**Application No. 6697/18**

**M.A. v. Denmark**

**Observations of the Government of Denmark**

1. By letter of 13 September 2018, the European Court of Human Rights (hereinafter 'the Court') notified the Government of Denmark (hereinafter 'the Government') of the above application and invited the Government to submit written observations on the admissibility and merits of the case with regard to whether it was contrary to Article 8 of the European Convention on Human Rights (hereinafter 'the Convention') or Article 14 of the Convention, taken in conjunction with Article 8, to refuse to grant the applicant's wife a residence permit in Denmark based on family reunification. The time limit for the Government's submission of observations has been fixed at 15 January 2019.

2. The Government submits that there has been no violation of Article 8 or Article 14 of the Convention taken in conjunction with Article 8.

3. As this case raises serious questions of fundamental importance affecting the interpretation of the Convention, the Government kindly requests that the Chamber relinquish jurisdiction in favour of the Grand Chamber as authorised by Article 30 of the Convention and Rule 72 of the Rules of Court. As far as the Government knows, the Court has never considered an application concerning whether a person granted subsidiary protection (i.e., international protection granted to a person seeking asylum who does not qualify as a refugee) has a more favourable right to family reunification under Article 8 of the Convention. The Government refers in this matter to *S., V. and A. v. Denmark* (applications Nos 35553/12, 36678/12 and 36711/12), in which the Chamber had decided by decision of 17 July 2017 to relinquish jurisdiction in favour of the Grand Chamber, see para. 5 of the judgment delivered on 22 October 2018 in *S., V. and A. v. Denmark* (cited above).

4. The Government is at the disposal of the Court, should these observations or the application in general give rise to any questions.

## I. Facts

5. The Court has asked the Government to prepare a statement of facts in accordance with the instructions set out in the guidelines annexed to the Court's letter of 13 September 2018.

6. On 8 June 2015, the Danish Immigration Service (*Udlændingestyrelsen*) granted the applicant a residence permit for 1 year pursuant to section 7(3) of the Danish Aliens Act (*udlændingeloven*), which applies to individuals who face the 'risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment [...] based on a particularly serious situation in [their] country of origin characterised by arbitrary violent attacks and ill-treatment of civilians' (temporary protection status). The applicant's residence permit has subsequently been renewed for 1 year at a time.

7. The applicant appealed the decision to the Refugee Appeals Board (*Flygtningenævnet*), arguing that he should have been granted residence under section 7(1) of the Aliens Act (individuals falling within the United Nations Convention Relating to the Status of Refugees of 28 July 1951) (hereinafter 'the 1951 Refugee Convention') (Convention status) or under section 7(2) of the Aliens Act (individuals who do not qualify as refugees, but who risk the death penalty or being subjected to torture or inhuman or degrading treatment or punishment if returned to their country of origin) (protection status). On 9 December 2015, the Refugee Appeals Board upheld the decision of the Danish Immigration Service to grant the applicant temporary protection status pursuant to section 7(3) of the Aliens Act.

8. On 5 July 2016, the Danish Immigration Service refused the application for family reunification under section 9(1)(i)(d) of the Aliens Act lodged by the applicant's wife on 4 November 2015 because the applicant had not held a residence permit under section 7(3) for the last 3 years. Furthermore, the Danish Immigration Service found that no exceptional reasons, including regard for family unity, made it appropriate to issue a residence permit under section 9c(1) of the Aliens Act.

9. On 16 September 2016, the Immigration Appeals Board (*Udlændingenævnet*) upheld the refusal of the application for family reunification. Following the decision, the applicant instituted proceedings before the domestic courts claiming, *inter alia*, that the decision of the Immigration Appeals Board was null and void as it was in breach of Article 8 of the Convention and Article 14 of the Convention taken in conjunction with Article 8. The decision is appended as Annex 1.

10. By its judgment delivered on 19 May 2017, the High Court of Eastern Denmark (*Østre Landsret*) (hereinafter 'the High Court') found against the applicant and accordingly dismissed the applicant's claims of violation of the Convention.

11. The applicant subsequently appealed the judgment of the High Court to the Supreme Court of Denmark (*Højesteret*) (hereinafter 'the Supreme Court'). By its judgment delivered on 6 November 2017, the Supreme Court upheld the judgment of the High Court. In its judgment, the Supreme Court assessed the applicant's claims based on the case-law of the Court, finding that the Immigration Appeals Board's refusal of 16 September 2016 to grant family reunification did not constitute a violation of Article 8 of the Convention or 14 of the Convention taken in conjunction with Article 8. The judgment is appended as Annex 2.

## II. Domestic law and practice

12. The fundamental provisions on the right afforded to aliens to enter and to remain in Denmark, including the criteria for family reunification, are laid down in the Aliens Act. The relevant provisions read as follows:

13. Section 7(1) to (3) of the Aliens Act:

> **'Section 7.**
> (1) Upon application, a residence permit will be issued to an alien if the alien falls within the provisions of the Convention Relating to the Status of Refugees (28 July 1951).
>
> (2) Upon application, a residence permit will be issued to an alien if the alien risks the death penalty or being subjected to torture or inhuman or degrading

treatment or punishment in case of return to his or her country of origin. An application as mentioned in the first sentence hereof is also considered an application for residence under subsection (1).

(3) In cases falling within section 7(2) in which the alien's risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment is based on a particularly serious situation in his or her country of origin characterised by arbitrary violent attacks and ill-treatment of civilians, temporary residence will be granted upon application. An application as mentioned in the first sentence hereof is also considered an application for residence under subsections (1) and (2).'

14. Section 9(1)(i) of the Aliens Act regulates the basic criteria for family reunification:

**'Section 9.**
(1) Upon application, a residence permit can be issued to –
(i) an alien over the age of 24 who cohabits at a shared residence, either in marriage or in regular cohabitation of prolonged duration, with a person permanently resident in Denmark over the age of 24 who –
(a) is a Danish national;
(b) is a national of one of the other Nordic countries;
(c) has been issued with a residence permit under section 7(1) or (2) or section 8;
(d) has held a residence permit under section 7(3) for at least the last three years; or
(e) has held a permanent residence permit for Denmark for at least the last three years; [...]'

15. Section 9c(1) of the Aliens Act, which provides for a general exception to section 9 where exceptional reasons make it appropriate, has the following wording:

**'Section 9c.**
(1) Upon application, a residence permit can be issued to an alien if exceptional reasons make it appropriate, including regard for family unity and, if the alien is under the age of 18, regard for the best interests of the child. Unless particular reasons make it inappropriate, including regard for family unity and, if the alien is under the age of 18, regard for the best interests of the child, the issue of a residence permit under the first sentence hereof as a result of family ties with a person living in Denmark is subject to the conditions set out in section 9(2) to (24), (34) and (35). The provisions of section 9(26) to (33) and (36) to (42) apply with the necessary modifications.'

16. Section 7(3) and section 9(1)(i)(d) of the Aliens Act were amended by Act No. 153 of 18 February 2015, which entered into force on 20 February 2015. The Act introduced a distinction between on the one side individuals who are not eligible for Convention status under section 7(1), but who risk the death penalty or being subjected to torture or inhuman or degrading treatment or punishment if returned to their country of origin (protection status under section 7(2)), and on the other side individuals who risk the death penalty or being subjected to torture or inhuman or degrading treatment or punishment due to on a particularly serious situation in their country of origin characterised by arbitrary violent attacks and ill-treatment of civilians (temporary protection status under section 7(3)). Section 9(1)(i)(d) was also amended by the Act, postponing the right to family reunification in general for individuals with temporary protection status under section 7(3) by 1 year, with the exception provided for under section 9c(1). Finally, the Act introduced a review clause in section 3 because the temporary protection status introduced was a new feature and because a need for subsequent adjustment might arise in the future. The Government refers to the extract of the *travaux préparatoires* of the Act in Annex 3.

17. Act No. 102 of 3 February 2016, which entered into force on 5 February 2016, amended Section 9(1)(i)(d) of the Aliens Act again, extending the general required period of residence for individuals granted temporary protection status under section 7(3) to qualify for family reunification from 1 year to 3 years. The Government refers to the extract of the *travaux préparatoires* of the Act in Annex 4.

18. As regards the review clause in section 3 of Act No. 153 of 18 February 2015, the Government observes that section 3 was repealed by Act No. 562 of 29 May 2018, which entered into force on 1 June 2018. The reason behind was that it was the opinion that the rules on temporary protection status under section 7(3) of the Aliens Act operated as intended. In the *travaux préparatoires* of the Act it was noted, *inter alia*, that:

> '[...] one of the reasons for introducing the rules on temporary protection status under section 7(3) of the Aliens Act was that the previous rules did not

sufficiently allow for the fact that some aliens might need protection because of a particularly serious general situation, which, depending on the circumstances, could change over a short period of time. The purpose of introducing the rules on temporary protection status was thus to tailor the need for protection for this group of people to make it easier to return them to their country of origin when the situation in their country of origin makes it possible. It is thus a fundamental principle for the protection status that the protection will cease when it is no longer needed.
The Ministry of Immigration and Integration further observes that it is important to strike the right balance between, on the one hand, the protection of people in need of protection and, on the other hand, a restriction of the influx and the number of refugees and migrants in Denmark in order to ensure an efficient integration. In this context, it should be noted that the number of refugees and reunited families has an impact on the possibility of local authorities to keep up in terms of their integration efforts so that their integration in Denmark can be successful.'

19. The Government refers to the extract of the *travaux préparatoires* in Annex 5.

## III. Relevant European and international law

### a. The European Union

20. Denmark has opted out of the common European asylum and immigration policies (Title V of Part III of the Treaty on the Functioning of the European Union) and is not bound by measures adopted pursuant to those policies. This follows from Articles 1 and 2 of the Protocol (No. 22) on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

21. However, the Government in the following refers to the relevant European Union (EU) law in this field for the purpose of outlining how the right to family reunification is governed at EU level.

22. The right to family reunification is set out in the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter') and a number of EU legislative acts.

23. Article 7 of the Charter reads as follows:

'*Article 7*
**Respect for private and family life**
Everyone has the right to respect for his or her private and family life, home and communications.'

24. The Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) contain the following guidance in the interpretation of Articles 7 and 21(1):

> '*Explanation on Article 7 – Respect for private and family life*
> The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. [...]
> In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR: [...]'

25. In the present case, the relevant secondary EU law is particularly Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter 'the Family Reunification Directive'); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter 'the recast Qualification Directive'); and Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereinafter 'the Temporary Protection Directive').

26. The Family Reunification Directive is the main EU secondary legislation dealing with family reunification rights of third-country nationals (i.e., those who are not nationals of an EU Member State).

27. The purpose of the Family Reunification Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

28. The Directive provides for an opportunity for the Member States to postpone the right to family reunification by (generally) 2 years, except where the sponsor is a 1951 Convention refugee.

29. The relevant provisions of the Family Reunification Directive read as follows:

> '*Article 8*
> Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.
> By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.'
>
> '*Article 12*
> [...] 2. By way of derogation from Article 8, the Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her.'

30. According to Article 3 of the Directive, it does not apply in situations such as where the sponsor is authorised to reside in a Member State on the basis of a subsidiary form of protection (i.e., international protection for persons seeking asylum who do not qualify as 1951 Convention refugees) in accordance with international obligations, national legislation or the practice of the Member States, or the sponsor is applying for authorisation to reside on that basis and is awaiting a decision on his or her status.

31. The definition of the scope of the Directive was tightened as a result of the negotiations on the proposed Directive between the EU Member States.

32. According to the Commission's initial proposal for the Council Directive (OJ C 116 E, 26.4.2000, p. 66, Article 10), waiting periods for family reunification were thus prohibited for both 1951 Convention refugees and persons enjoying subsidiary protection. The explanatory memorandum to the amended proposal for the Council

Directive (OJ C 62 E, 27.2.2001, p. 99) contains the following comments from the Commission:

> 'One amendment [proposal for amendment by the European Parliament] restricts the scope of the directive. It excludes persons enjoying a subsidiary form of protection and calls for the adoption without delay of a proposal on their admission and residence. The Commission accepts this amendment and has changed the relevant articles accordingly. It considers that persons in this category must have the right to family reunification and need protection; however, it recognises that the absence of a harmonised concept of subsidiary protection at Community level constitutes an obstacle to their inclusion in the proposed directive. The Conclusions of the Tampere European Council of 15 and 16 October 1999 specify that "[refugee status] should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection". To that end, the Scoreboard presented by the Commission in March 2000 and endorsed by the Council envisages the adoption before 2004 of a proposal on the status of persons enjoying subsidiary forms of protection. The Commission intends to make such a proposal next year, which could also cover family reunification for this category of third-country nationals.'

33. In 2004, the EU legislative framework governing asylum and family reunification became supplemented by Council Directive 2004/83/EC (the Qualification Directive), later repealed and replaced by the recast Qualification Directive.

34. Recital 39 of the preamble to the recast Qualification Directive is worded as follows:

> 'While responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility.'

35. The relevant provisions of the recast Qualification Directive read as follows (and apply, according to Article 20(2) of the Directive, both to refugees and persons eligible for subsidiary protection unless otherwise indicated):

> '*Article 2*
> **Definitions**
> For the purposes of this Directive the following definitions shall apply:

[...]
(j ) **"family members" means**, in so far as the family already existed in the country of origin, **the following members of the family** of the beneficiary of international protection **who are present in the same Member State** in relation to the application for international protection:
- the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried; [...]'

'*Article 23*
**Maintaining family unity**
1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure **that family members** of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member. [...]'

'*Article 24*
**Residence permits**
1. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).
Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than 3 years and renewable.
2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.' (*Emphasis added*)

36. The Temporary Protection Directive was adopted against the backdrop of, *inter alia*, the large-scale movement of people fleeing the conflict in Kosovo and variations between national measures relating to the protection status and rights granted in the event of a mass influx. The Directive governs the obligations of EU Member

States relating to the conditions of reception and residence of persons enjoying temporary protection in the event of a mass influx. The Directive has not yet been applied, but nonetheless it reflects a relevant interpretation at international level of the right to family reunification (in the event of a mass influx) of beneficiaries of temporary protection.

37. Article 15 of the Temporary Protection Directive reads as follows:

> '*Article 15*
> 1. For the purpose of this Article, in cases where **families already existed** in the country of origin **and were separated due to circumstances surrounding the mass influx**, the following persons shall be considered to be part of a family:
> (a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted;
> (b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time.
> 2. **In cases where the separate family members enjoy temporary protection in different Member States, Member States shall reunite family members where they are satisfied that the family members fall under the description of paragraph 1(a)**, taking into account the wish of the said family members. Member States may reunite family members where they are satisfied that the family members fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship they would face if the reunification did not take place.
> 3. **Where the sponsor enjoys temporary protection in one Member State and one or some family members are not yet in a Member State**, the Member State where the sponsor enjoys temporary protection **shall reunite family members, who are in need of protection**, with the sponsor in the case of family members **where it is satisfied that they fall under the description of paragraph 1(a).** The Member State may reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place.
> 4. When applying this Article, the Member States shall [take] into consideration the best interests of the child.
> 5. The Member States concerned shall decide, taking account of Articles 25 and 26, in which Member State the reunification shall take place.

6. Reunited family members shall be granted residence permits under temporary protection. Documents or other equivalent evidence shall be issued for that purpose. Transfers of family members onto the territory of another Member State for the purposes of reunification under paragraph 2, shall result in the withdrawal of the residence permits issued, and the termination of the obligations towards the persons concerned relating to temporary protection, in the Member State of departure. [...]' (*Emphasis added*)

38. The Commission's explanatory memorandum for the Council Directive (OJ C 311 E, 31.10.2000) contains the following general comments:

'2.4. The concept and legal framework for temporary protection in the event of a [mass influx, *added here*] has been developed in recent history and varies between the European Union Member States. Most have provided in their legislation for the possibility of establishing temporary protection schemes either by statute or by subordinate instruments, circulars or ad hoc decisions. Certain of them do not have the expression "temporary protection" as such, but in reality the residence documents that are issued and the link with the asylum system have the same practical effect. Systems also vary in terms of the maximum duration of temporary protection (ranging from six months to one, two, three, four or even five years maximum). Certain Member States provide for the possibility of suspending the examination of asylum requests during the temporary protection period; others do not. The chief differences lie in the welfare rights and benefits granted to persons enjoying temporary protection. Certain Member States allow the right to employment and family reunification; others do not. Certain Member States provide that the benefit of temporary protection may not be enjoyed at the same time by an asylum-seeker: applicants must opt for one or the other. Other Member States make no provision for such an incompatibility.
[...]
5.6. [...] In its proposal on family reunification the Commission stated that the question of preserving family unity in the context of temporary protection would be addressed by a specific proposal rather than the general proposal. Given the limited predefined duration of temporary protection, the Commission feels it is necessary to concentrate on the family as already constituted in the country of origin **but separated by the circumstances of the mass influx**. A broad concept of the family can be posited. This corresponds to the Member States' practice in relation to the Kosovars. **But the right provided for here is more limited than the right provided for by the family reunification Directive. Moreover the Commission cannot deny that the political conditions for proposing a broader approach to family reunification for persons enjoying temporary protection than proposed here do not seem to be met.** It would like to link recognition of a specific situation and the right to lead a normal family life that is secured by the European Human Rights Convention and is therefore available also to persons enjoying temporary protection, as indicated in the Council of Europe Recommendation

adopted by the Committee of Ministers on 15 December 1999 on family reunion for refugees and other persons in need of international protection (R(99)23). [...]' (*Emphasis added*)

39. The Commission's explanatory memorandum also contains the following comments on Article 13 of the proposal for a Council Directive (amended during the EU legislative procedure and replaced by Article 15 in the final Directive):

> '*Article 13*
> This Article lays down the conditions for maintaining the family unit for the duration of the temporary protection. **It does not provide for a right to family reunification as defined in the Proposal for a Council Directive on the right to family reunification of 1 December 1999 (COM(1999) 638 final),** as it is felt that the temporary nature of the situation does not allow for the exercise of this right in the same form. It is based on a humanitarian concept linked to the causes of the flight. The family circle is broader than in the Directive on family reunification but it covers the case of families already established in the country of origin and excludes the setting up of a family. **Nor does it cover the reunification of a family member lawfully resident in a third country (where this country is not the country of origin) with members of the family enjoying temporary protection in one of the Member States.** The individuals reunited are entitled to residence permits issued under the temporary protection regime. The Article applies, within the context of temporary protection, the right to respect for family life embodied in international law and in particular in the European Convention for protection of human rights and fundamental freedoms while taking account of the special circumstances of temporary protection. [...]' (*Emphasis added*)

**b. Other relevant international law**

40. The International Covenant on Civil and Political Rights (hereinafter 'the ICCPR') protects family life under Articles 17 and 23. They read as follows:

> '*Article 17*
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.'

> '*Article 23*
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.'

41. The Government observes that when considering individual communications, the Human Rights Committee has not yet, to the Government's knowledge, established that persons under subsidiary protection have a preferential right to family reunification pursuant to the ICCPR.

## IV. Law

### a. Questions to the parties

42. The Government has been requested to address the following question in its observations:

> 'Was the decision of 16 September 2016 by the Immigration Appeals Board to refuse to grant the applicant's wife a residence permit in Denmark based on family reunification in breach of his rights under Article 8 of the Convention, or under Article 14 taken in conjunction with Article 8?'

### b. Alleged violation of Article 8

43. It follows from Article 8 of the Convention, *inter alia*, that everyone has the right to respect for his family life, and that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

44. According to the case-law of the Court, a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there, and Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. In a case which concerns both family life and immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest, see, *inter alia*, para. 100 of the judgment delivered on 3 October 2014 in *Jeunesse v. the Netherlands* (application No. 12738/10), para. 38 of the judgment delivered on 19 February 1996 in *Gül v. Switzerland* (application No. 23218/94), and paras 67-68 of the judgment delivered on 28 May 1985 in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (applications Nos 9214/80, 9473/81 and 9474/81).

45. Furthermore, it follows from the case-law of the Court that the essential object of Article 8 is to protect individuals against arbitrary action by the public authorities. In addition, there may be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar (see, for example, the decision delivered on 6 July 2006 in *Priya v. Denmark* (application No. 13594/03). In the context of both positive and negative obligations, the State must strike a fair balance between the competing interests of the individual and of the community as a whole (see, for example, para. 38 of *Gül v. Switzerland* (cited above), and para. 63 of the judgment delivered on 28 November 1996 in *Ahmut v. the Netherlands* (application No. 21702/93).

46. Thus, the right to respect for family life may entail an obligation only under certain circumstances for a State to grant family reunification, in which cases a fair balance must be struck between competing interests of the individual and of the community as a whole. The State enjoys a certain margin of appreciation in such cases, see

para. 38 of *Gül v. Switzerland* (cited above), paras 67-68 of *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (cited above), and paras 42-43 of the judgment delivered on 10 July 2014 in *Mugenzi v. France* (application No. 52701/09).

47. In its judgment delivered on 6 November 2017, the Supreme Court of Denmark said as follows:

> 'The decision in the case at hand was made in accordance with the provision that persons who are not recognised as refugees according to the UN Refugee Convention, but who cannot return because they risk ill-treatment falling within Article 3 of the Convention on Human Rights because of the general conditions in their country of origin, must normally have had a residence permit for three years before they become eligible for family reunification. A number of other signatory countries to the Convention on Human Rights also have rules stipulating that persons who are granted protection status without being Convention refugees can only be granted family reunification after the expiry of a certain period. The European Court of Human Rights has not yet considered to what extent such statutory waiting periods applicable to persons who are granted protection status without being Convention refugees are compatible with Article 8.
>
> The Court said in its judgments of 10 July 2014 in *Tanda-Muzinga v. France* and *Mugenzi v. France* that refugees need to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens and that such applications must be examined promptly, attentively and with particular diligence. The applicants of the above two cases were not persons granted temporary protection status, but refugees recognised under the Refugee Convention. As a matter of fact, the cases did not concern a statutory waiting period as in the case at hand, but situations in which the visa application examination procedure had been unreasonably lengthy.
>
> The Court of Human Rights found in its judgment of the same date (10 July 2014) in *Senigo Longue and Others v. France* that Article 8 had been violated in a situation in which the French authorities had, in connection with the examination of an application for family reunification, doubted the applicant's maternal relationship with two children who had been left alone in Cameroon and had taken four years to reach a decision. In that case, the Court said that, despite the margin of appreciation enjoyed by the State, the decision-making process did not sufficiently safeguard the flexibility, speed and efficiency required to observe the right to respect for family life. The applicant of that case was not a refugee, but had come to France as a result of family reunification with her spouse. The case did not concern the period of 18 months that she had to wait under French law before being able to apply for family reunification, but only the long processing time after the application had been lodged.
>
> It follows from the case-law of the Court of Human Rights that the factors to be taken into account when determining whether the State is obliged to grant family reunification are the extent to which family life is effectively

> ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion, see, *inter alia*, para. 70 of the judgment delivered on 28 September 2011 in *Nunez v. Norway*.'

48. The Government observes, as highlighted by the Supreme Court, that the Court has no case-law on Article 8 of the Convention in relation to the granting of family reunification to individuals with temporary protection status based on a general risk of violation of Article 3 in their country of origin. The Government is fully aware of the fact that in the judgments delivered by the Court on 10 July 2014 in *Tanda-Muzinga v. France* (application No. 2260/10), para. 75, and *Mugenzi v. France* (application No. 52701/09), para. 54, the Court recalled the following observation:

> 'The Court reiterates that the 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 [...]. In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens [...].'

49. It is important to note that the Court finds that the consensus at the international and European level is for a *more favourable* procedure with regard to family reunification for refugees under the 1951 Refugee Convention. Thus, the applicants in *Tanda-Muzinga v. France* and *Mugenzi v. France* were refugees afforded protection under the 1951 Refugee Convention and not beneficiaries of international subsidiary protection. Therefore, the cases do not concern an individual like the applicant in the present case, who is entitled to subsidiary protection. Furthermore, the cases against France concerned procedural aspects of the right to family life with regard to family reunification, while the present case is a matter of substance as it concerns a statutory waiting period of 3 years for eligibility for family reunification applicable to persons granted subsidiary protection status, but not recognised as Convention refugees. Accordingly, the Government submits that the ordinary principles for family reunification and the right to respect for family life, as established by the Court, should be applied in the present case. In *Jeunesse v. the Netherlands* (cited above), the Court said in para. 107:

'[...] Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion [...].'

50. The Government observes in the present case that the alleged violation of Article 8 of the Convention concerns the Immigration Appeals Board's refusal of 16 September 2016 to grant the applicant's wife a residence permit in Denmark based on family reunification. The Government does not contest that there is a family life within the meaning of Article 8 of the Convention between the applicant and his wife and that the refusal to grant a residence permit amounted to an interference. However, the Government submits that the interference with the applicant's family life resulting from the impugned measure was justified under Article 8 § 2 as it was in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

*i. The interference was in accordance with the law*

51. The Government observes that the Immigration Appeals Board's decision of 16 September 2016 to refuse family reunification was in accordance with section 9(1)(i)(d) of the Aliens Act because the applicant had not had a residence permit under section 7(3) for the last 3 years as required by the law and because there were no exceptional reasons, including regard for the unity of the family, to justify family reunification under section 9c(1) of the Aliens Act. As to the reasons why the exception set out in section 9c(1) of the Aliens Act did not apply to the case at hand, reference is made to the decision of 16 September 2016 of the Immigration Appeals Board, see page 7 of the decision appended as Annex 1. The Government therefore submits that the refusal was in accordance with the law, which was accessible and predictable.

*ii. The interference was in pursuit of a legitimate aim*

52. In its judgment delivered on 6 November 2017, the Supreme Court said as follows:

> 'It appears from the *travaux préparatoires* of section 7(3) and section 9(1)(i)(d) of the Aliens Act that the separate treatment of this group of people whose need for protection is based on the general situation in their country of origin (temporary protection status under section 7(3)) and the limited right to family reunification afforded to this group were introduced in light of the conflict in Syria, which has caused millions of people to flee and has led to a significant increase in the number of new asylum-seekers in Denmark. It also appears from the *travaux préparatoires* that the Government is ready to assume joint responsibility and safeguard the protection of this group of asylum-seekers for as long as they need protection, but that Denmark is not to accept so many refugees that it will threaten national cohesion. Moreover, it appears that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society.
>
> Against this background, the Supreme Court finds that the restriction on the eligibility for family reunification is justified by interests to be safeguarded under Article 8 of the Convention on Human Rights.'

53. The Government submits that the statutory waiting period of 3 years, which was introduced due to a concern for a mass influx of asylum-seekers emanating from the conflict in Syria, and at the same time a concern that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society, thus pursued the legitimate aim of protecting the 'economic well-being of the country'. The Government observes that the legitimate aims mentioned in Article 8 § 2 have a wider scope than any of the corresponding exceptions in Article 9 § 2, Article 10 § 2 and Article 11 § 2 of the Convention. Economic well-being may, in principle, be a legitimate aim where a State is concerned, because of the population density, to regulate the labour market, see para. 26 of the judgment delivered on 21 June 1988 in *Berrehab v. the Netherlands* (application No. 10730/84).

54. Furthermore, the Court has found in several cases that ensuring an effective implementation of immigration control may be a legitimate aim as part of preserving the economic well-being of a country, which may justify an interference with family

life, see, *inter alia*, para. 79 of the judgment delivered on 15 May 2012 in *Nacic and others v. Sweden* (application No. 16567/10), and para. 40 of the decision of 8 April 2014 in *J.M. v. Sweden* (application No. 47509/13).

*iii. The interference was necessary in a democratic society*

55. It follows from the case-law of the Court, that in order for an interference to be considered necessary in a democratic society, it must correspond to a pressing social need and be proportionate to the legitimate aim pursued, see, *inter alia*, para. 58 of the judgment delivered on 26 March 1987 in *Leander v. Sweden* (application No. 9248/81). The Government submits that for the reasons set out below, the interference with the applicant's family life was necessary in a democratic society.

56. Concerning the necessity of the interference, the Supreme Court – with whom the Government fully concurs – said the following in its judgment of 6 November 2017:

> 'The question is now whether the restriction is necessary in a democratic society in order to safeguard the said interests.
>
> The Supreme Court finds that the situation of [M.A.] is not comparable with the situations considered by the European Court of Human Rights in Tanda-Muzinga v. France, Mugenzi v. France and Senigo Longue and Others v. France. The first two cases concerned Convention refugees, and all three cases concerned long processing times.
>
> The assessment of whether the decision of the Immigration Appeals Board to refuse family reunification is compatible with Article 8 must therefore be based on the general criteria listed by the European Court of Human Rights, see Nunez v. Norway (cited above).
>
> [M.A.] had had a residence permit for Denmark for about one year and three months when the application was refused by the Immigration Appeals Board. Accordingly, he had limited ties in Denmark, and [G.M.], his spouse, has no ties in Denmark.
>
> The Supreme Court accepts as a fact that the couple face insurmountable barriers to cohabiting in Syria because [M.A.] risks ill-treatment falling within Article 3 if returned to Syria due to the particularly serious situation characterised by arbitrary violence and ill-treatment of civilians. In reality, the refusal of the application for family reunification therefore implies that he is prevented from cohabiting with his spouse, although the barrier to his right to exercise his family life is only temporary.
>
> It follows from the decision of the Refugee Appeals Board of 9 December 2015 that [M.A.] has not placed himself in an adversarial position to the Syr-

ian authorities or to the opposition of the regime due to his specific and personal circumstances so that he risks persecution or ill-treatment falling within section 7(1) or section 7(2) of the Aliens Act and that he has not caught the attention of the Syrian authorities or others in such manner that he falls within those provisions. Therefore, he can return to Syria when the general situation in the country improves. If there is no such improvement within three years from the date on which [M.A.] was granted residence in Denmark, he will normally be eligible for family reunification with his spouse. An application to this effect can be lodged two months prior to expiry of the three-year period, and the Supreme Court accepts as a fact that, in that case, the application will be examined as set out in the travaux préparatoires of the Act as quickly as possible when he has resided in Denmark for three years and a decision has been made to renew his temporary residence permit under section 7(3). Should exceptional circumstances emerge before the expiry of the three-year period, such as serious illness, which will make the separation from his spouse particularly severe, it will be possible to be granted family reunification under section 9c(1) of the Aliens Act.

Against this background, the Supreme Court finds that the condition that [M.A.] must normally have been resident in Denmark for three years before he can be granted family reunification with his spouse falls within the margin of appreciation enjoyed by the State when balancing the regard for the respect for his family life and the regard for the interests of society, which can be safeguarded according to Article 8.

The Supreme Court finds that the decrease in the number of asylum-seekers in 2016 and 2017 cannot result in a different outcome of the assessment of whether the decision made by the Immigration Appeals Board in the case of [M.A.] was justified. The Supreme Court observes in this respect that it was decided by Act No. 153 of 18 February 2015, which introduced the one-year residence permit requirement as a condition for the right to family reunification, that a review of the Aliens Act should be introduced in the Parliamentary year 2017/2018 at the latest. By Act No. 102 of 3 February 2016, which amended the three-year residence permit requirement, this review clause was maintained. The reason for this amendment given in the travaux préparatoires is that the Government found that the extraordinary situation with a very large number of asylum-seekers and applications for family reunification in Denmark had made it necessary to tighten rules as proposed.

The Supreme Court therefore concurs in the view that the decision made by the Immigration Appeals Board is not contrary to Article 8 of the European Convention on Human Rights.'

57. As appears from the *travaux préparatoires* the main reason to the amendment of section 9(1)(i)(d) of the Aliens Act was the sudden influx of asylum-seekers in 2014 and 2015 and that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society. The Government in power at the time suggested

the statutory amendment, as it was necessary in order to accommodate all the people in need of help and handle the potential risk to the social cohesion of society. The Government therefore emphasises that the present case concerns the general question of family reunification rights of individuals with temporary protection status (subsidiary protection).

58. As regards the applicant's interests, the Government would add to the observations of the Supreme Court, that the Immigration Appeals Board's decision of 16 September 2016 included an assessment of the applicant's interests and any special grounds for granting a residence permit under section 9c(1) of the Aliens Act. Section 9c(1) of the Aliens Act is a statutory exemption to the provision under section 9 of the Aliens Act. The assessment under section 9c(1) is specific and may be applied during the full 3-year period in which family reunification is generally postponed under section 9(1)(i)(d). As it appears, the Immigration Appeals Board did not find any grounds for exempting the applicant from the statutory requirement of 3 years' residence as a condition of family reunification. The Government refers to page 7 of the decision of 16 September 2016 the Immigration Appeals Board (Annex 1).

59. Furthermore, the Government observes that the applicant is not a refugee as defined by the 1951 Refugee Convention and is not exposed to a specific individual risk, which is a relevant consideration in the assessment of a potential violation of Article 8 of the Convention. The applicant's subsidiary protection status is a result of the general situation in his country of origin, which may change rather quickly, see, for a comparison with the case-law of the Court, the judgment delivered on 28 June 2011 in *Sufi and Elmi v. the United Kingdom* (applications Nos 8319/07 and 11449/07) and the judgment delivered on 5 September 2013 in *K.A.B. v. Sweden*, (application No. 886/11).

60. In 2011, the Court found in *Sufi and Elmi v. the United Kingdom* (cited above) that the violence in Mogadishu was of such a level of intensity that anyone in the city would be at a real risk of treatment prohibited by Article 3 of the Convention simply

by virtue of an individual being exposed to such violence on return. However, in 2013 in *K.A.B. v. Sweden* (cited above), the Court assessed the question anew and concluded that the situation in Mogadishu was no longer of such a nature as to place everyone present in the city at a real risk of treatment contrary to Article 3.

61. In the same way, the situation in Syria and the risk on return may change. This is reflected in the applicant's temporary protection status under section 7(3) of the Aliens Act. Should the applicant not be able to return, he may instead be eligible for family reunification with his wife under section 9(1)(i)(d) of the Aliens Act after a period of 3 years. The Government observes in this connection that, according to the *travaux préparatoires* of the provision, the applicant will be able to apply for family reunification 2 months before the 3-year period expires in order to be able in actual fact to live together with his wife as soon as possible. The authorities are required to expedite the processing of an application as much as possible from the date when an applicant becomes eligible for family reunification and must give it priority to other applications. According to the information received by the Government, the current application processing time in such cases is around 2 ½ months, and the authorities also accept applications submitted up to 3 months before the date of eligibility. The applicant will thus be able to be reunited with his wife immediately after the statutory waiting period of 3 years. The Government submits that this is a necessary and proportionate means for safeguarding the interests of the community as a whole as it also reflects the applicant and his wife's lack of ties to Denmark.

62. The Government also notes that, on 11 December 2018 the United Nations refugee agency (UNHCR) said at a news briefing that around 37,000 refugees had returned to Syria in 2018 and that they forecast around 250,000 Syrians would return in 2019.

63. In light of the extensive economic burden on society and the possible temporary need for protection, it was a necessary response to a pressing social need to postpone family reunification for a period. As pointed out by the Supreme Court, similar

distinctions between refugees and beneficiaries of subsidiary protection with regard to family reunification also exist in other European countries.

64. A number of countries in Europe have tightened conditions for family reunification over the past years and some have passed statutes setting out waiting periods for family reunification. In *Germany*, the right to family reunification for persons granted subsidiary protection was postponed by 2 years in March 2016. As of 1 August 2018, the 2-year waiting period was replaced by new legislation under which family reunification to beneficiaries of subsidiary protection was made possible again, albeit with a quantitative limitation to a quota of up to 1,000 persons per month. The authorities must decide on humanitarian grounds whom to grant a residence permit. In *Sweden*, a new temporary statute entered into force in July 2016, which suspended the right to family reunification for subsidiary protection beneficiaries by a period of 3 years altogether. The statute applies to those who have applied for asylum after 24 November 2015 and will remain in force until July 2019. One of the provisions of the statute stipulates that family reunification should be granted if a refusal would otherwise violate Sweden's obligations under international law. *Austria* also introduced a waiting period of 3 years for subsidiary protection beneficiaries in June 2016. Furthermore, additional requirements such as sufficient income, health insurance and accommodation were imposed on subsidiary protection beneficiaries. In *Switzerland*, individuals with a status similar to subsidiary protection are subjected to a waiting period of 3 years as from recognition to reunification. Family reunification is conditional upon the availability of suitable housing, language skills and proof that the family are not dependent on social assistance. In *Latvia*, persons with subsidiary protection are only eligible for family reunification after at least 2 years' residence. Finally, *Norway* also has a similar waiting period for post-flight couples (family life formed after flight) who are subject to ordinary family reunification rules. The person living in Norway must thus be engaged in full-time employment or education for 4 years before a residence permit based on family reunification may be granted.

65. Furthermore, a number of EU Member States have introduced legislation, which distinguish between 1951 Convention refugees and beneficiaries of subsidiary protection. In *Czech Republic*, *Hungary* and *Slovakia*, subsidiary protection beneficiaries are excluded from the more favourable rules for refugees. In *Cyprus*, a statute was introduced in 2014 that excluded beneficiaries of subsidiary protection from the right to family reunification altogether. A similar rule exists in *Malta*. In *Greece*, only 1951 Convention refugees, and not subsidiary protection beneficiaries, are covered by the family reunification legislation implementing the Family Reunification Directive. As of 1 July 2016, *Finland* gives different treatment to 1951 Convention refugees and subsidiary protection beneficiaries, as only individuals in the latter category have to demonstrate means of support as a requirement for family reunification.

66. Finally, a few countries have also introduced restrictions that apply specifically for 1951 Convention refugees. In *Cyprus*, the above-mentioned statute enacted in 2014 deprived 1951 Convention refugees of the preferential right to family reunification. In *Greece* and *Austria*, refugees must apply for family reunification within 3 months of recognition as refugees to benefit from the preferential rules in the 1951 Refugee Convention. Otherwise, they must meet requirements as to income, employment and accommodation to be granted family reunification.

67. The Government also observes that there are relevant measures at international level providing for a distinction between 1951 Convention refugees and other beneficiaries of international protection and recognising a more restricted access to family reunification for the latter group.

68. The Family Reunification Directive thus provides for a potential waiting period with regard to family reunification for third-country nationals which does not apply to refugees. Moreover, the Temporary Protection Directive only provides for a right to family reunification with family members who also have a need for protection (see Article 15, referenced above). In the *travaux préparatoires* of this Directive, it

is recognised that the temporary nature of the situation does not allow for the exercise of family reunification in the same form as that provided for in the Family Reunification Directive. It is furthermore noted in the *travaux préparatoires* that at the time some Member States of the European Union allowed for the right to family reunification in case of temporary (subsidiary) protection; while others did not.

69. In addition, the recast Qualification Directive does not provide for a right to family reunification with family members who are not present in the same Member State as the beneficiary of international protection (see the definition of 'family members' in Article 2, which is explicitly limited to members 'who are present in the same Member State in relation to the application for international protection' (referenced above)).

70. In the assessment on Article 8 of the Convention, the Government attaches importance to the fact that the applicant is a beneficiary of subsidiary protection and fled Syria by himself. According to the European Union's recast Qualification Directive the applicant would thus not have been eligible for family reunification had Denmark been legally bound to implement this Directive.

71. Altogether, when assessing whether the introduction of a statutory waiting period of 3 years applicable to persons with temporary protection status in Denmark under section 7(3) of the Aliens Act is compatible with Article 8 of the Convention, it is important to take into account the law in other European countries as well as other international law, such as the law of the European Union. Based on such comparative analysis, it is clear that Member States have an urgent need for being able to introduce and uphold a statutory waiting period for beneficiaries of subsidiary protection in order to cope with the influx of persons in need of protection.

72. Furthermore, the Government submits, that it is important to strike the right balance between, on the one hand, offering protection to individuals in need for protection and, on the other hand, limiting the influx of refugees and migrants to Denmark and

ensuring effective integration. In this context it is observed that the number of refugees and persons granted family reunification is relevant to the ability of the local authorities to manage the task of integrating newcomers, and accordingly to the success of the integration efforts in Denmark. Against this background, it is the opinion of the Government that the rules on temporary protection status under section 7(3) of the Aliens Act function as intended and are necessary.

73. In conclusion, the Government submits that a fair balance was indeed struck within the margin of appreciation that the State enjoys in cases concerning family reunification according to Article 8 of the Convention in the applicant's case.

**c. Alleged violation of Article 14 taken in conjunction with Article 8**

74. The alleged violation of Article 14 of the Convention, taken in conjunction with Article 8, concerns the Immigration Appeals Board's refusal to grant the applicant's wife a residence permit based on the applicant's temporary protection status under section 7(3) of the Aliens Act, which the applicant contends resulted in discrimination as compared with persons granted protection under section 7(1) and section 7(2) of the Aliens Act.

75. Concerning Article 14 of the Convention taken in conjunction with Article 8, the Supreme Court said as follows in its judgment delivered on 6 November 2017:

> 'The requirement of three years' residence as a condition of family reunification applies to persons like [M.A.] issued with a residence permit under section 7(3) of the Aliens Act who risk ill-treatment falling within Article 3 of the Convention on Human Rights if returned to their country of origin because the situation in the country of origin is generally characterised by arbitrary violence against civilians. As opposed to those situations, the three-year residence requirement does not apply to aliens issued with a residence permit under section 7(1), because they fall within the Refugee Convention, or under section 7(2), because they risk ill-treatment falling within Article 3 if returned to their country of origin due to their personal circumstances.
>
> Article 14 of the Convention on Human Rights prohibits differential treatment based on the rights protected by the Convention, such as sex, race, colour, language, religion, etc. or 'other status'.

[M.A.] had not experienced differential treatment based on sex, race or any other status as expressly listed in Article 14 by the date of the decision made by the Immigration Appeals Board. However, it appears from the case-law of the Court of Human Rights that a person's immigration status can be any 'other status' falling within Article 14, see para. 45 of the judgment of 27 September 2011 in *Bah v. the United Kingdom* and paras 44 to 47 of the judgment of 6 November 2012 in *Hode and Abdi v. the United Kingdom*. It further appears that differential treatment contrary to Article 14 occurs if persons in similar or comparable situations are afforded a more favourable treatment in terms of the rights protected by the Convention and such differential treatment is not based on objective and fair reasons, that is, if the differential treatment is disproportionate to the legitimate aim pursued and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Finally, it appears that the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment and that the scope of this margin will vary according to the circumstances, the subject matter and the background.

According to the *travaux préparatoires* of section 9(1)(i)(d) of the Aliens Act, the different rules on family reunification applicable to aliens granted residence under section 7(1) and (2) and aliens like [M.A.] who are granted residence under section 7(3) are justified by the circumstance that aliens granted residence under section 7(1) and (2) are subjected to personal persecution, usually because of a conflict with the authorities or others in their country of origin, whereas aliens granted residence under section 7(3) are not subject to personal persecution but have fled due to the general situation, such as war, in their country of origin. Those individuals therefore do not have a specific conflict with anybody in their country of origin, and the *travaux préparatoires* considered it a fact that, in general, this group of individuals have a more temporary need for protection than persons subjected to personal persecution as the situation in their country of origin may quickly change in nature and become more peaceful.

The Supreme Court considers it doubtful whether the situation of [M.A.] is comparable with the situation of aliens granted residence under section 7 (1) and (2) of the Aliens Act because they risk persecution due to their personal circumstances if returned to their country of origin. Despite this assumption, the Supreme Court finds that the difference in the right to family reunification, which is, as already mentioned, based on an assessment of the need for protection among different groups of individuals, must be deemed to have been based on objective and fair reasons falling within the margin of appreciation enjoyed by the State in a case concerning differential treatment based on immigration status.

Accordingly, the Supreme Court finds no basis for dismissing the assessment made by the Danish Parliament, according to which, from a general perspective, the need for protection of persons falling within section 7(3) of the Aliens Act is more temporary than that of persons falling within section 7(1) and (2). The general situation in a person's country of origin, which has justified a temporary need for protection, may quickly change. This is illustrated

by the judgments delivered by the Court of Human Rights on 28 June 2011 in *Sufi and Elmi v. the United Kingdom* and on 5 September 2013 in *K.A.B. v. Sweden*.

In assessing whether the restriction in the right of [M.A.] to be granted family reunification in Denmark with his spouse is compatible with Article 14, cf. Article 8, the Supreme Court has also emphasised that his separation from his spouse, as mentioned in the above paragraph on Article 8, is only temporary and that he can be granted family reunification at a later point if exceptional reasons apply.

Against this background, the Supreme Court concurs in the view that the decision made by the Immigration Appeals Board is not contrary to Article 14 of the European Convention on Human Rights, cf. Article 8, either.'

76. The Government refers to the observations of the Supreme Court. The Government thus submits that the refusal of the application for family reunification does not reflect a difference in treatment of persons in analogous, or relevantly similar, situations within the meaning of Article 14 of the Convention. This is also mentioned in the *travaux préparatoires* of the Act amending section 9(1)(i)(d) of the Aliens Act (Act No. 102 of 3 February 2016):

> 'Aliens granted residence under section 7(1) or (2) of the Aliens Act are facing individual persecution, typically because of a specific conflict with the authorities or others in their country of origin. By contrast, aliens granted residence under section 7(3) of the Aliens Act have fled general conditions (such as war) in their country of origin. In other words, they do not have a specific conflict with any one in their country of origin. On the whole, this group therefore have a more temporary need for protection than those subjected to individual persecution, as the situation in the country of origin may quickly change and become more peaceful.'

77. For this reason, the Government submits that the applicant is not in an analogous, or relevantly similar, situation with persons granted protection under section 7(1) or section 7(2) of the Aliens Act, and there is thus no difference in treatment. In the Government's view, this is not changed by the Court's findings in the judgment delivered on 6 November 2012 in *Hode and Abdi v. the United Kingdom* (application No. 22341/09).

78. However, should the Court find that a difference in treatment does exist, the Government submits that it is not discriminatory as it has an objective and reasonable justification. As mentioned above, the difference is based on the applicant's need

for protection, which is not based on a specific individual risk, but is of a more temporary character than the need for protection of those falling within section 7(1) and (2) of the Aliens Act. This is emphasised by the fact that Syrian persons in need of protection, like the applicant, are now beginning to return to Syria voluntarily, see above under para. 62. As an inherent consequence, the applicant's separation from his spouse is likewise temporary. The Government submits, as is also submitted above, that the statutory waiting period pursues the legitimate aim of protecting the 'economic well-being of the country', which may be a legitimate aim where a State is concerned about the population density to regulate the labour market or to ensure an effective implementation of immigration control, see *Berrehab v. the Netherlands* (cited above), *Nacic and others v. Sweden* (cited above), and *J.M. v. Sweden* (cited above).

79. As also referenced above, a distinction between different forms of beneficiaries of subsidiary protection and 1951 Convention refugees is also found in a number of Member States in Europe, including Germany, Sweden, Austria, Switzerland, Hungary, Cyprus, Greece and Finland.

## V. Conclusion

80. Altogether, the Government submits that there has been no violation of Article 8 or Article 14 of the Convention taken in conjunction with Article 8.

**Copenhagen, 15 January 2019**

**Mr Michael Braad**

**Agent of the Government of Denmark**

**Mrs Nina Holst-Christensen**

**Co-Agent of the Government of Denmark**