vulnerable group

22. Lastly, the intervener submits that a narrow margin of appreciation exists in the present case because the second applicant belongs to a group –persons seeking international protection- that has in recent years been the target of growing hostility and increasingly restrictive policies throughout Europe. The Court's case law on Article 14 of the Convention shows an increased sensitivity to the social structures and processes of stereotyping and stigmatization that have the result of rendering certain groups particularly vulnerable to discrimination and exclusion.[38] In this connection, the Council of Europe's Commissioner for Human Rights has already observed that 'restrictive legislative measures concerning family reunification have become particularly prevalent in the wake of the increased arrival of migrants and asylum seekers in Council of Europe member states in 2015 and 2016, as part of governments' policies to make their countries less attractive to migrants and asylum seekers'.[39] While the Commissioner has recognized the substantial number of asylum applications received by Sweden in 2015, and commended the Swedish authorities' efforts in helping asylum seekers and refugees, the Swedish Temporary Act was also identified as one of the measures of concern.[40] The intervener observes that these restrictive measures were introduced, and continue to be in place, against the background of a political climate characterised by increased hostility against refugees and asylum seekers, as evidenced through a rise in xenophobic discourse, hate speech and hate crime throughout Europe.[41] In Sweden specifically, a series of attacks on reception centres for asylum seekers has been reported as well as an increase in hate speech incidents, including hate speech against migrants/refugees in the aftermath of the heightened number of arrivals in 2015.[42] It follows that the Temporary Act and the difference in treatment resulting from it must be assessed in the wider context of stigmatisation and exclusion of persons seeking international protection in Sweden and other Contracting States. It is in this context that the second applicant, as a Syrian national who can no longer avail himself of the protection of his country of nationality and has been compelled to live elsewhere as a beneficiary of subsidiary protection, must be qualified as a member of a vulnerable group.

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[37] *Biao v Denmark* Appl no 38590/14 (ECtHR GC 24 May 2016) paras 113-114.

[38] *Kiyutin v. Russia* Appl no 2700/10 (ECtHR 10 March 2011) para 63. See also L. Peroni and A. Timmer, 'Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention law' 11 *International Journal of Constitutional Law* [2013] pp 1056-1085 and O.M. Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' 4 *Oslo Law Review* [2017] pp 150-171.

[39] Council of Europe Commissioner for Human Rights, Third party intervention in the case of *M.A. v Denmark* Appl no 6697/18 (COmmDH(2019)4), published on 31 January 2019, para 18.

[40] Ibid. See also the report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Sweden from 2 to 6 October 2017 (CommDH(2018)4) available at <https://rm.coe.int/commdh-2018-4-report-on-the-visit-to-sweden-from-2-to-6-october-2017-b/16807893f8. accessed 8 July 2019, pp 6-7.

[41] European Commission against Racism and Intolerance, *Annual Report on ECRI's Activities covering the period from 1 January to 31 December 2016* (CRI(2017)35), available at <https://rm.coe.int/annual-report-on-ecri-s-activities-covering-the-period-from-1-january-/16808ae6d6> accessed 15 July 2019, paras 6-7; European Commission against Racism and Intolerance, *Annual Report on ECRI's Activities covering the period from 1 January to 31 December 2017* (CRI(2018)26), available at ,https://rm.coe.int/annual-report-on-ecri-s-activities-covering-the-period-from-1-january-/16808c168b accessed 8 July 2019, para 9; European Union Agency for Fundamental Rights, *Current migration situation in the EU: hate crime*, November 2016, available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-november-monthly-focus-hate-crime_en.pdf> accessed 8 July 2019, p 2; European Union Agency for Fundamental Rights, *Fundamental Rights Report 2019*, available at <https://fra.europa.eu/en/publications-and-resources/publications/annual-reports/fundamental-rights-2019> accessed 8 July 2019, p 91.

[42] European Commission against Racism and Intolerance, *Report on Sweden*, adopted on 5 December 2017 (CRI(2018)3), available at <https://rm.coe.int/fifth-report-on-sweden/16808b5c58> accessed 8 July 2019, paras 20-21 and 46; Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden*, 6 June 2018 (CERD/C/SWE/CO/22-23), available at <https://www.ohchr.org/EN/Countries/ENACARegion/Pages/SEIndex.aspx> accessed 8 July 2019, para 10.

23. In light of the foregoing, the intervener submits that the difference in treatment experienced by the second applicant can only be justified by very weighty reasons.

4.2 Legitimate aim

24. It is the Court's well-established case law that a difference in treatment is discriminatory 'if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[43]

25. Turning to the Swedish measure, the intervener observes that the Swedish government submitted a legitimate aim in compliance with Article 14 ECHR. According to the State, 'the aim of these temporary factors of immigration control, is to temporarily reduce immigration while improving the capacity of reception and introduction arrangements'.[44] However, the intervener submits that there is no reasonable relationship of proportionality between the aim and the measure in the overall proportionality assessment.

4.3 Proportionality assessment

26. According to the Court's case law, several factors need to be evaluated when assessing whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Generally speaking, the Court must be satisfied that *firstly,* there is no other means of achieving the aim that would impose less of an interference with the right to equal treatment. S*econdly*, the aim to be achieved should be important enough to justify this level of interference.[45] Taking into account the narrow margin of appreciation applicable in the present case, the arguments set out below indicate that the measure taken by the Swedish authorities is not proportionate to the aim pursued and hence, that the difference in treatment suffered by the second applicant is not based on an objective and reasonable justification.

Arbitrariness of the distinction

27. The intervener submits that the distinction between refugees and BSPs, which is incorporated in the Swedish Temporary Act, is arbitrary and therefore lacks an objective and reasonable justification. The legitimate aim stated by the Government is to temporarily reduce immigration, while improving the capacity for reception. The intervener contends that this does not justify the making of the mentioned distinction. The Swedish Government has not demonstrated that it is specifically the family members of BSPs who arrived after 24 November 2015 and applied for family reunification between 20 July 2016 and 19 July 2019 who constituted a too heavy a burden on the Swedish reception capacity. This means that there exists no objective and reasonable justification for the differential treatment of this particular group.

28. Further, and separately, the intervener recalls that the distinction between BSPs and refugees in Sweden is not justified by different protection needs. The intervener recalls the argument made in subsection 2.2.1, where it was shown that refugees and BSPs are similarly affected by the consequences of forced migration. Moreover, the fact that the large majority of Syrian asylum seekers in Sweden are granted BSP status rather than refugee status does not reflect an actual difference in their needs for protection. Therefore, both groups should enjoy the same rights. The intervener also recalls the arbitrariness of the timeframe, in which the Swedish Temporary Act resulted in a suspension of the right to family reunification. The only decisive factor in determining whether BSPs were eligible for family reunification was the time of their application. Those who applied for family reunification before the measure's decisive cut-off date were granted this right. Those who were unluckier and

[43] *Burden v UK* Appl no 13378/05 (ECtHR 29 April 2008) para 60.
[44] Ministry for Foreign Affairs Department for International Law, Human Rights and Law, *Statement of facts and observations of the government of Sweden on admissibility and merits*, Application no. 22105/18 Case of *M.T. and others*, UDFMR2R2019/1/ED, Stockholm, 6 May 2019, para 90.
[45] Council of Europe: European Court of Human Rights, *Handbook on European non-discrimination law*, available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf>, accessed 15 July 2019, p 93.

had their international protection status recognised at a later stage, were unable to apply for family reunification. Again, the legitimate aim put forward by the Government does not justify the restriction of family reunification rights specifically for this group of BSPs.

Suitability of the measure in light of the stated legitimate aim

29. The intervener observes that the stated aim of the Swedish Government in its announcement of 24 November 2015 proposing the new measures was to 'create a respite for Swedish refugee reception' following a 'strain' on Swedish public services including 'social services, schools and trauma care'.[46] The intervener submits that a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (the restriction of the rights of BSPs) cannot be established here.[47] In several respects, the measure's restriction of the right to family reunification for minor beneficiaries of subsidiary protection, actually serves to undermine the stated aim. It is highly probable that a minor BSP, such as the second applicant at the time of his application for family reunification, will present far more of a 'strain' on state services if he or she is not accompanied by his or her parent(s). Moreover, the ability of minor BSPs to reunite with their parent(s) will not affect the numbers of children needing places in schools, as it concerns children who are already present in Sweden. Considering the Government's concerns about 'trauma care', observers have noted that the reunification of minors with their family members serves to limit the psychological trauma of separation.[48] This means that children who are able to reunite with their families will, from a purely pragmatic point of view, represent far less of a 'strain' on state services.

Impact on the applicant

30. Concerning the proportionality of the distinction, the intervener draws attention to the impact of the disputed measure on the second applicant. The distinction complained of, applied only for a limited period of time. However, the effect of the Temporary Act has been to permanently deprive the applicant of the possibility of family reunification. Beneficiaries of subsidiary protection who were unable to apply for family reunification because of the Temporary Act, are able to do so within three months as of 20 July 2019 (s. 1 *supra*). However, this possibility does not benefit the applicant, who has in the meantime reached the age of majority and no longer meets the conditions for family reunification. Therefore, the measure has a very invasive effect on the second applicant's life. It does not only present a temporary discomfort, or a phase that can be tolerated.[49] The intervener stresses that when the first and third applicants applied for residence permits in Sweden in February 2017 the second applicant would have been eligible for family reunification but for the restrictions laid down in the Temporary Act. As to the Government's argument that the applicant would be eligible for family reunification after obtaining a permanent residence permit, the interveners submit that this does not redress the disadvantage experienced by the second applicant, because it is uncertain if and when he would meet the conditions for permanent residence.

Best interests of the child

31. In the case at hand, the young age of the applicant indicates his vulnerable position that must be taken into consideration as part of the proportionality assessment.[50] This Court has on many occasions stated that 'there is a broad consensus, including in international law, in support of the idea that in all decisions concerning

[46] European Commission, *Commission staff working document fitness check on EU legislation on legal migration (SWD (2019) 1056 final)* available at <https://www.government.se/articles/2015/11/government-proposes-measures-to-create-respite-for-swedish-refugee-reception/> Accessed 15 July 2019.
[47] *Religionsgemeinschaft der Zeugen Jehovas v Austria* Appl no 40825/98 (ECtHR 31 October 2008) para 87.
[48] Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, June 2017, available at <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0> accessed 15 July 2019.
[49] This view is supported by the Swedish Migration Court of Appeal in a similar case: <https://www.asylumlawdatabase.eu/en/content/sweden-%E2%80%93-migration-court-appeal-rules-case-family-reunification-subsidiary-protection> accessed 15 July 2019.
[50] *Eg Cam v Turkey* Appl no 51500/08 (ECtHR 23 February 2016), para 67; *Tarakhel v Switzerland* Appl no 29217/12 (ECtHR 4 December 2014) para 119.

children, their best interests are of paramount importance'.[51] Yet the Swedish Temporary Act resulted in the child in question, an unaccompanied minor seeking international protection, being permanently deprived of the opportunity to be safely reunited with his parents. The same applies to any child with subsidiary protection who turns 18 while the temporary measure is still in place: such a child loses his or her right to family reunification permanently. The intervener submits that, when assessing the proportionality of the measure, its harsh and permanent effects on children must be taken into account.

The 'race to the bottom' argument

32. Lastly, the intervener draws the attention of the Court to the fact that the distinction between refugees and BSPs regarding family reunification is a recent trend within EU Member States and could be described as a 'race to the bottom'. Out of the 28 EU Member States, 14 differentiate between refugees and BSPs as regards the granting of the right to family reunification.[52] Of those Member States, which deny the right of family reunification to BSPs, several have only begun to do so in recent years - from 2016 onwards.[53] This suggests that, rather than being a consistent practice, distinguishing in this manner is a recent and atypical phenomenon that is a deviation from common state practice. This not only risks to be discriminatory under Articles 8 and 14 ECHR, but also exemplifies how EU Member States use the introduction of restrictive measures in a 'race to the bottom' as a method of managing and limiting migration.[54] The intervener submits that the Swedish measure is part of a recent trend in the EU Member States demonstrating a deviation from the norm of treating beneficiaries of both statuses equally with regard to the right to family reunification.

33. In view of the above arguments, the intervener submits that the difference in treatment resulting from the Temporary Act regarding the right to family reunification lacks an objective and reasonable justification.

III Conclusion

34. In light of the arguments submitted above, the intervener urges the Court to find that the Swedish Temporary Act violates Article 8 ECHR read together with Article 14 ECHR. This is to be considered separately from any potential breach of Article 8 ECHR, which is not addressed in this intervention.

[51] *Jeunesse v the Netherlands* Appl no 12738/10 (ECtHR 3 October 2014) para 109.
[52] European Migration Network, *Family Reunification study of Third-Country Nationals in the EU plus Norway: national practices*, EMN Synthesis Report, April 2017, available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_inform_family_reunification_en.pdf> accessed 15 July 2019, p 20.
[53] This is the case in Austria, Denmark, Sweden, Finland and Germany.
[54] European Council on Refugees and Exiles, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, 2016, para 1.