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**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

**Application No. 6697/18
M.A. v. Denmark**

Introduction

1. On 29 November 2018, the Council of Europe Commissioner for Human Rights (hereinafter: the Commissioner) informed the European Court of Human Rights (hereinafter: the Court) of her decision to intervene as a third party in the Court's proceedings, in accordance with Article 36, paragraph 3, of the European Convention on Human Rights (hereinafter: the Convention), and to submit written observations concerning the case of *M.A. v. Denmark*. The case concerns a denial of a request for family reunification, on the basis that the applicant had not yet possessed a residence permit for at least three years, as generally required by Danish law for persons with a temporary protection status under section 7, subsection 3 of the Aliens Act.¹
2. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.²
3. The protection of the human rights of migrants, including persons who have been granted international protection, has been a priority issue for the Commissioner and her predecessors. They have repeatedly emphasised that full protection would include ensuring their right to family reunification, regardless of the specific international protection status granted. This intervention is based on the Commissioner's work regarding family reunification in numerous Council of Europe member states including Denmark. It also builds on two Issue Papers on migrant integration and family reunification published by the Commissioner's Office.
4. Section I of the present written submission sets out the Commissioner's view on the importance of access to family reunification for beneficiaries of international protection. Section II outlines the key elements of the Court's case-law with regard to family reunification that the Commissioner considers of particular importance to the case at hand. Section III describes the Commissioner's main recommendations on access to family reunification. Section IV presents the Commissioner's observations regarding the situation in Denmark, in particular its application of the three-year waiting period for family reunification to persons granted protection under section 7, subsection 3, of the Aliens Act. These sections are followed by the Commissioner's conclusions.

I. The importance of family reunification for refugees and other beneficiaries of international protection

5. Family reunification procedures allow foreign nationals residing in Council of Europe member states to request permission to bring members of their family to join them, and to re-establish family life on the territory of their member state of residence. Access to family reunification is of particular importance to persons who have been forced to flee their countries of origin and have subsequently received a form of international protection in a Council of Europe member state. Such protection can take the form of recognition as a refugee under the 1951 Convention Relating to the Status of Refugees (hereinafter: 1951 Convention refugees), or other forms of protection following from the international human rights obligations of states. Such other forms of protection, depending on the specific legal framework, are often denoted as subsidiary or temporary protection. The Commissioner notes that these terms are not applied in the same manner in all Council of Europe member states.
6. The Commissioner attaches great importance to the possibility of persons receiving international protection to be able to benefit from family reunification. In the Commissioner's

¹ Family reunification may be granted before the end of this three year period in exceptional cases, if this is required pursuant to Denmark's international obligations, in accordance with section 9c, subsection 1, of the Aliens Act.

² [Resolution \(99\)50](#) on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

2016 Issue Paper ‘Time for Europe to get migrant integration right’ (hereinafter: the Issue Paper on integration), family reunification was identified as a key factor for promoting the effective integration of migrants, including beneficiaries of protection, in Council of Europe member states.³ It noted that research into restrictions on family reunification have not, as sometimes argued by states, promoted integration. Rather, delayed or aborted family reunification has often had a significant negative effect on individuals’ integration efforts. The Issue Paper urged more efforts to ensure the successful integration of migrants, including those receiving protection, with family reunification as one of the priority areas for such efforts.⁴

7. Family separation has been found to have very serious effects on beneficiaries of international protection. This may include severe distress, sleeping or eating disorders, depression, anxiety and feelings of guilt for leaving family members behind in dangerous situations.⁵ Apart from inflicting hardship on beneficiaries of international protection, such problems have been recognised as getting in the way of their necessary steps towards integration, such as language learning, other education, and orientation towards the labour market. In many cases, only once the source of this problem has been removed, meaning that family reunification has been achieved, can the integration trajectory truly begin.⁶
8. The effects of family separation are not however limited to the beneficiaries of protection in Europe. As noted in the Commissioner’s Issue Paper on integration, “[f]or beneficiaries of international protection, delaying the enjoyment of their right to family reunion also denies effective protection to family members in camps and conflict zones.”⁷ In the Commissioner’s 2017 Issue Paper ‘Realising the right to family reunification of refugees in Europe’ (hereinafter: the Issue Paper on family reunification), it is noted that: “[t]he urgency of family reunification lies also in the fact that families left behind are often at great risk – particularly if they remain in conflict zones or are living precariously in countries in the region of conflict, where the protection available often falls well below international legal standards. In that context, swift family reunification is not only a matter of good policy, but may be equated with humanitarian evacuation.”⁸ The Commissioner would like to underline that the negative effects of prolonged family separation on family members left behind may be all the greater if the beneficiary of protection in Europe is the head of household. In many conflict-affected areas, as well as in places in neighbouring countries where family members may seek refuge, single women and children may be particularly at risk of violations of their rights whilst waiting for permission to join their family member already in Europe.
9. The Commissioner has also noted the importance of family reunification as a safe and legal route for family members to travel to Council of Europe member states. The lack of safe and legal routes has been identified by many actors, including the Commissioner, the United Nations High Commissioner for Refugees (UNHCR), the United Nations High Commissioner for Human Rights, the EU Fundamental Rights Agency, and numerous NGOs and experts as an important factor driving irregular and often highly perilous migration to Europe. In this context, the Parliamentary Assembly of the Council of Europe has noted that “Member States must provide for safe and regular means of family reunification, thus reducing the recourse to smugglers and mitigating the risks associated with irregular migration.”⁹

³ Commissioner for Human Rights, [Time for Europe to get migrant integration right](#), May 2016, Chapter 1.

⁴ *Ibid.*, Chapter 3.

⁵ See, for example, the European Council on Refugees and Exiles and the Red Cross (2014), [Disrupted Flight: The Realities of Separated Families in the EU](#), 2014.

⁶ Cf., for example, UNHCR, [A New Beginning: Refugee Integration in Europe](#), 2013.

⁷ Commissioner for Human Rights, [Time for Europe to get migrant integration right](#), May 2016, page 13.

⁸ Commissioner for Human Rights, [Realising the right to family reunification of refugees in Europe](#), June 2017, page 12.

⁹ Parliamentary Assembly of the Council of Europe, [Resolution 2243\(2018\)](#), Family reunification of refugees and migrants in the Council of Europe member states, adopted 11 October 2018, paragraph 2.

II. States' obligations with regard to family reunification

10. Family reunification procedures are an important instrument in the protection of the right to respect for family life. The centrality of the protection of family life is evident from, for example, the Universal Declaration of Human Rights,¹⁰ the International Covenant on Civil and Political Rights,¹¹ the Convention on the Rights of the Child,¹² and the European Union Charter of Fundamental Rights.¹³ With regard to persons receiving international protection, the Final Act of the UN Conference of Plenipotentiaries, which adopted the Convention relating to the Status of Refugees, emphasised that family reunification is an essential right of refugees.¹⁴ Furthermore, the European Social Charter requires Contracting parties to facilitate as far as possible the reunion of family members with foreign workers residing on their territory legally.¹⁵ The European Committee of Social Rights has further noted that such rights should be enjoyed to the fullest extent possible by refugees, and that the obligations undertaken by states under the European Social Charter required a response to the specific needs of refugees and asylum seekers, including the "liberal administration of the right to family reunion."¹⁶
11. With regard to the Convention, the Commissioner observes that, whilst the Convention does not explicitly set out a right to family reunification, the Court has held in a number of cases that the obligations of Contracting states under Article 8 may under certain circumstances give rise to positive obligations to allow the re-establishment of family on their territories. In light of these obligations, the state must strike a fair balance between the competing interests of the individual and those of the community as a whole.¹⁷ In this regard, the Commissioner specifically takes note of the Court's case-law with regard to the family reunification of persons receiving international protection as Convention refugees. The Court's judgments in *Tanda-Muzinga v. France*¹⁸ and *Mugenzi v. France*¹⁹ in particular have been instrumental in clarifying contracting states' obligations with regards to family reunification applications in this respect. The Commissioner notes the Court has found that "family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life."²⁰ She further observes that these judgments contain a number of key elements with regard to refugees.
12. Firstly, in its case-law on family reunification more generally, the Court has often considered, as a central question, whether family life can be enjoyed elsewhere than in the Council of Europe member state in which the applicant resides. It has looked, inter alia, at whether there have been insurmountable obstacles to establishing family life in the country of origin. However, given the fact that refugee status implies the person cannot be returned, this element cannot be applied in their situation. The Commissioner further observes that the Court has also extended this to situations where applicants could not return for other reasons, even when they did not have any lawful status in the Council of Europe member state in question.²¹

¹⁰ Article 16(3) of the Universal Declaration of Human Rights.

¹¹ Article 23(1) of the International Covenant on Civil and Political Rights.

¹² Articles 9 and 10 of the Convention on the Rights of the Child.

¹³ Article 7 of the Charter of Fundamental Rights of the European Union.

¹⁴ UN Doc. A/CONF.2/108/Rev.1, 25 July 1951.

¹⁵ Article 19(6), of the European Social Charter (revised).

¹⁶ ECSR, Conclusions 2015, January 2016, paragraph 21.

¹⁷ For example, *Tuquabo-Tekle v. the Netherlands*, application no. 60665, judgment of 1 December 2005, paragraph 42.

¹⁸ *Tanda-Muzinga v. France*, application no. 2260/10, judgment of 10 July 2014.

¹⁹ *Mugenzi v. France*, application no. 52701/09, judgment of 10 July 2014.

²⁰ *Tanda-Muzinga v. France*, application no. 2260/10, judgment of 10 July 2014, paragraph 74; *Mugenzi v. France*, application 52701/09, judgment of 10 July 2014, paragraph 54.

²¹ The Commissioner notes that in the case of *Mengesha Kimfe v. Switzerland* (application no. 24404/05, judgment of 29 July 2010), the Court found a violation of the right to family life when married couples were forced to reside in different cantons pending their removal following an unsuccessful asylum application. While

13. Secondly, the Court has noted that the conferral of refugee status confirms that the applicant had to flee his or her country of origin for fear of persecution, and had thus not made a conscious decision to leave family members behind. As such, the applicant could not be held responsible for the fact that family life had been interrupted. This, the Court has found, would make family reunification the only means of re-establishing family life. It has subsequently noted that the respondent state should have “institute[d] a procedure that took into account the events that had disrupted and disturbed his family life and had led to his being granted refugee status.”²²
14. Thirdly, drawing upon the Grand Chamber judgment in *Hirsi Jamaa and Others v. Italy*, the Court also found that obtaining international protection “constitutes evidence of the vulnerability of the parties concerned”.²³ Such vulnerability should be taken into account also in processing family reunification applications.
15. The Commissioner suggests that these particular elements were central to the Court’s finding in these cases that family reunification requests of refugees should be handled speedily, attentively and with particular care, ensuring that procedures are flexible, prompt and effective.
16. With regard to the promptness of the handling of family reunification requests, the Commissioner notes that the Court has not set a specific time limit, but that in *Tanda-Muzinga v. France*, the Court considered a lapse of time of three-and-a-half years as excessive.²⁴

III. The Commissioner’s recommendations with regard to family reunification

17. The Commissioner and her predecessors have devoted considerable attention to the way Council of Europe member states have addressed family reunification, and in particular how they have dealt with the family reunification needs of persons benefitting from subsidiary or temporary protection.
18. While a number of states continue to treat 1951 Convention refugees and subsidiary or temporary protection beneficiaries in the same manner as regards family reunification, in some Council of Europe member states restrictions have been imposed on the ability of the latter group to apply for family reunification. The Commissioner has noted 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 for migrants and asylum seekers.²⁵ The Commissioner has addressed these issues in Cyprus,²⁶ Malta²⁷ and

appreciating that in this case both partners were already within the jurisdiction of Switzerland, the Commissioner notes the fact that the Court found that Article 8 required allowing them to cohabit despite the fact that their stay in Switzerland was formally unlawful. The Court appears to have found the fact that they were unable to return to their country of origin, due to the Ethiopian authorities’ opposition to their repatriation, and thus their inability to enjoy family life there, as a determinative factor.

²² *Tanda-Muzinga v. France*, application no. 2260/10, judgment of 10 July 2014, paragraph 73; *Mugenzi v. France*, application no. 52701/09, judgment of 10 July 2014, paragraph 52.

²³ *Tanda-Muzinga v. France*, application no. 2260/10, judgment of 10 July 2014, paragraph 75; *Mugenzi v. France*, application no. 52701/09, judgment of 10 July 2014, paragraph 54. Both citing *Hirsi Jamaa and Others v. Italy* [GC], application no. 27765/09, judgment of 23 February 2012, paragraph 155.

²⁴ *Tanda-Muzinga v. France*, application no. 2260/10, judgment of 10 July 2014, paragraph 80. Whilst the Court in this case dealt with a parent-child relationship, the Commissioner would consider this to be the case for adult couples as well, given the importance of family unity for resuming a normal life.

²⁵ See, for example: [Annual activity report 2015](#) by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, CommDH(2016)7, 14 March 2016, page 4; Commissioner for Human Rights, [Time for Europe to get migrant integration right](#), May 2016, page 9.

²⁶ [Report](#) by Nils Muižnieks, Commissioner for Human Rights, following his visit to Cyprus from 7 to 11 December 2015, CommDH(2016)16, published 31 March 2016, paragraphs 37 and 76.

²⁷ [Letter](#) by Nils Muižnieks, Commissioner for Human Rights, to Michael Farrugia, Minister for Home Affairs and National Security of Malta, CommHR/NM/sf043-2017, 14 December 2017.

Greece,²⁸ where only 1951 Convention refugees were accorded the right to apply for family reunification, with beneficiaries of subsidiary protection excluded from this option. The 2017 country report on Slovenia noted the intention of the authorities to pass legislative changes that would impose stricter conditions for persons with subsidiary protection.²⁹ In Switzerland, the 2017 country report drew attention to the strict conditions for family reunification for persons 'provisionally admitted' (on the basis of a so-called 'status F'), which included a three-year waiting period before applications would be accepted.³⁰ Finally, concerns have been expressed by the Commissioner about the adoption in 2016 by Germany and Sweden respectively, of temporary laws which would suspend the right to family reunification for persons with subsidiary protection for a period of two years, with some exceptions, or until such persons were granted a permanent residence permit.³¹

19. In each of these situations, the Commissioner has called on the authorities of the respective member states to ensure that persons with subsidiary or temporary protection would be granted equivalent family reunification rights as Convention refugees. This is in line with the 2017 Issue Paper on family reunification, which specifically sets out recommendations with a view to ensuring that effect is given to the Court's case law that all refugee family reunification procedures are flexible, prompt and effective, in order to ensure protection for the right to respect for family life. These recommendations cover a wide range of issues including which family members should be considered eligible for reunification, ensuring that sufficient time for applications is given, reducing administrative and practical barriers to reunification, and eliminating onerous evidentiary requirements. With regard to the present case, two sets of recommendations are of special importance.
20. Firstly, the Commissioner has recommended that Council of Europe member states should review and revise state policies if they discriminate between Convention refugees and beneficiaries of subsidiary or temporary protection.³² The Commissioner believes that both groups are in an analogous or sufficiently similar situation and that differences in treatment with regard to family reunification cannot be objectively and reasonably justified. The Commissioner notes that UNHCR has also maintained that states should provide beneficiaries of international protection access to family reunification under the same favourable rules as those applied to 1951 Convention refugees.³³ Similarly, the Parliamentary Assembly of the Council of Europe, in a recent report on family reunification, warned that "subsidiary or temporary protection status must not be considered as an 'alternative refugee status with fewer rights. States should thus not substitute subsidiary or temporary protection status for refugee status, in order to limit family reunification due to the temporary and personal nature of this subsidiary status."³⁴
21. Secondly, the Issue Paper on family reunification recommends that family reunification processes are not unduly delayed, including with regard to waiting times before an application for family reunification may be submitted. Specifically, the Commissioner has recommended

²⁸ [Report](#) of the Commissioner for Human Rights, Dunja Mijatović, following her visit to Greece from 25 to 29 June 2018, CommDH(2018)24, published 6 November 2018, paragraphs 68 and 87.

²⁹ [Report](#) by Nils Muižnieks, Commissioner for Human Rights, following his visit to Slovenia from 20 to 23 March 2017, CommDH(2017)21, published 11 July 2017, paragraphs 36 and 49. The amendments to impose stricter conditions on beneficiaries of subsidiary protection were rejected by the Slovenian Parliament in October 2017.

³⁰ [Rapport](#) par Nils Muižnieks, Commissaire aux Droits de l'Homme suite à sa visite en Suisse du 22 au 24 mai 2017, CommDH(2017)26, published 17 October 2017, paragraphs 167-169.

³¹ Nils Muižnieks, "[Eine Frage der Menschenwürde](#)", opinion editorial in *Süddeutsche Zeitung*, 23 October 2017; [Report](#) by Nils Muižnieks, Commissioner for Human Rights, following his visit to Sweden from 2 to 6 October 2017, CommDH(2018)4, published 16 February 2018, paragraphs 21-22 and 28-29.

³² Commissioner for Human Rights, [Realising the right to family reunification of refugees in Europe](#), June 2017, page 7, recommendation 2.

³³ See, for example, UNHCR, [Refugee Family Reunification: UNHCR's response to the EC Green Paper on the Right to family reunification of third-country nationals living in the European Union \(Directive 2003/86/EC\)](#), February 2012, page 6.

³⁴ Parliamentary Assembly of the Council of Europe, [Resolution 2243\(2018\)](#), Family reunification of refugees and migrants in the Council of Europe member states, adopted 11 October 2018, paragraph 6.

that waiting times of more than one year should be considered inappropriate.³⁵ The relevance of those recommendations with regard to the situation in Denmark will be discussed in Section IV below.

IV. Observations on Denmark

The Commissioner's exchanges on family reunification with the Danish authorities

22. Denmark's laws and policies regarding family reunification have been a point of attention for successive Commissioners over the course of approximately 15 years.³⁶ This has included a number of issues subsequently addressed by the Court, such as restrictions on family reunification with regard to age and citizenship.³⁷ Most recently, in January 2016, the Commissioner's predecessor sent a letter to the Danish Minister for Immigration, Integration and Housing, in which he expressed concern about the lengthening of the waiting time for family reunification for those receiving temporary protection under section 7, subsection 3 of the Aliens Act, to three years. In particular, it was noted that this measure raised issues of compatibility with Article 8 of the Convention.³⁸

The difference in family reunification rights based on protection status

23. One of the characteristics of the protection status under section 7, subsection 3, of the Aliens Act, is its presumed temporariness, which is regarded as a reason to apply different family reunification rights as compared to other status holders, including 1951 Convention refugees. In this respect, the Commissioner presents the Court with the following observations.
24. Firstly, she notes that when differences in family reunification rights have been made in Council of Europe member states, this has often disproportionately affected Syrians. This was particularly evident in Germany, where prior to the adoption of the aforementioned temporary law restricting family reunification many Syrians had been granted 1951 Refugee Convention status, but afterwards were mainly granted subsidiary protection.³⁹ In the Commissioner's 2017 report on Sweden, this trend was also noted.⁴⁰ In both cases, the Commissioner has not been able to identify a substantive change in the protection needs of Syrians generally, that would explain such a shift.
25. The Commissioner notes that a similar situation can be discerned in Denmark, where there has been a steady decline in the number of Syrians recognised as 1951 Convention refugees, and a marked increase in those accorded temporary protection (and thus a waiting period for family reunification) since the introduction of section 7, subsection 3, of the Aliens Act.⁴¹
26. Secondly, she notes that, with regard to the question of family reunification, persons granted protection under section 7, subsection 3 could appropriately be considered in the same position

³⁵ Commissioner for Human Rights, [Realising the right to family reunification of refugees in Europe](#), June 2017, page 8, recommendations 15 and 16.

³⁶ [Report](#) by Álvaro Gil-Robles, Commissioner for Human Rights, on his visit to Denmark, 13-16 April 2004, CommDH(2004)12, published 8 July 2004, paragraphs 8-19; [Memorandum](#) by Thomas Hammarberg, Commissioner for Human Rights, to the Danish Government: assessment of the progress made in implementing the 2004 recommendations of the Commissioner for Human Rights, CommDH(2007)11, published 11 July 2007, paragraphs 21-24; [Report](#) by Nils Muižnieks, Commissioner for Human Rights, following his visit to Denmark from 19 to 21 November 2013, CommDH(2014)4, published 24 March 2014, paragraphs 10-19 and 74.

³⁷ See *Osman v. Denmark*, application no. 38058/09, judgment of 14 June 2011; *Biao v. Denmark* [GC], application no. 38590/10, judgment of 24 May 2016.

³⁸ [Letter](#) by the Commissioner for Human Rights, Nils Muižnieks, to the Minister for Immigration, Integration and Housing, Inger Støjberg, 12 January 2016, published 15 January 2016.

³⁹ Commissioner for Human Rights, [Realising the right to family reunification of refugees in Europe](#), June 2017, page 34.

⁴⁰ [Report](#) by Nils Muižnieks, Commissioner for Human Rights, following his visit to Sweden from 2 to 6 October 2017, CommDH(2018)4, published 16 February 2018, paragraph 25.

⁴¹ See the written submission of the Danish Institute for Human Rights in this case, which presents data on the statuses accorded to Syrians in Denmark.

as Convention refugees. In particular, she notes that persons under section 7, subsection 3, of the Aliens Act are likely to satisfy, in the same way as Convention refugees, at least three of the central elements of the *Tanda-Muzinga v. France* and *Mugenzi v. France* judgments.

27. With regard to the first element of non-returnability, this might be presumed to exist whenever a person is granted a form of international protection, regardless of whether this is Convention refugee status. With regard to section 7, subsection 3 of the Danish Aliens Act, the Commissioner notes that this status is granted to “individuals who face capital punishment, torture or inhuman or degrading treatment due to severe instability and indiscriminate violence against civilians in their home country.” The potential consequences of return are clearly enumerated in this provision, which confers on the beneficiary protection against being returned.
28. The main material difference that the Commissioner can discern is that the permit attached to the temporary protection status is of shorter duration than those attached to other protection statuses in Danish law. This appears to be based on the assumption that the protection needs of the persons holding such a status may be considered more temporary, and they can be expected to return as soon as the circumstances in the country of origin allow it. This is supported, for example, by the reply to the Commissioner’s letter to the Danish authorities in January 2016.⁴² However, the Commissioner notes that the length of the residence permit itself does not indicate that, in the case of persons granted temporary protection, there is any clarity about the moment when they could return. This, in her view, is supported by the fact that the one-year permit is renewable. The provisions of the Aliens Act thus already recognise that the non-returnability of the applicant can last longer than the initial one-year period, and even considerably so. The Commissioner further notes that, in principle, the other protection statuses that can be provided under Danish law can also be considered temporary, with the possibility of revocation or non-renewal of residence permits in case of changed circumstances which would eliminate the initial need to grant protection.
29. The Commissioner would like to note that there may be particular uncertainty about the moment of possible return when a status is conferred on the basis of violent conflict in the country of origin. The Commissioner observes that such conflicts are often protracted.⁴³ With regard to Syria, she notes that eight years after the start of the conflict, the majority of Syrians who apply for asylum are still granted protection in light of the situation in their country of origin.⁴⁴
30. With regard to the second element of responsibility for leaving family members behind and reunification being the most appropriate way to re-establish family life, the Commissioner observes that, as with Convention refugee status, the conferral of a subsidiary or temporary protection status similarly may confirm that the applicant did not make a conscious decision to leave family members behind. Even when the reason for fleeing the country of origin is not motivated by individual persecution, as in the case of Convention refugees, there may be other situations in which departure may be considered forced, rather than a choice. The Commissioner suggests this would be the case when the departure (and subsequent leaving behind of family members) is motivated, for example, by the fear of the death penalty, or of torture or inhuman or degrading treatment, regardless of whether this treatment would be individually targeted or the result of instability or generalised violence.

⁴² [Letter](#) by Inger Støjberg, Minister for Immigration, Integration and Housing, to Nils Muižnieks, Commissioner for Human Rights, 11 March 2016.

⁴³ Also see the Commissioner’s comments in the letter to the Maltese authorities, paragraph 27 above: “Laws and policies that clearly disadvantage persons with subsidiary protection may be ill-founded and discriminatory. Often, the assumption that persons with subsidiary protection only remain in Europe for a short while does not reflect reality. Rather, with conflicts across the world being protracted, their temporary situation often turns into a permanent one.”

⁴⁴ The European Asylum Support Office (EASO) has noted that the recognition of Syrian asylum seekers at first instance in member states of the European Union, plus Norway and Switzerland, stood at 88% between June and November 2018. See EASO, [Latest Asylum Trends](#), November 2018 (accessed 21 January 2019).

31. With regard to the third element of vulnerability, the Commissioner notes that the Court has recognised, in addition to Convention refugees, the vulnerability of asylum seekers. For example, the Grand Chamber, in *M.S.S. v. Belgium and Greece*, recognised that “the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured.”⁴⁵ And that, in that same case, the Grand Chamber attached “considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.”⁴⁶
32. The Commissioner would therefore suggest that asylum seekers who are eventually granted another form of international protection than 1951 Refugee Convention status, but who have similarly been forced to leave their countries of origin and need protection against return, are also vulnerable, including for the purpose of considering their family reunification applications.

The three-year waiting period and the requirement of promptness

33. With regard to the effects of the waiting period, the Commissioner reiterates her recommendation that “[w]aiting periods of over one year are inappropriate for refugees and for their family members”.⁴⁷ The Commissioner emphasises that in the preceding quotation, the term ‘refugees’ is used broadly, and encompasses also those with other international protection statuses.⁴⁸ Several factors are relevant in this regard. First of all, the above-mentioned importance of re-establishing family life after flight, and the damaging effects of long-term family separation, as well as the vulnerability of the applicant and potentially of family members left behind.
34. Furthermore, the Commissioner notes that whilst the recommendation deals with waiting periods per se, it was made with awareness of the fact that *de facto* family separation will often be considerably longer than the officially established waiting period. Family separation will have already occurred from the moment of flight, and endures during the procedure to confer a protection status on the applicant. Only from the moment of conferral of that status, will the waiting period take effect.⁴⁹ An application for family reunification can be accepted only once the waiting period is over, with the processing of that application, and the subsequent arrangements for the *de facto* reunification and re-establishment of family life, taking additional time. This means that even a limited waiting period of one year will likely result in the inability to enjoy family life for a much longer period. It goes without saying that even longer waiting periods, such as three years in the case at hand, will significantly add to the time in which family life cannot be enjoyed effectively.
35. The Commissioner observes that the European Commission against Racism and Intolerance (ECRI) has recommended that Denmark allow family reunification for beneficiaries of temporary protection within their first year of residence in Denmark.⁵⁰ Similarly, the UN Committee on the Elimination of Discrimination (CERD) called upon the Danish authorities to revise the introduction of a one-year waiting period for persons with temporary protection status in Denmark (which was later extended to three years).⁵¹ Additionally, the UN Human Rights Committee called on Denmark to consider reducing the three-year waiting period.⁵²

⁴⁵ *M.S.S. v. Belgium and Greece* [GC], application no. 30696, judgment of 21 January 2011, paragraph 232.

⁴⁶ *Ibid.*, paragraph 251.

⁴⁷ Commissioner for Human Rights, [Realising the right to family reunification of refugees in Europe](#), June 2017, page 8, recommendation 15.

⁴⁸ As per paragraph 8 above.

⁴⁹ Unless applied retrospectively from the moment of the initial asylum application.

⁵⁰ ECRI, [Report](#) on Denmark, fifth monitoring cycle, adopted on 23 March 2017, published on 16 May 2017, paragraph 79.

⁵¹ CERD, [Concluding observations](#) on the combined twentieth and twenty-first periodic reports of Denmark, CERD/C/DNL/CO/20-21, 12 June 2015, paragraph 11.

⁵² UN Human Rights Committee, [Concluding Observations](#) on Denmark, CCPR/C/DNK/CO/6, 15 August 2016, paragraph 35.

36. The Commissioner further notes that the three-year waiting period applied in Denmark significantly overruns the period considered appropriate by the Commissioner. Furthermore, she notes that this three-year waiting period is comparable to that considered excessive in *Tanda-Muzinga v. France*,⁵³ and that the actual time it would take to re-establish family life will likely exceed the time-frame in that case.

Conclusions

37. The Commissioner reiterates the importance of the ability of all those granted international protection, regardless of whether this is as a Convention refugee or other status, to reunite with family members left behind. Long-term family separation has important negative consequences for the beneficiary of protection, family members left behind, as well as for the objective of successful integration and the avoidance of dangerous, irregular migration to Europe.
38. Given the extensive work done by her Office, the Commissioner cannot but see recent restrictions on the family reunification rights of beneficiaries of subsidiary or temporary protection as part of a strategy of deterrence of certain Council of Europe member states. Whilst those member states may take measures to control migration flows, the Commissioner believes these have resulted in transgressions of their positive obligations with regard to allowing the re-establishment of family life on their territories. This, as noted above, follows from the Court's case law on family reunification of Convention refugees, whose situation shows considerable overlap with that of persons with subsidiary or temporary protection and should thus, in the view of the Commissioner, be extended to them as well.
39. To conclude, the Commissioner reiterates her view that:
- Syrians are being disproportionately affected by restrictions to the right to family reunification, following a shift from granting 1951 Refugee Convention status towards other forms of protection, whilst no substantive change in the protection needs of Syrians can generally explain this shift;
 - persons granted international protection status, whether 1951 Convention refugees, beneficiaries of subsidiary protection, or beneficiaries of temporary protection, such as under section 7, subsection 3 of the Danish Aliens Act, would appropriately be considered in an analogous, or relevantly similar, situation with regard to the question of family reunification;
 - the application of differential rules to persons under subsidiary or temporary protection with regard to their access to family reunification, and in particular subjecting them to a waiting period, raises issues under Article 8, as well as Article 14 in conjunction with Article 8, of the Convention;
 - long-term waiting periods for family reunification, such as the three years in the current case, fail to meet the requirement of promptness as set out in the case-law of the Court.

⁵³ *Tanda-Muzinga v. France*, application no. 2260/10, judgment of 10 July 2014, paragraph 80.