Tampere University

JAANA PALANDER

The Role of Human Rights in Family Reunification

Fair Balance between Respect for Family Life and National Interests

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Many things and many people have affected my journey and made this dissertation possible. I cannot mention all, but I will thank the most prominent in more or less a chronological order.

I have always enjoyed travel and learning new things. These aspirations have caused me to learn languages and travel abroad. I have also studied and worked abroad. I have been privileged to benefit from the free movement of workers and study progammes of the European Union (EU). While travelling and sojourning in big European cities, I saw and heard of the troubles that some foreigners face with immigration rules, but it was not until I travelled and stayed to work in Mexico that I experienced these rules myself. Despite the paperwork, I was, and still am, privileged when I travel and work even outside the EU. However, since I was already studying law and administration, that experience kindled in me an interest in immigration law. There were no courses in immigration law, though. Luckily, I had a chance to do an internship in the Finnish Immigration Service (Migri), where I used my knowledge of general administrative law in analysing the decisions taken by the office. Thank you, Jaana Vuori for being a great mentor during my short stay in Migri.

After graduating with a master's degree, I worked for a few years in a Register Office in Espoo. Thank you, Heidi Rantatulkkila for being a great boss and also the officiator in our marriage ceremony. During those years I got to know nice colleagues, many registers and some issues related to immigration management. However, I still had the urge to know more about immigration law and management. Therefore, I applied for doctoral studies with the objective of becoming an expert in immigration law. Thank you, Jukka Kultalahti and Jukka Viljanen for accepting me as a candidate for doctoral studies, and somewhat later as a university teacher at Tampere University. There were also many nice colleagues at Tampere University, and I want especially to thank Pauliina Havakka and Heta Heiskanen, Raija Huhtanen, Reija Knuutila, Heidi Niemi, Elina Nieminen and Elina Pekkarinen for all your support, both professional and personal. There were still no courses in immigration law, but I attended courses and conferences abroad and became familiar

with legal material related to immigration law. My first contact with immigration research was with Tiina Vaittinen, who introduced me to a research community connected with Etmu ry and Nordic Migration Research network. She is also the reason for my long service in the Nordic Journal of Migration Research as a book review editor, thank you, Tiina. In Tampere University I also got to know researchers from other faculties, such as Pirkko Pitkänen, who invited me to participate in her EU funded research project. She introduced me to Sergio Carrera from the University of Maastricht, who kindly agreed to our request to become my other supervisor for some time. Thank you, Pirkko and Sergio for believing in my research.

Around that time, I was also invited to write to a book dealing with transnational aspects of social security, thank you, Laura Kalliomaa-Puha for making that happen. Then I started working at the University of Eastern Finland (UEF), substituting for Maija Dahlberg, who has been a great support when I started at UEF and took over her teaching in constitutional and human rights law. Thank you, Maija. I am also grateful to Hanna-Maria Niemi, who later co-operated with me in teaching. Finally, I also had courses in immigration law, but as a teacher. Thank you, Heikki Kallio, Toomas Kotkas, Eeva Nykänen and Ulla Väätänen for creating this new subject with me, it has been a pleasure to work with you. We even wrote a textbook on immigration law, co-operating with some other great experts.

In Joensuu at UEF, I also met immigration researchers from other faculties and was invited to join a Finnish Research Council funded project. Thank you, Laura Assmuth for offering me that great opportunity to work with wonderful colleagues on an interesting research project. During that project, I managed to write another article for my dissertation. I also met many great researchers, and with some of them I have been applying for and with some even succeeded in obtaining funding for research projects. I want especially to thank Saara Pellander, who has been a great mentor both professionally and personally. We have so much in common and our names are so similar that we have been even mixed up by other people. It does not matter, though, since we take pride in each other's work and some we have even done together.

Then, I applied for a researcher position at the Migration Institute of Finland on a project closely related to family reunification, or actually family separation. Thank you, Marja Tiilikainen for this great opportunity to work at the institute and on the interesting project with nice colleagues. Here I managed to write my third dissertation article, and also got to know many new migration researchers from Finland and abroad. I want especially to thank Helena Wray for co-operation and valuable comments on my article. After that I returned to work at the University of

Eastern Finland for a couple years as a teacher, but then I was invited to join another Research Council of Finland funded project (dec. no. 345154 and 345405) on a topic related to immigration and integration. Thank you, Magdalena Kmak for inviting me to join this project and for enabling me to get to know Åbo Akademi University and all the lovely people at the Institute for Human Rights. During this project I published my fourth article and was able to finalize my dissertation synthesis. I also want to thank Heta Heiskanen, Magdalena Kmak, Anu Mutanen and Jukka Viljanen for commenting on the first draft of the synthesis. Their comments have helped me to spot errors and add missing aspects.

This dissertation was mostly funded by working as a university teacher or as a project researcher, but I have also received two grants. Thank you, Tampere University and the Finnish Cultural Foundation for grants making it possible to concentrate on research for a longer period. I also want to thank Virginia Mattila for correcting my English in this synthesis and Christina Saarinen for correcting the articles written in English.

I want to express my gratitude to the pre-examiners, Heli Askola and Tuomas Kuokkanen, who read the synthesis and gave their valuable comments. This synthesis is a lot better after the modifications I made after those comments. I have not been able to comply with all their requests simply because my time and resources are limited. However, I am happy that even with the obvious shortcomings, they consider my work good enough to merit a public defence for the doctoral degree. I look forward to the doctoral defence in September, thank you in advance, Sanna Mustasaari for kindly agreeing to act as the opponent.

Finally, I want to thank my family. My mother and father Ansa and Teijo Palander, who have always supported me whatever crazy things I have decided to do. My dear sister, Mari Palander, who has given me good company and a place to stay while working in Joensuu. Last but not least, my core family, my dear husband Luis Pérez Noyola and our lovely daughters Sienna and Hannia. They have had to endure a lot because my weird job in academia. On the other side, they give me a reason to think and do other things than research, which is also important. I also need to thank our dog Taco. He keeps me company and gives me a reason to go outside during my home office days.

In Tampere, 3 August 2024

Jaana Palander

ABSTRACT

This dissertation in Public Law, for a doctoral degree in Administrative Sciences, is a study on the role of human rights in migration law in the specific context of family reunification. The role of human rights and the scope of human rights protection are assessed in light of the European Convention on Human Rights and the standards created in the European Court of Human Rights. The focus is on Article 8 of the Convention that protects the right to respect for family life. The focus is also on the principle of proportionality and the fair balance test used by the Court of Human Rights to assess states' compliance with their human rights obligations. The fair balance test takes into account and weighs various individual and national interests.

In this dissertation, state compliance is investigated in the case of Finland. As in some other European countries, the conditions for family reunification have been tightened in the last couple of decades also in Finland. Therefore, it is relevant to ask what the human rights obligations are, and how Finland ensures the protection of human rights and the right to respect for family life in the context of migration. Since Finland is a member of the European Union and bound by the common migration and asylum policy, it is also necessary to ask what supranational obligations emerge, and what the role of human rights is in migration law of the European Union.

These questions are approached with a legal method by analysing the structure and logic of interpretation in court cases and by using theories on interpretation methods addressed in the legal literature. As often is the case in human rights research, the aim of this dissertation is to enhance human rights protection. Since one of the findings of this study is that the legal human rights protection is minimal, extra-legal approaches are also adopted. This research draws inspiration from sociological studies and applies political theories to point out flaws in the legal thinking. Through this broader Law and Society approach, I challenge conventional legal thinking on what the fair treatment of foreigners is and what is in the national interest.

I agree with many that, in the context of migration control and family reunification, human rights protection should be promoted with a pragmatic approach. However, too much leeway for the national interest at the expense of

reasonableness and proportionality impairs the effectiveness and credibility of human rights protection. I argue that such a development can be impeded by paying more attention to the proportionality assessment and protection of the essence of the human right. The findings of this dissertation point towards the erosion of international protection and solidarity when national interests are in play. Previously established human rights standard that requires facilitation of family reunification for those who cannot enjoy family life elsewhere is challenged. I call for principled pragmatism, where certain principles are recognised to be the essence of human rights and understood as non-derogable rules.

Key words: human rights, migration law, family reunification, proportionality principle, fair balance test, minimalism, pragmatism

TIIVISTELMÄ

Tämä hallintotieteiden tohtorin tutkintoa varten laadittu julkisoikeudellinen väitöskirja on tutkimus ihmisoikeuksien roolista ulkomaalaisoikeudessa erityisesti perheenyhdistämisen kontekstissa. Ihmisoikeuksien roolia ja ihmisoikeuksien suojelun laajuutta arvioidaan Euroopan ihmisoikeussopimuksen ja Euroopan ihmisoikeustuomioistuimen luomien standardien valossa. Pääpaino on Euroopan ihmisoikeussopimuksen 8 artiklassa, joka suojaa oikeutta perhe-elämän kunnioitukseen. Tutkimuksessa myös keskitytään suhteellisuusperiaatteeseen ja ihmisoikeustuomioistuimen käyttämään oikeudenmukaisen tasapainon testiin (*fair balance test*), jolla arvioidaan noudattavatko valtiot ihmisoikeusvelvoitteitaan. Kyseisessä testissä otetaan huomioon ja punnitaan erilaisia yksilöllisiä ja kansallisia intressejä.

Tässä väitöskirjassa selvitetään valtion kansainvälisoikeudellisten velvoitteiden noudattamista Suomen tapauksessa. Kuten joissain muissakin Euroopan maissa, perheenyhdistämisen ehtoja on parin viime vuosikymmenen aikana tiukennettu myös Suomessa. Sen vuoksi on aiheellista kysyä, mitkä ovat ihmisoikeusvelvoitteet ja miten Suomi turvaa ihmisoikeuksien ja erityisesti perhe-elämän suojan kunnioittamisen muuttoliikkeiden kontekstissa. Koska Suomi on Euroopan unionin jäsen ja yhteisen maahanmuutto- ja turvapaikkapolitiikan sitoma, on myös kysyttävä, mitä ylikansallisia velvoitteita syntyy ja mikä on ihmisoikeuksien rooli unionin maahanmuuttolainsäädännössä.

Näitä kysymyksiä lähestytään oikeudellisella menetelmällä analysoiden oikeustapausten tulkinnan rakennetta ja logiikkaa sekä käyttämällä oikeustieteen tulkintamenetelmiä koskevia teorioita. Kuten ihmisoikeustutkimuksessa usein on tapana, tämän väitöskirjan tavoitteena on edistää ihmisoikeuksien suojelua. Koska yksi tämän tutkimuksen havainnoista on, että oikeudellinen ihmisoikeuksien suojelu on minimaalista, omaksutaan tutkimuksessa myös oikeustieteen ulkopuolisia lähestymistapoja. Tässä työssä ammennetaan inspiraatiota sosiologisesta tutkimuksesta ja sovelletaan poliittisia teorioita oikeudellisen ajattelun puutteiden osoittamiseksi. Tällä laajemmalla yhteiskunnallisen oikeustutkimuksen lähestymistavalla haastan perinteistä oikeudellista ajattelua siitä, mitä on ulkomaalaisten oikeudenmukainen kohtelu ja mikä on kansallisen edun mukaista.

Olen samaa mieltä monien kanssa siitä, että muuttoliikkeen hallinnan ja perheenyhdistämisen yhteydessä ihmisoikeuksien suojelua olisi edistettävä pragmaattisesti. Liiallinen kansallinen liikkumavara ja kansallisen edun painotus kohtuullisuuden ja suhteellisuuden kustannuksella voi kuitenkin heikentää ihmisoikeuksien suojelun tehokkuutta ja uskottavuutta. Väitän, että tällaista kehitystä voidaan estää kiinnittämällä enemmän huomiota suhteellisuusarviointiin ja ihmisoikeuden ydinalueen suojeluun. Tämän väitöskirjan havainnot viittaavat kansainvälisen suojelun ja solidaarisuuden rapautumiseen silloin, kun on kyse kansallisista eduista. Aiemmin vahvistettu ihmisoikeusstandardi, joka edellyttää perheenyhdistämisen helpottamista niille, jotka eivät voi nauttia perhe-elämästä muualla, on asetettu kyseenalaiseksi. Kehotan periaatteelliseen pragmatismiin, jossa tietyt periaatteet ymmärretään säännöiksi, jotka tunnustetaan kuuluvan ihmisoikeuksien ydinalueelle ja joista ei voi poiketa.

Avainsanat: ihmisoikeudet, ulkomaalaislaki, perheenyhdistäminen, suhteellisuusperiaate, oikeudenmukaisen tasapainon testi, minimalismi, pragmatismi

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ABBREVIATIONS

Art.	Article
CETS	Council of Europe Treaty Series
CJEU	Court of Justice of the European Union
COM	Commission (of the European Union)
EC	European Community
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ed.	editor
e.g.	*exempli gratia* (Latin), for example
et al.	*et alia* (Latin), and others
EU	European Union
FRD	Family Reunification Directive
GC	Grand Chamber
HE	*hallituksen esitys* (Finnish), government proposal (for a law)
SopS	*sopimussarja* (Finnish), treaty series
TFEU	Treaty on the Functioning of the European Union
p.	page
para.	paragraph
PeVL	*perustuslakivaliokunnan lausunto* (Finnish), statement of the Constitutional Law Committee
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
v.	*versus* (Latin), against
vp.	*valtiopäivät* (Finnish), parliamentary assembly

ORIGINAL PUBLICATIONS

Publication I Palander, Jaana: Eurooppaoikeus ja pienipalkkaisten ulkomaalaisten työntekijöiden perheenyhdistäminen: tarkastelussa tulorajan lainmukaisuus ja suhteellisuus. In Sosiaaliturvan rajoilla: Kirjoituksia kansainvälisestä sosiaalioikeudesta. Edited by Kalliomaa-Puha, Laura and Tuovinen, Anna-Kaisa. Kansaneläkelaitos, 2017.

Publication II Palander, Jaana: Lainsäädännön hukattu kotouttamispotentiaali: Perheenyhdistäminen, lainvalmistelu ja arjen turvallisuus. In Arjen turvallisuus ja muuttoliikkeet. Edited by Assmuth, Laura; Haverinen, Ville-Samuli; Prokkola, Eeva-Kaisa; Pöllänen, Pirjo; Rannikko, Anni and Sotkasiira, Tiina. Suomalaisen kirjallisuuden seura, 2021.

Publication III Palander, Jaana: Recognizing Insecurities of Family Members Abroad: Human Rights Balancing in European and Finnish Case Law. In Forced Migration and Separated Families: Everyday Insecurities and Transnational Strategies. Edited by Tiilikainen, Marja; Hiitola, Johanna; Ismail, Abdirashid and Palander, Jaana. IMISCOE Series. Springer, 2023.

Publication IV Palander, Jaana: Family Reunification Restrictions and the Politics of Belonging in Finland. Retfaerd 175(1) 2023.

1 INTRODUCTION

1.1 Setting the Scene: Research Field and Theme

This paper is a thesis synthesis presented in part fulfillment of the requirements for the degree of Doctor in Administrative Sciences at the School of Management, Tampere University. The topic of the research is the role of human rights in migration law and governance, concentrating on the issuing of residence permits based on family ties, in other words, family reunification. This is mainly a legal study in the field of Finnish Public Law and specifically on Asylum and Migration Law, which is a special field of Administrative Law. In addition, this research falls within the field of Human Rights Law, which is a sub-field of Constitutional Law. Although the point of departure is the Finnish legal and political system, in many areas of Public Law, including Asylum and Migration Law, supranational law is of great importance. Therefore, this research also acknowledges the relevant European Human Rights Law and European Union Law.

Asylum and Migration Law as an academic field is fairly new in Finland, although the field of law has existed in administrative and court practice for decades. At the same time the field has been judicialised, meaning that the law regulates the administrative decision-making and the courts are able to assess the legality of the decisions.[1] Indeed, for some decades asylum and migration issues have accounted for some of the greatest numbers of cases brought before the administrative courts and the Supreme Administrative Court.[2] Despite judicialisation, in the sphere of politics, the discussion often fails to recognise legal, and especially human rights preconditions for policy-making, let alone to promote human rights protection. The Finnish government and the Ministry of the Interior are currently planning an overall review of the migration legislation. The initial publication on the legislative project

[1] Aer 2016, p. 28.

[2] Statistics for administrative courts and the Supreme Administrative Court of Finland: https://app.powerbi.com/view?r=eyJrIjoiOGE1NDQxNDgtYjI2Yy00Yzk1LWFmMTUtNjNkNzA4ZDMxYTczIiwidCI6IjdjMTRkZmE0LWMwZmMtNDcyNS05ZjA0LTc2YTQ0M2RlYjA5NSIsImMiOjh9 (visited on 15.7.2023).

suggests that human rights aspects should be better considered both in legislative work and in administrative practice. The publication suggests that the relation between the "overall consideration" and proportionality assessment and human rights obligations should be clarified.[3] My doctoral thesis provides useful material from which to seek answers to these questions in general and in the context of family reunification in particular.

Family reunification is a topic that has attracted a lot of research in various disciplines, including management, administrative, legal and policy studies, which I consider methodologically closest to my research. In Sweden, Ahlén recently conducted an empirical policy study on the management of family reunification. He draws attention to the selectivity and growing conditionality of family reunification policies and distinguishes contrasting perspectives on "what states want".[4] Ahlén finds in his comparative studies that differences between countries in the restrictiveness of their migration policies depend on the institutional design of welfare states. However, he does not include an analysis of legal design, which is an important factor in western welfare countries built on the rule of law. Other research in Sweden on family reunification restrictions has reported serious shortcomings in quality of legislative work, legal balancing and the rule of law.[5] In his conclusions, however, Ahlén does point out the lack of "normative problematization" in political debates and recognises the need for balancing in policy-making.[6] His research demonstrates a need to combine a legal approach with management studies, but also with practical political decision-making. After all, there is ample research on balancing in family reunification decision-making; it is often the focus in legal research, and the specific focus in this thesis.

The restrictions on family reunification have inspired research showing how migrants' well-being and integration in host countries are affected by the challenges of family reunification and the difficulties of the migrants' family members abroad,[7] and how the difficulties can even amount to security threats.[8] The restrictions on family reunification, such as the income requirement, have given rise to criticism of

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[3] Ministry of the Interior 2023.

[4] Ahlén 2022, p. 24.

[5] Stern 2019.

[6] Ahlén 2022, p. 36.

[7] See e.g. Kofman 2004; Van Walsum 2008; Strik et al. 2013; Eggebø 2013. Wray et al. 2015; Bonjour and Kraler 2015; Jesse 2017; Tiilikainen et al. 2016.

[8] Tapaninen 2016, pp. 154–156; Hiitola 2019; Vanhanen 2019, p. 198; Leinonen and Pellander 2020; Tiilikainen et al. 2023.

unequal opportunities between migrant categories to enjoy family unity.[9] Research on the effects to employment and predictions about fulfilling the income requirement have not been encouraging from the viewpoint of the migrant sponsor, especially of sponsors receiving international protection.[10] Researchers have also noted unequal opportunities to organise caregiving within transnational families.[11] Researchers have pointed out arbitrary decision-making and wide discretion in questions such as determining the existence of real family life,[12] as well as controversies over medical methods for proving age or family ties.[13] Most notably, the controversial treatment of children has triggered research and even legal analysis pointing out family reunification decisions undermining the best interests of the child.[14] Legal research has identified human rights problems or at least minimalist human rights protection in regard to family reunification.[15]

For a legal scholar, a natural approach is then to investigate if the practice is in accordance with the law, and especially with legal human rights obligations. My focus is on the right to respect for family life laid down in Article 8 of the European Convention on Human Rights[16] (ECHR, the Convention, SopS 18–19/1990) and its interpretation. However, that is no easy task since the legal principles created in the European Court of Human Rights (ECtHR) are abstract, casuistic and sometimes even controversial. For example, Viljanen has labelled the case law on "the right of aliens to have family life" casuistic, unpredictable, unprincipled and unamenable to application of the necessity test.[17] The basic setting of relevant human rights obligations and balancing in family reunification is clearly explained in textbooks both in Finland and abroad.[18] However, to better understand the logic of balancing, articles providing more detailed and critical analysis have been important literature for my legal analysis. Many researchers, especially outside Finland, have explained

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[9] Hervey 1995; Peers 2004; Könönen 2014, p. 180; Vaittinen and Näre 2014; Hiitola 2019; Pirjatanniemi et al. 2021.

[10] Larsen and Lauritzen 2014; Miettinen et al. 2016.

[11] Askola 2016; Pellander 2016.

[12] Pellander 2016; Halme-Tuomisaari et al. 2019.

[13] Tapaninen and Helen 2013; Tapaninen 2018.

[14] Heiskanen and Knuutila 2014; Sormunen 2017; Saarikoski 2019; Tapaninen et al. 2019; Kuusisto-Arponen 2016; Klaassen et al. 2020; Non-discrimination Ombudsman 2020.

[15] Pirjatanniemi 2014; Halme-Tuomisaari 2016; Pirjatanniemi et al. 2021.

[16] Officially the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention entered into force in 1953, but Finland acceded to it in 1990.

[17] Viljanen 2003, pp. 316–323.

[18] See e.g. Kuosma 2004; Peers 2012; Boeles et al. 2014; Aer 2016; Kallio et al. 2018; Groenendijk and Strik 2022.

the case law and clarified the guiding principles.[19] However, there is still room for new observations. In this thesis, I will analyse the proportionality assessment and balancing test in the migration context in the light of more general theories on proportionality.[20] In addition, I will point out the newest developments in the ECtHR case law and analyse their implications in a wider legal and political context.

In the course of my research, I have noticed that dogmatic human rights law research is not sufficient to correct the wrongs and alleviate the feeling of unfairness stemming from underlying structural inequalities. Some human rights researchers also argue that human rights adjudication, and especially proportionality assessment, are often poor remedies.[21] Therefore, in addition to investigating the structure and principles of human rights reasoning, I have engaged in critical human rights studies questioning the existing structures. This research has been guided by an objective to enhance human rights and well-being in real life, and therefore I have adopted a pragmatic approach with multi- and interdisciplinary methods. For example, the security studies literature and the everyday security approach have greatly influenced my work in two multidisciplinary book projects.[22] In addition, I have engaged in theoretical discussion on the connection between belonging and family reunification, developing further the work of many other political and legal scholars.[23]

1.2 Legal Sources and Principles for Human Rights Protection

Three main elements in the international human rights framework apply to family reunification: protection of family life, equality and rights of the child. The principle of proportionality can be considered to be one of these elements, as Klaassen suggests.[24] These human rights are stipulated in various international law instruments, and also supervised and interpreted by various institutions. In the case of Finland, the most effective international human rights obligations are created by the European Convention on Human Rights and the supervising European Court

[19] See e.g. Storey 1990; Lambert 1999; Thym 2008; Spijkerboer 2009; Klaassen 2015; Dembour 2015; Hilbrink 2017; Wray 2023.

[20] See e.g.Tridimas 1996; Alexy 2002; Barak 2012; Lenaerts 2019.

[21] Roach 2021.

[22] See Tiilikainen et al. 2023 and Assmuth et al. 2021.

[23] Wray 2011; Block 2012; Rytter 2013; Staver 2014; Pellander 2016; Mustasaari 2017.

[24] Inspired by Klaassen (2015, p. 364–378), who lists “elements of the right to family unification” but replaces protection of family life with the principle of proportionality.

of Human Rights. The ECtHR has the power to apply and interpret the Convention (Art. 32 ECHR), and the judgements are binding upon the parties concerned (Art. 46 ECHR). During the years, the ECtHR has clarified and developed the content of the rights, and also of the interpretation principles. This European human rights system has also encountered criticism. For more than ten years observers have been talking about a legitimacy crisis manifesting as a tug of war between judicial activism and restraint.[25] In this dissertation, I will address the dilemma from a contextual viewpoint by analysing ECtHR cases concerning the family reunification of foreigners. After all, immigration control has been one of the most controversial contexts in the legitimacy discussion.[26]

The most relevant provision in the ECHR is Article 8, which protects the right to respect for private and family life. The first paragraph establishes the right and the second paragraph provides the conditions for limitation of the right.

"Article 8 ECHR

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

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

In this dissertation, I will concentrate on the interpretation of Article 8. Therefore, other elements of human rights protection receive less attention. Article 14 ECHR protects equality by prohibiting discrimination, which in family reunification cases is often applied together with Article 8.[27] However, the details of interpretation are different, and their legal analysis is not addressed in this thesis. The element of the rights of the child is integrated in the interpretation of Article 8 ECHR and therefore relevant for this thesis. The ECtHR applies the principle of the best interest of the child stemming from Article 3(1) of the United Nations Convention on the Rights of the Child (SopS 59–60/1991).[28] However, wider investigation of this element is not included in this thesis.

Curiously, the Finnish Constitution (731/1999), which includes a list of basic rights, does not explicitly protect family life. However, it is well-established in

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[25] See e.g. Dahlberg 2015; Heri 2024.

[26] See e.g. Bossuyt 2012.

[27] See e.g. Klaassen 2015, pp. 87–95.

[28] See e.g. Klaassen 2015, pp. 77–81; Sormunen 2021. See also Klaassen et al. 2020.

preliminary works as well as in the legal literature that the right to private life (Section 10) also protects family life, and it must be protected at least to the same extent as the ECHR system requires.[29] European Union law and the Charter of Fundamental Rights (2000/C 364/01, the Charter) Article 7 on respect for private and family life and Article 24 on the rights of the child may also contribute to the interpretation of the Finnish Constitution in family reunification context when applying EU law. According to the Finnish Constitution, constitutional, human rights and EU law obligations are binding on every level of governance (Section 22), and therefore different actors are supposed to assess human rights compliance and apply human rights reasoning. In addition, compliance with human rights obligations is considered a constitutional principle.[30]

To legally protect basic and human rights at national level, it is thus necessary to determine if there are human rights obligations stemming from Article 8 ECHR. Is family reunification a human right? Klaassen in his dissertation aimed at finding out if the right to family reunification exists in the ECHR system. He mentions first that there is no explicit right in the text of Article 8, but it has been interpreted to limit state competences in certain cases and to include an obligation to accept the entry of family members.[31] Others have answered the question quite similarly, namely that Article 8 does not confer a subjective right to family reunification, but that the balancing exercise can lead to a positive obligation to grant admission to a family member.[32] Thym writes that Article 8 confers no direct right to family reunification, but an "indirect one, following from the positive obligations 'inherent in effective respect for family life'".[33] However, according to Friedery, family reunification is more like a principle under the wide umbrella of the right to respect for private and family life.[34] The possible right to family reunification is often interpreted to be limited to settled migrants and refugees,[35] but Staver has also argued that there is an emerging, but fragile, right to family reunification for other forced migrants.[36]

Finnish legal scholars often describe human rights obligation in immigration control in a rather ambiguous manner: first stating that states have the unlimited

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[29] Hallberg et al. 2011, Chapter 6; Nieminen 2013.

[30] Husa and Jyränki 2021.

[31] Klaassen 2015, p. 40.

[32] Groenendijk and Strik 2022, p. 307.

[33] Hailbronner and Arévalo 2016, p. 311. Referring to the ECtHR case Ahmut v. the Netherlands.

[34] Friedery 2018, p. 37. See also Schotel 2012, pp. 12 and 184.

[35] Thym 2014; Council of Europe 2017.

[36] Staver 2008.

sovereign right to control the entry of foreigners, but then admitting that, for example, Articles 3 and 8 of the ECHR do indeed establish some human rights obligations.[37] When asked if family reunification is a human right, some stress that there is no human right to family reunification,[38] and some are hesitant.[39] Legal scholars seem to be concerned about the nature of the right to family reunification or right to respect for family life. Aer describes the right to respect for family life as a legal principle that can in some cases lead to obligations such as allowing family reunification. He emphasises, however, that the right to respect for family life does not include absolute rights, but always operates as a principle that must be balanced against other interests.[40] In this dissertation, I will investigate this dichotomy of rights and principles by carefully assessing to what extent the ECtHR has established obligations and if some aspects can be considered absolute.

According to widely accepted principles theory, a right or a norm can be either a rule or a principle. A rule is applied in an all-or-nothing fashion and a principle in more-or-less fashion. A rule is tested against facts (subsumption) and a principle is balanced with other interests.[41] It is safe to say that human rights are more often principles than rules. Christoffersen demonstrates how the ECtHR is inclined to treat rights as principles and the balancing is omni-present.[42] However, some human rights are absolute rules,[43] and the essence theory argues that every right has a core that is a rule that cannot be balanced.[44] What all the commentators seem to agree on, however, is that the existence of the right thus depends on the result of the fair balance test, which is known to be unclear and inconsistent. Klaassen deems this problematic because the ECtHR has a subsidiary role in supervising human rights compliance, and this would require clear guidance. This makes it "difficult to guarantee the effective protection of Article 8 at the domestic level".[45]

This study is thus concerned with making the fair balance test in the family reunification context clearer and more coherent. General legal principles for interpretation, such as the proportionality principle, can be helpful in this task. Legal

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[37] Aer 2016, pp. 4–6; Kallio 2018, pp. 122–123; Pellonpää et al. 2018, pp. 821–822.

[38] Aer 2016, p. 5; Palander 2018, p. 399.

[39] Halme-Tuomisaari 2016.

[40] Aer 2016, pp. 125–126.

[41] Dworkin 1967; 2002(1977). See also Raz 1972; Alexy 2002.

[42] Christoffersen 2009, p. 206.

[43] At least the non-derogable rules mentioned in the Article 15 ECHR.

[44] Alexy 2002.

[45] Klaassen 2015, p. 97.

principles can be considered as sources of law, although less compelling. The basic law on balancing is perhaps best described by Alexy, who has proposed an ideal proportionality (optimisation) test largely based on the German tradition but widely adopted in European legal systems, both national and supranational. The assessment of proportionality has three elements: 1) suitability, 2) necessity and 3) proportionality in a narrow sense (balancing).[46] The final balancing is supposed to follow the rule: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other".[47] Quite similarly to Alexy, Barak has identified four elements for proportionality assessment: 1) proper purpose, 2) rational connection, 3) necessity and 4) the proportionality in a narrow sense (balancing). He has observed that in some contexts the balancing can be of a special kind, *sui generis*,[48] and controversial when the interests balanced are vertical,[49] as in the public law model. Courts have a challenge to balance incommensurable interests in a way that would not seem arbitrary and *ad hoc*,[50] and every court system creates (or not) their own principles for balancing that accommodate the diversity of contexts. However, when creating those principles, guidance should be derived from the more abstract basic rules of balancing.[51]

A more specific aspect of the proportionality theory is the question of the core or essence of a right. Alexy writes about a "centre of resistance" or "fire wall".[52] He explains that according to the absolute theory, every right has an immutable core, whereas in the relative theory the essential core is what is left over after the balancing test has been carried out.[53] Leijten has developed a core rights perspective for the ECtHR. She focuses on economic and social rights,[54] but her theoretical structures can also be applied in general. Leijten distinguishes four ways of adjudicating human rights that have different approaches to the interpretation of the scope of a right, to

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[46] Alexy 2002.

[47] Alexy 2002, p. 102; 2003a, p. 136.

[48] Barak 2012, p. 213.

[49] Barak 2008, p. 172. Barak explains that vertical balancing is conducted between competing private and public interests. "Vertical balancing does not determine the boundaries of the right that is being infringed; rather, it determines the degree of protection that the legal system affords a given right." Referring to Schauer 1982.

[50] Barak 2008. See also Greer 2010; Endicott 2014.

[51] Barak 2012, pp. 542–545.

[52] Alexy 2003a, p. 140.

[53] Alexy 2002, p. 193.

[54] The right to family reunification can be considered partly a social right. After all, it is also stipulated in the European Social Charter, which is left outside this work.

the idea of a core and to the review of restrictions. For her, the nature of the content of the core and the review needed for finding it (content-review) can be 1) absolute-absolute, 2) absolute-relative, 3) relative-absolute or 4) relative-relative.[55] According to Leijten, the more absolute approach increases clarity and predictability but may be considered a problem from the point of view of separation of powers if the court is considered to be creating new law. In contrast, more relativity means less predictability and more contextualism, when the decisions are made on a case-by-case basis. However, more relativity also means stricter proportionality and reasonableness tests.[56]

The proportionality principle and balancing have been widely adopted in the ECtHR adjudication.[57] Viljanen describes a three-tier limitation test based on the limitation clauses in the Convention.[58] The limitation has to 1) be prescribed by law, 2) have a legitimate aim and 3) be necessary in a democratic society, where the third phase is the actual balancing. Often a fourth step, or actually a first step, is added since first the ECtHR usually determines the scope and nature of the right and whether an infringement has occurred.[59] Many scholars agree that the ECtHR does not follow the ideal proportionality and balancing test.[60] There is a multitude of different versions of balancing in different contexts and it may be pointless to try to arrive at a general balancing test for the ECtHR, yet developing general principles is still desirable.[61] However, this research aims to determine the specific balancing test in the context of family reunification and to analyse it in the light of general theories and the basic balancing test.

Migration control is a context with few international law or human rights obligations,[62] and is thus considered the last bastion of sovereignty, as Dembour describes it.[63] In addition to the above-mentioned human rights protection, some more explicit soft law instruments exist, but states do not take them seriously.[64]

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[55] Leijten 2018, Chapter 7.1.1.

[56] Leijten 2018, p. 206–207. Referring to Liebenberg 2010.

[57] Acknowledged by various scholars, see e.g. Viljanen 2003; Christoffersen 2009; Barak 2012; Leijten 2018. Stoyanova 2023 prefers to use the term reasonableness review.

[58] Such as paragraph 2 of Article 8. Viljanen 2003.

[59] Alexy 2002, p. 196; Viljanen 2003, pp. 174–175; Letsas 2006, pp. 710–711. Barak 2012, p. 19; Leijten 2018, pp. 89–90.

[60] Greer 2004; Christoffersen 2009.

[61] Viljanen 2003, pp. 332–342.

[62] See e.g. Opeskin et al. 2012; Chetail 2019.

[63] Dembour 2015.

[64] See e.g. Friedery 2018.

States cling to their sovereignty; they do not engage easily in new supranational legal obligations in this field. Against this background, the competencies achieved by the European Union (EU) on asylum and migration policy are remarkable. The EU has competence in migration management based on Article 79 of the Treaty on the Functioning of the EU (2012/C 326/01, TFEU) and it has also used it in regard to family unification by legislating the Family Reunification Directive (2003/86/EC, FRD).[65] In addition, the Court of Justice of the EU (CJEU) has confirmed in the case Parliament v. Council that the Directive has to be applied and interpreted in the light of the Charter as well as the minimum standards of the ECHR.[66] EU law and the Charter can in theory provide better protection than the ECHR, but the Strasbourg and Luxembourg courts[67] often tend to harmonise their reasoning through judicial dialogue.[68] In addition, the two European courts seem to operate on a presumption of equivalent protection of human rights.[69]

Despite all this, it is widely accepted that the Family Reunification Directive does establish a subjective right to family reunification, and that the restrictions and balancing it allows must be guided by the notion that the objective of the directive is to promote family reunification, as well as by effectivity and proportionality principles.[70] In addition, the FRD applies to family formation (marriage migration) and the conditions of residence permit cannot be more stringent than minimum conditions for family reunification.[71] However, the FRD has a restricted personal scope of application. If the EU has not legislated on some issue, such as the family reunification of subsidiarily protected people, students or immobile citizens, EU law and the Charter most likely do not apply.[72] EU law has thus the potential to generate a better right to family reunification for those who are covered by it. The FRD has quite similar minimum standards to the ECtHR, but since the rules are written in detail, they are easier to apply and supervise. For this reason, interpretation in the

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[65] There are also other EU directives that regulate on family reunification of some privileged groups.

[66] CJEU, Parliament v. Council, [GC], C-540/03, 27 June 2006. See also Rosas and Armati 2018, p. 191; Groenendijk and Strik 2022, p. 308.

[67] The ECtHR is situated in Strasbourg and the CJEU in Luxembourg.

[68] Morano-Foadi 2015.

[69] Kargopoulos 2014, p. 104.

[70] Groenendijk and Strik 2022, pp. 308–309. Klaassen 2015, p. 149.

[71] CJEU case Chakroun v. Minister van Buitenlandse Zaken, C-578/08, 4 March 2010, paras 53–64. However, the Member State can limit the most favourable treatment of refugees to family reunification (FRD Article 9(2)).

[72] Groenendijk and Strik have presented some arguments in favour of wider personal scope for the Family Reunification Directive based on the coherence of EU law in the area of Asylum law (2022, pp. 311–312).

CJEU is often textual. For example, the CJEU has confirmed a strong right to family reunification for unaccompanied child refugees, and also clarified the rules on assessing the minority of a refugee, but mainly without human rights balancing.[73] Therefore, if concentrating exclusively on human rights standards, EU law is not directly relevant, but there may be indirect influence through judicial dialogue or legislative choices if the EU law develops better protection.

One aim of this research is to determine how the human rights principles and the requirement for balancing are received in the national context of Finland. This is related to accepted sources of law in the Finnish national legal system. Overall assessment of relevant factors, be they legal or "real", is nothing new in administrative or judicial decision-making,[74] but the role of human rights or other supranational obligations in that assessment is a more recent issue.[75] However, the role of human rights in the context of migration control is a less studied topic in Finland. Kuosma was certainly hopeful of the enhanced role of human rights in 2004, when the last overhaul of Finnish immigration law was made and many guiding principles revised.[76] However, a study in 2014 suggested that human rights development has not changed the national law-oriented approach to migration issues in the Finnish Supreme Administrative Court.[77] If the court is hesitant about challenging the law and review its compliance with human rights,[78] it is important that the legislature should properly consider human rights obligations. This aspect is of special interest in this dissertation.

This research evaluates how the human rights obligations are recognised in national legislation, mainly in the Aliens Act (301/2004) and its various provisions that apply to family reunification. There are also separate laws regulating the family reunification of some migration categories, that either relax the requirements for privileged groups or make no difference to the general rules stipulated in the Aliens Act. After all, separate laws must be interpreted in coherence with the Aliens Act, which is the general law in this field. The Aliens Act includes general provisions guiding the decision-making, such as Section 5 on proportionality principle and Section 6 on the best interests of the child. In addition, the Aliens Act includes

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[73] See CJEU cases of A and S v. Staatssecretaris van Veiligheid en Justitie, C-550/16, 12 April 2018; CR, GF and TY v. Landeshauptmann von Wien, C-560/20, 30 January 2024.

[74] Aarnio 1986; Merikoski 1956.

[75] See e.g. Scheinin 1991, Viljanen 2003; Lavapuro et al. 2011, Ojanen 2012 and 2022.

[76] Kuosma 2004.

[77] Pirjatanniemi 2014, p. 971.

[78] However, this aspect is not systematically scrutinised in this dissertation.

provisions (such as Section 66 a) that require overall assessment of certain factors in case of a negative decision, and this is clearly influenced by the balancing requirement from human rights law.[79] Therefore, along with legislature, administrative decision-makers also apply human rights principles, and the administrative courts supervise the practice. It is of no significance to the ECtHR for determining human rights compliance which national institution is the guardian of human rights. However, which institution conducts the balancing may be relevant for the practical and effective protection of the human rights of foreigners.

1.3 Research Questions and Corresponding Publications

The overall research objective is to ascertain what role is played by human rights in asylum and migration law and policy. Focusing on family reunification makes it possible to explore in detail the human rights reasoning used in European supranational courts, especially in the ECtHR. The methodological approach is mainly legal in this dissertation and therefore it is necessary to determine the human rights obligations on family reunification. Since a considerable amount of research has already been presented on this topic, this question is already partly answered above through the existing literature. However, I will analyse further the fair balance test in the light of general theories on proportionality and balancing. I will also add information from more recent court cases while explaining the development of the fair balance test. In Chapter 3, I concentrate on the court cases of the ECtHR and in Chapter 4 on those of the CJEU. This part of the research uses legal doctrinal theory with an empirical touch since legal norms are drawn from court judgements. In this part, the research is original and has not been published in research articles. The research questions for this part are:

- What is the structure and general logic of the fair balance test in family reunification cases in the ECtHR? (Chapter 3.1)
- What is the role of human rights in the migration context in ECtHR practice and how could it be enhanced? (Chapter 3.2)
- What is the structure and general logic of the fair balance test in family reunification cases in the CJEU? (Chapter 4)

The latter part of the synthesis also uses critical legal approaches and draws on social and political studies. Chapter 5 is dedicated to testing and analysing the

[79] National law is dealt with in more detail in Chapter 5.

compliance of Finnish national law with human rights standards, and also to analysing the flaws in human rights protection. The role of human rights within law-making is explored by analysing the quality of human rights impact assessment and by demonstrating the nexus with well-being and integration. In Chapter 6, the Finnish legal system of family reunification is analysed in light of the politics of belonging[80] in order to show the wider impacts on society and to offer an alternative approach to the human rights minimum for the fair treatment of foreigners. In addition to the Finnish context, in Chapter 6, the European human rights standards are critically evaluated and theoretical argumentation developed for better human rights protection. In this latter part, the analysis is based on my previously published research publications. If the focus of the publication has differed somewhat from the research topic of my thesis, in this synthesis, I have concentrated on the role of human rights and the development of human rights protection. The research questions for this part are:

- How is human rights balancing organised in the Finnish legislation on family reunification? (Chapter 5, Publication I)
- How is human rights balancing considered in recent legislative work on family reunification restrictions in Finland? (Chapter 5, Publication II)
- How do human rights standards relate to the politics of belonging in the Finnish family reunification legislation? (Chapter 6, Publication IV)
- How can international human rights standards be developed to provide better protection and respect for family life? (Chapter 6, Publication III)

Although above I have dedicated certain publications to specific chapters, there is some overlap and thus also cross references. The research publications are marked with Roman numbers according to their chronological order of publication. However, I have decided to deal with them in this thesis synthesis in a slightly different order. Two of the four publications were written in Finnish since some of the projects were conducted to serve Finnish academia and decision-makers (Publications I and II). The two other publications were written in English because they are more theoretical and contribute to academic discussions mainly developed outside Finland (Publications III and IV). I decided to write this synthesis in English to be more accessible and attract a wider audience both in Finland and abroad.

Most of the publications for this thesis are deliverables from various projects where family reunification has been a research topic (Publications II, III and IV). Those projects were multidisciplinary, and the publications were influenced by the

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[80] This concept describes the level of belonging that the legal and political structures may reflect. See Publication IV.

empirical research, interviews and observations made by my colleagues or together with them. However, the legal research setting is my own creation and I wrote the publications by myself. I have been fortunate, however, to benefit from comments from more experienced researchers. In this synthesis, when addressing a topic on which I have not previously published, I provide more background information and refer to the relevant literature. In contrast, where I draw mainly on an already published work, I invite the reader to refer to that publication for more information.

1.4 Central Concepts and Focus of the Research

Family reunification is the administrative procedure by which foreigners apply for a residence permit based on family ties to a person already residing in the host country – in this case Finland. Although it is nowadays widely used in administrative language due to influence from international and especially EU law, the specific term family reunification (in Finnish *perheenyhdistäminen*) is rarely used in the Finnish legislation.[81] In international law, the term family reunion is sometimes used, but most often family reunification.[82] Sometimes other writers have used the term family unification as un umbrella term for both types of family reunification, where the family has been created prior to migration, and family formation, where the family is to be created after migration.[83] Family formation is sometimes also referred to as marriage migration.[84] The term family migration is quite similar to family unification, but it may be understood to refer to the even larger phenomenon of migrating with family members.[85] In this study, I have limited my focus mainly to family reunification because the ECtHR seems to have limited the effective human rights protection to families existing prior to migration. This is also reflected in EU law, for example in Article 9(2) FRD on facilitating only the reunification of refugee families.[86]

In this research I use the term sponsor to refer to a person already resident in the host country whose family member is applying for a residence permit. This is the

[81] Only one mention can be found in the Aliens Act Section 114, added when amended in 2016.

[82] Friedery 2018, p. 29.

[83] For example, Klaassen 2015, pp. 16–17.

[84] Kofman 2004; Wray 2011; Eggebø 2013.

[85] Ahlén 2023, p. 16.

[86] However, this issue is far from clear. After all, the ECtHR has acknowledged that the relationship between newly married is family life. See e.g. Klaassen 2015, pp. 41–42.

person whose human rights are mainly protected because the applicant is (usually) not within the jurisdiction of the relevant court.[87] Literally the term sponsor refers to the party paying the expenses, which is slightly misleading. This term is not used in Finnish law either, but rather a term translated literally as family unifier (*perheenkokoaja*).[88] Nevertheless, I have chosen to use the term sponsor because it is widely used in the English academic literature. After all, sponsor is a somewhat relevant term when talking about fulfilling the income requirement.

The position of a sponsor in the family reunification process is central although he or she is not the applicant. The migration or citizenship status is relevant to the conditions and restrictions imposed for family reunification. The sponsor may thus be also a national of the host country. However, this aspect has not been so significant from the point of view of human rights protection and usually the ECtHR cases deal with foreign sponsors. Another reason for focusing on foreign sponsors in this study is that in Finnish law and practice, the conditions are stricter and therefore family reunification is more difficult for their family members. Among foreign sponsors I have focused on other than EU citizens exercising their rights of free movement. EU citizens are more privileged than other foreigners due to the strong EU constitutional protection of free movement. It is important to note that the stronger protection has to some extent spilled over to third country national sponsors in cases where the sponsor is a guardian of an EU citizen. The logic of the reasoning of the CJEU, starting from the Grand Chamber case of Ruiz Zambrano in 2011,[89] has been to secure the enjoyment of EU citizenship rights of members of families of mixed nationalities.[90] Although an interesting aspect, also from the viewpoint of the proportionality assessment, I have decided to exclude this area of law because including the aspect of EU free movement law would expand the dissertation considerably. In addition, and for similar reasons, the effect of the Association Agreement between the EU and Turkey on family reunification is not considered in this dissertation.[91]

The definition of a family member is also of crucial importance for family reunification. The scope of family members accepted for family reunification is stipulated in Finnish immigration law as well as in various EU directives. Finnish law

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[87] Draghici 2017, p. 344.

[88] However, the term sponsor is used in the unofficial translation into English of the Finnish Aliens Act.

[89] CJEU, Ruiz Zambrano v. Office national de l'employ [GC], C-34/09, 8 March 2011.

[90] See e.g. Palander 2018, Chapter 3; Juvonen 2021, Chapter 6.3.3; Peers 2023, Chapter 6.

[91] See Palander 2018, Chapter 3.

limits the concept of a family member to persons belonging to the nuclear family, namely spouse and children. A spouse may also be of the same sex, and unmarried/unregistered but co-habiting partners are accepted for family reunification. Children may also be adopted or foster children, but must be under 18 years old (Aliens Act, Section 37). There are some options for a residence permit based on family ties for other relatives if the sponsor is a Finnish citizen (Section 50) or is enjoying international protection (Section 115). The definition of a family member is slightly wider in the case of EU citizens' free movement (Section 154). The law reflects the established minimum human rights standards. In the ECtHR, the definition of a family member may in principle be limited to the nuclear family according to the cultural values of the receiving society. However, family ties may in exceptional situations of dependence have a wider meaning and include close relatives or, for example, adult children.[92] The scope of family members eligible for family reunification may raise human rights considerations and a substantial body of literature has already accumulated.[93] Therefore, I have decided to focus in this thesis on other aspects of the family reunification adjudication.

Human rights as a concept is multidisciplinary and can be understood in different ways even within legal studies.[94] Approaches to human rights vary along a continuum from idealism to nihilism. My approach is mainly legal positivist, which recognises as law written statutes and their interpretations by authoritative institutions. An idealist approach looms over my research, however, especially when conducting critical legal studies. An idealist approach is strongly guided by ideas of universalism and equality. Although in this thesis I have limited the human rights inquiry to the right to respect for family life (Article 8 ECHR) and not investigated cases on prohibition of discrimination (Article 14 ECHR), the question of equality is often indirectly relevant. As mentioned above, the test that the ECtHR uses to assess state compliance differs between rights. Cases concerning Article 8 and family reunification are ultimately addressed through a fair balance test (*oikeudenmukaisen tasapainon testi*), which can be considered a type of proportionality test. Finnish term for this specific test is not yet well established, being habitually simply referred to as balancing (*punninta*).[95]

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[92] See e.g. Klaassen 2015, pp. 41–42.

[93] See e.g. Pellander 2016; Askola 2016.

[94] Dembour 2010.

[95] See e.g. Aer 2016, pp. 37–40.

The fair balance test in family reunification cases consists broadly of two aspects: individual interests and national interests.[96] It is helpful to imagine a balancing scale where these two types of interest are placed in opposite weighing pans. Interests can be whatever, but some interests carry more legal weight than others. When individual interests touch on the protective scope of a human right, protective elements such as the limitation test[97] and supranational supervision apply. In the case of Article 8 ECHR, acceptable national interests (legitimate aims) are listed in the limitation clause (Paragraph 2): national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals as well as the protection of the rights and freedoms of others. As Hilbrink has demonstrated, the state may have various reasons for restricting and denying family reunification,[98] but the reasons should fall under some of the national interests listed in Paragraph 2. For example, immigration control is often presented as a national interest, which is not one of the explicit legitimate aims but is equated with the prevention of disorder, often also referred to as public order, or with the economic well-being of the country.[99]

Finally, it is important to differentiate between different types of cases within the migration context in the ECtHR. Family reunification is about the admission of new people to the territory of the host state. It is possible to distinguish cases of expulsion and regularisation from cases of admission. Expulsion means removing a (settled) person from the country, regularisation means allowing a person staying without a residence permit to obtain a regular status, whereas admission means allowing a person staying abroad to obtain a residence permit and enter the country. The distinction is based on different national immigration law provisions and on the fact that the ECtHR treats them slightly differently in the balancing assessment.[100] However, the contexts are close and the ECtHR itself sometimes borrows from other contexts when creating more general principles within the same Article 8. Therefore, some expulsion or regularisation cases may be relevant for the analysis. In addition, Klaassen explains that some expulsion or regularisation cases can be

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[96] Often individual interests are referred to as private interests. National interests are also referred to as state or public interests, see e.g. Hilbrink 2017.

[97] Also referred to as a justification test, Klaassen 2015, p. 46.

[98] Hilbrink 2017, Chapter 2.1.3.

[99] Thym 2008; Cornelisse 2010, Chapter 3; Klaassen 2015, pp. 46–47; Hilbrink 2017, Chapter 4.4.3.

[100] Klaassen 2015, Chapters 1.5 and 3.3.4; Council of Europe 2017, p. 16; European Union Agency for Fundamental Rights and Council of Europe 2020, pp. 173–194.

considered "quasi-admission" cases as far as the factual characteristics of the situation are concerned.[101]

1.5 Structure of the Synthesis

The existing research is a starting point for any new research. In this introductory chapter I have thus already presented a literature review of the existing research on family reunification. The focus of this review is on family reunification as a research topic in legal and other related research fields, and especially on how other academics see the question of family reunification as a human right. The purpose of this literature review is also to show what new my thesis contributes to the research. In Chapter 1, I have also explained the main concepts for this thesis. Other concepts are explained later as and when they appear in the synthesis or in the research articles. Then, in Chapter 2, I describe my methodological setting. I start by explaining the philosophical foundations of my research that I feel are best described as pragmatic. Then I explain and justify the various research methods used in this dissertation. Some of the methods are legal and some are multi- or transdisciplinary.

In Chapter 3, I delve more deeply into the topic of human rights balancing in family reunification. I start building my own picture of the balancing by going through the most relevant ECtHR cases and different stages of development of the balancing exercise. Then I explain in my own words how I perceive human rights balancing in family reunification cases, and critically assess the flaws and controversies in the logic and practice of balancing. The criticism concerns the very low level of respect for migrants' human rights. Finally, at the end of Chapter 3, I also argue how I would hope to see the balancing developed in the future legal practice. This same argument I build further in some of the publications included in this thesis, which I discuss later in Chapter 6.

In Chapter 4, I explain how family life is protected in the context of family reunification in EU law. First, I give a general picture of EU competences and objectives on migration law and policy. Then I concentrate on specific questions and controversies related to human rights protection. Secondary EU law, namely the Family Reunification Directive, is central to the concrete protection of family life. In this chapter, too, the focus is on the application of the proportionality principle and the balancing of interests. I investigate relevant cases of the CJEU and detect some

[101] Klaassen 2015, pp. 12–13.

differences in approach to the proportionality assessment. Finally, I analyse the possibilities for better protection of family life in EU law.

Chapter 5 is dedicated to the national sphere and seeks to explain how human rights obligations are considered in Finnish law and practice. This is observed from the perspectives of legislative drafting, application of the law in administrative practice and also in court practice. This chapter thus presents a more traditional legal human rights approach interested in the state compliance with international human rights obligations. Chapter 6.2 also deals with the Finnish legislation, but from an interdisciplinary viewpoint.

Since the current understanding of legal human rights does not provide a tool for improving the situation of migrants, I have moved beyond the legal boundaries and approached the question of respect for family life from a new, more societal perspective. Therefore, in Chapter 6, I address from an extra-legal viewpoint, the question of what constitutes a correct level of respect for family life in family reunification cases. However, my approach is so close to that of legal analysis that it is safe to say I use inter- or transdisciplinary methods in these two studies. In Chapter 6.3 in particular I develop the theory on human rights jurisdiction, thus the approach is legal theoretical. However, the critical approach is inspired by empirical observations of hardship endured by family members abroad made in other research, but also in legal practice.

In the Conclusions, I summarise the key findings of the research and emphasise their wider societal connections. I respond to the research questions and point out some limitations of the research, material and methods. Based on this study it is possible to conclude how human rights protection is structured in European supranational law and in Finnish national law in the context of family reunification. The level of protection is found to be minimal, and this research explains what it means in law and practice. The minimal role of human rights in this context manifests itself differently in supranational and in national law and practice. However, the interplay between different actors is crucial for the future developments of human rights protection. Since my approach is critical human rights research and the aim is to secure effective human rights protection, I also make pragmatic suggestions for better proportionality assessment. The findings point towards the erosion of international protection and solidarity when confronted with national interests. The aim of this study is to provide tools to assess that this tradeoff is based on reasonable grounds and fair treatment of foreigners.

2 DISCIPLINARY, THEORETICAL AND METHODOLOGICAL APPROACHES

2.1 Philosophical Foundation in Pragmatism

Pragmatism is a branch of philosophy that has also influenced legal discipline and legal thought. Pragmatism is a way of dealing with problems or situations focusing on practical approaches and solutions that will work in practice. Therefore, the word pragmatism is often contrasted with the word idealism. Pragmatists have thus not been interested in abstractions and theories, but in concrete human conditions. They have been opposed to formalism and deductive types of reasoning.[102] Pragmatism has affected different movements in law such as Legal Realism, Law and Society, Sociology of Law and Critical Legal Studies. Human rights balancing is inherently a partly legal realistic interpretation. In balancing, in addition to rights, real-life consequences and state interests (the common good) are also considered. Realists take the surrounding societal factors into account, but the difference lies in the preference for individual and community social values.[103]

Pound is thus considered one of the founders of sociological jurisprudence. Pragmatism is mentioned as the background ideology for both sociological jurisprudence and the legal realism that followed later.[104] In his legal thinking, Pound was concerned with the maintenance of equilibrium between the differing interests of individuals. He was interested in the results of law, and in how its application affected people.[105] He stressed practical problems instead of the development of theory, as in the Sociology of Law. His approach emphasised how law affected practical, everyday life. According to Pound, legal rules should be general guides for the judge, and the judge should be given a degree of discretion in determining justice

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[102] Milovanovic 2003, p. 115. Referring to James 1955 and Dewey 1931.

[103] Milovanovic 2003, p. 110.

[104] See e.g. James 1955.

[105] Hunt 1978, p. 20–22.

(fair decision) in individual cases. Pound claimed that interpretation of the law needs information from other disciplines such as sociology.[106]

It is obvious that early writers of the Sociology of Law movement, especially Pound, have had an effect in the development of human rights balancing. In Pound's theory, interests could be individual, social or public. A legal system confers legitimacy on certain of these interests in law. That is, it recognises some and ensures protection in law. Pound considered that the law should ensure the maximum amount of fulfillment of interests in a society, and minimise sacrifices, waste and senseless friction. He introduced interest-balancing, where social interests such as public safety or the public health were balanced against the individual's interests. Curiously, Pound seemed to attach greater importance to the public and social interest (the public good) than to private interests.[107] Law was concerned with balancing interests so as to ensure the overall co-ordination of society toward some desirable end.[108]

Pragmatic, realist and practical approaches have also gained followers in Finland, and the influence on administrative law has been undeniable and well-documented.[109] Legal scholars and judges in Finland have long been concerned with "extra-legal" factors affecting interpretation, especially in cases of legal *lacunae*.[110] Similarly to Pound, earlier academics in Finland seemed to value the public and social interest over individual interests.[111] Only later (from the 1990s on) did basic and human rights obligations emerge and gain legal meaning and more weight in legal balancing.[112] Before that, both in Finland and abroad, human rights arguments were considered "extra-legal" norms belonging to substantive legal reasoning rather than to formal reasoning. By external principles, for example, Weber meant norms outside the state supported body of laws and the procedures used in their enforcement.[113] For Milovanovic in 2003, applying human rights principles in court still meant using creative strategies to incorporate external standards into the formal system. Interestingly, for him, the notion of the rule of law was reserved for the formal rational sphere and applying human rights standards would be against that

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106 Milovanovic 2003, pp. 111–112. Referring to Pound 1907.

107 Hunt 1978, p. 30; Pound 1968, pp. 65–66.

108 Milovanovic 2003, p. 127.

109 Von Wright 1972; Aarnio 1982; Kulla 1999; Aer 2010 and 2018.

110 Lindroos-Hovinheimo 2011.

111 Tolonen 1997, p. 36.

112 See e.g. Heinonen and Lavapuro 2012.

113 Weber 1978, p. 657.

principle.[114] I argue that nowadays, at least in Finland, human rights obligations are considered to be formal legal rules and principles, but that in the interpretation of principles, external and substantive aspects are also taken into account.

In Finland, Pirjola conducted pragmatic human rights research on questions related to international protection and the *non-refoulement* principle (among other topics). To him, the pragmatic approach to human rights is about identifying the gap between abstract human rights norms and their concrete realisation, and looking at the unresolved tension between the juridical world of rights and the political world of their realisation.[115] According to Pirjola, a pragmatic approach is necessarily contextual, understanding human rights "through the subjective sense made of it by actors in that context".[116] In my research, I have tried to be even more practical and contextual, while still remembering to rely on general legal principles when seeking solutions to situations that might promote human rights in bad faith. I understand this as principled pragmatism. Also, Pirjola seems to recognise that balancing is a link between political and legal, and that balancing "can lead to good results".[117]

My approach is pragmatic in various ways. The law and its application and interpretation have pragmatic importance since they shape people's lives and direct their actions. In legalistic societies based on the rule of law, such as Finland, the law and its application determine what people can or cannot do, and how they can live their lives. Law and its implementation can also force people to be or act in a certain manner. I am interested in the pragmatic (instrumental) use of law to advance ethical and moral (human rights) goals and desirable development in society. I focus on court practice since courts have the final word in practical cases on how concepts (fair balance) are defined and how law should be applied. Although the verdicts of an international human rights court may have less pragmatic importance and actual effect on people's lives than the judgements of domestic courts, they do have great potential for influencing the interpretation of human rights standards at the national level.

However, I also consider that the legal statute itself, and the process of enacting a statute, is of great interest to a pragmatist. When a law is clearly written and detailed enough to provide a solution to a practical legal problem, the rights are better protected. The preliminary legislative works (government proposal and parliamentary committee deliberations) often provide guidance and information on

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[114] Milovanovic 2003, p. 63.

[115] Pirjola 2013, pp. 55 and 58.

[116] Pirjola 2013, pp. 56 and 58. Referring to Koskenniemi 2005, p. 616.

[117] Pirjola 2013, p. 56.

societal goals, as well as justifications for restrictions. These justifications also have (or should have) a role in court practice. As already mentioned, in Finland, all public decision-makers as well as the legislature, are required to respect and fulfill human rights obligations. Also, they need practical tools for assessing the human rights compliance of legal acts, administrative decisions and court cases. The human rights court gives guidance and sets an example of how that assessment should be made, and thus what role human rights should have in decision-making. In the migration context, and especially in cases of family reunification, the human rights court uses the fair balance test that includes pragmatic argumentation.

In the political sphere, pragmatism and realism are often connected with nefarious power games over influence and resources. Human rights considerations are often secondary. In international politics, "principled pragmatism" is an EU foreign policy concept that is supposed to bring more realism to international relations, but at the same time respect constitutional principles.[118] It is thus often the political decision-making that is considered inherently pragmatic. However, administrative and even judicial decision-making can also have pragmatic features. Wray concludes her recent analysis stating that the European Court of Human Rights takes a pragmatic approach to assessing family reunification cases, which raises concerns about "transparency and full justification".[119] Therefore, it would be important to develop more principled human rights balancing in the family reunification context.

One approach is to search for pragmatic (effective, immediate) ways to enhance human rights protection. This entails knowing the system well so as to be able to use it to maximum effect. This often also means finding the middle way, accepting the reality, lowering expectations and, for example, abandoning idealistic objectives of free movement or full equality. Wray considers that it is more productive to argue not that immigration control is given too much importance, but that family life is also important. She would not put too much energy into arguing that family reunification be treated as a negative obligation instead of a positive obligation. She would rather emphasise that in the positive obligation case the interests – general interest and the human right – should also *a priori* carry the same weight.[120] However, she also considers that the distinction between positive and negative obligations is

[118] The EU Global Strategy launched in June 2016. See Bremberg 2020; Snyder and Vinjamuri 2012.

[119] Wray 2023, p. 70.

[120] Wray 2023, p. 186.

the mechanism by which the priority awarded to states rather than migrant families is made legally possible.[121]

2.2 Contextualism in Legal Human Rights Studies

Contextualism is a theoretical approach to analyse interpretation methods, but also a research approach that pays attention to particular aspects of the research topic. According to the Law in Context movement, knowing the research topic well and from different aspects, such as theoretical, practical, political, legal and sociological, is key to comprehensive research.[122] Contextualism and specialisation are natural characteristics of law and legal research. From a legal viewpoint, contextualism presupposes that legal principles and legal interpretation can vary between different topics and different fields of law. Therefore, there may be different contexts even within a field of law or under the same human right provision that follow specific principles and interpretation theories.[123] Contextualism inevitably introduces questions on equality from the point of view of general administrative law.

Raitio analyses contextualism in EU law through the Finnish literature. His analysis permits the conclusion that contextualism is observed in different ways and on different levels. On a more general level the context may be cultural, societal, or historical. More specifically, context may refer to the legal system of rules (legal order) that is most relevant to a specific case. As Jääskinen has described it, context is the different spatial and substantive dimensions that rules can have.[124] Raitio claims that in EU law, contextualism is balancing between textual, systemic and teleological interpretations. I consider that interpretation can be contextual, but contextualism is not an interpretation method. Therefore, general legal interpretation theories, such as the proportionality principle, should be valid in every context. They may be assigned different weights or importance in different contexts, but, as Raitio points out, in EU law, teleological interpretation may be assigned greater importance because it is supported by the textual interpretation of primary treaties.[125]

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[121] Wray 2023, p. 13.

[122] See e.g. Twining 1997; Banakar (ed.) 2010.

[123] See e.g. Draghici 2017.

[124] Jääskinen 2008, pp. 145–146 and 151–158.

[125] Raitio 2014, p. 522.

Scholars in Finland have also perceived many problems with over-contextualisation of legal interpretation, for example, departing from general principles and theories such as the hierarchy of norms for the casuistic and tailored decision-making that only opts for *ad hoc* justice.[126] Rautiainen also describes how the ECtHR in some cases uses the particular context as an excuse for not following the previously established general principles. He connects the consensus principle to this development by demonstrating that if in some context no consensus on the level of protection exists, the states have a wider margin of appreciation[127] prohibiting the court to create new standards or even to apply existing standards from other comparable contexts.[128] If Rautiainen connected contextualism with consensus and the margin of appreciation, Pekkarinen does the same with the casuistic approach but also stresses that contextuality has independent value when the ECtHR normatively defines the scope of protected human rights.[129]

Pekkarinen has thus analysed ECtHR practice and written that contextualism seems to mean departing from earlier or simultaneously created principles. She notes that contextualism can also enhance protection rather unexpectedly, thus creating uncertainty. Contextualism can also mean simply taking the special characteristics of a certain context appropriately into account. Pekkarinen argues that contextualism can be understood as a natural part of the court's interpretation methods since topics are indeed different. This does not necessarily imply incoherence.[130]

The context of migration control is different from other administrative contexts and there are also differences between sub-contexts such as asylum, free movement and other types of migration. In my research on family reunification, I consider the admission of foreign family members, which implies specific interpretation principles and even contextual limitations to the scope of the human right.[131] As mentioned above in the introduction, the sub-contexts of admission, expulsion and regularisation are different but sufficiently similar for the court to perceive principles shared between them, but there are also significant differences. The ECtHR deals with expulsion as a case of negative obligations, whereas family reunification is considered as a case of positive obligations. The difference between these two

[126] Raitio 2014, p. 521. Referring to Siltala 2004, pp. 283–286.

[127] Margin of appreciation is a doctrine of a leeway that the ECtHR affords to state interests in balancing and arguably also in other situations. See e.g. Greer 2006; Letsas 2006.

[128] Rautiainen 2014.

[129] Pekkarinen 2018, p. 51.

[130] Pekkarinen 2018.

[131] See e.g. Dembour 2015.

contexts is mainly the status of the applicant as a migrant entering the country, usually for the first time, in contrast to a migrant already staying and enjoying family life in the host country.[132]

For me in this research, contextualism means taking account of the specific features of substantive rules (the substance) and emphasizing them to better understand the structure of the decision and the logic of the argumentation. Although temporal and spatial dimensions of context may have some relevance, in this study, context means first and foremost the thematic legal substance and the area of migration law. This sub-area of administrative law has attracted attention from legal scholars both in Finland and abroad, as seen in research and textbooks. Even the practice of the European Court of Human Rights in the context of migration has been systematically analysed to describe guiding principles in this area, for example, by Çali and others.[133] Such books help scholars and lawyers to understand the specificities of adjudication in this context. However, interestingly, the book also shows how new developments and better human rights protection can also manifest by the court moving from contextual interpretation to follow more general principles.[134]

To a certain extent contextualism is thus natural and rational. However, I also appreciate the coherence of law, which is often secured through general principles of law. Perhaps this is the dilemma between the fox and the hedgehog that Berlin and Dworkin have represented: "the fox knows many things, but the hedgehog knows one big thing".[135] Foxes seem to be minimalists, preferring casuistic problem solving and distrust generalisations, whereas hedgehogs refer to and develop broad rules and abstract theories. As in many difficult questions in law, there needs to be a balance between these two approaches to decision-making.[136] Thus, there needs to be principled pragmatism and balancing, which is the issue on which I focus in this thesis.

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[132] See e.g. Dembour 2015. This issue will be investigated in detail in Chapter 3.

[133] Çali et al. 2021.

[134] Çali et al. 2021, Chapter 4 by Ledi Bianku.

[135] Old Greek fable. See e.g. Berlin 1953; Dworkin 2011.

[136] Sunstein 1999.

2.3 Legal Interdisciplinary Approach and Research Material

A pragmatic approach has guided my research so that I have tried to focus on the real-life consequences of limitations to the applicants and families. The consequences of immigration to society have likewise been of interest. However, I have not considered it feasible to engage in sociological research in this thesis. I have not, for example, conducted interviews with people affected by legal and administrative practice. Therefore, this research is not multidisciplinary but, at the most, interdisciplinary. My research can be considered as a part of the interdisciplinary "law and something" -movement, namely Law and Politics or Law and Sociology. If the sociological element in my research is from the work of colleagues, the analysis of law and politics is my own creation. I consider this approach to entail using both legal and political methods and theories to conduct research. For example, in Publication IV on family reunification law and the politics of belonging, I systematise the legal framework quite traditionally but then analyse the findings from the point of view of a political theory of belonging.

In the Finnish methodological literature, the term Law and Society is preferred to describe studies conducted by lawyers also considering political, social and economic aspects. Law and Sociology (or the Sociology of Law) has been understood as using more sociological disciplinary methods and as being mainly pursued by sociologists. Some discussion has also been presented on the differences between Law and Society and Socio-Legal Studies.[137] Law and Society is considered more empirically inclined, whereas Socio-Legal Studies are more theoretical.[138] My research resembles the Law and Society movement in that I emphasise the effects and consequences of the law and consider political and social aspects in the interpretation of law. However, my research is more theoretical than empirical, thus closer to Socio-legal Studies. I agree with Minkkinen, that more important than labelling is that the research is done properly and that it is effective and yields answers to the societal challenges of our time.[139] Therefore, also in this sense, my approach is pragmatic.

Critical legal scholars have used narratives and storytelling as a method to portray the struggle and injustices that some people face. They use "everyday experiences" to give a voice to oppressed groups. This makes it possible to deconstruct and

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137 See e.g. Feenan (ed.) 2013; Cowan and Wincott (eds.) 2016.

138 Ervasti 2022, pp. 26–27; Minkkinen 2017, p. 915.

139 Minkkinen 2021, p. 101.

reconstruct repressive systems and structural inequalities.[140] Similarly to many realists, critical legal scholars saw law as a tool to advance justice and equality in society (instrumentalism).[141] There are thus many connections between pragmatic approaches, socio-legal studies and critical legal studies. In my research, one of my objectives is to provide tools for legal reasoning that could improve the standing of disadvantaged people by arguing for recognition and more weight in human rights balancing for those "everyday experiences". In addition, I have engaged in the critical study of human rights by assessing the practice of the ECtHR itself through general legal principles such as reasonability, proportionality and coherence.

Above all, my methodological approach is legal human rights research. I have assessed with legal analysis the obligations that the European supranational law creates. The analysis is based on legal texts, court cases and dogmatic interpretation theories. The cases scrutinised are limited to the context of the admission of foreigners and specifically of family reunification. However, I have not conducted a systematic analysis of all possible cases but chosen the most relevant to demonstrate the process and development of balancing. For example, from the ECtHR, I have not included otherwise relevant admission decisions because, at least in theory, they have not received as rigorous deliberation and testing, and are not expected to affect the line of reasoning in the same way as actual judgements. Cases from supranational courts (ECtHR and CJEU) are available online on their internet pages.[142]

Typical human rights study compares standards stemming from human rights case law with national law and practice to determine compliance, which I have done more or less in all my publications. Since some research on compliance with and the role of human rights in court practice already exists, I have concentrated in my publications on the legislative aspect. The material for that study consists mainly of existing legislation on family reunification and relevant preparatory works. This material is publicly available on the internet.[143] I have referred, when available, to some publicly available national court cases on certain specific questions.[144] However, I have not conducted a systematic analysis of compliance with human

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[140] Matsuda 1996.

[141] Milovanovic 2003, pp. 149–150.

[142] ECtHR: https://hudoc.echr.coe.int/eng and CJEU: https://curia.europa.eu/juris/recherche.jsf?language=en.

[143] Legislation: https://www.finlex.fi/en/. Preparatory works: https://www.eduskunta.fi/FI/valtiopaivaasiat/Sivut/default.aspx .

[144] Administrative Courts: https://oikeus.fi/tuomioistuimet/fi/index/ratkaisut/hallinto-oikeuksienratkaisut.html. Supreme Administrative Court: https://www.kho.fi/fi/index/paatokset.html.

rights standards in national court practice but only selected examples of relevant cases to point out some potential problems. I have also had access to some unpublished cases from the Helsinki Administrative Court,[145] which I have referred to in Publication III.

[145] All 221 family reunification cases in 2017 in the Helsinki Administrative Court.

3 BALANCING HUMAN RIGHTS WITH NATIONAL INTERESTS

3.1 Human Rights Case Law on Family Reunification

3.1.1 Establishing Principles

In 1985, the ECtHR passed a judgement in plenary formation, consolidating a competence for the human rights court to rule on immigration issues. In this first admitted court case, namely Abdulaziz, Cabales and Balkandali v. the United Kingdom, the ECtHR stated foundational principles that have been the basis for the development of case law concerning immigration control under Article 8 ECHR.[146] In this case, the Court found a violation based on discrimination in connection with the right to respect for family life (Articles 14+8), but not solely based on the right to respect for family life (Article 8). Nevertheless, the Court acknowledged that states have an obligation to respect the family life of foreigners, and that in some cases this can amount to an obligation to allow family reunification. The Court established some principles that later served as a basis for other family reunification cases, as well as cases in slightly different contexts of expulsion and regularisation.

In the case of Abdulaziz, Cabales and Balkandali the ECtHR stated: "although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life".[147] The court adds, however, that positive obligations are not easy to assess and that the notion of respect in this context is not clear-cut but depends on situations and practices in respondent states. The court also mentions that states have a wide margin of appreciation in such cases. The ECtHR states the default point for the reasoning in the context of migration control: "as a matter of well-established international law and subject to its treaty

[146] There had been admissibility decisions before that naturally influenced this case.

[147] ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 67.

obligations, a State has the right to control the entry of non-nationals into its territory" and that "a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved".[148] This way the ECtHR started with a rather casuistic approach.

In the case of Abdulaziz, Cabales and Balkandali, the ECtHR thus came to the conclusion that there was no lack of respect for family life. It is possible to distinguish three factors that directly influenced this outcome. First, the case was about family formation (marriage migration) and not about reunification of an already existing family left behind. Second, the applicants did not present any obstacles to developing family life elsewhere. Third, there were no elements of arbitrariness in that according to the national law at that time, the spouses could not be expected to be eligible for settlement.[149] No other factors can be drawn from this first case, and it is worth noting that the ECtHR did not mention balancing at all. Besides arbitrariness, the Court seemed to emphasise possible obstacles to enjoying family life elsewhere. This marked the foundations for the so-called elsewhere test, which has been considered important in family reunification cases.[150]

3.1.2 Introducing Balancing

In 1996 the ECtHR delivered a judgement in the case of Gül v. Switzerland, where it was established for the first time that determining state obligations in context of family reunification requires "balancing between the competing interests of the individual and of the community as a whole", a phrase that was borrowed from positive obligation cases in a different context.[151] There was no general agreement among the judges or between the Commission and the ECtHR as to whether the case concerned should be about negative or positive obligations. The court did not take a stance on that issue in the case of Gül but only commented that "the applicable principles are, nonetheless, similar" and that "in both contexts regard must be had to the fair balance".[152] However, in the case of Ahmut v. The Netherlands, also

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[148] ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 67.

[149] ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 68.

[150] Storey 1990; Lambert 1999; Klaassen 2015, pp. 43–45.

[151] ECtHR, Gül v. Switzerland, 19 February 1996, para. 38.

[152] ECtHR, Gül v. Switzerland, 19 February 1996, para. 38.

delivered in 1996, the court clearly stated that at issue was a positive obligation.[153] In both cases the ECtHR stated that the state enjoys a certain margin of appreciation, instead of a wide margin as in the case of Abdulaziz, Cabales and Balkandali.[154]

Although the ECtHR refers to balancing in both cases of Gül and Ahmut,[155] it proceeds in a similar manner as in the case of Abdulaziz, Cabales and Balkandali. If the judges used a proportionality test, the details are not enclosed in the written judgement. The argumentation is mainly based on contrary or analogy arguments via-à-vis the previous case law. The ECtHR states that its tasks are to determine the scope of state obligations based on the facts of the case and to determine to what extent family reunification is the only way for the applicants to develop family life.[156] The outcome in both cases was the same: no violation. Although there was still no robust balancing test, the difference between the wording of the concluding paragraphs in the respective judgements reveals that some kind of move towards balancing had occurred. If in the case of Gül the court was understood to assess the possible interference with rights protected by Article 8,[157] in the case of Ahmut the court acknowledged possible positive obligations and presumably assessed the fair balance between the interests of the state and the individual.[158]

This turn might have been partly influenced by the dissenting opinion of Judge Martens (approved by Judge Russo) in the case of Gül, where he advocated for this type of change in the court's approach. He stated as a starting point that "According to the Court's well established case law, 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'".[159] Judge

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[153] ECtHR, Ahmut v. the Netherlands, 28 November 1996, para. 63.

[154] ECtHR, Gül v. Switzerland, 19 February 1996, para. 38. ECtHR, Ahmut v. the Netherlands, 28 November 1996, para. 63. See also ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 63.

[155] ECtHR, Gül v. Switzerland, 19 February 1996, para. 38. ECtHR, Ahmut v. the Netherlands, 28 November 1996, para. 63.

[156] ECtHR, Gül v. Switzerland, 19 February 1996, paras 38–39; ECtHR, Ahmut v. the Netherlands, 28 November 1996, paras 68–70.

[157] "Having regard to all these considerations, and while acknowledging that the Gül family's situation is very difficult from the human point of view, the Court finds that Switzerland has not failed to fulfil the obligations arising under Article 8 para. 1 (art. 8-1), and there has therefore been no interference in the applicant's family life within the meaning of that Article (art. 8-1)." ECtHR, Gül v. Switzerland, 19 February 1996, para. 43.

[158] "In the circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other." ECtHR, Ahmut v. the Netherlands, 28 November 1996, para. 73.

[159] ECtHR, Gül v. Switzerland, dissenting opinion by Judge Martens, approved by Judge Russo, 19 February 1996, para. 6. Referring to the case ECtHR, McMichael v. the United Kingdom, 24 February 1995.

Martens appeared to be sceptical about an interpretation which, in cases of the expulsion of a foreigner, the obligation to respect family life would be negative and in the cases of the entry of a foreigner the obligation would be positive. However, this is exactly how the case law subsequently developed. As Judge Martens pointed out, this distinction between types of obligation would be insignificant if the limitation test was similar. However, back in 1996 and arguably still today, the fair balance test of a positive obligation is different from the actual limitation test based on Paragraph 2 of Article 8. I agree with Judge Martens when he explains that "in the context of positive obligations, the margin of appreciation might already come into play at the stage of determining the existence of the obligation, whilst in the context of negative obligations it only plays a role, if at all, at the stage of determining whether a breach of the obligation is justified".[160] In the research literature, the cases of Gül and Ahmut have been seen as demonstrating "the maturation of the Court's conception of positive obligations under Article 8", evident in the move from a wide to a certain margin of appreciation.[161]

3.1.3 Developing the Balancing

First in the case of Sen v. the Netherlands in 2001 and later in the case of Tuquabo-Tekle and Others v. the Netherlands in 2006, the court introduces a slightly different approach to balancing: "In this context it is to be borne in mind that the present case concerns not only immigration but also family life and that it involves an alien – Mrs Tuquabo-Tekle – who already had a family which she had left behind in another country until she had achieved settled status in her respective host countries".[162] The case of Tuquabo-Tekle and Others is in many aspects similar to the case of Sen in 2001. In both cases the ECtHR found a violation through balancing. Both cases involved children born and brought up in the host country and therefore, in my understanding, their rights were assessed to carry more weight. In the balancing, the court afforded considerable weight to the ties to the host country of the parents and

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[160] ECtHR, Gül v. Switzerland, dissenting opinion by Judge Martens, approved by Judge Russo, 19 February 1996, para. 8.

[161] Mowbray 2004, p. 175.

[162] ECtHR, Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, para. 44. See also ECtHR, Sen v. the Netherlands, 21 December 2001, para. 37.

especially the children born there.[163] In the overall assessment of various factors, the ECtHR came to the conclusion that there were major impediments to the family's developing family life in the country of origin, and that the host state was "the most adequate place" for family reunion.[164] In the case of Sen, the concurring opinion of Judge Türmen and observations received from the government of Turkey stressed the fundamental importance of family unity for enjoying family life, but the court did not include that thesis in the judgement.[165]

In the case of Konstatinov v. the Netherlands in 2007, the ECtHR stated that it did not, in principle, "consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income". However, in this case, too, the court assessed the reasonableness of this kind of requirement by considering efforts made to comply with the income requirement such as efforts to find work. Other relevant factors included criminal background and precarious immigration status. In addition, the ECtHR in this context, too, considered whether there were any insurmountable obstacles to the enjoyment of the family life at issue outside of the respondent country.[166] In the case of Konstatinov v. the Netherlands, the court found no violation.

In Hasanbasic v. Switzerland in 2013 the ECtHR, in the formation of Grand Chamber, assessed the proportionality of denying the extension of residence permit when the family was living on welfare benefits and the applicant had minor criminal convictions. Due to the previous settled status of the applicant, the case was treated similarly to expulsion cases; the restriction was considered an infringement of negative obligation and the balancing was made in more detail (substantively). For example, the court commented on the proper weight of various factors such as criminal convictions and health problems.[167] The economic well-being of the country was accepted as a legitimate aim,[168] but the ECtHR concluded that there were various factors weighing in favour of the applicant in the balancing, and thus

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[163] ECtHR, Sen v. the Netherlands, 21 December 2001, para. 40. ECtHR, Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, paras 47–48.

[164] ECtHR, Sen v. the Netherlands, 21 December 2001, para. 40; ECtHR, Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, paras 47–48.

[165] ECtHR, Sen v. the Netherlands, 21 December 2001, para. 34 and concurring opinion of Judge Türmen, p. 14.

[166] ECtHR, Konstatinov v. the Netherlands, 26 April 2007, paras 50–52.

[167] ECtHR, Hasanbasic v. Switzerland, 11 June 2013, paras 58 and 64.

[168] Whereas protecting the public order was not. ECtHR, Hasanbasic v. Switzerland, 11 June 2013, para. 58.

found a violation. Curiously, the court described family unity as an essential part of the protection of the right to respect for family life.[169]

Most of the cases of family reunification deal with parties other than sponsors enjoying international protection. Therefore, it has been challenging to formulate principles regarding the fair balance test in the specific context of international protection.[170] In two cases concerning France in 2014, the ECtHR had to decide on the family reunification of sponsors with refugee status.[171] However, the case was not about a residence permit decision but a visa that would allow the family members enter after receiving a residence permit. The court stated, however, "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" and that such applications must be examined promptly, attentively and with particular diligence. Interestingly, the court used the concept "essential right" in describing the significance of family reunification to refugees. The ECtHR stated "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".[172] Unfortunately, principles adopted from these cases were later reduced to mere procedural requirements.[173]

In the Grand Chamber case of Jeunesse v. the Netherlands in 2014, which was about the regularisation of a family member, the ECtHR introduced a new kind of reasoning that has subsequently also proven to be relevant in the context of family reunification. In this case, the default point for the balancing exercise was similar to that in earlier cases, but the court introduced a new notion of cumulative assessment of relevant factors. The ECtHR considered factors relevant to the personal interests of "the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration".[174] An important factor seemed to be the best interests of the child. The court stated that although "alone they cannot be decisive, such interests certainly must be afforded significant

[169] Stating in French: "l'un des aspects fondamentaux". ECtHR, Hasanbasic v. Switzerland, 11 June 2013, para. 61.

[170] See e.g. Council of Europe 2017.

[171] ECtHR, Tanda-Muzinga v. France, 10 July 2014 and ECtHR, Mugenzi v. France, 10 July 2014.

[172] ECtHR, Tanda-Muzinga v. France, 10 July 2014, para. 75.

[173] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 137–139 and especially title d).

[174] ECtHR, Jeunesse v. the Netherlands [GC], 3 October 2014, para. 121.

weight".[175] In the verdict, the ECtHR stated that "fair balance has not been struck between the competing interests involved". The court came to this conclusion by "viewing the relevant factors cumulatively", and thus considering the circumstances of the applicant's case as exceptional.[176] This regularisation case gave hope for a fairer balance through cumulative assessment, also in family reunification cases where the applicants do not have similar burden of justifying or counterbalancing an illegal stay.

3.1.4 Balancing the Right Away

The ECtHR has recently addressed two cases where sponsors receiving temporary or subsidiary protection were denied family reunification after the 2015–2016 situation of the arrival of a large number of asylum seekers from Syria and the Middle East. The first case M.A. v. Denmark in 2021 seemed logical for the outcome and confirmed that in the presence of insurmountable obstacles, the court might find a violation even without factors such as the best interests of the child.[177] However, the reasoning of the court raises some concerns. In this Grand Chamber judgement, the ECtHR stated that there was no case law on the family reunification of temporarily or subsidiarily protected sponsors, and that the earlier principles afforded no clear guidance to contracting parties.[178] However, the court itself also appeared to struggle in formulating those principles. In this case of M.A. v. Denmark, the court listed the factors affecting its deliberation in a new way, listing circumstances where "the Court has been reluctant to find that there was a positive obligation" and circumstances where "the Court has generally been prepared to find that there was a positive obligation".[179] This approach resembles an empirical rather than a legal theoretical method that might have been expected from the ECtHR. Interestingly, the insurmountable obstacles factor (or the absence thereof) was mentioned in both categories, highlighting the importance of this factor.

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[175] ECtHR, Jeunesse v. the Netherlands [GC], 3 October 2014, paras 109 and 118.

[176] ECtHR, Jeunesse v. the Netherlands [GC], 3 October 2014, paras 121–122.

[177] As pointed out by Wray 2023, p. 68.

[178] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 192.

[179] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 134–135.

From a legal theoretical viewpoint, the ECtHR in M.A. v. Denmark reiterated a concept of cumulative assessment of factors in the fair balance test.[180] This notion brings guidance to the proportionality assessment by expecting proper balancing that recognises all the relevant factors cumulatively when assessing the total weight in favour of the applicants.[181] It appears to be a method in determining the most adequate place to enjoy family life, a concept introduced in earlier case law.[182] Although in the judgement the court pointed out important factors and principles, such as the principle of effectiveness,[183] it failed to recognise the importance of the insurmountable obstacles test. The ECtHR even adopted an idea of the "progressive importance of insurmountable obstacles" in the balancing exercise introduced by the Danish government and the Danish Supreme Court, thus diluting the absolute nature of insurmountable obstacles.[184] In fact, the ECtHR starts its reasoning by stating that "there are no absolute rights under Article 8".[185]

Other factors affecting the scope of the margin of appreciation were the degree of consensus between states on the level of respect for family life afforded to sponsors with subsidiary and temporary protection status, and the quality of the parliamentary and judicial review. All this deliberation was made before the ECtHR assessed the fair balance. The court thus deemed it necessary to assess its competence in human rights supervision in this apparently new situation. This, and the fact that the ECtHR afforded the state a wide margin of appreciation, can be considered as sign of a strengthened subsidiary principle.[186] It is also noteworthy that the margin of appreciation came into play at the stage of determining the existence of the obligation rather than at the stage of determining whether a breach of the obligation was justified, as Judge Martens pointed out in 1996.[187] Interestingly, the ECtHR found a violation mainly based on the lack of individualised assessment considering family unity in the fair balance test,[188] which can be identified as a

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[180] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 135.

[181] Introduced to the family reunification context through the case of Jeunesse v. the Netherlands [GC] mentioned above.

[182] ECtHR, Sen v. the Netherlands, 21 December 2001, para. 40; ECtHR, Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, paras 47–48.

[183] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 142, 162 and 193.

[184] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 162, 188 and 193.

[185] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 142.

[186] Subsidiarity principle usually means deference on the part of the ECtHR towards national courts and legislature. See more on various aspects of the subsidiarity principle in Mowbray 2015.

[187] See this synthesis, footnote 159.

[188] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 193.

procedural aspect of the subsidiarity principle.[189] Although the ECtHR in this case of M.A. v. Denmark found a violation of the state's human rights obligations, the deliberation documented in the judgement left unanswered many questions about the effectiveness of the substantive protection of Article 8 in the migration context.

It is noteworthy in the deliberation that the ECtHR justified this new human rights standard based on European Union legislation, namely the Family Reunification Directive, that allows a two-year waiting period (three by derogation) for the family reunification of so-called voluntary migrants.[190] However, the directive does not allow any waiting period for refugees, and it does not apply to subsidiarily or temporarily protected sponsors.[191] However, there is a Temporary Protection Directive that secures family reunification without any mention of a waiting period (Article 15).[192] This directive is now applied to Ukrainians, as well as to foreigners staying permanently or receiving international protection in Ukraine.[193] The ECtHR thus chose to juxtapose subsidiarily and temporarily protected sponsors with voluntary migrants although another interpretation was possible. For example, the Office of the United Nations High Commissioner for Refugees (UNHCR) had argued that no distinction should be made between persons receiving temporary or subsidiary protection and persons with regular refugee status.[194] In addition, the ECtHR overemphasised the meaning of the Family Reunification Directive as a proof of state practice since not many member states have imposed a waiting period.

Therefore, the ECtHR failed to recognise the exceptional nature of the international protection regime that the court itself has been creating when expanding protection beyond political persecution via interpretation of Article 3 ECHR. The court emphasised the absolute nature of the obligations of Article 3 and acknowledged that "the situation of general violence in a country may be so intense as to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his or her presence there." However, the ECtHR used these

[189] Spano 2014, p. 499; Mowbray 2015, p. 340; Vedsted-Hansen 2022, pp. 13–15.

[190] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 46, 156–157, 162 and 193.

[191] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Articles 3 and 12.

[192] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for granting 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.

[193] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Article 2.

[194] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 39–41 and 108–114.

observations only to legitimise the national policy of prioritizing reception and accommodation of asylum seekers on accepting their family reunification.[195] In addition, these observations were made under the title of determining the scope of the margin of appreciation of the contracting state, which was deemed to be wide.[196]

In the case of M.A. v. Denmark the ECtHR chose not to apply and develop the vulnerability argument which the applicant, as well as the UNHCR, invoked in their submissions to the court.[197] In light of earlier case law, the people enjoying international protection could have been considered as a particularly vulnerable group for the same reasons as asylum seekers in the case of M.S.S. v. Belgium and Greece.[198] This can be seen as vulnerability backsliding, where the court omits the link to vulnerability and abandons earlier standards on the vulnerability of asylum seekers.[199] As Thym points out, the right to family reunification for temporarily and subsidiarily protected people, or "civil war refugees", is left to the political arena to decide, human rights do not determine the outcome.[200]

The other recent case concerning sponsors with subsidiary or temporary protection status, M.T. and Others v. Sweden in 2023, unfortunately proved correct the fears of the weakening of protection of respect for family life. In this case, the ECtHR found no violation although it found insurmountable obstacles to enjoying family life in the country of origin (Syria).[201] The Court thus applied the "progressive importance of insurmountable obstacles" test created in the case of M.A. v. Denmark,[202] and attached considerable importance on the state's interest in the economic well-being of the country and the financial burden created by the reception and accommodation of asylum seekers.[203] In the case of M.T. and Others v. Sweden, the ECtHR afforded a wide margin of interpretation to the respondent state.[204] In this case, the Court was satisfied with the individualised assessment provided by Swedish law,[205] although Judge Ktistakis, in his dissenting opinion, did not find that

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[195] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 145.

[196] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 161.

[197] ECtHR, M.A. v. Denmark [GC], 9 July 2021, paras 77 and 112.

[198] ECtHR, M.S.S. v. Belgium and Greece [GC], 21 January 2011, paras 232 and 251.

[199] Hudson 2024.

[200] Thym 2021.

[201] ECtHR, M.T. and Others v. Sweden, 20 October 2022, para. 77.

[202] ECtHR, M.T. and Others v. Sweden, 20 October 2022, para. 58.

[203] ECtHR, M.T. and Others v. Sweden, 20 October 2022, para. 59.

[204] ECtHR, M.T. and Others v. Sweden, 20 October 2022, para. 58.

[205] ECtHR, M.T. and Others v. Sweden, 20 October 2022, paras 83–84.

the individualised assessment had been made in an effective way.[206] It seems that the case of M.T. and Others v. Sweden was a nail in the coffin of preferential treatment for people receiving international protection (other than refugee status) and facing insurmountable obstacles to enjoying family life in their country of origin.

3.2 Contextual Analysis of Interpretation Principles

3.2.1 Testing the Scope of Human Rights

Before addressing the details of balancing, it is necessary to reflect on the reach of the protective ambit of a human right, in other words, on the ambit test and the structure of a right. In human rights case law, along with other admissibility criteria, the ECtHR determines if the circumstances of a case belong to the ambit of a human right (Art. 34 ECHR).[207] If the facts and circumstances do not come within the ambit of the right, the case is not considered to be within the court's competence and falls outside of human rights supervision. Before 1985, when the first family reunification case was admitted to the ECtHR, admissibility decisions seemed to be about the jurisdiction and competence of the Strasbourg court to deal with cases related to admission of foreigners. Playing on words with Letsas, I can say that there was no right to admission.[208] There thus appeared to be a substantive exclusion in the context of immigration – a contextual limitation. This is expressed by the phrase: "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory".[209] That phrase is supposed to reflect state practice which is considered a legal source in international law.[210] However, this exclusion was difficult to reconcile with the obligation of a state to respect the human rights of everyone within its jurisdiction

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[206] Dissenting opinion of Judge Ktistakis in ECtHR, M.T. and Others v. Sweden, 20 October 2022, para. 3.

[207] See Practical Guide on the Admissibility Criteria (visited on 15.7.2023).

[208] Referring to the idea behind the phrase "no human right to adopt" in Letsas 2008. See also Letsas 2013.

[209] ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 67.

[210] Article 38(1) of the Statute of the International Court of Justice states that international law derives from international conventions, international custom and general principles of law.

(Art. 1 ECHR).[211] Therefore, the ECtHR had to recognise some protection for settled or vulnerable migrants. Foreigners were thus considered deserving of human rights protection if they had stayed longer or had obtained settled immigration status in the host country, or if they needed protection because of vulnerable status such as being a child, a disabled person or an asylum seeker.[212]

The Strasbourg court no longer categorically excludes immigration cases, but many observers still consider that there is some kind of contextual limitation that markedly affects the assessment – the Strasbourg reversal described by Dembour.[213] The factor of ties to the country of origin was originally considered an inherent limitation to the right to respect for family life in family reunification cases.[214] Wray has shown that first the insurmountable obstacles criterion was applied as an applicability test, testing if the issue at hand came within the ambit of Article 8.[215] This "elsewhere" approach, doctrine or test was considered to narrow the scope of effective protection for vulnerable migrants facing insurmountable obstacles to enjoying family life elsewhere.[216] Nowadays this "elsewhere test" is often considered a doctrine or a premise of adjudication of the ECtHR in family reunification cases.[217] Technically, it seems to be a factor that is considered when assessing the proportionality of the positive obligation imposed on the respondent state, in other words, when balancing individual and state interests. According to Klaassen, this factor is usually decisive,[218] which has apparently contributed to some observers considering it to be a doctrine. He writes that the Court attaches "nearly absolute" weight to this factor in balancing.[219] All these different observations are accurate and lie at the heart of the problem. However, I will raise one more aspect into this

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[211] The Commission (supervisory body before the ECtHR) already in the case X v. Sweden (30 June 1959) acknowledged that Article 8 applies also in the immigration context, although it did not admit the case for other reasons. See Draghici 2017, p. 341.

[212] See e.g. Çali et al. 2021, Part 1. On vulnerability in legal argumentation, see e.g. Peroni and Timmer 2013.

[213] Dembour 2015, pp. 118–119.

[214] The use as an inherent limitation occurs first in the ECtHR case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, concurring opinion of Judge Bernhardt, para. 1. See Xenos 2012 for inherent limitations in ECHR case law.

[215] Wray 2023, p. 61.

[216] Apparently introduced to the academia by Storey 1990. See also Lambert 1999; Klaassen 2015; Hilbrink 2017; Milios 2018 and Wray 2023.

[217] Klaassen 2015, pp. 43 and 83.

[218] Klaassen 2015, pp. 83–84.

[219] Klaassen 2015, p. 83.

discussion by arguing that the elsewhere test is more than just a factor in the balancing.

Wray has presented an extensive analysis of the use of the "insurmountable obstacles" criterion (elsewhere test), showing that it has not been applied systematically and consistently. Wray concludes her historical analysis by claiming that the existence of insurmountable obstacles is not a precondition for success. However, she also describes its function as "a long stop to ensure that the Court does not destroy the possibility of family life by refusing a claim".[220] To me, this "long stop" appears to be the very essence of the right to respect for family life. Although Wray does not see its significance in the same way as I do, nothing in her observations invalidates my analysis. The fact that the insurmountable obstacles criterion (or the elsewhere test) has previously been used as an applicability criterion merely suggests that in some old cases the ECtHR provided protection only if the circumstances of the case reached the core of the human right. As Wray writes, nowadays it is clear that the Convention protects the family life of migrants also outside the core area, thus the protective ambit of the right has been enlarged. The most recent cases, however, seem to indicate that the core area is compromised.

As Milios has pointed out, commentators in academia seem to be divided into those who only recognise the elsewhere approach and those who favour a "connections approach".[221] For example, Wray clearly advocates for the connections approach when arguing that the ECtHR should attach more weight to the ties to host country.[222] The elsewhere approach is often criticised for being too strict and not taking sufficient account of the interests of settled migrants. Milios also describes how the connections approach can be detrimental to refugees and other sponsors in need of protection, who usually do not yet have strong ties to the host country. I agree with Milios that the juxtaposition of the elsewhere and connections approaches is not necessary. He suggests that the ECtHR should apply both an elsewhere and a connections approach, depending on the circumstances of each case.[223] Indeed, there seems to be a slight misunderstanding among some scholars who consider the elsewhere approach to mean that "the right to entry […] only exists when it cannot be expected of the family to settle in the country of origin".[224] My argument is that the ECtHR should first apply the elsewhere test and then, if no insurmountable

[220] Wray 2023, p. 62.

[221] Milios 2018, p. 418.

[222] Wray 2023, p. 68.

[223] Milios 2018, p. 418.

[224] Klaassen 2015, p. 96.

obstacles are found, apply the fair balance test, where the connections approach would attach proper weight to the ties to the host country.

I also argue that the function of the elsewhere test can be seen as an interplay between the core and the ambit of the law. To me it appears that the elsewhere test determines the core of the right to respect for family life in the case of family reunification. Farzamfar calls a test determining the core of a right an essence test,[225] thus the elsewhere test can be considered an essence test. It is widely accepted that fundamental and human rights should have a core, which cannot be compromised and balanced. Otherwise, the right would be ineffective and meaningless.[226] The protection of the core is even stronger at national level, at least in theory.[227] This core can be considered a right and its periphery, within the ambit (scope), as a principle that can be restricted by other principles and interests. This would mean that there is an elsewhere rule at the core of the human right principle of respect for family life in the context of family reunification. Since in the first cases the elsewhere test was decisive and there was no balancing, it can be interpreted to mean that the ECtHR was securing only the core of the human right. However, balancing was subsequently applied in finding violations, thus now the right to respect for family life clearly has a larger protective ambit around the core. It is here that the balancing and other interpretation principles and tests operate. In Figure 1, I have illustrated the tests and principles of interpretation within the core and the surrounding ambit.

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[225] Farzamfar 2021, p. 80. Also "respect-for-the-essence test" by Lenaerts 2019.

[226] Alexy 2003a; Scheinin 2009; Barak 2012, p. 471; Ojanen 2016; Webber 2017; Van Droogenbroeck and Rizcallah 2019; Lenaerts 2019; Farzamfar 2021, pp. 77 and 204.

[227] Viljanen 2001 (updated in 2011, visited on 15.7.2023), pp. 139–140.

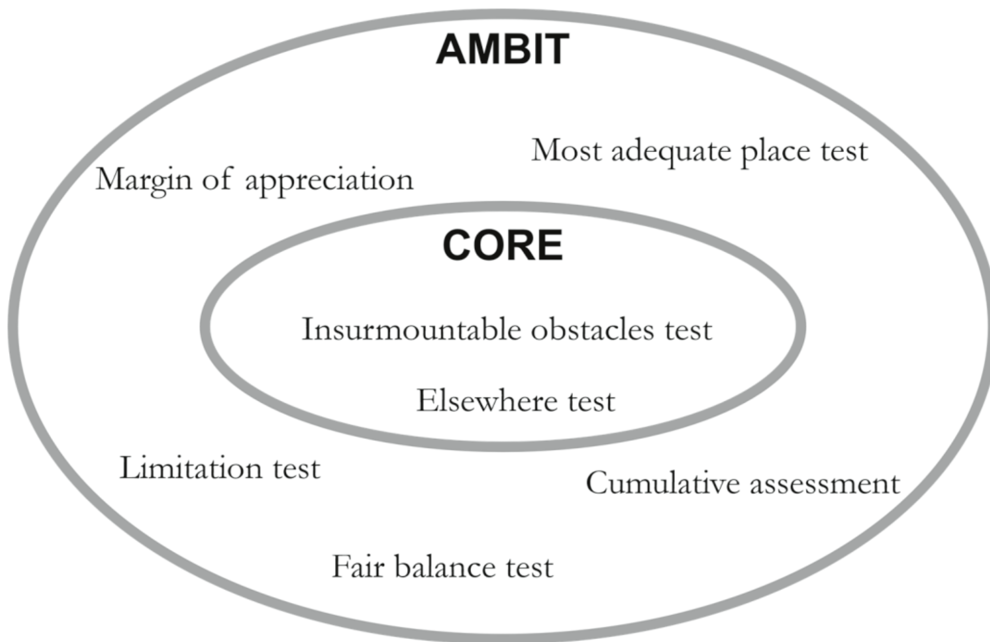

Figure 1. Interpretation principles and tests for determining the core and the surrounding protective ambit of the right to respect for family life in the context of migration.

Outside the core but within the protective ambit, the ECtHR uses various interpretation methods, tests and principles to determine compliance with human rights standards. Many of these tests are variations of a proportionality assessment. The actual borderline for finding a violation, as Brems describes it,[228] lies within this area between the bottom line around the core and the line where the ambit ends. The typical limitation test according to Paragraph 2 in Article 8 has three phases: the restriction has to 1) be prescribed by law, 2) have a legitimate aim and 3) be necessary in a democratic society. The third phase is considered to include a necessity or proportionality test.[229] It also refers to democratic decision-making, which can be considered to anticipate democratic deliberation instead of arbitrary decision-making, but also that the consideration of necessity is to some extent left to the national democratic institution. It is widely accepted in earlier research that the ECtHR more or less follows this typical limitation test in expulsion cases involving interference in the family life of migrants, infringing a negative obligation, whereas in the context of family reunification (admission) the test is slightly different because

[228] Brems 2009.

[229] See e.g. Viljanen 2003. See also this synthesis, p. 23.

the infringement concerns a positive obligation.[230] According to the court itself, although family reunification may be a positive rather than a negative obligation and the court does not refer to the limitation test of paragraph 2 in Article 8, "the applicable principles are, nonetheless, similar".[231]

In the family reunification context, the ECtHR thus talks about a fair balance test instead of a limitation test. As demonstrated above, the fair balance test has been described differently throughout the time the court has applied it in family reunification cases. For a long time, it seemed that nothing in the balance could tilt the scale in favour of individual interests, and that the court was merely conducting an elsewhere test, thus only expecting states to have an obligation to admit family members if they cannot enjoy family life elsewhere. However, the first cases to find a violation confirmed that individual interests may also prevail in the balancing. Those cases referred to the most adequate place to enjoy family life instead of the only place,[232] as is the idea in the elsewhere test. Nevertheless, the balancing has been deemed unfair because only the best interests of a child residing in the respondent state could tip the balance, and no sufficient weight was given to the individual interests of the sponsor or other family members. Only recently has the ECtHR referred to a cumulative assessment of factors with potential for making the balancing fairer by attaching more weight to individual interests.[233] The fair balance test should thus balance interests cumulatively to determine the most adequate place to develop family life.

The ECtHR applies a margin of appreciation doctrine to give a certain leeway or deference to states in determining the importance and weight of some state interests in the balancing exercise.[234] In addition to this substantive aspect, a structural use of the margin of appreciation is identified in the case law.[235] The level of deference towards national decision-makers is expressed through the assignment of a wide, certain or narrow margin of appreciation. In family reunification cases assessed in this synthesis, a wide and a certain margin of appreciation have appeared. Interestingly, although historically the development has been from a wide to a certain margin, in recent cases the margin has been deemed wide. This is further supported

[230] See e.g. Milios 2018.

[231] ECtHR, Gül v. Switzerland, 19 February 1996, para 38.

[232] This new wording was received with high hopes in academia. See Wiesbrock 2010, p. 518; Hailbronner and Arévalo 2016, p. 325.

[233] See also Wray 2023, p. 68.

[234] This is how the margin of appreciation is usually applied in other contexts. See e.g. Arai-Takahashi 2002; Mowbray 2004.

[235] Letsas 2006.

by the strengthening subsidiarity principle recently added to the Convention by Protocol number 15.[236] The subsidiarity principle has been observed to function in many ways and to be evolving over time,[237] which can also be observed in family reunification case law. The family reunification case M.A. v. Denmark is especially important, and is also of greater significance in the development of the subsidiarity principle, since it was one of the first Grand Chamber judgements noting the coming into force of Protocol number 15.[238] In addition, the case has been seen as a direct response to the Danish government to their demand for more margin of appreciation and stronger subsidiarity in the migration context. More deference was granted, but migration issues come under the supervision of the ECtHR.[239]

3.2.2 Observations on the Fair Balance Test

As mentioned above, the ECtHR uses a fair balance test, which is slightly different from the typical limitation test applied under Article 8. The differences in approach can be partly explained by the positive character of the obligation in the context of family reunification,[240] but also by the contextual limitation of immigration issues explained above. Those aspects are also interconnected. As Wray explains, accepting that the obligation is positive instead of negative means accepting the default idea of state sovereign power to control immigration. In her recent research, she has chosen a pragmatic approach to enhance human rights protection without trying to overturn the underlying principles.[241] This research takes a similar approach and therefore it is important to thoroughly comprehend the structure and function of the fair balance test, but also to critically point out how the contextual limitation (the Strasbourg reversal) affects the test. The effects are seen at least in the lenient approach to the

[236] This Protocol was adopted in 2013 but entered into force on 1 August 2021.

[237] See e.g. Mowbray 2015.

[238] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 150.

[239] Gammeltoft-Hansen et al. 2021.

[240] The type of obligation affects the strictness of the court's scrutiny, for example, by determining the width of margin of appreciation. See e.g. Viljanen 2003, pp. 183–184. Mowbray 2004; Xenos 2012; Dahlberg 2015; Lavrysen 2016, p. 214. Stoyanova (2023, p. 14) has written that the state has a wider choice of measures in cases of positive obligation compared to the stricter necessity test connected with negative obligations.

[241] Wray 2023 p. 185.

requirement of a legitimate aim, as well as in the reluctance to attach significant weight to the interests of individuals.

What does it mean to have a certain default point, or starting point, for the balancing exercise? The idea is built on an assumption that the scale is already tilted to the other side at the beginning of balancing. Wray writes that the state sovereignty over the admission and stay of migrants is like a pre-existing norm, or prior legal fact.[242] Some scholars connect the default point for balancing with the discussion of family reunification as a right or a non-right.[243] However, as mentioned in the introduction, family reunification is not a human right *per se* but respect for family life is. Family reunification is the consequence of finding insufficient respect for family life in a restrictive situation of migration control. Therefore, it is more appropriate to concentrate on the respect for family life as a right or a non-right. The default point for balancing can thus be either the state's right to control (sovereignty) or the individual's right to respect for family life – or a true balance between these.

It is important to remember that the idea of the legalisation of human rights has been to give certain moral values more legal weight. Greer takes the view that the ECtHR is committed to the "priority to rights" approach, which, however, does not imply that Convention rights are inherently more important than public interests. He considers that "in weighing rights and public interests, the fulcrum should be comprehensively set closer to the public interest than rights so that a stronger leverage is required from considerations of the collective good in order to tilt the scales".[244] The question is, are the individual interests of migrants given this extra weight through human rights protection? This priority to rights approach would mean that migrants and citizens with foreign family members would by default have a right to family life and family unity, which could then be allowed to be restricted applying the limitation test described in Article 8-2. This does not seem to be happening in practice, however.

Analysis of the case law on family reunification reveals that only one factor representing individual interests has gained decisive weight and led to a judgement condemning a state of violation of human rights obligations. This is the best interests of the child in the cases of Sen and Tuquabo-Tekle, where the ECtHR found that the children's interests had been seriously neglected in the decision-making.[245] At the

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[242] Wray 2023, pp. 70 and 72.

[243] Wray 2023, pp. 72–73. See also Dembour 2015, p. 122; Klaassen 2015, pp. 40 and 43.

[244] Greer 2006, p. 227.

[245] ECtHR, Sen v. the Netherlands, 21 December 2001; Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005.

time when these judgements were given, there was hope among scholars of fairer balancing and more weight being given to individual interests, but that hope was later discouraged.[246] Scholars in Finland, too, have argued for more weight being given to the interests of the children in migration control, at the same time pointing out the difference in the importance of the best interests of the child between administrative contexts.[247] By no means are the child's best interests given paramount importance in the context of migration control.[248] It is also good to note that in both the ground-breaking cases referred to, the children had strong ties to the host country; they had been born in the host country. Migrants' children residing abroad and requesting reunification have not received similar attention.

During the years and in different cases, the ECtHR has introduced various factors to be considered in the balancing exercise. The factors can be taken as a procedural requirement expecting the decision-maker to consider them. The fact that the CJEU has indicated more factors related to individual interests to be considered in the fair balance test, as will be demonstrated in the following Chapter 4, may be a sign of better rights protection, especially if they are cumulatively assessed as indicated by other case law. However, the weight given to each factor is more relevant than the total number of factors. Some factors, such as vulnerability, also overlap with others. Vulnerability can function as a magnifying factor in the balancing, emphasising the disadvantages position, which is supposed to further substantive equality.[249] The ECtHR has perhaps provided the most comprehensive lists relevant factors in the cases of Rodrigues da Silva and Hoogkamer v. the Netherlands in 2006 and Jeunesse v. the Netherlands in 2014.[250] Although those cases were about regularisation by family reunification, they have also been referred to in family reunification cases. According to the analysis of the case law, the factors to be considered in the balancing are at least:

- family ties and dependence,
- ties to the host country,
- ties to the country of origin,
- insurmountable obstacles for living in the country of origin,

246 See e.g. Spijkerboer 2009.

247 Sormunen 2017; Hakalehto and Sovela 2018.

248 As explained e.g. by Wray 2023. See ECtHR the case of Jeunesse v. the Netherlands [GC], 3 October 2014.

249 Peroni and Timmer 2013, p. 1080.

250 ECtHR, Rodrigues da Silva and Hoogkamer v. the Netherlands, 31 January 2006, para. 39. Jeunesse v. the Netherlands [GC], 3 October 2014, para. 107.

- factors of immigration control,
- considerations of public order,
- precarious immigration status,
- vulnerable status and
- best interests of the child.

Wray has observed that in general the situation and interests of the sponsor are not afforded much weight.[251] This is an interesting and also a surprising observation since it is indeed the sponsor whose human rights are in essence under scrutiny. I show in Publication III of this dissertation how in the light of general international law principles it could be difficult to give significant weight to the interests of family members abroad. However, the interests and hardships of the resident sponsor should be recognised and given considerable weight if individual interests to be given human rights protection. The connections approach mentioned above suggests that individual interests and ties to the host country should be given more weight. Or at least the weight of different factors should be determined more clearly.[252] What obviously happens in the balancing in this context is that the state interests and the incontestable need to control migration outweigh the interests of the sponsor and others involved.

It appears from the case law that the ties to the host country are related to the weight given to individual interests. Settled status of a sponsor has served as a justification for stronger human rights protection, or in the past, to any protection. Ties to the host country are often reflected through the length of (legal) stay and the type of residence permit; permanent residence implies stronger rights whereas temporary residence constitutes a weaker obligation to respect human rights. Therefore, it is surprising that sponsors who are nationals of the host country often face similar challenges to family reunification.[253] The contextual limitation of migration control thus also affects citizen sponsors. It is somewhat surprising that in regularisation cases people staying irregularly have been granted protection of family life.[254] In addition, there is a different dilemma with the international protection category. People enjoying international protection do not usually have ties to the host country, but an undeniable interest in family reunification. International protection has, at least implicitly, been an exceptional category with enhanced rights

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[251] Wray 2023, pp. 62–63.

[252] Draghici 2017, p. 363. The Court lists new factors but does not indicate their weight.

[253] ECtHR, Biao v. Denmark [GC], 24 May 2016; See Palander 2016.

[254] Thym 2008.

protection justified by vulnerability.[255] Until recently, the insurmountable obstacles criterion and the elsewhere test have worked in favour of people needing protection.[256]

I argue that in addition to paying more attention to the legal value of the interests of individuals, the legitimacy of state interests also needs to be more carefully scrutinised. In a typical limitation test, for a restriction to be in conformity with the Article 8-2 ECHR, the national measure needs to have a legitimate aim.[257] However, in positive obligation cases the scrutiny is not so strict. Draghici has observed a difference in having a strict scrutiny of legitimacy of the aim "public order" in expulsion cases when the applicant has committed crimes, versus a more lenient scrutiny of the aim "prevention of disorder" in admission cases where the applicant has not committed crimes but only wants to challenge the restrictive legislation.[258] In the context of family reunification, the ECtHR has been so lenient on this requirement that Milios considers that any aim could be accepted.[259] Thym points out that the ECtHR does not really assess the legitimacy of the aim and is ready to accept quite flexible interpretations of the aims enumerated in Article 8-2. However, he adds that the court has not accepted the sole objective of limiting the number of foreigners in society but required even a loose connection with the aims of Article 8-2, which has not been a difficult task for national governments.[260] In court practice, the most common reason for restrictions on family reunification has been the economic well-being of the country. The ECtHR has also accepted that immigration control which serves the general interests of the economic well-being of the country pursues a legitimate aim.[261] Recent cases also show that the ECtHR has accepted the (temporary) limitation of the number of family migrants in an exceptional situation which is a burden on national finances.[262]

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[255] See e.g. Council of Europe 2017.

[256] See also Milios 2018.

[257] The reason for the restriction needs to fall within one of the aims enumerated in Paragraph 2 of Article 8, which are: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

[258] Draghici 2017, p. 357.

[259] Milios 2018, p. 417.

[260] Thym 2008.

[261] See e.g. ECtHR, Osman v. Denmark, 14 June 2011, para. 58; ECtHR, Biao v. Denmark [GC], 24 May 2016, para. 117.

[262] ECtHR, M.A. v. Denmark [GC], 9 July 2021 and ECtHR, M.T. and Others v. Sweden, 20 October 2022.

To remedy the problems in the balancing to make it fairer to the migrant, academics have suggested, for example, reversing the default point, abandoning the elsewhere test, using the limitation test similar to that used in expulsion cases and adjusting the balancing by giving more weight to individual interests.[263] Draghici has put forward an interesting argument that the elsewhere test should be applied only when there are compelling reasons for denying family reunification, such as in the case of criminal behaviour.[264] The most pragmatic approach is to develop the balancing by arguing for more weight to individual interests or by demanding better justification for the weight given to the public interest. Hilbrink has also criticised the unquestioned weight given to the generic interest of states to control or restrict migration in the balancing exercise.[265] She claims that it runs contrary to general theories on proportionality and balancing. "A judicial opinion that is based on the categorical rejection or prioritisation of a particular interest, cannot be qualified as being based on a balancing exercise".[266] According to Hilbrink, such reasoning can rather be qualified as subsumption than balancing.[267]

In another context, Leijten argues that although the aim is for the government to determine and is democratically agreed upon, the ECtHR should take a close look at the suitability and necessity of the infringement.[268] Taking guidance from a more general legal theory on proportionality, according to Barak, an ideal proportionality test includes proper purpose, rational connection and necessity components when assessing the justifications for restrictions, or the legitimacy of the aim in the ECtHR context. Barak concedes that the appropriateness of the purpose (aim stated) is not difficult to justify, but some criteria should still apply. Rational connection requires that the means selected by the legislator must fit the purpose. Barak writes that there is no need to prove certainty, but still more than a minimal probability that the purposes will be fulfilled. According to him, the necessity component requires the legislator to select from all the means available the one that least limits the constitutional right. In addition, in the actual balancing exercise, the relation between the probability and urgency of fulfilling the legislative purpose and the probability

[263] Klaassen 2015, p. 81; Draghici 2017, pp. 388–389. Arguments for similar proportionality assessment in case of negative and positive obligations can also be found in the more general theoretical literature, see e.g. Barak 2012; Pitkänen 2012. Different views also exist, see e.g. Wibye 2022.

[264] "Situations where the non-national poses a threat to the community." Draghici 2017, p. 388.

[265] Hilbrink 2017, pp. 324–332.

[266] Hilbrink 2017, p. 158. Referring to Aleinikoff 1987, p. 946.

[267] Hilbrink 2017, p. 158. Referring to Alexy 2003b, p. 434.

[268] Leijten 2018, pp. 227–228.

and degree of harm to the enjoyment of the constitutional right is important.[269] Klaassen suggests that using the proportionality test based on Article 8-2 applied in expulsion cases in the admission cases, too, would "force both parties in each case to motivate how the measure of refusal of entry relates to the legitimate aim pursued".[270]

3.2.3 Minimalism and Limitation of the Core of a Human Right

Human rights minimalism can be understood in different ways. In Finland, in the past, the approach of the Supreme Administrative Court has been described as minimalistic because it is not prepared to promote human rights beyond the minimum level protected by the institutions of international supervision, referring mainly to the ECtHR.[271] For this kind of minimalistic approach to be truly in compliance with international obligations, solid knowledge of ECtHR standards is essential. Therefore, in this chapter, the focus is on ECtHR practice and European human rights standards. The questions are: what are the minimum obligations and are human rights standards minimalistic in an immigration context? Discussion on minimum core rights and human rights minimalism often deals with the number and nature of human rights, making value judgements between different human rights and trying to narrow down the list of rights.[272] In this thesis, I am rather concerned with the scope of established human rights. Minimalism can be understood as securing only the core obligations or the essence of a human right.

Simpson explains minimalism and different approaches to the scope of human rights in a recent article.[273] Minimalists often understand human rights as not aiming to ensure a good life, but rather only a minimally decent life,[274] the fundamental conditions of a good life,[275] or of any life at all (bodily security).[276] Rather than a flourishing life, for some minimalists, human rights only aim to guarantee "the more

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[269] Barak 2012, pp. 422–433.

[270] Klaassen 2015, p. 83.

[271] In general, Ojanen 2011, p. 447; in the context of immigration control, Pirjatanniemi 2014, p. 43.

[272] See e.g. Cassese 2012.

[273] Simpson 2021. All the references presented in this paragraph are discovered through his work.

[274] Nickel 1987, pp. 36–37; Miller 2007.

[275] Liao 2015, pp. 39–73.

[276] Ignatieff 2003, p. 56.

austere life of a normative agent".[277] Others claim that human rights should only secure needs, rather than preferences.[278] Cohen argues that human rights protection could be something more than just protecting against bodily harm: it could ensure an "adequate standard of living". Although Cohen seems to be writing about an appropriate set of human rights instead of the structure of a human right, his thoughts on membership and inclusion as justification for more rights appear relevant in the context of immigration.[279] Simpson summarises his inquiry by writing that for minimalism, human rights seek to enable a merely decent or tolerable human existence.[280]

Some scholars have tried to determine the core in a more legal theoretical way. Tasioulas points out the difference between minimum core rights or obligations and other rights in the context of economic and social rights, taking examples such as alleviation of hunger. According to him, one characteristic for a core right or obligation is its special value which can be justified by "human dignity or basic needs required for survival". Other specifications of a core right or obligation that Tasioulas has stated are immediacy, inderogability and justiciability, although I consider them more as consequences of rather than preconditions for a core right or obligation.[281] Interestingly, he emphasises that core rights or obligations must be realised "here and now", thus the immediacy specification mentioned above.[282] Tasioulas concentrates on the temporal aspect – now or later – of human rights obligations. In a migration context, however, the spatial dimension – here or elsewhere – is even more relevant.

I have argued above that the human right to respect for family life has a core in the immigration context that obliges states to allow family reunification in the presence of insurmountable obstacles to enjoying family life in the country of origin or elsewhere (hence the elsewhere rule). Reflected against the minimum core doctrine described by Tasioulas, the elsewhere rule as a possible core obligation could be justified by the special value argument. Living apart from the core family may not be life threatening, but especially when the separation is forced, it can be disturbing or even devastating for the individual, undermining equal dignity and

[277] Griffin 2008, p. 53.

[278] See Miller 2007; 2012.

[279] Cohen 2004, pp. 197 and 210.

[280] Simpson 2021, p. 7.

[281] Tasioulas 2017, p. 10.

[282] As a counter argument to the doctrine of progressive realisation of economic and social rights. Tasioulas 2017, pp. 2 and 10.

moral integrity. Immediacy, inderogability and justiciability can find some support in ECtHR case law, but a lack of clear principles and the recent turn in the assessment of insurmountable obstacles cast a shadow over inderogability. However, in my opinion, the characterisation of a core right or obligation should also involve consideration of effectiveness. The effectiveness principle in human rights law requires that a human right should not be rendered empty and meaningless.[283] It should be able to afford protection in situations where the person would otherwise be deprived of any enjoyment of that right. The purpose is also to avoid a *lacuna* in human rights protection.[284] In this way the aspect of "here" in Tasioulas' idea of core rights or obligations "here and now" assumes greater importance.

My argument that the elsewhere rule is the core of the human right in this context, entails various legal debates related to the interpretation and limitation of rights. According to well-established legal theories, both in Finland and at supranational level, restricting the core of a fundamental or human right should be difficult or even prohibited.[285] Lenaerts explains how in EU law the Court of Justice of the EU has been quite clear on the inalienable core of certain fundamental rights, which does not allow states proportionality assessment, balancing or margin of appreciation.[286] He emphasises that the "respect-for-the-essence test" and a proportionality assessment are two different types of inquiry.[287] Lenaerts writes that the obligation to respect the essence of a right can be found in the case law of the European Court of Human Rights, although he also acknowledges that the doctrine has not been as clear in ECtHR practice.[288]

ECtHR Judge Pinto de Albuquerque has quite recently dealt with this theory in his concurring opinion in the case of Muhammad and Muhammad v. Romania in 2020.[289] Along with some other judges, he is concerned about the inability of the majority of judges to clearly define the essence of the human right in question and

[283] See e.g. Rietiker 2010; Serghides 2022.

[284] Gammeltoft-Hansen 2011.

[285] Alexy 2003a; Scheinin 2009; Barak 2012, p. 471; Ojanen 2016; Webber 2017; Van Droogenbroeck and Rizcallah 2019; Lenaerts 2019; Farzamfar 2021, pp. 77 and 204.

[286] Lenaerts 2019, p. 788.

[287] Lenaerts 2019, p. 781.

[288] Lenaerts 2019, pp. 780 and 788. ECtHR case law starting from the judgment of "Belgian Linguistic Case", Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, 23 July 1968.

[289] The case is about procedural safeguards (Protocol 7 Article 1 and Article 6 ECHR) in the expulsion trial of two foreign students who were claimed to pose a threat to national security. The Concurring opinion of Judge Pinto de Albuquerque (joined by Judge Elósegui) in ECtHR, Muhammad and Muhammad v. Romania [GC], 15 October 2020.

to distinguish the examination of that essence from the proportionality test. Judge Pinto de Albuquerque goes to considerable lengths in explaining the different approaches in the court's case law. He sees a utilitarian approach allowing limitations to the protection of the core, and an essentialist approach where the core of the right is given a more absolute character. Judge Pinto de Albuquerque regrets how the ECtHR introduces a possibility to "counterbalance" limitations against the minimum procedural safeguards clearly stated in the Article 1 of Protocol number 7. Although, in this case, a violation was found, Judge Pinto de Albuquerque feels that it "leaves the door open to the discretionary mix, that is to say, sheer manipulation of the 'counterbalancing factors'".[290]

I argue that this kind of manipulation conflating the essence test and proportionality test, or ignoring the essence test, has recently occurred in the context of family reunification. The ECtHR has recently dealt with two cases related to sponsors enjoying subsidiary or temporary protection: the above-mentioned M.A. v. Denmark in 2021 and M.T. and Others v. Sweden in 2023. In both cases the ECtHR found insurmountable obstacles (elsewhere test), but that did not stop the court from balancing, or requiring balancing at the national level. The ECtHR justified the encroachment of the proportionality on the essence of the right by a new notion of "progressive importance of insurmountable obstacles", which allowed temporal limitations to the enjoyment of the essence of family life. This development in the case law can be interpreted to mean that the court has either narrowed the scope of the protected core area of the right or allowed balancing and a margin of appreciation also in the core area.

Another problem with theories in the above-mentioned cases, especially with M.A. v. Denmark, is that the ECtHR seemed to assess its competences, admissibility and the scope of the right to respect for family life before balancing, allowing a wide margin of appreciation and considered national interests already at that point. In addition to being confusing, the reasoning is problematic in the light of general theories of proportionality and balancing. Barak has written that "the clash between conflicting interests or values should not be expressed in the scope of the right, but rather in the manner the right is exercised and realised, and it is in this domain that proportionality plays a central role".[291] It seems that in addition to the substantive and procedural margin of appreciation, there is also one for assessing the competences of the ECtHR and the scope of the Convention. In the case of M.A.

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[290] Concurring opinion of Judge Pinto de Albuquerque (joined by Judge Elósegui) in ECtHR, Muhammad and Muhammad v. Romania [GC], 15 October 2020, para. 35.

[291] Barak 2010, p. 5.

v. Denmark, the ECtHR was careful not to impose new obligations on states, which can be seen as an effect of the strengthened subsidiarity principle.

What could allow, in a legal sense, a restriction in the core area of a right? In the case of M.A. v. Denmark, the ECtHR justified it with the exceptional circumstances following a large number of asylum seekers. However, the ECHR system has a specific process for derogating from human rights obligations in time of emergency. Article 15 of the Convention allows derogation from obligations under Article 8 "in time of war or other public emergency threatening the life of the nation". However, interpretation of Article 15 also involves a proportionality assessment, and it has been argued that "judicial scrutiny in derogation cases should be even heavier".[292] If a state wants to invoke this possibility of derogation, it has to inform the Secretary General of the Council of Europe of the measures and the reasons (Art. 15-3). This was not the case in M.A. v. Denmark nor in M.T and Others v. Sweden. Another justification for restricting the core area is that the balancing also reaches there, and that in exceptional circumstances and when very weighty national interests are at stake, individual interests must yield. However, the legitimate aim put forward in these cases was not even national security but economic interests, which questions the justification of limiting the core area. In the political sense, however, the justification is often sought by referring to security concerns and using human rights restrictions as deterrents. Relying on security argumentation when the real aim is to protect economic interests can be called securitisation.[293]

From a legal theoretical viewpoint, this balancing in the previously considered core area can be interpreted as suggesting that the ECtHR takes a relativist and utilitarian approach to determining the essence of the right. This interpretation suggests that there is no separate essence test but only a fair balance test and the core area is not predetermined but consists of what is left after balancing state interests against individual interests.[294] This is in line with the findings of Christoffersen, who seems to be of the opinion that the ECtHR does not follow the absolute theory.[295] According to him, the doctrine of the protection of the very essence of rights is usually indistinguishable from the ordinary fair balance test.[296] However, he shows that in some contexts extraordinary limitations have been allowed, whereas in

[292] Letsas 2006, p. 730.

[293] On securitisation, deterrence policies and rights see e.g. Sasse 2005; Dauvergne 2007; Gammeltoft-Hansen and Tan 2017 and 2021; Palander and Pellander 2019; Farzamfar 2021.

[294] As described by Alexy 2002, p. 193 and Webber 2016, p. 82.

[295] Christoffersen 2009, p. 145.

[296] Christoffersen 2009, p. 163.

another context it would have been considered an unacceptable limitation of the very essence of the right.[297]

Tasioulas also connects interest balancing to the deliberation of minimum core rights and argues that the practical possibilities for realizing the right and the burden states bear should be considered. He writes: "And an obligation, which is the content of a right, will only exist if it is feasible, which is in turn a matter of it being possible to comply with and not unduly burdensome."[298] He is even more pragmatic that I am when he considers that an obligation has a natural limit in feasibility. In contrast, I consider that a state is violating human rights obligations if it cannot secure the minimum core of a human right. There is also a significant difference between what a state cannot do and what it will not do, which is considered political feasibility.[299]

If only protecting the essential core of the right is minimalism, it is fair to say that the level of human rights protection in the ECtHR is minimalistic in the context of family reunification which deals with the admission of foreigners. The ECtHR has reiterated in every case the significance of the elsewhere doctrine and in most case has found no insurmountable obstacles to enjoying family life elsewhere and therefore no violation. The fair balance test has not provided much additional human rights protection, and therefore the borderline for finding a violation has been close to the bottom line.[300] However, there are a couple of cases where the ECtHR has provided a glimpse of fairer balancing, found a violation, and thus shown that there can be protection beyond the minimum core. Unfortunately, the recent practice of detecting insurmountable obstacles but not finding a violation can be interpreted as limiting the core of the right and thus labelled ultra-minimalism.[301] Human rights minimalism means a narrower scope and weaker protection, but it can also mean better predictability. The indeterminacy of the scope of protection outside the core area is considered problematic and therefore a minimalist system is seen as practically determinate, feasible and politically viable.[302] However, balancing the core area also brings indeterminacy to the minimalistic, or rather, the ultra-minimalistic approach.

A striking detail in the recent cases concerning the waiting time, as well as in some other cases before, has been that the proportionality is assessed only observing the consequences to the applicants in this individual case. The court considers the actual

[297] Christoffersen 2009, p. 149.

[298] Tasioulas 2017, p. 22. On feasibility, see Reinhardt 2014.

[299] Simpson 2021, p. 8. Referring to Posner 2014, p. 137.

[300] As Brems 2009 describes the minimum perspective.

[301] Nickel 1987; Ignatieff 2003.

[302] Simpson 2021, pp. 13–18.

waiting time endured by the applicants and not the time that the law might allow if strictly applied.[303] Although most of the cases in the ECtHR concerning family reunification deal with case-by-case (*in casu*) individual proportionality assessment, the court potentially has an option to engage in a more abstract assessment of legislation. It has also done so in family reunification cases, but in relation to claims of discrimination (Art. 14).[304] The hesitation and at times heated discussion on the possibility for abstract assessment of the legislation are a symptom of a lack of a common understanding or *opinio juris* on the competences of the ECtHR. The idea of contextual limitation on application of the ECHR to immigration issues seems to hold strong among states. The principle of subsidiarity, strengthened by additional Protocol No. 15, may justify a wider margin of appreciation in some cases, but is it supposed to limit some contexts outside of human rights supervision or limit the protection to the minimum core? In contrast, the European Union has taken a firmer stand on the question of competence and rights protection, also reflecting the proportionality assessment, which will be explained in the following chapter.

[303] "Although Article 8 of the Convention cannot be considered to impose on a State a general obligation to authorise family reunification on its territory (see paragraph 142 above), the object and purpose of the Convention call for an understanding and application of its provisions such as to render its requirements practical and effective, not theoretical and illusory, in their application to the particular case." ECtHR, M.A v. Denmark, 9 July 2021, para 162.

[304] See e.g. ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985.

4 BALANCING IN EUROPEAN UNION LAW

4.1 Common Immigration Policy and Legislation on Family Reunification

The competence of the Union in immigration policy is based on Article 79 of the TFEU. Finland is a member of the EU and is bound by the common immigration and asylum policy and law. Article 79 TFEU establishes both the aims of common migration policy, which are "efficient management of migration flows, fair treatment of third country nationals residing legally in Member States, and the prevention of […] illegal immigration and trafficking in human beings", as well as the competence of the EU to legislate on family reunification. The preamble (Para. 16) to the Family Reunification Directive states that "the objectives of the proposed action, namely the establishment of a right to family reunification for third country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community". The objectives mentioned in the preamble (Paras 4 and 6) of the Family Reunification Directive are to facilitate integration, to promote economic and social cohesion, as well as to protect the family and establish or preserve family life. The family reunification framework in EU law thus encompasses general Community policy objectives and more specific immigration policy objectives.

EU law and the Family Reunification Directive must be in accordance with the fundamental rights laid down in the EU Charter, as well with human rights standards established by the ECHR. However, the compliance and the effect of the FRD on European protection of family life are debated. Many observers argue that the directive does not comply with human rights standards.[305] The problem of compliance is best illustrated by the EU Parliament's motion for the annulment of certain articles of the Family Reunification Directive for being contrary to the fundamental right to respect for family life.[306] Proponents of the annulment argued

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[305] See e.g. Cholewinski 2002; Wiesbrock 2011, pp. 138–165.

[306] CJEU, Parliament v. Council, C-540/03, 27 June 2006.

that certain articles allowing derogations such as waiting period or age limit for family reunification are against fundamental and human rights obligations. However, the CJEU considered that the directive does not violate human rights obligations since it does not oblige the member states to apply those above-mentioned restrictions, but leaves a margin of appreciation to consider fundamental and human rights obligations, for example, through Article 17.[307] In addition, although the Advocate General and the judges meticulously investigated the existing obligations of international law on family reunification, they did not find clear rules to be in conflict with the directive.

Nevertheless, the Family Reunification Directive is acknowledged to have rights-promoting objectives.[308] The EU approach can be considered a rights-based approach to migration since EU law legally protects the right to family reunification and determines it as the starting point of legal argumentation.[309] The "cosmopolitan outlook" of EU migration law described by Thym also coincides with the rights-based approach since "it is bound to take migrants' interests seriously".[310] It is logical to assume that this different default point also affects the interpretation and effective protection of family life. As mentioned above, the overall assessment is a human rights obligation in family reunification cases. The EU legislature has taken this into account in Article 17 FRD by including a requirement to consider certain interests on a case-by-case basis before denying family reunification. European countries had similar provisions in their respective legislations or at least practices in their migration management even before the EU directive due to human rights obligations. In addition, the FRD seems to recognise the elsewhere rule as a minimum human rights obligation since it states that as an extra requirement for facilitation of family reunification for refugees (Art. 12(1)).

Article 17 FRD states: "Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family". The factors to be balanced in the overall assessment are thus prescribed by law and establish procedural rules for authorities. According to a Communication from the EU Commission, procedural requirements also entail considering factors

[307] CJEU, Parliament v Council, C-540/03, 27 June 2006, paras 87–90, 98 and 103–104.

[308] Hardy 2012; Oosterom-Staples 2007.

[309] See e.g. Sasse 2005; Eisele 2012; Spijkerboer 2009, pp. 281–282.

[310] Thym 2013.

such as the living conditions in the country of origin, the age of the children concerned, the fact that a family member has been born and/or brought up in the member state, economic, cultural and social ties in the member state, the dependency of family members and the protection of marriages and/or family relations.[311] More factors can also be detected from the recent case law analysed below.

Article 17 can be considered as guidance for the proportionality assessment since it lists the factors to be taken into account in the overall assessment, similarly to the factors relevant to the balancing exercise in the ECtHR. The balancing plays a role in cases where the conditions of the directive are not fully met by the applicant. In other words, even if the admission of a family member is denied based on a condition allowed by the directive, authorities have to consider the proportionality of the negative decision. The balancing of the relevant factors indicated above is necessary to avoid excessively restrictive and disproportionate application of the directive in individual cases. Some observers have noticed that there are member states which do not understand what this article expects from the implementation and application of the law. At the time of the intended revision of the Family Reunification Directive, Wiesbrock considered that Article 17 should be modified to articulate more explicitly that "all cases had to be considered individually, preventing blanket refusal on grounds of non-compliance and guaranteeing that exceptions are made for all applicants who cannot reasonably be expected to comply with the conditions".[312] No revision to the FRD has been made, but the Commission recalls in the Communication that the obligation for overall assessment based on Article 17 "also applies when Member States have made use of the possibility of requiring evidence of the fulfilment of certain conditions".[313]

The drafters of the Family Reunification Directive intended Article 17 to reflect the balancing in the ECtHR and to function as a backstop or safety net.[314] However, some observers also considered that uncritical utilisation of Article 17 could be a problem in the sense that "the parameters of Article 17 may not be regarded as sufficient if compared with the series of 'guiding principles' set down by the ECtHR".[315] Their main concern seemed to be that the implementation and interpretation by the member states and the CJEU might not live up to the standards of the ECtHR. The European Commission has stressed that in the proportionality

[311] COM(2014) 210 final.

[312] Wiesbrock 2011, p. 165.

[313] COM(2014) 210 final.

[314] Papagianni 2006, p. 163.

[315] Sitaropoulos 2006.

assessment, the weight assigned to individual and public interests must be similar to that in comparable cases and refers to the case law of the ECtHR and the CJEU.[316] Many commentators seem to have considered concordant standards as positive and rights promoting, but they have mainly referred to standards stemming from the context of expulsion.[317] It is thus necessary to reflect on the level of human rights protection in the context of admission and compare it to EU law standards.

4.2 Proportionality Assessment and Balancing in the Case Law

The case law of the CJEU has proven that Article 17 does indeed require a proportionality assessment in the form of an individual assessment of relevant factors. In various paragraphs in the case Parliament v. Council, the CJEU stresses the importance of Article 17, although without mentioning proportionality. The court confirms that the relevant "criteria correspond to those taken into consideration by the European Court of Human Rights".[318] The CJEU has stated in the case Parliament v. Council that the balance of interests includes all three aspects when relevant to a specific case.[319] The court has specified in its case law those three factors and given other factors for consideration. When the CJEU referred to relevant factors based on the case law of Article 8 ECHR, it mentioned: "The European Court of Human Rights has stated that, in its analysis, it takes account of the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives".[320] The three aspects have not always been equally important. For example, in the case of Chakroun, the CJEU made reference to the factor of duration of stay but not to the factor of cultural and social ties with the country of origin.[321] Later, in the case of Buitenlandse Zaken v.

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[316] COM(2014) 210 final, p. 28.

[317] Peers 2004, pp. 183–184; Papagianni 2006, p. 163; Carrera 2009, pp. 383–387.

[318] CJEU, Parliament v. Council, C-540/03, 27 June 2006, para. 64.

[319] CJEU, Parliament v. Council, C-540/03, 27 June 2006, para. 99.

[320] CJEU, Parliament v. Council, C-540/03, 27 June 2006, para. 56. The CJEU referred to ECtHR cases of Sen v. the Netherlands, 21 December 2001, para. 37; and Rodrigues da Silva and Hoogkamer v. the Netherlands, 14 September 2004, para. 39.

[321] CJEU, Chakroun v. Minister van Buitenlandse Zaken, C-578/08, 4 March 2010, para. 38: "…authorities ought to have taken account of the long duration of the residence and of the marriage and that, by omitting to do so, they disregarded the requirement of individual examination of the application laid down in Article 17 of the Directive".

K and A in 2015, the CJEU introduced some factors that need to be taken into account when assessing specific individual circumstances for departing from integration measures: "age, illiteracy, level of education, economic situation or health".[322] In addition, Advocate General Kokott mentioned in her opinion that "availability of preparatory material in a form that he can understand, the costs payable, and the burden in terms of time may also be significant".[323]

In the first contentious case invoking the Family Reunification Directive, namely that of Chakroun v. Minister van Buitenlandse Zaken in 2010, the court explains that the obligation of individual assessment established in Article 17 precludes any blanket application of the conditions allowed in the FRD.[324] However, Article 17 or proportionality assessment were not central to the court's argumentation in this case, since the main focus was on textual interpretation related to other articles. However, an important aspect of this case was the CJEU emphasizing that the objective of this directive is to promote family reunification.[325] Furthermore, the court stated that "Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation".[326] The CJEU also stated that the possibilities of restricting family reunification (in Art. 7(1)(c)) must be interpreted strictly "since the authorisation of family reunification is the general rule".[327] These founding principles for the CJEU's approach to family reunification cases and to the interpretation of the directive appear different from the deferential approach of the ECtHR, where the starting point is the sovereign right to control immigration.

In the joint cases of O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L in 2012, the CJEU restated the obligation regarding individual proportionality assessment established by Article 17 FRD. The court stated that the competent authority has to "make a balanced and reasonable assessment of all the interests in play", when implementing the directive but also when applying it in an individual

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[322] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 58.

[323] Opinion of Advocate General Kokott in case Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 43.

[324] CJEU, Chakroun v. Minister van Buitenlandse Zaken, C-578/08, 4 March 2010, para. 48. See also opinion of Advocat General Sharpston on the case Chakroun, para. 49.

[325] CJEU, Chakroun v. Minister van Buitenlandse Zaken, C-578/08, 4 March 2010, para. 43. See also Hardy 2012.

[326] CJEU, Chakroun v. Minister van Buitenlandse Zaken, C-578/08, 4 March 2010, para. 41.

[327] CJEU, Chakroun v. Minister van Buitenlandse Zaken, C-578/08, 4 March 2010, para. 43.

case, and consider the best interests of the children involved.[328] The CJEU further advised that when implementing or interpreting the directive, the provisions need to be applied in the light of Articles 7 and 24 of the EU Charter of Fundamental Rights, "with a view to promoting family life".[329] The court also stressed that the member states should avoid undermining the objectives and effectiveness of the FRD,[330] which must have been a cause for concern, especially since the Finnish court did not recognise the directive as a supranational source of law in its deliberation and questions for preliminary ruling presented to the CJEU.

In the case of K and A in 2015, the CJEU was specifically asked to give a preliminary ruling on the proportionality of integration measures restricting family reunification. The CJEU applied its earlier principle by saying that since the authorisation of family reunification is the general rule, the possibility to impose an integration requirement (Article 7(2) FRD) must be interpreted strictly.[331] In addition, the court restated that "the leeway given to the Member States must not be used by them in a manner which would undermine the objective and effectiveness of that directive, which is to promote family reunification".[332] The CJEU took the view that the EU's general principle of proportionality was central in evaluating the legality of the implementation measures concerning integration requirement.[333] The court stated an example that a requirement of passing an integration examination would exceed what is necessary if it prevented family reunification although "they [the applicants] have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective".[334] The CJEU added that the integration measure should not be aimed at filtering out those persons able to exercise their right to family reunification.[335] The CJEU requires that a hardship clause (similar to Article 17 FRD) in national law should exempt a family member

[328] CJEU, O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L, Joint Cases C-356/11 and C-357/11, 6 December 2012, para. 81.

[329] CJEU, O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L, Joint Cases C-356/11 and C-357/11, 6 December 2012, para. 80.

[330] CJEU, O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L, Joint Cases C-356/11 and C-357/11, 6 December 2012, para. 83.

[331] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 50. Referring to CJEU case Chakroun, C-578/08, 4 March 2010, para. 43.

[332] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 50. Referring to CJEU case Chakroun, C-578/08, 4 March 2010, para. 43.

[333] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 51. Referring by analogy to CJEU case Commission v. Netherlands, C-508/10, 26 April 2012, para. 75.

[334] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 56.

[335] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 57.

from an integration requirement "in all possible cases where maintaining that requirement would make family reunification impossible or excessively difficult".[336] In addition, the same requirement was applied to the proportionality assessment of application fees, as well as to the costs of integration tests and materials.[337]

In her opinion on the case of A and K, Advocate General Kokott refers repeatedly to Article 17, and separately to a proportionality test, which is supposed to be explained by reference to the Green Paper published in 2011.[338] The Green Paper states in the part referred to that the admissibility of integration measures "should depend on whether they serve the purpose of facilitating integration and whether they respect the principles of proportionality and of subsidiarity".[339] It is not clear, however, if the Commission is referring to proportionality as in Article 5(3) TEU or Article 52 in the Charter of Fundamental Rights. Furthermore, the evaluation report of the Commission referred to states that the proportionality of integration measures can be assessed "on the basis of the accessibility of such courses or tests", and considering if "their impact serve purposes other than integration".[340] Elsewhere in that report the Commission also states that restrictions on grounds of public order should follow the general principle of proportionality and Article 17, requiring "to take account of the nature and solidity of the persons' relationship and duration of residence, weighing it against the severity and type of offence against public policy or security". Here the Commission seemed to consider the proportionality test to be something other than the individual assessment based on Article 17 of the Directive. However, the CJEU claimed that Article 17 supports the interpretation of the proportionality principle when the member state assesses case-by-case the factors relevant to counterbalance the integration requirement.[341]

In the case of Khachab in 2016, which deals with the income requirement prescribed in Article 7(1) of the Family Reunification Directive, the CJEU reiterated that the "competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, must make a balanced and reasonable assessment of all the interests in play".[342] The court considered that the

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[336] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 63.

[337] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 64.

[338] The Member State had referred to the proportionality requirement stated in the Green Paper in their request for preliminary ruling. Opinion of Advocate General in case Minister van Buitenlandse Zaken v K and A, C-153/14, 19 March 2015, para. 43.

[339] European Commission 2011, part 2.1.

[340] Commission of the European Communities 2008, part 4.3.4.

[341] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 60.

[342] CJEU, Khachab v. Subdelegación del Gobierno en Álava, C-558/14, 21 April 2016, para. 43.

margin of appreciation was somewhat narrowed because the national authorities had to interpret Article 7 FRD in the light of Article 7 of the Charter, which protects private and family life.[343] The general principle of proportionality was mentioned again in this case, pointing towards an obligation to ensure the proportionality of implementation measures at the national level. The CJEU stated that the measures "must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary to attain them".[344] In this case, the CJEU considered that the directive had the general objective of facilitating the integration of third country nationals into member states by making family life possible through reunification,[345] as well as a more specific objective of the family not becoming a burden on the host society, stemming from the relevant Article 7(1).[346] Although in this case the CJEU did not base its argumentation on a proportionality assessment,[347] it seems that the court may have weighted the restrictive measures against the specific aim of protecting the economic well-being of the country.[348] The concrete outcome of this case was the clarification that the terms "stable" and "regular" in Article 7(1)(c) FRD allow prospective assessment of resources for one year following the submission.[349]

The income requirement was also under review in the case of K and B in 2018. Here the CJEU considered that it had jurisdiction and competence to give a preliminary ruling in a case concerning a sponsor who had subsidiary protection status, which is normally outside the scope of the FRD. The CJEU wanted to clarify the interpretation of the FRD because the national authorities had explicitly legislated on treating a sponsor benefitting from subsidiary protection similarly to refugees covered by the FRD.[350] The court stated that when applying Article 17 FRD, "account must be taken, inter alia, of specificities related to the sponsor's refugee status". It referred to aspects similar to the ECtHR elsewhere test when explaining that "since they cannot conceivably lead a normal family life in their country of origin, they may have been separated from their family for a long period

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[343] CJEU, Khachab v. Subdelegación del Gobierno en Álava, C-558/14, 21 April 2016, para. 28. Referring to CJEU case O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L, Joined Cases C-356/11 and C-357/11, 6 December 2012, paras 79–80.

[344] CJEU, Khachab v. Subdelegación del Gobierno en Álava, C-558/14, 21 April 2016, para. 42.

[345] CJEU, Khachab v. Subdelegación del Gobierno en Álava, C-558/14, 21 April 2016, para. 26. Referring to CJEU, Parliament v. Council, C-540/03, 27 June 2006, para. 69.

[346] CJEU, Khachab v. Subdelegación del Gobierno en Álava, C-558/14, 21 April 2016, para. 39.

[347] But had a legal semantic approach.

[348] A legitimate aim stated in Article 8-2 ECHR.

[349] CJEU, Khachab v. Subdelegación del Gobierno en Álava, C-558/14, 21 April 2016, paras 30–31.

[350] CJEU, K and B v. Staatssecretaris van Veiligheid en Justitie, C-380/17, 7 November 2018, para. 41.

of time before being granted refugee status and satisfying the substantive conditions required by Article 7(1) of the directive may pose greater difficulties for them than for other third country nationals".[351] The CJEU ruled that the three-month condition for exemption from income requirement cannot apply to situations in which particular circumstances render the late submission objectively excusable.[352] Although this decision gives guidance on interpretation of income requirement for refugees, it does not directly apply to beneficiaries of subsidiary protection in other member states. However, a similar requirement to consider ties to the country of origin, as well as the option to enjoy family life elsewhere, applying to everyone is directed to states through the ECtHR.

Integration requirements have been under scrutiny in the CJEU in some cases. In 2022, in the case of X v. Udlændingenævnet the Danish court requested a preliminary ruling on integration requirements for the family reunification of a Turkish sponsor.[353] The case triggered provisions in the Association Agreement (Decision No 1/80) between EU and Turkey prohibiting new restrictions on the rights of Turkish workers (Art. 13). The court considered the language test required of the sponsor as a new requirement, which is prohibited unless it is justified by public policy, public security or public health (Art. 14) or if it is justified by an overriding reason in the public interest.[354] The court did not find a match in the Article 14 objectives, but accepted integration as an overriding reason in the public interest. However, the CJEU conducted a proportionality assessment to test if the national legislation "is suitable to achieve that objective and does not go beyond what is necessary in order to attain it."[355] In the end, the CJEU considered that the restriction was not justified because the language test required of the sponsor was not a suitable measure to ensure successful integration of the family member since the abilities or language skills of the family member were not considered.

Another recent relevant case was that of X and Others v. État belge, also known as "Afrin", in 2023.[356] The CJEU considered that whereas Article 4(1) establishes a right to the family reunification of certain family members without allowing a margin of appreciation, Article 5 on procedural provisions leaves some margin to the

[351] CJEU, K and B v. Staatssecretaris van Veiligheid en Justitie, C-380/17, 7 November 2018, para. 53.

[352] CJEU, K and B v. Staatssecretaris van Veiligheid en Justitie, C-380/17, 7 November 2018, para. 66.

[353] CJEU, X v. Udlændingenævnet, C-279/21, 22 December 2022.

[354] CJEU, X v. Udlændingenævnet, C-279/21, 22 December 2022, para. 35.

[355] CJEU, X v. Udlændingenævnet, C-279/21, 22 December 2022, para. 39. See also earlier CJEU case of C and A v. Staatssecretaris van Veiligheid en Justitie, C-257/17, 7 November 2018, para. 65.

[356] CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023.

member states. The court stressed that "the margin of appreciation must not be used by them in a manner which would undermine the objective of that directive or its effectiveness".[357] The case was about the procedural obligation to apply for family reunification in person at a diplomatic or consular post. The Belgian legislation was deemed contrary to EU law because it did not allow exceptions and consideration of difficult circumstances that could amount to "inhuman or degrading treatment, or indeed put their lives in danger".[358] The CJEU emphasised the need for more favourable conditions for refugees and facilitation of their family reunification.[359]

The case was resolved on reasoning based on fundamental rights and the balancing required by Article 52 of the Charter.[360] The CJEU reiterated that the FRD needs to be interpreted and applied in the light of Articles 7 and 24 of the EU Charter of Fundamental Rights.[361] Although the court pointed out that Article 7 contains rights corresponding to Article 8 ECHR, it constructed the proportionality test slightly differently. The CJEU considered that such inflexible legislation "infringes the right to respect for the family unit laid down in Article 7 of the Charter".[362] Together with the Advocate General, the court assessed that the legislation making applying for family reunification impossible or excessively difficult, thus jeopardising the effective enjoyment of that right, was a disproportionate interference in the right to respect for family unity when otherwise legitimately aiming at protecting the system against fraud.[363]

4.3 Analysis of the Protection of Family Life

Sitaropoulos in 2006 observed that the EU had embarked on a more inclusive path regarding the human rights of third country nationals by enacting the Family

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357 CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023, paras 41–42.

358 CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023, para. 52.

359 CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023, para. 43.

360 Article 52(1) of the Charter: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

361 CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023, para. 46

362 CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023, para. 56.

363 CJEU, X and Others v. État belge, "Afrin", C-1/23 PPU, 18 April 2023, para. 57.

Reunification Directive, although he found the directive to be lacking in many points on the level of European protection.[364] I agree that there may be issues of compliance in relation to certain strict conditions allowed by the FRD, but from the wider perspective of international obligations towards family reunification, it is actually the EU that sets better standards of protection for many immigrants.[365] More protective standards can be seen in the mere fact that EU law explicitly establishes a "clearly defined individual right".[366] EU law thus recognises the right to family reunification as a default point, whereas the ECtHR considers it to be an exception to the rule of a sovereign power over the admission of immigrants.[367]

Moreover, the strength of the obligations stemming from the FRD is considered "unrivalled by any other international instrument", and, for example, to go beyond the very weak obligation contained in Article 44 of the International Convention on Migrant Workers' Rights.[368] However, it seems to me that the CJEU has revived the almost forgotten standards of the European Social Charter (SopS 79–80/2002). The CJEU has stated that the member states should not have such restrictive requirements for family reunification which "would make family reunification impossible or excessively difficult".[369] This principle resembles the standard stemming from Article 19-6 of the European Social Charter, which the European Committee of Social Rights (ECSR) has interpreted to require facilitation of family reunification and laws that "should not be so restrictive as to prevent any family reunion".[370] However, the ECSR seems to accept that the law may prevent family reunification in a limited number of cases.[371]

Despite the many similarities in the human rights protection afforded by the CJEU and the ECtHR, I also perceive important differences. In contrast to the exceptionality approach of the ECtHR, EU law recognises the right to family reunion as the general rule. The elsewhere approach dominates in the human rights court, but the CJEU has not applied such contextual limitations which would affect the scope of the protection of family reunification. The approach of the ECtHR has been described by the Advocate General of the CJEU as protection in hardship

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[364] Sitaropoulos 2006.

[365] See also Groenendijk 2006, pp. 218–219; Wiesbrock 2011, p. 164.

[366] CJEU, Chakroun, C-578/08, 4 March 2010, para. 41.

[367] CJEU, Chakroun, C-578/08, 4 March 2010, para. 43. See also Groenendijk 2006, pp. 324–342; Spijkerboer 2009, p. 292.

[368] De Guchteneire et al. (eds.) 2009, p. 373.

[369] CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 63.

[370] See e.g. ECSR, Conclusions XVII-1, Netherlands and Conclusions XVII-1, Finland.

[371] ECSR, Conclusions XIX-4, Germany.

situations.[372] However, in the Family Reunification Directive, the protective effect of "clearly defined individual rights" as well as the application of Article 17 and the general proportionality principle is not restricted to hardship cases and exceptional circumstances. I consider that the default point for legal inquiry determines the approach of the court as well as the weight attached to different factors in the proportionality assessment.

The proportionality principle and balancing in family reunification cases in EU law can thus be applied through different routes. Article 17 requires considering and balancing differing interests when the applicant would not otherwise fulfill the requirements in the Family Reunification Directive. Article 17 is clearly influenced by the ECtHR standards, but it is not clear if that article is only supposed to guarantee the human rights minimum or higher standards. Proportionality assessment is also conducted without applying Article 17 because the directive has to be interpreted in the light of the Charter and the right to respect for family life protected in Article 7. The application of the Charter brings with it the proportionality requirement in Article 52 of the Charter. According to that article, limitations of fundamental rights need to be provided for by law, respect the essence of the right and be proportionate. Although some convergence with the ECtHR is obvious, the CJEU seems to follow its own standards. It is also remarkable that the CJEU prefers to make the proportionality assessment *in abstracto*, considering the proportionality of the legislative choices and the legislation implementing the directive. In contrast, the majority of judges in the ECtHR do not deem this possible and concentrate on the details of an individual case, thus assessing proportionality *in casu*.

Although the Commission only mentions procedural obligations,[373] in the literature the balancing of interests in the CJEU is also considered to involve substantive requirements.[374] Procedural requirements leave some discretion to authorities, whereas substantive revision submits the weight of different factors to the scrutiny of the Luxembourg Court. In the case of K and A in 2015, Advocate General Kokott appeared to suggest in her opinion that the CJEU might be ready to develop the criteria of proportionality assessment, but not necessarily to give a ruling

[372] See opinion of Advocate General Kokott in the CJEU case Parliament v. Council, C-540/03, 27 June 2006.

[373] European Commission 2014.

[374] Hardy 2012, p. 444.

on the proportionality of a particular restriction in a contentious case.[375] However, recent cases have shown that the CJEU is ready to substantively assess the weight of different rights and interests in the proportionality assessment. Hilbrink also argues that the EU proportionality test includes the element of necessity that must always be argued for.[376]

In many cases, in addition to substantively assessing the weight of different interests, the CJEU seems to have critically analysed the general interest presented as an objective and an aim for the restriction. The CJEU has emphasised reasonableness and suitability as specific aspects of the proportionality analysis. From the viewpoint of the general principles of EU law, as Tridimas has pointed out, suitability is often assessed before proportionality.[377] This is shown by rigorous assessment of the legitimacy of the measures and objectives presented for limitations. Neither the Family Reunification Directive nor the Charter of Fundamental Rights stipulates legitimate aims as stated in Article 8-2 ECHR. The Charter only mentions the "objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" (Art. 52(1)). However, the CJEU seems to have accepted policy aims similar to those in Article 8-2 and the case law of the ECtHR. The case law presented here considers, for example, enhancing integration, protecting economic well-being and preventing fraud as legitimate aims. Hilbrink considers that in the EU law, "a generic interest in ensuring effective immigration control or in quantitatively restricting immigration is not considered a legitimate justification for denying entry or residence".[378]

The fact that the CJEU refers to Article 7 of the Charter of Fundamental Rights, namely the right to respect for family life, and applies the limitation test based on Article 52(1) of the Charter, suggests that family reunification is protected by fundamental rights. The CJEU has referred to the right to family unity, which indicates that in EU law the family unity of immigrants is better protected than in the ECtHR. Perhaps no similar contextual limitation exists, and family unity is weighted similarly as in the context of child protection, for example. Another, slightly different question is if family reunification is protected in EU law as a fundamental right. Thym pointed out in 2009 that the CJEU case Parliament v. Council "emphasizes that rights established by the Directive are no direct realisation

[375] Opinion of Advocate General Kokott in CJEU case Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015.

[376] Hilbrink 2017, p. 334.

[377] Tridimas 1996, p. 84.

[378] Hilbrink 2017, p. 334.

of constitutional guarantees". Adding, however, that although "such individual rights remain 'simple rights' without the normative force of constitutional fundamental and/or human rights", it does not mean that they are meaningless.[379]

There has been little interaction between the CJEU and the ECtHR in family reunification cases. Klaassen noted in 2015 that the CJEU has not referred to the ECtHR practice in its case law concerning family reunification.[380] However, he does not seem to count the case of Parliament v. Council. Some scholars have expected the Strasbourg Court to be influenced by the FRD, although it has seemed unclear how this interaction would affect the level of protection.[381] Thym has considered that the margin of appreciation would partly lose its relevance.[382] Recently, in 2021, the ECtHR has referred to the Family Reunification Directive in the case of K.A. v. Denmark with the purpose of justifying a wide margin of appreciation to states wishing to restrict the family reunification of sponsors receiving subsidiary or temporary protection. The ECtHR interpreted EU law to allow a three-year waiting time but did not consider that the CJEU definitely required strict scrutiny of the proportionality of that measure. Interestingly, the CJEU has interpreted the ECtHR practice in the case of Parliament v. Council and already concluded in 2006 that a waiting time for family reunification would not be contrary to the ECHR.[383] However, in my opinion, the case of Parliament v. Council did not sufficiently consider the factor of insurmountable obstacles or the elsewhere test.

[379] Thym 2009, pp. 9–10.

[380] Klaassen 2015, p. 379.

[381] Lambert 2014.

[382] Thym 2008.

[383] CJEU, Parliament v. Council, C-540/03, 27 June 2006, para. 98.

5 RESPECT FOR FAMILY LIFE IN NATIONAL LAW

5.1 Human Rights Monitoring in Finland

According to the literature review in Chapter 1.2 and the legal analysis in Chapter 3, the main human rights obligations for the right to respect for family life in family reunification cases are legality, legitimate aim and proportionality of restrictions. The ECtHR most often supervises how the national courts assess fair balance in a specific case, but the supervision may also extend to other national actors – "the Court has repeatedly held that the choices made by the legislature are not beyond its scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure".[384] In most cases, the ECtHR merely checks in a procedural sense that the balancing is conducted at the national level, but in some cases the ECtHR conducts the balancing itself in a more substantive sense. The ECtHR has stated that insufficient reasoning and absence of real balancing are contrary to the requirements of Article 8.[385] However, the ECtHR does not specify what institution at the national level should be in charge of balancing and how the states should arrange their human rights monitoring.

In this chapter, I will contemplate how human rights compliance, and especially balancing, is organised in the Finnish system in general and in the specific context of family reunification. First, I need to clarify some aspects of the interplay between human rights standards and their monitoring in the national legal system of Finland. According to Ojanen, the starting points for the co-ordination of human rights supervision between national and supranational systems in Finnish constitutional law are that: 1) supranational and national rights form a pluralist system where the different parts complement each other and should be interpreted in harmony, 2) the subsidiarity principle in supranational fundamental and human rights law expects that the supervision is primarily national and that states can autonomously decide how that system works, the highest court being the backstop, 3) the Finnish Constitution expects all authorities to ensure basic and human rights, but places the

[384] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 148.

[385] ECtHR, M.A. v. Denmark [GC], 9 July 2021, para. 149.

Constitutional Law Committee of Parliament in charge of the supervision of constitutionality and 4) supranational obligations are minimum standards that cannot be derogated, but national rights protection may, and sometimes should, be better.[386]

Lavapuro et al. explain how the Finnish system of constitutional human rights supervision is of an intermediate type between legislative sovereignty and judicial supremacy. The Constitutional Law Committee issues opinions and interpretations of the constitutionality of government bills, thus an *ex ante* constitutional review. This is a parliamentary committee (consisting of members of parliament) but they intend to make legal analysis, and for that they consult legal scholars and other experts. The Constitutional Law Committee has the authority to determine the content of constitutional rights, but its style of reasoning has not been helpful to the courts. The Committee usually comments on formal and technical issues and is thoroughly dogmatic. Lavapuro et al. write that "its outcomes are actually strikingly exempt from such political and moral deliberations".[387] The authors also point out some flaws in the reasoning of the Committee, when it seems to have forgotten its role as the most authoritative interpreter and argued that its interpretation was only relevant in the context of the specific government bill issue.[388]

The courts assumed an *ex post* role in the constitutionality review in 2000, when the current Constitution was enacted (Section 106). Any court can set aside a law if it is deemed unconstitutional or in breach of international obligations. Therefore, lower administrative courts have an important task to ensure correct human rights balancing. The Supreme Administrative Court rectifies obvious mistakes and sets precedents on issues requiring guidance to ensure equal application of law in various lower administrative courts. However, in many areas of law, including migration law, access to the highest court is limited by the requirement of leave to appeal. In addition, a curiosity in the Finnish system is that also the Immigration Service can lodge an appeal to the Supreme Administrative Court. Therefore, although the Supreme Administrative Court judgements are powerful, human rights monitoring cannot be left entirely to the highest court because it will not review every case.

The revisionary powers given in Section 106 of the Constitution are rather weak, since, for the court to set aside a statutory requirement, it needs to show "evident conflict" with constitutional or supranational obligations. Therefore, the main tool for judicial revision has been harmonising a "human rights friendly"

[386] Paraphrasing Ojanen 2011, pp. 443–446.

[387] Lavapuro et al. 2016, p. 232.

[388] Lavapuro et al. 2016, p. 235.

interpretation.[389] Lavapuro et al. argue that the courts have gradually started to refer especially to the practice of the ECtHR.[390] However, this may be partly due to the observations that the Constitutional Law Committee does not give much substantive interpretation and that there is not much dialogue between different actors in Finland. Ojanen wrote in 2011 that the courts seem to follow the minimalist approach of only securing minimal human rights but of not advancing the national level of basic rights protection.[391]

Based on firmly established constitutional doctrine, limitations to national basic rights must be tested with a "permissible limitation test".[392] This is applied primarily in the Constitutional Law Committee, but it should also be adhered to in the court.[393] The national test includes the following seven conditions:

"(i) Limitations must be provided by an Act of Parliament.
(ii) Legislative provisions on limitations must be sufficiently clear and precise.
(iii) The essence of a constitutional right cannot be subject to limitations.
(iv) Limitations must have a legitimate aim that corresponds to the objectives of general interest or the need to protect the fundamental rights of others.
(v) Limitations must conform to the principle of proportionality, including be necessary for genuinely reaching the legitimate aim.
(vi) Limitations must be in conformity with human rights obligations binding on Finland.
(vii) There must exist adequate legal safeguards (judicial review, the right to appeal, the right to be heard, etc.) regarding interferences with constitutional rights."[394]

The national limitation test thus resembles the general limitation test for relative rights in the ECtHR. For example, it also includes the proportionality requirement. Yet there is one significant difference; the national test establishes a clear principle on protecting the essence of the right. Ojanen and Salminen claim that in this test, every factor is decisive, meaning that if even one criterion is not met, the limitation is unconstitutional. I agree with them that the national test is, at least potentially,

[389] Lavapuro et al. 2016, p. 227.
[390] Lavapuro et al. 2016, p. 225.
[391] Ojanen 2011, p. 447. Ojanen and Salminen 2019, p. 398.
[392] Ojanen and Salminen 2019, pp. 379–380. Referring to Viljanen 2001.
[393] Ojanen 2011, p. 447.
[394] Ojanen and Salminen 2019, pp. 379–380.

more rigorous than the limitation test in the ECtHR.[395] In this chapter, I will investigate how the legislature and the Constitutional Law Committee have implemented supranational legal obligations and considered the permissibility of fundamental and human rights limitations in the context of family reunification. The role of courts is also briefly addressed.

5.2 Balancing in Finnish Immigration Law

Finnish immigration law currently regulates in some considerable detail the entry of family members of sponsors already residing in Finland. Almost all sponsors are eligible for family reunification, but there are various legal conditions, as well as administrative hurdles, and these may differ depending on the immigration status of the sponsor.[396] In the publications forming part of this dissertation, I have mainly concentrated on the condition of sufficient financial requirements (Finnish Aliens Act, Section 39) since it has often been considered to be a significant restriction on family reunification in Finland.[397] Section 39.1 presents a clear rule that a certain level of income, the amount of which is specified in administrative guidance, is a condition for residence permit. However, it also leaves a certain amount of discretion and the option to consider human rights obligations and proportionality, the application of which is the focus in this sub-chapter.

In Publication I of this dissertation, I analysed the human rights principles related to family reunification and also the compliance with human rights of the income requirement as a precondition for family reunification. The publication has three objectives: to demonstrate the real-life consequences of the strict income requirement, to explain the legislation and administrative practice relevant to this topic, and to assess the compliance with national and supranational European standards on proportionality. The focus of this publication was foreign workers, or in other words labour migrants, since when I started the work for this dissertation, low-income migrant workers seemed to be the group most affected by the income requirement. Later, after the 2016 amendment, the most affected group turned out

[395] See Report 25/1994 of the Constitutional Law Committee, pp. 4–5. For a comprehensive examination of the permissible limitations test under the Constitution, see Viljanen 2001. In Ojanen and Salminen 2019, p. 380.

[396] See more detail on the family reunification legislation in Aer 2016; Palander 2018. See also Publication IV.

[397] Vaittinen and Näre 2014; Miettinen et al. 2016; Pellander 2016.

to be sponsors enjoying subsidiary protection, which I concentrated on in the rest of the publications constituting this dissertation.

In Publication I of this dissertation, I explain how the high income requirement affects low-income, but also middle-income workers because the income required for a family of four is higher than the average wage in Finland. I explain with a practical example how the families might be obliged to either live separated, how the sponsor would need to take on various jobs, or would need to find a job for the spouse before his or her arrival in Finland. I show in detail how the law and administrative guidance direct the decision-maker. The focus is on the analysis of the social security system and on the calculation of the income since some benefits can be considered as income and some not. It turned out to be crucial, also from the viewpoint of EU law obligations, which benefits can be considered as "social security benefits compensating for expenses" (Section 39.2) and which are basic social assistance. I found some inconsistencies or at least unclarity in the relevant sources of law and in the literature. Different interpretations are possible, but, for example, the chosen approach to exclude unemployment benefit for foreigners (formerly integration benefit) from the income calculations does not seem illegal. However, I argue in the publication that a more lenient approach on the required income level or included benefits would be more human rights friendly and could be seen as an investment rather than a burden on the economic well-being of the country.

In addition to a legal conceptual analysis, the case needs to be analysed through the obligations stemming from the proportionality principle. Finnish law and administrative practice terminologically distinguish the situations where the proportionality of legislation is assessed *in abstracto* (in Finnish *suhteellisuus*) and when it is assessed *in casu* in an individual case (in Finnish *kohtuullisuus*). I analysed how European human rights law establishes some principles for *in casu* proportionality assessment, but the requirements are too vague and unclear to apply. However, EU law also applies in this case since migrant worker sponsors are covered by the Family Reunification Directive, which requires case-by-case (*in casu*) proportionality assessment when denying family reunification (Article 17). Application of the directive brings with it the guidance of the CJEU practice, for example, the requirement that when applying the Article 17 FRD, the relevant fundamental rights of the EU Charter also need to be considered (Articles 7 and 24).[398] In addition, although it is necessary but not sufficient to legislate on proportionality assessment, it needs to be effective to ensure that the limitations on family reunification do not

[398] CJEU, O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L, Joint Cases C-356/11 and C-357/11, 6 December 2012, para. 80.

render enjoyment of the right to family reunification impossible or extremely difficult.[399] According to EU law standards, proportionality is supposed to be observed both *in casu* and *in abstracto*.[400]

The proportionality assessment required by human rights law and EU law is enshrined in the Finnish Aliens Act. Many sections address the need to assess necessity, proportionality and human rights compliance with restrictions. First of all, Section 5 states: "in the application of this Act, aliens' rights may not be restricted any more than necessary". According to the literature, this Section 5 reflects the more general proportionality principle in administrative law, which is expressed in the Section 6 of the Administrative Procedure Act (434/2003). According to Laakso, the practical meaning of the proportionality principle is that the decision-maker chooses, among all the possible legal outcomes, the option that least restricts the rights of the foreigner. He thinks that this differs from an individual proportionality assessment and points out that there is no such requirement in general administrative law.[401] However, Kotkas has shown that individual proportionality assessment may exist in special administrative law such as in the field of social welfare law.[402] It is obvious that immigration law also has individual proportionality assessment implemented in law, as I will demonstrate next in detail.

In 1983, when the first Aliens Act (400/1983) was enacted, the legislature created an overall assessment in an individual case for situations involving expulsion, which required considering ties to Finland, the seriousness of the crime and certain aspects of *non-refoulement* (Section 18.3–4). Later in 1991, a new Aliens Act (378/1991) was passed and the overall assessment in a situation of expulsion was amended to include consideration of family relations and the principle of *non-refoulement* (Section 43). Based on preparatory works,[403] the impetus for these provisions was the new international law obligations, and especially ECHR obligations, that needed to be implemented after Finland's accession to the Convention. Later, in 2004, this provision transferred to the current Aliens Act (Section 146.1) and amended by means of referring to the best interests of the child, respect for family life and ties to the country of origin. Soon after that, in 2006, Section 66 a was added to the Aliens Act in connection with the implementation of the Family Reunification Directive.[404]

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399 CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 63.

400 CJEU, Minister van Buitenlandse Zaken v. K and A, C-153/14, 19 March 2015, para. 51.

401 Laakso 2006, pp. 330 and 337.

402 Kotkas 2014, pp. 48–50.

403 Government proposals HE 186/1981; HE 47/1990 vp.

404 Government proposal, HE 198/2005 vp.

This proportionality test corresponds to the individual proportionality assessment of Article 17 FRD. Three aspects must be taken into account when considering refusal of the permit: "the nature and closeness of the alien's family ties, the duration of his or her residence in the country and his or her family, cultural and social ties to the home country".[405] Section 66 a thus introduced a requirement for an overall assessment and human rights consideration in the context of family reunification, also in situations of admission and not only expulsion.

In addition to those more general individual proportionality tests, Section 39.1 establishes an individual assessment to consider derogation from the income requirement: "In individual cases, a derogation may be made from the requirement if there are exceptionally serious grounds for such a derogation or if the derogation is in the best interests of the child". This Section thus mentions two factors that could justify a decision not to apply the income requirement in an individual case. According to the preparatory works,[406] "exceptionally serious grounds" are intended to cover situations where an income requirement would be disproportionate in an individual case (in Finnish *kohtuuton*), for example in the case of children or disabled people, as well as considering various obligations and standards stemming from supranational law, which obviously also includes the fair balance test. The original Government proposal even mentions that individual circumstances could be taken into account although there were no insurmountable obstacles to enjoying family life in the country of origin. "Best interests of the child" refers to Section 6 of the Aliens Act and supranational standards created especially when emphasizing the well-being of children in the balancing exercise.[407]

In the literature, Aer argues that the phrase "exceptionally serious grounds" speaks for a strict proportionality assessment that would not readily give weight to individual interests. However, he also mentions that when Article 8 ECHR obligations so require, the income requirement must be derogated.[408] Over the years, the Finnish Immigration Service and courts have been testing the correct line of interpretation of the proportionality assessment in Section 39.1 of the Aliens Act. The court practice has confirmed that very serious health conditions of children are

[405] The quoted phrases refer to the English translation of the Aliens Act.

[406] See e.g. Government proposal HE 28/2003 vp, p. 140; Constitutional Law Committee statement PeVL 27/2016 vp.

[407] The quoted phrases refer to the English translation of the Aliens Act.

[408] Aer 2016, pp. 110–114.

required to derogate from Section 39.[409] There has been some difference of opinion between the actors on how easy or difficult it should be to derogate from the income requirement or from other conditions for family reunification. For example, in two of the above-mentioned cases, the Immigration Service challenged the reasoning of lower administrative courts, arguing that they had been too lenient in their approach to proportionality assessment.[410] Often, as in these cases, the decision-making in the Supreme Administrative Court revolves around the question of how difficult it is for the family to enjoy family life elsewhere.

Curiously, Aer argues that the assessment based on "exceptionally serious grounds" in Section 39.1 does not include all the same factors that the ECtHR considers in its fair balance test in the context of family reunification. As an example he mentions the security situation in the country of origin of the family member, referring to the insurmountable obstacles test.[411] It is true that the court often concentrates on specific questions, for example, related to the proportionality of the flexibility in ways of accumulating the required income,[412] or the three months' time limit for derogation.[413] Although it can be justified, in theory, that those two assessments are separate, in practice the outcome should be based on Section 66 a and the fair balance test. Therefore, in the current situation, the decision-maker may not find a basis for derogating from the income requirement based on Section 39.1, but then possibly find insurmountable obstacles to enjoying family life elsewhere, thus creating an obligation for the state to allow family reunification without restrictions.

Aer also points out that the proportionality assessment in Section 39.1 allows no flexibility in the amount of income required.[414] However, according to more recent court cases, there can be some flexibility in the assessment of the amount required. This aspect is relevant to the situations of the low and middle-income workers analysed in Publication I. In 2017, in a case concerning a Rwandan worker and his family, the Supreme Administrative Court quashed a lower court judgement based

[409] Supreme Administrative Court of Finland, KHO:2010:18, 25 March 2010 and KHO:2013:97, 22 May 2013; KHO:2014:51, 19 March 2014. These cases deal with marriage migration.

[410] Supreme Administrative Court of Finland, KHO:2010:18, 25 March 2010 and KHO:2013:97, 22 May 2013.

[411] Aer 2016, p. 112.

[412] Supreme Administrative Court of Finland: KHO:2011:43, 11 May 2011; KHO:2016:155, 24 October 2016; KHO:2021:84, 22 June 2021.

[413] Supreme Administrative Court of Finland, KHO:2020:66, 5 June 2020; KHO:2021:98, 7 July 2021; KHO:2021:99, 7 July 2021.

[414] Aer 2016, p. 111.

on too strict proportionality assessment and returned the negative decision on family reunification to the Immigration Service. The sponsor's salary was 250 euros short of the monthly income requirement of 2600 euros. Whereas the administration and the lower court perceived no relevant factors that could be considered in favour of the applicants in the proportionality assessment (Sections 39.1 and 66 a), the Supreme Administrative Court afforded weight to the difficulties the mother would face if returned to her country of origin, Zambia, with the two children. She had suffered from post-traumatic stress after experiencing violence in Zambia, the reason why she had earlier applied for international protection but without success. The lower court did not consider this relevant and stated that protection needs are only assessed in the asylum process. Interestingly, for the proportionality assessment, the Supreme Court applied only Section 39.1 and not 66 a. The court also emphasised that this issue also involved the EU Family Reunification Directive, where allowing the reunification is a default point and restrictive conditions and should be applied in a proportionate manner and with respect for family life.[415]

The case above is significant for many reasons, not least because of the emphasis the court put on the obstacles to enjoying family life in the country of origin. In addition, those obstacles did not need to be insurmountable or constitute a need for international protection, which is in line with the original purpose of the legislature expressed in the preparatory works in 2003.[416] Against this background the current restrictions on family reunification of people receiving international protection seem controversial. More of this aspect in Chapters 5.3 and 6.3. I argue, however, that in the context of voluntary migration, the national actors should also apply a more rigorous proportionality assessment, especially in cases concerning EU law, in which the reasonableness of both state and individual interests would be better considered.

Therefore, I show in Publication I how the more ambitious proportionality assessment could be conducted. There are at least two ways to concretely assess the proportionality of the required income level. One way to assess the proportionality is to compare the required level with the calculations for minimum social assistance granted to families without income. Those calculations are based on the amount of money a family is assumed to need for basic needs. The level of social assistance has actually been used as a reference when determining the appropriate level of minimum income for family reunification. I found no significant difference between what is expected to be needed for a decent living and what is required for family

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[415] Supreme Administrative Court of Finland, KHO 2017:6, 16 January 2017.

[416] Government proposal HE 28/2003 vp, p. 140.

reunification.[417] Another way to assess the proportionality is to compare the required level to the average salary, which shows that many families would face difficulties in meeting the requirement. It seems to be a structural problem in Finland that about half of wage-earners could not support a family of four without social benefits. Nevertheless, I think that this situation could be challenged by the court by reason of finding it impossible or extremely difficult in certain cases to fulfill the income requirement.

I argue that the proportionality assessment could better consider the reasonableness and suitability arguments related to the measures adopted to achieve the legitimate aim. It seems to me that the working life-oriented integration objective, which is a justification for the income requirement, is well achieved if the migrant is already working full time. However, whether the administrative decision-maker would make such a decision is debatable. Although the proportionality assessment can be considered as a human rights or EU law obligation, legal principles are not often considered strong enough to dispense with a clearly stipulated condition in the text of the Aliens Act. The principle of legality is strong in Finnish administrative law; the decisions must be based on law and rights and obligations have to be clearly prescribed by law. This is part of the principle of the rule of law. However, clear supranational law obligations must be followed as legal sources, which may create a conflict.[418] The rule of law and legality can be considered to be good things for the predictability and determinacy of law as long as the legislature ensures the compliance with human rights obligations. Therefore, in Publication II of this dissertation I analysed the proportionality assessment of the legislature and the Constitutional Law Committee when further restricting family reunification by expanding the income requirement.

5.3 Legislative Drafting and Respect for Human Rights

In 2016, in response to the large number of asylum seekers entering Europe, including Finland, the Government of Finland decided to restrict family reunification for sponsors enjoying subsidiary or temporary protection. In Publication II of this dissertation, I analysed this legislative process from the

[417] See Publication I, p. 158.

[418] Mäenpää 2017, Chapter 5.2.

viewpoint of human rights compliance and monitoring, as well as the legal potential for integration.[419] I intentionally omitted the question of the rights of the child in international law, and the assessment of the best interests of the child, since other research on that topic has been presented.[420] In the publication, I first explain how legislative drafting, and especially impact assessment, is instructed in Finland. Then I refer to a vast amount of literature providing information on the impacts of family separation, family reunification and the income requirement. I try especially to find research on the nexus of family reunification and integration. The yardsticks for the treatment of foreigners in this analysis are not only the human rights minimum but also integration, well-being and everyday security. Finally, I analyse the probability and proportionality of the negative and positive impacts of the income requirement, the quality of the legislative drafting and constitutional monitoring, as well as the integration potential of the new legislation.

While drafting the new law restricting family reunification, all the possible optional conditions mentioned in the EU Family Reunification Directive were considered.[421] Until then, Finland had applied only the income requirement but not in the category of international protection. Before the amendments, the Finnish Aliens Act already stipulated the income requirement as a general condition for being granted a residence permit (Section 39), but exempted applications related to international protection. However, the new law did not introduce other conditions, but extended the income requirement to persons enjoying international protection (Section 114). In the preparatory works the legislature emphasised that the income requirement would be a general condition in all types of family reunifications.[422] Section 114 of the Finnish Aliens Act now stipulates that the family members of a foreigner who has been granted refugee status are exempt from the income requirement if the application is submitted within three months of the time at which the asylum decision on the sponsor was received. Persons under subsidiary or temporary protection are not exempted from the income requirement.[423]

To form a picture of how legislative drafting is supposed to be done in Finland, I analysed the instructions on legislative drafting and impact assessment. No specific

[419] Legal potential for integration is a concept used by Jesse, meaning the possibility or the probability of the legislative framework supporting the integration of foreigners. See e.g. Jesse 2017.

[420] Sormunen 2017 and 2021; Non-discrimination Ombudsman 2020. It is worth mentioning that the Aliens Act was amended in 2022 to remove the income requirement from child sponsors.

[421] Although the FRD does not apply in this situation.

[422] Government proposal, HE 43/2016 vp, p. 5.

[423] Beneficiaries of the EU Temporary Protection Directive (2001/55/EC) being an exception.

legislation exists on the quality of legislative drafting, but legally non-binding instructions for good regulation are published by the Finnish ministries, mainly the Ministry of Justice. The legislature wields a lot of power in this democratic society guided by the principle of popular sovereignty. However, the powers of the legislature are constrained by the Constitution, basic rights as well as international and EU law obligations, and those aspects must be considered in the early stages of a legislative process.[424] In challenging cases involving basic and human rights, where the legislature may exercise discretion, different interests and impacts must be assessed and balanced, and choices justified.[425] Impact assessment and balancing have received quite a lot of attention in instructions and in the literature,[426] but often aspects related to different status and the recognition of foreigners' interests has not been addressed at all.[427] One exception is the instructions issued by the Ministry of Social Affairs and Health, providing guidance to the legislator on assessing impacts affecting people's lives, including indirect impacts.[428]

As analysed above in Chapter 3, although the ECtHR case law mainly deals with application of the law and requires the option for the administrator to assess the proportionality of a limitation when making a decision on family reunification, there is also an obligation for the legislature to assess proportionality *in abstracto*. The legislature should thus ensure that the law includes a provision on overall assessment and balancing, but also themselves apply the fair balance test set by the ECtHR. I have also argued that the fair balance test should respect more the general principle of proportionality, emphasizing the reasonableness and proportionality between the measures used and the aims pursued, also considering the probability of recognised impacts. In determining the public and individual interests, reasonable account should be taken of the consequences for family life of securing the right and limiting the right. This is where the impact assessment of the legislative drafting comes into play. Reasonableness and proportionality cannot be adequately assessed if the real-life consequences are not properly investigated or predicted. This is also the point where law meets politics, and the pragmatic meets the abstract.

Returning to the national case of extending the income requirement to persons enjoying international protection, it is clear that Article 8 ECHR applies, and that the proportionality of the limitation should be challenged *in abstracto*. However,

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[424] Ministry of Justice 2013.

[425] Ministry of Justice 2013, Chapter 4.1.18.

[426] E.g. Niemivuo 2002; Ministry of Justice 2007; Keinänen and Pajuoja 2020.

[427] Palander 2019.

[428] Ministry of Social Affairs and Health 2016.

according to the preparatory work, the Finnish legislature and the Constitutional Law Committee did not engage in substantial balancing. Both the Committee statement and the government bill emphasised the default point for human rights adjudication drawn from the ECtHR case Abdulaziz, Cabales and Balkandali, stating that "a State has the right to control the entry of non-nationals into its territory", and listed the factors to be taken into account in the balancing based on the ECtHR case of Rodrigues da Silva and Hoogkamer, but the relevance and weight of those factors is not analysed in the light of the prevailing situation.[429] The very lack of balancing could be considered a violation of, or at least a problem relating to, the obligations under Article 8 ECHR. In addition, the Constitutional Law Committee did not recognise the elsewhere test as an essence test, and thus did not consider the obvious obstacles that persons enjoying international protection would face in developing family life elsewhere. The government proposal mentions that the effects of restrictions concern people who cannot enjoy family life elsewhere, but stresses that the factors that have led to the need for protection are not supposed to affect the overall assessment.[430] A national legislature does not have the power to curtail the application of human rights standards in practical situations. The Supreme Administrative Court has not directly dealt with this question,[431] but some cases ignore the vulnerability of refugees and obstacles to enjoying family life in the country of origin,[432] whereas some cases indicate that obstacles to enjoying family life in the country of origin, and perhaps even the fact of subsidiary protection, are taken into account in the overall assessment.[433] More of this topic in Chapter 6.3.

In addition, one aspect of the elsewhere test is included in the Section 114.4.3 of the Aliens Act as an extra condition for exemption from the income requirement for refugees.[434] The approach is similar to, and most likely adopted from, the Family Reunification Directive (Art. 12(1)). To be more precise, the provision in the FRD states that member states may require conditions such as the income requirement

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[429] Government proposal HE 43/2016 vp, pp. 12–13; Constitutional Law Committee statement PeVL 27/2016 vp, p. 3.

[430] Government proposal HE 43/2016 vp, pp. 26 and 30.

[431] Based on search with the word family reunification (*perheenyhdistäminen*) in Edilex, which is an online platform for published cases.

[432] Supreme Administrative Court of Finland, KHO:2021:98, 7 July 2021; KHO:2021:99, 7 July 2021.

[433] Supreme Administrative Court of Finland, KHO 21.12.2018/6061, 21 December 2018.

[434] Sections 114.2 and 114.3 also include a reference to the elsewhere test, but in the original purpose of a backstop to secure the minimum human rights protection in case of protecting national interests of public order, safety or health. See Supreme Administrative Court of Finland, KHO 21.12.2018/6061, 21 December 2018.

"where family reunification is possible in a third country with which the sponsor and/or family member has special links". Similarly, the Aliens Act (Section 114.4.3) refers to a possible third country for enjoying family life as a condition to facilitation of family reunification. The elsewhere test thus has two aspects: being able to enjoy family life in the country of origin or in a third country. If a person has received international protection, it means that the possibility to enjoy family life in the country of origin has already been assessed and there are insurmountable obstacles. However, Section 114.4.3 adds the other aspect of the elsewhere test as an extra condition.

Using the elsewhere test as a condition for family reunification can also be found in Section 47.5 of the Aliens Act. This provision deals with the family formation (marriage migration) of foreigners that have received their permanent or continuous residence permit based on family ties and those ties have subsequently been severed. Section 47.5 states that in this situation, the decision-maker must consider the possibility to enjoy family life in the country of origin or elsewhere. However, the Supreme Administrative Court has judged this to be in violation of the Family Reunification Directive since the objective of the directive is to promote family reunification and provides an exhaustive list of possible restrictions.[435] In the case of refugees, Finnish law is in accordance with the FRD, although compliance with human rights standards is another question.

My analysis points out challenges in the proportionality of restrictions and the role of the *ex ante* human rights monitoring similar to those discovered in research conducted in Sweden.[436] How could the Committee and the legislature have conducted a better proportionality assessment? I will demonstrate two ways of making a more rigorous assessment of human rights compliance. First, the Committee could have expected the legislature to assess likelihood of the sponsors being able to enjoy family life in their country of origin, or elsewhere. Sponsors receiving international protection, including subsidiary or temporary protection, are usually considered to encounter insurmountable obstacles if they were to return to their country of origin.[437] It is possible to see from earlier preliminary works related to the income requirement that exemption in the case of international protection was in place precisely because of international law obligations.[438] Perhaps following

[435] Finnish Supreme Court, KHO:2018:48, 11 April 2018.

[436] Stern 2019, p. 94. See also Palander et al. (Chapter 2) in Tiilikainen et al. 2023.

[437] As in ECtHR cases M.A. v. Denmark [GC], 9 July 2021, and M.T. and Others v. Sweden, 20 October 2022. See also Council of Europe 2017.

[438] Government proposal HE 50/1998 vp.

the national standards and the seven-prong "permissible limitation test" would have guided the Constitutional Law Committee to consider the possible core of the right.[439] The Finnish Constitutional Law Committee stated that it would be a problem if family reunification were completely obstructed,[440] but it did not investigate that further. Those drafting the legislation could have taken into consideration the potential consequences indicating a very small number of successful family reunification applications.[441] Acknowledging the high probability of family separation as a consequence of the planned restriction, the legislator should also have considered the societal consequences of family separation – the indirect impacts.

Second, the Committee could have considered the reasonableness and the proportionality of the measures used to achieve the objective. According to the government bill, the grounds for extending the income requirement to those enjoying international protection were better management of migration, reducing the costs to society, enhancing the ability of people receiving international protection to provide for their families, making integration easier, and ensuring that Finland does not appear a particularly attractive destination country for asylum seekers.[442] The government was quite open about the objective of reducing the number of asylum seekers and reducing the costs related to the asylum process by any possible (legal) means. Other laws restricting the rights of asylum seekers were also passed, including keeping legal aid to a minimum and shortening the times allowed for appealing against a decision by lodging a complaint with the court.

I referred in Publication II to the ample literature already presented on this topic, and this points towards the challenges to integration rather than the benefits. According to the literature, the likelihood of an income requirement or other restrictions on family reunification enhancing integration is low. It can be also considered that an income requirement is not a suitable means of enhancing integration and may actually cause serious damage to well-being and to the feeling of everyday security. With this restriction the law thus provides little legal potential for integration, as Jesse has noted.[443] Therefore, the real aims of this restriction are to reduce the costs to society, which can be considered to correspond to the

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[439] See this synthesis, p. 89.

[440] Constitutional Law Committee statement PeVL 27/2016 vp.

[441] Although the very revealing investigation by Miettinen et al. (2016) was made only after this legislative amendment, the data on which to conduct such research were available much earlier.

[442] Government proposal HE 43/2016 vp, p. 1.

[443] Jesse 2017.

legitimate aim of the economic well-being of the country (Art. 8-2 ECHR) and to deter people from entering Finland to seek asylum, which is not possible to justify with any of the aims allowed by the ECHR. Indeed, the Constitutional Law Committee mentioned that it considers the aim of attracting fewer asylum seekers to Finland problematic in the light of the constitutional obligation for authorities to protect basic and human rights (Section 22). However, it saw no problem with human rights and with restricting the right to respect for family life for economic reasons.[444] The Constitutional Law Committee thus subscribes to human rights minimalism at its best.

As mentioned above, the legislature did ensure some discretion for the administration to consider human rights obligations when deciding on family reunification in an individual case. In relation to this recent amendment to the Aliens Act, the Constitutional Law Committee stated that the assessment of proportionality of the income requirement in an individual case must be wider than in previous practice, which has been deemed very strict. The Committee also expects factors other than the best interests of the child to be taken into account. The Committee especially mentions the possible particular vulnerability of the sponsor, due, for example, to sickness or mental problems, as well as the practical ability to meet the income requirement.[445] It is confusing how the Committee emphasises the special characteristics and vulnerability of those affected by the legislative amendment, namely people enjoying international protection, but at the same time allows that categorical restriction. It seems that the Committee overestimates the leeway available to the administrative level in making exceptions based on constitutional aspects in a case where the requirements are clearly stipulated in the law.

[444] Constitutional Law Committee statement PeVL 27/2016 vp, p. 2.

[445] Constitutional Law Committee statement PeVL 27/2016 vp, pp. 3–4.

6 EXPANDING LEGAL RIGHTS AND METHODS

6.1 Limits of the Legal Approach

In the preceding chapters I have mainly approached the research task using legal methods, trying to explain the level of legal human rights protection. I have found that all the relevant actors secure only the minimum level of protection, the protection reduced to the very minimal allowed by the ECtHR, which recently seem to have been further reduced to pure balancing with no effective core. In the context of immigration control, the standard of fairness in human rights law is far from ideas of equality, well-being or integration. According to the literature, minimalistic human rights protection only ensures decent or tolerable human existence. This aptly describes the level of human rights protection in the context of immigration control. I share a fear with some other scholars that legal human rights practice may promote a world view or lead to consequences that we do not actually want to support.[446] In the context of family reunification, the dark side of human rights also promotes the status quo of the state-centric world order devoid of solidarity towards extending human rights protection to people outside their state territory.

A question then arises: what can a researcher do if discontent with this level of respect for family life? One answer is to call for better human rights protection under the law, for example, by arguing for more equality between different contexts and groups of people. Another, perhaps more pragmatic option within the law is to argue for minor improvements such as giving more weight to certain interests in the balancing, which has been used in earlier chapters in this dissertation. Wray calls this approach the "moral reconstruction" of human rights adjudication.[447] One option is also to look at the outskirts of the law to argue for a more coherent legal system, which I have done above with general legal principles or soft law guidance on good regulation. These areas of legal thinking are not as severely affected by the minimalistic human rights approach, but still have equality and well-being as their guiding stars. Another option is to look for solutions outside the law. An

[446] Pirjola 2013, pp. 56–57.

[447] Wray 2023, pp. 179–180.

interdisciplinary approach enables thinking outside the box and introducing new ideas into legal thinking.

I departed from traditional legal approaches in two of my publications written in English. However, in Publication II of this dissertation I already chose as a yardstick the well-being and integration of foreigners and analysed the integration potential of the family reunification legislation. In addition, Publication II touches upon the concept of everyday security developed in critical security studies. In Publication III, I first systematised the right to family reunification in Finnish law and then analysed it through the lens of the politics of belonging. This theory from critical political studies looks at how politicians and decision-makers understand and construct society and its members. Belonging is a useful concept bridging politics and law since the law is clearly structured by a certain understanding of insiders and outsiders. Publication IV continues to develop the everyday security aspect explored in Publication II, but now not only from the point of view of the sponsor but also the family members waiting abroad. The concept of everyday security is a bridge between the real-life consequences of family separation and the proportionality assessment, where serious security threats should be given more weight. In addition, grave security concerns can amount to inhuman and degrading treatment, which might trigger human rights protection through Article 3 ECHR. However, as demonstrated in Publication IV, the primarily territorial jurisdiction of human rights limits state obligations within its borders, but critical legal theory on extraterritorial application of human rights provides an avenue for enhancing human rights protection.

As mentioned in Chapter 2.3, although I speak for the importance of socio-legal research, I have not used sociological methods myself. However, in Publication II and again in Publication IV I emphasised the need to know the impacts of the restrictive law in order to assess the human rights compliance. Impact analysis can be made either *in abstracto* or *in casu*, in the same way as the proportionality assessment itself. Human rights balancing thus includes extra-legal aspects and is inherently interdisciplinary. Conducting sociological research on impacts of family separation and restrictions on family reunification is necessary but not sufficient to assess fair balance. Interdisciplinary analysis is needed to highlight legally relevant factors among all the possible impacts on people's lives. On the other hand, sociological research may reveal new or unexpected impacts later possibly acknowledged to be legally relevant. This is perhaps the important feedback loop that Wray is referring to.[448] To emphasise the need for sociological research on impacts and the need for

[448] Wray 2023, p. 63.

interdisciplinary socio-legal studies on human rights obligations in the context of family reunification was one of the motives for editing the compilation book including Publication III of this dissertation.[449]

6.2 Politics of Belonging in the Context of Family Reunification

An interdisciplinary approach combining legal and political studies makes it possible to analyse the guiding principles and logic behind the legal system of immigration control. In Publication IV, I chose to apply the theory of the politics of belonging to the analysis of the legal framework on family reunification in the Finnish legislation. Many researchers have been interested in the concept of belonging in relation to immigration,[450] including in the specific context of restrictions on family reunification in Finland.[451] My research adds to the existing research by emphasising the temporal aspect of belonging. It also makes a more comprehensive legal analysis of the family reunification law. While much of the research on the politics of belonging has focused on political discourses, I concentrate on legal texts. This approach, concentrating on legal structures, can also be called legal belonging.[452] Politics of belonging thus describes the hierarchies of belonging perceived by decision-makers and politicians when they enact laws. People directed by those legal rules may assume something about their perceived belonging, which may then affect their sense of belonging. The term belonging is very close to the idea of legal recognition,[453] but belonging captures better the two-way connection between the politics of belonging and the feeling of belonging. However, determining the feeling of belonging was not the objective of this research.

I have found by means of a legal systematisation of the national rules on family reunification, that, in principle, Finnish migration law allows family reunification for almost all categories of migrants. The right to family reunification is denied or allowed based on the type of the residence permit (temporary, continuous and permanent) of the sponsor. In Finnish immigration law, there is always the right to family reunification when the sponsor has a continuous or permanent residence

[449] Tiilikainen et al. 2023.

[450] Geddes and Favell (eds.) 1999; Castles and Davidson 2000; Yuval-Davis 2006; 2011.

[451] Wray 2011; Block 2012; Rytter 2013; Staver 2014; Pellander 2016; Mustasaari 2017.

[452] Marglin 2021.

[453] Taylor 1994. Used in Mustasaari 2017 in connection with family reunification.

permit, Finnish nationality or EU citizenship. Only a few categories of certain types of temporary residence permits with weaker ties to Finland are denied family reunification. For example, rejected applicants who cannot be returned, which reflects their perceived non-belonging to society. Some temporary permit holders are allowed family reunification and thus are given the opportunity to foster belonging.

However, hierarchies based on the types of residence permit are not the whole story. The picture becomes messier when the effect of the conditions set by law and the actual access to the reunification process is considered. For example, permit holders in most categories are required to fulfil an income requirement, which creates differential treatment between different socio-economic groups. Family members of privileged groups perceived to have stronger ties to Finland are exempt from that condition, including family members of Finnish citizens. The 2016 amendment to the Aliens Act added a new group, those enjoying international protection, to the categories of migrants facing restricted family reunification. This caused a change in the logic of entitlement to family reunification: people under international protection no longer receive preferential treatment. However, family members of refugees are in a slightly better position; they may avoid the income requirement if the application is made within three months of the sponsor receiving their residence permit.

Immigration law thus creates hierarchies of belonging based on residence permit types and categories. The hierarchy of legal belonging seems to be constructed with temporary residents at the bottom, continuous residence permit holders slightly higher up, above them people granted continuous international protection and finally, at the top, EU citizens and Finnish citizens. From the point of view of sponsoring residence permits, the hierarchy has low-skilled or low-paid migrant workers and students at the bottom, highly skilled workers and entrepreneurs next, then people enjoying international protection, refugees in a slightly better position, then EU citizens and finally Finnish citizens at the top. Remarkably, the legal hierarchy differs from the sociological hierarchy described by Koskela,[454] according to which beneficiaries of international protection are considered less welcome than people with migrant worker status. However, the recent extension of the family reunification income requirement to people granted international protection has indeed narrowed the gap between the legal and sociological hierarchies of belonging.

The strict income requirement disrupts the logic of structural belonging created by the system of temporary and continuous types of residence permits. Although a person may be considered to be continuously or even permanently staying in

[454] Koskela 2014.

Finland, their family reunification can be effectively obstructed by the income requirement. Indirect deterrence policies aimed at discouraging new asylum seekers have also affected those under international protection in Finland. The indirect effect of this deterrence policy, combined with rigorous socio-economic gatekeeping, undermines the structural belonging of people working in low-income jobs, which may also affect their feeling of belonging. Although this treatment may not constitute illegal discrimination, it may not be wise in this era of demographic challenges, when facilitating integration as well as retaining integrated migrants is considered important. Immigration law should follow the politics of progressive belonging and respect the principles of equality and proportionality, as well as safeguard the coherence of the legal system.

In human rights balancing, it is the factor of ties to the host country that mark the connection with the country of residence. Family members have indirect ties to the host country where the sponsor resides, but it seems that these ties carry little legal weight. It is the ties of the sponsor to the host country that matter. In human rights practice, the ties to the host country are most often measured in terms of time. The longer the sponsor has stayed in the country, the stronger their entitlement to rights. This is also reflected in the theory of the progressive inclusion of foreigners.[455] As explained above, refugees and often other people under international protection have been considered exceptions. However, in national law (with some reflections in human rights law), the logic of belonging is not so clearly tied to the passing of time. Hierarchies of belonging are created through selective logic based on the prospects for a longer stay and thus potential belonging. In addition, selectivity through the income requirement has strengthened the economic logic, even at the expense of international protection.

Following the idea of the progressive inclusion of foreigners, a permanent residence permit should be considered to prove belonging and waive restrictions on family reunification. Being granted permanent residence does not currently affect the strictness of the restrictions on family reunification in Finland. I argue that it is an exaggeration to have to acquire nationality in order to have the right to enjoy family unity. To be also effective in the context of immigration, the right to respect for family life should recognise immigrants who have proven sufficient ties and successful integration, which permanent residence can be understood to reflect. Likewise in the Family Reunification Directive, in Article 3(1), the logic of entitlement to that right is based on the "reasonable prospects of obtaining the right of permanent residence". The right to family reunification should already be granted

[455] Horváth and Rubio-Marín 2010; Farahat 2014.

or made reasonably achievable before obtaining permanent residence, when the sponsor is issued with a residence permit for one year or more. The logic behind the Directive thus assumes that the sponsor should be allowed family reunification when issued with a permanent residence permit. However, this is not explicitly stated in EU law.

The right to respect for family life allows conditions and waiting time to a certain point, which should be before or at the latest when the sponsor is granted permanent residence. However, I argue that those restrictions are acceptable only in the context of voluntary migration. Forced migration should be and indeed has been treated as an exceptional context, where states have the obligation rather to facilitate than restrict family reunification. However, this logic seems to be changing in state practice, as well as in the practice of human rights law. If the ECtHR does not uphold this exceptionality of the international protection regime, people subjected to forced migration and enforced separation from family members are faced with similar restrictions based on progressive belonging and enjoyment of rights than other migrants. However, the consequences felt in everyday life for forced migrants are not the same as for voluntary migrants. This is a topic investigated in Publication III of this dissertation, which will be addressed in the following sub-chapter.

6.3 Recognising the Extraterritorial Reach of Family Life

Lambert wrote in 1999 on how the applicants in family reunification cases could be expected to obtain concrete (effective) protection only in situations related to international protection and the non-refoulement principle protected through Article 3 ECHR.[456] In 2004, Mowbray analysed the ECtHR case law on family reunification and came to the conclusion that the court is "extremely reluctant" to find violation. He assumed that in order to succeed, the facts of the case would need to demonstrate "a very serious need for admission", which he describes "perhaps involving an immediate risk to the life of the family member in his/her country of origin".[457] The situation that Mowbray describes is comparable to consequences amounting to a threat to the rights protected in Article 3 (prohibition of degrading or inhuman treatment) or even 2 (right to life) of the ECHR. Christoffersen writes about the interplay and concurrence between different articles, interestingly pointing

[456] Lambert 1999.

[457] Mowbray 2004, p. 175.

out cases where Article 3 can be considered as the absolute core of Article 8.[458] I have argued in Chapter 3 that the elsewhere test that determines if there are insurmountable obstacles to enjoying family life is an essence test for the right to respect for family life. Article 8 can indeed be considered to have, at its core, protection similar to that in Article 3. Insurmountable obstacles may manifest as protection needs triggering Article 3. However, recent case law suggests that the ECtHR gives less weight to those aspects, which undermines the effectiveness of Article 8, but also the absoluteness of Article 3.

With these jurisprudential developments and theoretisations in mind, I wrote Publication III, which deals with the legal challenges but also with the opportunities that human rights law encompasses to respond to the difficult situation of restrictions on the family reunification of forced migrants. From a legal point of view, recognizing the situation of family members abroad is problematic because states usually do not have human rights obligations towards people outside their territory. However, extraterritorial human rights obligations do exist in some circumstances, and are often connected to Article 3 ECHR. Publication III of this dissertation investigates whether family reunification can be considered such an issue, and what this means for human rights adjudication, in which the interests of different actors are weighted in search of a fair balance. The existing literature on extraterritoriality and human rights mainly concentrates on issues other than migration control,[459] while the existing research on the nexus of migration and extraterritoriality is more related to border management than to residence permit applications.[460] However, Stoyanova has acknowledged in her recent research based on the new human rights case law of the ECtHR that an approach more favourable to the applicants may also be warranted in the context of immigration control.[461] My research thus develops the existing discussion on extraterritoriality by concentrating on the less studied context of immigration control and, more precisely, family reunification.

Human rights protection and the state's obligation in family reunification cases are thus based on the interests of the person already in the country. For this reason, the principle of territorial jurisdiction is not an issue of admissibility in family reunification cases. However, it could be an issue when recognizing and weighing

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[458] Christoffersen 2009, p. 160.

[459] E.g. Gondek 2009; Da Costa 2013.

[460] E.g. Gammeltoft-Hansen 2011.

[461] Stoyanova 2023, pp. 243–244. Referring to ECtHR, M.N. and Others v. Belgium [GC dec.], 5 May 2020, para. 124.

the interests of family members in the balancing exercise. Should the interests and human rights of family members outside the territory of the host state be taken into account in decision-making? To answer this question, it is necessary to take a closer look at the territoriality principle and its possible exceptions. Gammeltoft-Hansen writes that the "the law on jurisdiction is geared to avoid overlapping or competing claims to jurisdiction by several states", but also to avoid a gap in human rights protection.[462] The ECtHR seems to have two tests for determining jurisdiction: a state's control over a territory or control over a person.[463] Gondek explains that a more person-oriented interpretation of human rights jurisdiction would always accept jurisdiction when a state has the authority to make a decision that affects a person's life and rights. Gammeltoft-Hansen describes this approach as a "functional conception of extraterritorial jurisdiction", which "applies the basic principle of human rights law that power entails obligations".[464] Gondek further explains that in the ECtHR practice there is also a gradual approach to person-oriented jurisdiction. This means that a state's obligation to secure the Convention rights of a given person applies proportionately to the control in fact exercised over that person; if the control is more limited, a person is within the jurisdiction only with regard to particular rights and obligations.[465]

Although the ECtHR has not explicitly connected extraterritoriality to family reunification, nor, to my knowledge, has the literature discussed it in this context,[466] general legal principles apply to all contexts and fields of law. The ECtHR has stated that in dealing with immigration control and residence permits, extraterritorial jurisdiction requires a connecting tie with the responding state, and that a jurisdictional link exists in a situation of pre-existing family or private life that the state has a duty to protect.[467] Drawing on the literature in other legal contexts, it seems that a functional conception of extraterritorial jurisdiction could bring family members abroad within the jurisdiction of the ECHR contracting parties. According to the functional approach, when a state has the authority to make decisions that affect the lives and rights of those outside its territory, it also has the obligation in its decision-making to respect human rights. However, human rights protections in

[462] Gammeltoft-Hansen 2010, p. 78.

[463] Gondek 2009, p. 373.

[464] Gammeltoft-Hansen 2010, p. 80.

[465] Gondek 2009, p. 376; Da Costa 2013, p. 302.

[466] Except for Stoyanova briefly commenting that extraterritorial jurisdiction seems plausible in the context of family reunification. Stoyanova 2023, pp. 243–244.

[467] ECtHR, M.N. and Others v. Belgium [GC dec.], 5 May 2020, paras 109 and 123.

such cases may not be as strong as in the territorial application of human rights. As Gondek writes, jurisdiction is a question separate from state responsibility.[468] Jurisdiction is the permission or obligation to take certain interests or rights claims into account, but a state's responsibility may still be limited for contextual reasons or due to the competing interests at stake. The extraterritoriality situation may thus affect the balancing of interests undertaken by the ECtHR. Milanovic argues that in the extraterritorial balancing, "the scales would weigh somewhat more heavily in favour of state interests than they would otherwise".[469] However, the literature referred to in Publication III suggests that rights such as the right to life (Art. 2 ECHR) and the prohibition of torture and inhuman treatment (Art. 3 ECHR) should be given more weight even in an extraterritorial situation.[470]

My review in Publication III of both the ECtHR and the Finnish case law has demonstrated that the situation of family members abroad has occasionally been referred to by the courts when balancing interests and when assessing the existence of insurmountable obstacles to enjoying family life elsewhere, dependence on the sponsor or the reasonableness of certain restrictions. Based on this sample, it seems that the ECtHR has given more weight than the Finnish national courts to the difficulties of family members abroad. The case law of the ECtHR shows that the cumulative assessment of relevant factors allows the situation of family members abroad to be taken into account when determining the most adequate place to continue family life together. There is room, however, to further develop the assessment of insurmountable obstacles by better acknowledging the hardships of family members abroad. The lack of clear legal rules means that an assessment of the human rights compliance of national practice with regard to this specific aspect of extraterritorial obligations is not currently feasible. Nonetheless, the Finnish national case law shows that despite occasionally considering the difficulties of family members abroad, the courts' cumulative assessment and consideration of family hardship is either lacking or has a very high threshold.

In both the ECtHR and in the Finnish courts, judges have sometimes concentrated on detailed restrictions, such as time limits. Considering the cases analysed for this publication, it seems that the courts in Finland are sometimes lost in detail and tend to overlook the assessment of fair balance and insurmountable obstacles. While the Finnish Supreme Administrative Court has taken the actual situation of applicants abroad into account when assessing the reasonableness of the

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[468] Gondek 2009, p. 370.

[469] Milanovic 2011, p. 112.

[470] See also Milanovic 2011, p. 114.

three-month time limit for exemption from the income requirement for refugees' family members, the court disregards the ultimate test of a cumulative assessment of the most adequate place to enjoy family life. The difficult situation of the family members abroad should have also been relevant from the point of view of assessing the applicants' ability to enjoy family unity, not only for assessing the excusability of delays in submission. The feasibility of continuing family life elsewhere should be the centre of adjudication for determining the responsibility of the host state to ensure family unity, analogous to its importance when using the extraterritoriality principle to assess which country must fill flaws in human rights protection.

Within this sample of court cases from the ECtHR and from Finland, the situation of family members abroad was seldom seen as significant, although the applicants often referred to such issues. However, if a factor is acknowledged in a decision, it is legally relevant. The challenge is thus to determine the proper weight to be given to such a factor. Considering Gammeltoft-Hansen's conclusion that it is the courts that should determine the reach of states' human rights obligations towards people outside state territory,[471] a review of case law indicates that the territoriality principle is still rather strong. However, the theory of extraterritorial human rights obligations can offer guidance and add to the balancing test by emphasizing the responsibility of a state when considering factors threatening life, health and security. Although, based on the sample used in this chapter, I cannot know if the authorities have given proper weight to the insecurities faced by family members abroad in positive decisions, I concede that there are some cases where these aspects have not been properly recognised. Therefore, it is important that further theoretical research emphasise this obligation and that empirical research be undertaken to investigate whether decision-makers respect the rights of family members abroad.

In my view, the interests, insecurities and refugee status of family members abroad should be significant in assessing applicants' ties to the country of origin and the obstacles to enjoying family life elsewhere. If concerns related to Article 3 ECHR arise, it should suffice to demonstrate insurmountable obstacles. However, in many cases these aspects are taken into account only when concerning the sponsor's ability to return, and not from the point of view of the family members abroad. As Costello et al. point out in a publication by the Council of Europe,[472] family reunification can sometimes accomplish the same ends as humanitarian evacuation from conflict zones or refugee camps. However, the situation should not need to be so drastic for

[471] Gammeltoft-Hansen 2011.

[472] Council of Europe 2017, p. 12.

a cumulative assessment to find a state responsible for permitting family reunification. The assessment of insurmountable obstacles would then serve as a backstop activated especially in the case of people receiving or needing international protection. However, as Stoyanova explains, the issues involving extraterritorial jurisdiction are sensitive in international relations and international law. Burden sharing and solidarity may exist between states or even between states and individuals to a certain point but is rarely considered to be a matter of human rights law obligations.[473]

[473] Stoyanova 2023, p. 302.

7 CONCLUSIONS

7.1 Human Rights Minimalism and Fading Effectiveness

The research idea for this dissertation emerged from the quest to clarify the role and content of human rights in the context of immigration control, and more specifically in the context of family reunification. I have mainly concentrated on human rights law and the court practice of the European Court of Human Rights for two reasons. First, because domestic Finnish decision-makers follow human rights standards created by the ECtHR as minimum standards for fair treatment of foreigners. Second, because the human rights standards of the ECtHR for family reunification are rather unclear and ever evolving. Nowadays European Union law is an equally important source of supranational obligations, which I have included for purposes of comparison, especially from the viewpoint of proportionality assessment. However, the focus is on human rights obligations. Therefore, I have first determined through legal analysis the standards of the ECtHR, which has also required theoretical analysis of the principles guiding legal thinking. Since the research approach is critical and the aim is to enhance human rights protection, I have theorised on ways to develop the decision-making to make it more coherent and protective. However, I have also acknowledged the sensitivity and weak rule of law in this policy area, and thus tried to keep the approach pragmatic. I call my approach merging legal principles and political pragmatism principled pragmatism.

Legal decision-making in human rights cases is often conducted through proportionality assessment, also called balancing, which in family reunification cases of the European Convention on Human Rights is called a fair balance test. I have concentrated on the human rights obligations stemming from the interpretation of the ECtHR on the right to respect for family life protected by Article 8 ECHR. I have thus omitted, for example, considerations of equal treatment (Article 14 ECHR), which is an important aspect that would require a separate investigation. Furthermore, by concentrating only on the aspect of proportionality and balancing, I have omitted some important questions such as the personal scope of family members protected by Article 8. However, I have included some additional aspects such as the extraterritorial jurisdiction of the ECtHR (concerning Article 1 ECHR)

since that explains the contextual limitation existing in cases concerning immigration control in general, and in cases of family reunification, the interests of family members abroad in particular.

Balancing as a human rights obligation has two dimensions: procedural and substantive. The ECtHR thus requires that a national actor make a proportionality assessment and give justification for the restrictions, but it can also assess the test substantively. However, especially in the context of immigration and family reunification, the ECtHR does not readily replace the assessment made by national authorities with its own assessment but may find a violation in the total absence of any assessment. Limiting its review to procedural assessment can be seen as demonstrating greater respect for the principle of subsidiarity, although sometimes procedural aspects can also amount to finding a violation. The ECtHR thus sometimes leaves it to the national actors to determine the relevant factors and their weight in the balancing. National authorities in their responses to the complaint need only demonstrate that a proportionality assessment similar to the fair balance test has been conducted by the legislature, administrator or the court. In principle, the ECtHR does not care which actor at national level is in charge of human rights monitoring.

Although the ECtHR has been hesitant in creating clear principles, some guidance and standards can be drawn from cases in which the ECtHR has substantively assessed the balancing. I have listed the factors in the balancing that the ECtHR has taken into account in its case law, such as the ties to host countries and to countries of origin.[474] In addition to the interests of the applicants, the ECtHR also takes into account the interests of the state, such as maintaining order or managing public finances. However, listing these factors and expecting the respondent states to consider them is still almost purely a procedural requirement. A more substantial proportionality test involves assessing the weight of different factors against each other. Although more detailed guidance would be helpful for national authorities to monitor obligations and ensure a more equal human rights protection between contracting parties, the ECtHR has been reluctant to assume that role. In the wider picture, the ECtHR is being sensitive to state views and following the strengthened principle of subsidiarity, thus being pragmatic. Principled pragmatism would require not losing the essence of human rights protection while allowing a margin of appreciation and following the principle of subsidiarity. I argue that this could be secured by paying more attention to the quality of the proportionality assessment, for example, by assessing more carefully the

[474] See this synthesis, pp. 62–63.

reasonability and probability of the adverse societal consequences that the state relies on.

It is therefore difficult, if not impossible, to understand the balancing without a wider picture of the principles related to the competences of the ECtHR, the scope of a human right and various other phases in the proportionality analysis. I argue that the inherent limitation in the context of immigration control detected by many observers has its roots in the principle of territorial jurisdiction. The control of entry of foreigners is, by default, outside the competence of the ECtHR since the people requesting entry are typically outside the country and without strong ties to the respondent state. However, in family reunification cases the rights holder, the sponsor, is in the host country. It is therefore obvious that human rights obligations bind the host state, but the context of immigration control nevertheless plays a role. I argue that the factor of the sponsor's ties to the host country should be paid more attention and given more weight. For example, sponsors holding a permanent residence permit should be allowed to invite family members to live with them. However, it is also important to note that in case of forced migration, the severed ties with the country of origin (insurmountable obstacles) carry considerable weight and may constitute an exception to the requirement of ties to host country.

In addition to the human rights standards created by the ECHR and the ECtHR, national authorities must follow the requirements of EU law. The same human rights principles guide the Court of Justice of the EU in family reunification cases, but EU law also offers better protection. When considering human and fundamental rights, the CJEU conducts a proportionality assessment, which often differs slightly in content, rendering the practice slightly more protective of immigrants' rights. EU law recognises the right to family reunification as a default point, whereas the ECtHR considers it to be an exception to the rule of sovereign power over the admission of immigrants. It thus seems that the ECtHR is still uncertain about its competence in the context of immigration control. This difference in competence and the default point for balancing could affect the outcome even more than it actually has. The image of European supranational standards in family reunification seems rather coherent despite the differences. In my view, European standards are interlaced like a television screen showing two slightly different fields in one image.

From the viewpoint of the national authorities, it is therefore quite safe also to follow the CJEU in human rights interpretation. However, EU law does not cover all situations, whereas Article 8 ECHR should. The interplay and gaps between these two systems becomes apparent, for example, in the legislation and approach concerning the subsidiary protection category. The EU has recognised this

protection category based on ECtHR practice protecting people from return to life threatening or inhuman circumstances (Art. 3 ECHR). The treatment of people with refugee or subsidiary protection status is in many ways similar. However, the EU legislature has not included people with subsidiary protection in the Family Reunification Directive. Therefore, the supranational rules protecting their family life in family reunification applications is left entirely to the ECtHR to determine. Unfortunately, the human rights court has chosen to downplay their protection needs and allow restrictions similar to those used in cases of voluntary migration. This interpretation is, rather surprisingly, partly justified by the gap in EU law. The ECtHR has taken that gap as a sign of national opinion not to grant beneficiaries of subsidiary protection rights similar to those enjoyed by refugees.

In my research, I have observed that the fair balance test connected with Article 8 is not purely legal analysis, but can accommodate different values and political opinions expressed by legitimate democratic processes. In addition, the ECtHR follows the principle of subsidiarity by allowing a margin of appreciation in determining the aim of restrictive measures as well the weight of the public interest. The approach of the ECtHR can be described as pragmatic. I have also found that the human rights standards for the protection of family life are minimal in the ECtHR. I have divided the development of the balancing test into four phases, where the first establishes principles such as the elsewhere rule, the second introduces balancing, the third develops the balancing to be more protective and the last one depicts the declining effectiveness of the right to respect for family life in the context of immigration control. This is illustrated by using the theory of core rights (core of a human right). Earlier research has recognised a certain logic in court's reasoning that places the opportunity to enjoy family life elsewhere as a threshold for human rights protection and a decisive factor in the balancing. I argue that the elsewhere test is, or could be, an essence test indicating the core of the right to respect for family life in the context of family reunification and migration control.

Recent case law in the ECtHR has shown, however, that the core, if it exists, is compromised. I argue that the current practice allows balancing the right away. The core is traditionally understood to be absolute, which raises doubts about the accuracy of my theorisation on the core and the essence test. However, some theories on interpreting the core rights suggest that a core can also be relative. If the elsewhere test appeared absolute before, now the ECtHR continues with the balancing even after finding insurmountable obstacles to enjoying family life elsewhere. This is unfortunate from the point of view of effective protection and clear standards. In a policy area where inherent limitations already affect the scope

of the right, and the objects of the law are not usually presented in the processes of democratic law-making, it would be important to have clear standards or at least a clear backstop ensuring human rights protection in the national law and court practice. If the ECtHR allows and expects the national actors to determine the substantive content of the protection, it should be able to describe the core, the situation when a contracting party is obliged to accept family reunification. Otherwise, the right to respect for family life is meaningless and empty in the context of family reunification. However, although the ECtHR may have changed its approach to the elsewhere test, the factor of obstacles to enjoying family life elsewhere remains important and carries considerable weight in the balancing.

7.2 Evasion of Responsibility at the National Level

The ECtHR thus expects the national actors to safeguard and monitor human rights protection. This is one aspect of the subsidiarity principle. In the context of family reunification, the ECtHR requires legality, legitimate aim and proportionality, and the proportionality assessment is called a fair balance test. The supranational human rights court gives some guidance on the content, but rarely reviews the accuracy of the balancing exercise or indicates which national actor should conduct it. I investigated how the balancing is organised between legislative, administrative and judicial actors at the national level and also analysed the advantages and challenges of the chosen national system. However, my analysis is not comprehensive or systematic, but provides examples of a limited number of situations in the context of family reunification where restrictions are applied, and thus where human rights obligations should be taken into account. I concentrated on legislation, legislative drafting and the practice of the Finnish Constitutional Law Committee because this phase of human rights monitoring has been less studied, although, in my opinion, very important for human rights protection. My initial plan was to include a more systematic analysis of national court cases, but I had to abandon that due to time constraints. However, relevant court cases are considered in specific questions.

In Publication I of this dissertation, one of my observations was that the Aliens Act, which includes the relevant legislation, has various provisions that require the administrator to assess the proportionality of a negative decision. Those provisions can be seen to accommodate the requirement of proportionality assessment of the ECtHR. The application of those provisions is dynamic. Although the current text

may not explicitly mention all the factors that the human rights court has referred to, the authorities seem to follow the supranational case law, both from the CJEU and the ECtHR, and adjust their decision-making to meet the requirements. The courts seem to follow a similar dynamic approach. However, there is a significant structural problem in such an *ex post* human rights protection system, which the Supreme Court of Finland has also pointed out; provisions reflecting the proportionality principle are weak when compared with the clear legal rules enacted in other provisions. This is a consequence of strong principles of legality and democracy. It is debated if the proportionality assessment can deem void a restriction which is clearly expressed in the national law. The ECtHR clearly expects the states to ensure that the outcome is not in breach of international obligations and therefore the proportionality assessment, at whatever stage it is made, must be effective. However, access to rights and the effectiveness of the human rights protection is undermined when the explicit conditions are so strict that in many cases recourse to the proportionality assessment is needed to reach an outcome compatible with human rights. For these reasons, I turned to investigate the *ex ante* review of the human rights obligation in the Finnish system.

Indeed, as Publication II of this dissertation demonstrates, in Finland the constitutionality, including human rights compliance, is mainly monitored *ex ante* by the Constitutional Law Committee. The Committee is expected to ensure that the legislature has conducted a human rights impact assessment, and then it should also comment on any problems with basic or human rights obligations. The Constitutional Law Committee in Finland is a political organ, but it is supposed to make a legal assessment with the help of legal experts. Therefore, I argue that this phase would also be ideal for assessing substantively *in abstracto* the proportionality of restrictions. However, in the question observed related to restriction on income requirement, the Constitutional Law Committee did not conduct substantial balancing but passed the task onto the administration. It allegedly secured minimal human rights obligations and issued some instructions on the factors to be taken into account in the balancing at the administrative level. In my opinion, the obligation passed on to the administration to conduct the overall assessment of relevant factors may be a sufficient but certainly not an efficient way to protect human rights. Access to rights is endangered if the applicants who may benefit from the fair balance test do not even apply because they do not *prima facie* meet the income requirement. I argue that the Constitutional Law Committee should conduct substantial balancing in abstract form.

After the large number of asylum seekers in 2015 and consequently a large number of people being granted international protection, the Finnish legislature was determined to bring the right to family reunification to the minimum level in the light of supranational law obligations. An amendment to the Aliens Act in 2016 ended the facilitation of family reunification for sponsors under international protection by extending the income requirement to all, only with the three-month exception for refugee sponsors and later the exemption of minor sponsors. In addition, the law imposes a condition on refugee sponsors regarding exemption from the income requirement: it is granted only if family life is not possible elsewhere (Section 114.4.3). This reflects the minimal level of respect for family life. The approach is similar to, and most likely adopted from, the Family Reunification Directive (Art. 12). The elsewhere test has thus also become a condition for enjoying human rights, in addition to being a backstop for minimum human rights protection when balancing interests. The difference is that when the elsewhere test is a condition, no balancing *in casu* with national interests is made. From the viewpoint of the legislature, the elsewhere test has transformed from a categorical facilitation principle to a factor considered in an individual case to make sure that family reunification is granted only when required by human rights law. In practice, this may lead to double assessment of protection needs: first in the asylum process and later in the family reunification process.[475]

The national legislature in Finland has thus chosen to remove the categorical facilitation of family reunification from people receiving international protection. However, human rights obligations remain and now the courts need to tackle the task of ensuring compliance with human rights. The fair balance test and the elsewhere rule are central to this assessment. Structural problems in human rights monitoring such as evading responsibility for proportionality assessment by passing it on to other actors may create situations where individuals have problems in accessing their human rights. When the human rights standards favouring people with protection needs are left to national courts to supervise, and sponsors enjoying international protection must fulfill the income requirement,[476] many do not even apply. By passing the human rights monitoring to the next level, the legislature shows half-hearted commitment to human rights and succeeds in its objectives to reduce the number of family reunifications and use the strict policy as a deterrent to reduce the number of asylum seekers.

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[475] As observed in the case of minor sponsors before the exemption was reinstalled. See Non-discrimination Ombudsman 2020.

[476] Which is estimated to be possible for very few. See Miettinen et al. 2016.

In the bigger picture, the role of human rights in European supranational law and the relation between EU law and the ECtHR standards seem to be unclear, or even intentionally blurred. It is a mistake to conclude that the Family Reunification Directive allows restrictions to the rights of subsidiarily protected sponsors when they are excluded from the personal scope of that directive. A correct conclusion would then be that the EU law does not say anything about their family reunification and therefore the legislature should pay more attention to the standards of the ECtHR. However, the ECtHR has recently allowed the state opinion, which is in a way also reflected in the EU politics, to affect its standards of protection. This vicious cycle of influence between actors at different levels may ultimately affect the wellbeing of foreigners at the national level.

Due to the incoherence, but also to the incompleteness of the ECtHR standards, I have engaged in theoretical analysis beyond dogmatic legal methods and the established legal obligations. Publication IV of this dissertation approaches the question of fairness and coherence of national law from the viewpoint of legal belonging. The theory of the politics of belonging analyses political speech on belonging and acceptance of foreigners as members of society. I have conducted a similar analysis but based on legal provisions, thereby analysing belonging as reflected in the law. Allowing a foreigner family reunification is a prime indicator of acceptance as a member of society. I have pointed out, among other things, how Finnish law makes no distinction between most temporary residence permit holders, continuous permit holders or permanent permit holders regarding their right to family reunification. According to the idea of progressive inclusion, the stronger and longer the ties, the better the rights should be. Ties to the host country are also recognised as a factor in the fair balance test of the ECtHR. As mentioned in Chapter 3 of this synthesis, better human rights protection could be attained by giving more weight to the ties to the host country. In Finnish law, facilitation of family reunification in the form of exemption from the income requirement is provided only after the sponsor obtains Finnish nationality. The belonging is thus indicated in terms of the socio-economic situation rather than ties to the host country. This may appear unfair and problematic among foreigners who already have strong ties and even permanent residence, but income below the required level. While their belonging is not recognised, their own sense of belonging may also be undermined.

7.3 Erosion of International Protection and Solidarity

The role of human rights in immigration control, and, more precisely, in family reunification, is thus weak and the level of protection minimal, especially in the case of sponsors enjoying international protection. In this dissertation, I have paid attention to different types of sponsors: voluntary migrants and involuntary migrants meaning people under international protection. However, there are also significant differences within those broad categories, such as between categories of international protection. I have not addressed temporary protection categories and their family reunification in this study, but I have pointed out the different treatment in human rights protection between refugee and subsidiary protection statuses. Although I have not included an analysis of the equality test and Article 14 ECHR in this study, the question of equality is at the heart of the fair treatment of foreigners. Selective policies familiar to the management of voluntary migration are applied to involuntary migration as well. The erosion of international protection and half-hearted commitment to human rights that can be noticed in other issues such as "pushbacks" of asylum seekers,[477] is also felt within family reunification law and practice when the subsidiarily protected sponsors are treated similarly to voluntary migrants. The insurmountable obstacles test no longer seems to be an essence test and a trump card e for people enjoying international protection. The group vulnerability of people enjoying international protection is not recognised by the ECtHR. In national law, only particular vulnerability is considered as a factor guaranteeing protection of family life, which leads to essentialism and minimalism within the vulnerability discourse as well.

It seems that the European supranational law is struggling to create a coherent picture between the two supranational courts and the states. Some states have chosen to treat subsidiary protection equally to refugee status, whereas others, such as Finland, have chosen to treat them differently. The legislature in Finland has argued for equal treatment between subsidiary protection and voluntary migration statuses. EU law says nothing because the sponsors benefitting from subsidiary protection are excluded from the scope of the Family Reunification Directive. Equal treatment between protection statuses can be argued for based on human rights law. However, the ECtHR itself has interpreted the gap in EU law as a sign of no favourable treatment envisaged by states to people benefitting from subsidiary protection status. This can be considered as another manifestation of the strengthened subsidiarity

[477] See e.g. Thym 2023.

principle. The ECtHR has thus chosen not to engage with this question although it has had an important role in creation of subsidiary protection in EU law. When international obligations are not clear, for example, when they are only based on ambiguous court practice, state practice seems to have the power to persuade a change in approach. However, the ECtHR should resist politisation and securitisation of human rights standards, as well as safeguard the effectiveness of human rights protection, for example, by only allowing margin of appreciation in regards the weight of national interest in balancing, and preferably only outside the core area.

Selective policies usually aim at protecting the economic wellbeing of the country, which is one of the legitimate aims for the restrictions in Article 8 ECHR. Economic interests have gained more weight in the fair balance test over time. If earlier security considerations were needed to deny foreigners protection or human rights, economic considerations now seem to be enough. However, economic consequences also need to be substantiated and their probability assessed. People granted international protection may be a bigger burden on public finances than other migrants. Conversely, restricting family reunification of labour migrants based on economic considerations is less plausible, especially in a situation of labour shortages. However, international protection has been understood as an exceptional sphere with an exemption from the income requirement. Therefore, since they are heavier, security considerations may be needed to justify restrictions or denial of rights in that area. However, to hold on to the justice and rule of law requires reasonable security concerns and proportionate restrictions. The proportionality assessment should be more rigorous in the case of security claims. My research demonstrates how the wave of securitisation of asylum seeking documented in other research has spilled over to the context of family reunification. I have shown in Publication II how the restrictions on family reunification of beneficiaries of international protection are indirectly justified by security concerns associated with a major influx of asylum seekers. This may not be direct securitisation of family reunification, but indirect deterrence policies whatsoever. As Publication IV of this dissertation points out, these policies designed to deter asylum applications and new people from entering the country mostly affect people enjoying international protection and already present in the country.

Some security concerns are more legitimate than others. In addition, some security threats are felt in the host country, and some abroad. However, the imbalance between acknowledged interests is striking in family reunification cases where the family members abroad may face security threats. In Publication III of

this dissertation, I presented examples of national court cases as well as ECtHR court cases in which the insecurities of family members are referred to. It seems that in most cases those interests are recognised, but not given decisive weight. The purpose of this research is not a systematic analysis of court cases but a theoretical exploration of the legal options to take better account of those security considerations. The challenge in this context of immigration control and family reunification is that the applicants are abroad, and states' human rights obligations are by default limited to people on their territory. However, I argue that the extraterritorial application of human rights obligations is justified when the applicants face situations capable of triggering Article 3 ECHR, which protects against inhuman and degrading treatment. Even such absolute human rights obligations cannot normally be attributed to a foreign state, but the family connection with the sponsor establishes a jurisdictional link that creates an obligation to respect human rights. Such extraterritorial application of Article 3 would enhance safe and controlled pathways to international protection and secure life in dignity for the whole family.

From a legal theoretical viewpoint, the above-described approach means placing Article 3 ECHR in the fair balance test together with Article 8 ECHR. It seems plausible that Article 3 reflects the idea of protecting human dignity and that it can be found at the core of every human right. Therefore, the prohibition of inhuman and degrading treatment can also be protected through the right to respect for family life. I argue that the elsewhere test described in this study is capable of accommodating Article 3 rights as well. When no other state is willing or able to protect against degrading treatment and secure family unity and life in dignity for the whole family, the host state should facilitate family reunification. Such a situation touches the core area of Article 8 and, therefore, very weighty reasons for restrictions of family reunification should be evinced by the state. It may even be necessary to determine an absolute core area where restrictions are not allowed in order to safeguard the effective respect for family life in human rights law. I argue that a human right cannot be thoroughly relative for it to be effective. In addition, the ECtHR should autonomously apply these standards to every case without making prejudgements through distinctions between protection statuses determined by states and the EU. Indeed, this is how the ECtHR has operated before. My suggestions for adjustments to the proportionality assessment are moderate; they can also be called pragmatic. The adjustments would not make a big difference in the rights of migrants but rather halt the backsliding of the treatment of migrants and especially of the respect for the international protection regime.

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Eurooppaoikeus ja pienipalkkaisten ulkomaalaisten työntekijöiden perheenyhdistäminen: tarkastelussa tulorajan lainmukaisuus ja suhteellisuus

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Jaana Palander

Eurooppaoikeus ja pienipalkkaisten ulkomaalaisten työntekijöiden perheenyhdistäminen

Tarkastelussa tulorajan lainmukaisuus ja suhteellisuus

Tässä kirjoituksessa käsitellään Euroopan unionin (EU) tai Euroopan talousalueen (ETA) ulkopuolelta eli niin sanotuista kolmansista maista tulevien työntekijöiden perheenyhdistämistä niin Suomen kansallisen oikeuden kuin EU-oikeudenkin näkökulmista. Maahanmuutto-oikeus, toisin sanoen ulkomaalaisoikeus, ja sosiaalioikeus nivoutuvat yhteen perheenyhdistämiselle asetetun tulorajan ja siihen liittyvän hallintokäytännön kautta. Perheenyhdistämistä voidaan eurooppaoikeudessa pitää yhtäältä sosiaalisena oikeutena ja toisaalta myös vapausoikeuksiin liittyvänä oikeutena. Sosiaalioikeus liittyy perheenyhdistämiseen myös sitä kautta, että ulkomaalaisille myönnettävä sosiaaliturva voi helpottaa perheenyhdistämistä. EU:n tai ETAn ulkopuolelta tulevien työntekijöiden ja heidän Suomessa oleskelevien perheenjäsentensä oikeus sosiaalietuuksiin on laaja; lähes yhdenvertainen kansalaisten kanssa. Oikeus sosiaalietuuksiin on oleellinen seikka, koska perheen toimeentuloa tukevat etuudet otetaan jossain määrin huomioon perheenyhdistämishakemusten yhteydessä ulkomaalaislain (L 301/2004) toimeentulovaatimusta (39 §) sovellettaessa ja tulorajan täyttymistä arvioitaessa.

Toimeentulovaatimus on vahva pääsääntö eurooppalaisessa maahanmuutto-oikeudessa, vaikka kritiikkiäkin on esiintynyt juuri perheenyhdistämisen rajoittamiseen liittyen (Hervey 1995; Peers 2004). Perheenyhdistämiseksi vaadittujen tulorajojen on katsottu luovan pienipalkkaiset ja matalan osaamistason globaalit työmarkkinat, jotka eivät ole perheystävälliset (Nagy 2010; Wickramasekara 2015). Suomessakin perheenyhdistämisen ehtona oleva tuloraja on sen verran korkea, että huolimatta joidenkin sosiaalietuuksien huomioimisesta pienipalkkaiset ulkomaalaiset työntekijät eivät saavuta oikeutta perheenyhdistämiseen. Jukka Könönen on tarkastellut ulkomaalaisen prekaarin työvoiman muun muassa perheenyhdistämiseen liittyvää eriarvoisuutta. Könösen mukaan toimeentuloedellytys tuottaa sivutuotteena luokkapohjaisen erottelun: suuripalkkaisissa tehtävissä työskentelevillä on automaattinen perheenyhdistämisoikeus, kun taas pienipalkkaisilla aloilla työskentelevillä ei ole oikeutta perheenyhdistämiseen (Könönen 2014, 180). Kuten tässä artikkelissa ilmenee, myös keskipalkkaisilla työntekijöillä, kuten sairaanhoitajilla, voi olla ongelmia tu-

lorajan saavuttamisessa. Tässä kirjoituksessa ongelmaa tarkastellaan niin kansallisten kuin eurooppalaistenkin oikeussääntöjen ja suhteellisuusperiaatteen valossa.

Artikkelin tavoitteet ovat kolmenlaiset. Ensinnäkin tarkoitus on tuoda esille monien ulkomaalaisten työntekijöiden vaikeus saada perhe Suomeen. Perheenyhdistämisen ehtona oleva tuloraja voi muodostua ylitsepääsemättömäksi esteeksi pienipalkkaisia tai jopa keskipalkkaisia töitä tekeville ulkomaalaisille. Tässä kirjoituksessa osoitetaan esimerkinomaisesti, kuinka EU:n ulkopuolelta tulevan sairaanhoitajan palkka ei todennäköisesti riitä kolmen perheenjäsenen saamiseksi Suomeen. Artikkelin toinen tarkoitus on kartoittaa se lainsäädäntö, oikeuskäytäntö ja viranomaisohjeistus, joka tulorajan arviointiin liittyy (seurattu 26.9.2016 saakka). Kokonaiskuva onkin hieman monimutkaisempi kuin voisi olettaa, sillä jotkut etuudet voidaan laskea tuloksi, kun taas toisia ei. Valitettavasti sosiaalietuuksien huomioon ottamisen mahdollistaman perheenyhdistämisen helpottamisen konkreettiset vaikutukset jäävät kuitenkin puolitiehen, koska oleellisimpia lapsiperheiden toimeentuloa turvaavia etuuksia ei joko oteta huomioon tai niistä ei ole saatavilla tietoa.

Artikkelin kolmas tarkoitus on tarkastella edellä kuvailtua ongelmaa suhteellisuus- ja kohtuullisuusperiaatteiden kautta. Euroopan unionin maahanmuutto-oikeus tarjoaa välineitä tarttua tähän kysymykseen perheenyhdistämisdirektiivin (Neuvoston direktiivi oikeudesta perheenyhdistämiseen 2003/86/EY) tulkinnan ja erityisesti Euroopan unionin tuomioistuimen (EUT) oikeuskäytännössä vahvistuneen suhteellisuusperiaatteen soveltamisen kautta. Maahanmuuttoasioissa on vakiintunut lähinnä eurooppaoikeuden kautta vaatimus kokonaisharkinnasta, jossa arvioidaan kielteisen päätöksen kohtuullisuutta eri tekijöiden valossa. Suhteellisuuden ja kohtuullisuuden voidaan julkisoikeudessa ymmärtää tarkoittavan hieman eri asioita, mutta ne kuitenkin liittyvät oleellisesti yhteen: ne ovat kuin saman kolikon kaksi eri puolta (Kotkas 2009). Tässä kirjoituksessa suhteellisuudesta puhutaan lähinnä abstraktisti lainsäädännön kohdalla ja kohtuullisuudesta puolestaan viranomaisen konkreettiseen päätöksentekoon liittyvän yksittäistapauksellisen harkinnan kohdalla.

Kansallisen oikeuden ja viranomaiskäytännön eurooppaoikeuden mukaisuuden tarkastelun lisäksi myös kansallisen oikeuden ja oikeuskirjallisuuden näkökulma tarjoaa mahdollisuuden kriittiseen tarkasteluun. Kun arvioidaan ulkomaalaislain 39 §:ssä mainittua toimeentulotukea vastaavan muun toimeentuloa turvaavan etuuden määritelmää ja Maahanmuuttoviraston soveltamisohjeessa oletettua työmarkkinatuen rinnastamista toimeentulotukeen, oleelliseksi nousevat sosiaalioikeuden keskeiset määritelmät ja jaotukset. Tarkoitus on myös osoittaa, että etuuksien määritte-

lemisellä, kuten myös tulorajan tasolla, voi olla vaikutusta lainsäädännön suhteellisuuden tai päätöksen kohtuullisuuden arviointiin.

Esimerkkinä filippiiniläisten hoitajien perheenyhdistäminen

Jotta perheenyhdistämisen hankaluutta olisi helpompi arvioida konkreettisesti, tarkastellaan tässä tutkimuksessa esimerkkitapauksena kuvitteellista mutta todenmukaista filippiiniläistä sairaanhoitajaa. Jo usean vuoden ajan Suomeen on rekrytoitu ulkomaalaisia työntekijöitä EU:n ulkopuolisista maista erityisesti hoitoalalle. Filippiinit puolestaan on maailmankuulu hoitoalan työntekijöiden kouluttaja ja viejä. Myös suomalaiset rekrytointifirmat ja sairaanhoidon yksiköt ovat tuoneet filippiiniläisiä töihin hoitoalalle. Filippiinit ja hoitoala on valittu esimerkiksi siitä syystä, että tämä kategoria ulkomaalaisia työntekijöitä on yhtäältä huomattavan suuri ja toisaalta varsin vakiintunut. Esimerkiksi henkilöstövälitysfirma Opteam on rekrytoinut sairaanhoitajia ja lähihoitajia Filippiineiltä vuodesta 2007. Moni filippiiniläinen sairaanhoitaja myös työskentelee ensin lähihoitajana (Koivuniemi 2012). Jo pelkästään Opteam oli rekrytoinut vuoden 2013 loppuun mennessä yhteensä vajaat 100 hoitajaa, joista 6 oli palannut takaisin Filippiineille. Opteam kertoo internetsivuillaan, että heidän rekrytoimistaan hoitajista Suomen kansalaisuuden oli siihen mennessä saanut 2 ja 9 oli asettunut Suomeen perheensä kanssa. (Opteam 2013.)

Perheenyhdistämisiä siis tehdään, mutta tutkimuskentältä kuuluu myös huolestuneita ääniä perheenyhdistämisen vaikeudesta tiukkojen tulorajojen takia. Tiina Vaittinen ja Lena Näre tarkastelevat artikkelissaan oikeudellisia ja hallinnollisia rakenteita, joiden vuoksi työperusteista siirtolaista voidaan kohdella eriarvoisena ja pitää hyödykkeenä, jota työmarkkinat ja yhteiskunta hyödyntävät omien tarpeidensa mukaisesti. He arvostelevat erityisesti sitä, että toimeentulovaatimus ja korkea tuloraja estävät pienipalkkaisten ulkomaalaisten perheenyhdistämisen ja mahdollisuuden normaaliin perhe-elämään Suomessa. (Vaittinen ja Näre 2014.) Myös Taloussanomat on kirjoittanut pienipalkkaisten työntekijöiden perheenyhdistämisen vaikeuksista korkean tulorajan takia sekä listannut 2 600 ammattia, joissa on liian pieni palkka, jotta ulkomaalainen voisi asua perheen kanssa ja tehdä töitä Suomessa (Taloussanomat 23.10.2011).

Esimerkkitapauksessa filippiiniläinen sairaanhoitaja Dalisay työskentelee suomalaisessa sairaalassa. Hänen tullessaan Suomeen töihin perhe jäi vielä odottamaan kotimaahan, mutta nyt kun Dalisay on juuri saanut toistaiseksi voimassa olevan työsopimuksen, hän haluaisi kotoutua Suomeen perheensä kanssa. Hänen kuukausipalkkansa sairaanhoitajana on nettona

2 141 euroa kuukaudessa (21,5 prosentin vero), mikä on laskettu sairaanhoitajan keskipalkan mukaan ottaen huomioon vuorotyöstä saatavat lisät (Tehy tilastoina 2013). On hyvä huomata, että sairaanhoitajan keskipalkka 3 030 euroa bruttona kuukaudessa on vain hieman pienempi kuin suomalaisten keskipalkka 3 308 euroa tai hieman enemmän kuin mediaanipalkka 2 946 euroa kuukaudessa (Tilastokeskus 2014). Dalisayn palkka on kuitenkin 10 prosenttia pienempi kuin hänen monilla kollegoillaan, koska hän ei vielä täytä suomalaisia pätevyysvaatimuksia, mikä on tyypillistä ulkomaalaisilla hoitajilla (Koivuniemi 2012, 25). Moni Dalisayn maanmiehistä työskentelee lähihoitajina ja heillä on joitain satoja euroja pienempi palkka.

Maahanmuuttoviraston ohjeistuksen mukaan tuloraja kahden lapsen ja puolison perheenyhdistämiselle on 2 600 euroa nettona kuukaudessa. Soveltamisohjeessa ilmoitetun mukaisesti Maahanmuuttovirasto ottaa automaattisesti tulona huomioon lapsilisän kahdesta lapsesta eli noin 200 euroa kuukaudessa (MIGDno/2013/1032). Dalisayn tulot jäävät siis lopulta 259 euroa alle vaaditun tulorajan. Tuon tulorajan saavuttamiseksi Dalisayn tulee joko tehdä muuta työtä kokopäivätyön lisäksi tai löytää puolisolleen työtä Suomesta. Jos työnsaanti ei onnistu, perheen tulee pohtia, tulisivatko vain lapset tai vain toinen lapsista Suomeen. Dalisay, kuten moni muukin ulkomaalainen työntekijä, joutuu lopulta valitsemaan perheen yhdessä olemisen ja Suomessa työskentelyn väliltä.

Toimeentuloedellytyksen soveltaminen perheenyhdistämistapauksessa

Kotimainen lainsäädäntö ja soveltamisohjeet

Edellä kuvatussa Dalisayn tapauksessa oleellista on toimeentuloedellytyksen tulorajan ja huomioon otettavien tulojen määräytyminen. Suomen ulkomaalaislain mukaan perheenjäsenelle myönnetään tilapäinen tai jatkuva oleskelulupa, riippuen perheenkokoajan oleskeluluvan tyypistä (45 § 3 mom. ja 47 § 3 mom.). Perheenkokoajalle ei varsinaisesti ole asetettu muita vaatimuksia kuin oleskelulupa. Hakijan eli perheenjäsenen puolestaan tulee pääsääntöisesti kuulua ydinperheeseen (37 §), hakea oleskelulupaa ulkomailta (45 § ja 47 §) ja täyttää toimeentulovaatimus (39 §). Yleisinä oleskeluluvan saamisen edellytyksinä ovat lisäksi asianmukaiset matkustusasiakirjat ja se, ettei hakija ole vaaraksi yleiselle turvallisuudelle (11 §). Dalisaylla on toistaiseksi voimassa olevaan työsuhteeseen perustuva jatkuva oleskelulupa, joten hänen perheenjäsenikseen katsottavat puoliso

ja lapset saavat myös jatkuvan oleskeluluvan, mutta edellytyksenä on, että perheen toimeentulo on turvattu.

Ulkomaalaislain 39 §:n 2 momentin mukaan ulkomaalaisen toimeentulo katsotaan turvatuksi ”jos hänen maassa oleskelunsa kustannetaan tavanomaiseksi katsottavilla ansiotyöstä, yrittäjätoiminnasta, eläkkeistä, varallisuudesta tai muista lähteistä saatavilla tuloilla”. Vaikka toimeentulovaatimus on kohdistettu oleskelulupaa hakevalle perheenjäsenelle, tarkastellaan tuloja perhekohtaisesti. Ulkomaalaislain esitöiden mukaan ”keskeistä on se, että yhteiskunta ei vastaisi ulkomaalaisen oleskelusta aiheutuvista kustannuksista vaan kustannukset hoitaisi oleskeluluvan saaja itse, hänen perheenjäsenensä, sukulaisensa tai muu taho” (HE 28/2003 vp, 139–140). Oikeuskäytännössä on tarkennettu, että esitöissä mainittu ”sukulainen tai muu taho” voi olla muu kuin elättämisestä oikeudellisesti vastuussa oleva henkilö (KHO:2011:43). Todellisuudessa ulkomaalaisten työntekijöiden perheenyhdistämistapauksissa toimeentulo on kuitenkin yleensä riippuvainen perheenkokoajan palkasta.

Vaadittua tulotasoa ei ole laissa määritelty, mutta 39 §:n 2 momentissa tarkennetaan edellytyksenä olevan, ettei ulkomaalaisen ”voida olettaa joutuvan toimeentulotuesta annetussa laissa (L 1412/1997) tarkoitetun toimeentulotuen tai vastaavan muun toimeentuloa turvaavan etuuden tarpeeseen”. Laissa mainittua muuta toimeentuloa turvaavaa etuutta ei ole lain tasolla tarkemmin määritelty. Samaisessa pykälän kohdassa kuitenkin määrätään, että ”tällaisena etuutena ei pidetä kustannuksia korvaavia sosiaaliturvaetuuksia”. Lain esitöissä tarkennetaan, että kustannuksia korvaavia etuuksia ovat esimerkiksi lapsilisä ja asumistuki (HE 28/2003 vp, 140). Maahanmuuttoviraston toimeentuloedellytyksen soveltamisohjeessa puolestaan tarkennetaan, että kustannuksia korvaavia sosiaaliturvaetuuksia ovat myös alle 16-vuotiaan vammaistuki (aiemmin lapsen hoitotuki), elatustuki ja opintotuki (siltä osin kuin kyse on opintorahasta ja asumislisästä) (MIGDno/2013/1032, 7 kohta).

Lisäksi soveltamisohjeessa selvennetään, että tuloina ”voidaan huomioida kuitenkin vain sellaisia hakijalle vasta oleskeluluvan myöntämisen jälkeen myönnettäviä kustannuksia korvaavia etuuksia, joihin nähden hakijan oikeus saada niitä tulevaisuudessa on selvä ja joiden määrä pystytään tarkasti ennakoimaan jo oleskelulupapäätöstä tehtäessä”. Esimerkkinä tällaisesta tulosta mainitaan lapsilisä. (MIGDno/2013/1032, 7 kohta.)

Ohjeen perusteella ei selviä, voiko tulevaisuudessa mahdollisesti saatavaa asumistukea ottaa huomioon. Asumistuen määrä riippuu asumiskuluista, asuinkunnasta ja ruokakunnan tuloista, joina otettaisiin huomioon myös toisen puolison työmarkkinatuki tai lasten kotihoidon tuki.

Maahanmuuttoviraston internetsivuilla todetaan perheenyhdistämisen edellytyksistä, että toimeentulo tulee olla turvattu ”muutoin kuin yhteiskunnan maksamilla etuuksilla”. Esimerkiksi annetaan perheenkokoajan palkkatulot, mutta ei mainita mahdollisuudesta joidenkin etuuksien huomioimiseen tulona. Maahanmuuttoviraston internetsivuilta löytyy kuitenkin erikseen neuvoja toimeentuloedellytyksen soveltamisesta, minkä mukaan tuloina voidaan ottaa huomioon joitain sosiaalietuuksia. Samaisella sivulla on etuuksista lueteltu esimerkinomaisesti ne samat viisi, jotka löytyvät Maahanmuuttoviraston toimeentuloedellytyksen soveltamisohjeesta. Jää kuitenkin epäselväksi, miten hakijan tulisi osoittaa mahdollisuutensa saada tietynlaista tukea tulevaisuudessa, jotta se otettaisiin perheenyhdistämishakemusta käsiteltäessä huomioon.

Lapsiperheille olennaisten etuuksien huomioiminen

Kaikkien edellä mainittujen kustannuksia korvaavien etuuksien katsotaan siis vähentävän muun vaadittavan toimeentulon euromäärää. Jotkut erityisesti lapsiperheille tarkoitetut etuudet jäävät kuitenkin mainitsematta. Lapsiperheille olennaisia etuuksia ovat myös äitiysraha, vanhempainraha ja kotihoidontuki. Maahanmuuttoviraston soveltamisohjeessa on mainittu eri yhteydessä jatkoluvan kohdalla, että kustannuksia korvaavien etuuksien lisäksi voidaan ottaa huomioon myös palkan sijaan maksettavia etuuksia, kuten vanhempainraha (MIGDno/2013/1032, 7 kohta). Perheenyhdistämishakemuksessa on kuitenkin usein kyse perheenjäsenen ensimmäisestä oleskeluluvasta. On hyvin mahdollista, että käytännössä myös palkan sijaan maksettavat etuudet otetaan huomioon, mutta siitä ei kuitenkaan ole tietoa saatavilla. Lasten kotihoidontuen kohtalo jää kuitenkin ohjeiden puolesta epäselväksi.

Maahanmuuttoviraston soveltamisohjeessa selvennetään, että tuloina ”voidaan huomioida kuitenkin vain sellaisia hakijalle vasta oleskeluluvan myöntämisen jälkeen myönnettäviä kustannuksia korvaavia etuuksia, joihin nähden hakijan oikeus saada niitä tulevaisuudessa on selvä ja joiden määrä pystytään tarkasti ennakoimaan jo oleskelulupapäätöstä tehtäessä” (MIGDno/2013/1032, 7 kohta). Oikeus edellä mainittuihin perhe-etuuksiin riippuu Suomessa jo asuvan perheenkokoajan oikeudellisesta asemasta ja lasten iästä, mikä on hakemusvaiheessa helposti etukäteen arvioitavissa.

Edellä mainittujen perhe-etuuksien lisäksi lapsiperheen toimeentulon kannalta oleellinen etuus on työtä hakevalle vanhemmalle maksettava työttömyystuki, työttömyyspäiväraha tai työmarkkinatuki. EU:n tai ETA-alueen ulkopuolelta tulevan ulkomaalaisen kohdalla ei oteta huomioon

aikaisempaa työhistoriaa, joten käytännössä tällaiselle ulkomaalaiselle työnhakijalle maksetaan työmarkkinatukea. Ennen vuonna 2015 voimaan tullutta muutosta kyseisestä tuesta käytettiin nimitystä kotoutumistuki. Tuen saamisen edellytykset ovat edelleen samat: Suomessa asuminen ja työmarkkinoiden käytettävissä oleminen (työttömyysturvalaki 1290/2002, 1 luku 8 § ja 2 luku 2 §). Työmarkkinatuki on siinä määrin tarveharkintaista, että tuen saajan omat tulot tai jotkut sosiaalietuudet vaikuttavat vähentävästi tuen määrään. Vuodesta 2013 lähtien puolison tulot eivät ole enää vaikuttaneet etuuden määrään. Perheenyhdistämishakemusta käsiteltäessä voitaisiin helposti selvittää hakijan oikeus työmarkkinatukeen.

Maahanmuuttoviraston soveltamisohjeessa kuitenkin työmarkkinatuki suljetaan pois tulorajassa huomioitavista etuuksista. Ohjeen alussa on määritelty kustannuksia korvaavia etuuksia ja saman kappaleen lopussa sanotaan, että ”kustannuksia korvaavana etuutena ei pidetä työmarkkinatukea, jonka tarkoitus on korvata työttömän perustoimeentuloa työttömyyden aikana” (MIGDno/2013/1032, 2 ja 7 kohta). Tämä asia on johdannon mukaan lisätty ohjeeseen 20.12.2013, mutta toki se on voinut olla käytäntönä myös aiemmin. Yhtäältä työmarkkinatuki ei siis soveltamisohjeen mukaan ole kustannuksia korvaava etuus, joka tulisi ottaa huomioon, mutta toisaalta sen ei suoraan sanota rinnastuvan laissa tarkoitetuksi toimeentulotukea vastaavaksi muuksi toimeentuloa turvaavaksi etuudeksi. Näin ollen työmarkkinatuen huomioimatta jättäminen perustuu viranomaisohjeeseen eikä lakiin, sillä työmarkkinatukea ei voi ongelmitta rinnastaa toimeentulotukeen. Tätä määritelmäongelmaa käsitellään myöhemmin tässä artikkelissa.

Sillä seikalla, perustuuko rajoitus lakiin vai viranomaisohjeeseen, voi olla merkitystä suhteellisuus- ja kohtuullisuusharkinnassa. Harkinta perheenyhdistämistapauksissa on laillisuusharkintaa, jossa eri oikeuslähteiden velvoittavuudella on merkitystä. Outi Suvirannan mukaan hallinnon virallislähteiksi luettavilla ohjeilla on merkitystä soveltamiskäytännön yhtenäisyyden turvaamiseksi, mutta niillä ei voi poiketa lainsäädännöstä. Laissa säädettyä tapauskohtaista harkintaa ei voi korvata hallinnonsisäisillä kaavamaisesti sovellettavilla kriteereillä. Lisäksi Suviranta huomauttaa, että ohjauksen on oltava yhteensopivaa myös perusoikeussäännösten kanssa. (Suviranta 2006, 29; ks. myös PeVL 27/2016 vp, 3.) Nämä seikat on otettu huomioon myös Maahanmuuttoviraston soveltamisohjeen johdannossa, jossa todetaan, että jos ohje on yksittäistapauksessa ristiriidassa perus- ja ihmisoikeuksien tai muun lainsäädännön kanssa, se ei ole ratkaisijaa sitova, sillä yksilön oikeuksien ja velvollisuuksien perusteista säädetään lailla (MIGDno/2013/1032). Oikeuslähdeopin mukaan laintulkintatilanteessa vastauksia oikeudelliseen ongelmaan haetaan lain tekstin lisäksi

pääasiassa lain esitöistä tai oikeuskäytännöstä. Sallittuna oikeuslähteenä pidetään myös oikeuskirjallisuutta. (Suviranta 2006, 21.) Myöhemmin tässä artikkelissa tarkastellaankin oikeuskirjallisuutta, jotta voidaan analysoida työmarkkinatuen rinnastamista toimeentulotukeen.

Nykyään asioissa, joissa on EU-oikeudellinen ulottuvuus, kuten ulkomaalaisten perheenyhdistämisessä, tulee myös seurata EU-oikeuden tulkintakehitystä. Vaikka direktiivien yhteydessä pääasiassa sovelletaan kansallista lainsäädäntöä, jolla direktiivi on implementoitu tai joka vastaa direktiivissä käsiteltyä oikeudenalaa, voidaan EU-tuomioistuimen oikeuskäytännöstä saada ohjetta kansallisten säännösten tulkintaan. (Suviranta 2006, 26.) EU-tuomioistuimen oikeuskäytännön lisäksi myös komission antamilla tulkintaohjeilla voi olla merkitystä. Periaatteessa niillä ei ole oikeudellista sitovuutta vaan samanlainen rooli kuin kotimaisilla hallinnon virallislähteillä. Käytännössä niitä kuitenkin seurataan tarkkaan, sillä komission tulkinnan noudattaminen voi suojata jäsenvaltiota myöhemmiltä oikeudellisilta ja taloudellisilta seuraamuksilta. (Suviranta 2006, 31.) Seuraavassa luvussa tarkastellaankin eurooppalaisen oikeuden velvoitteita ja erityisesti EU-oikeutta.

Perheenyhdistäminen ja toimeentuloedellytys eurooppalaisessa oikeudessa

Ihmisoikeuksista nousevia periaatteita perheenyhdistämiseen

Suomea velvoittavia perheenyhdistämiseen ja ulkomaalaisten sosiaalisiin oikeuksiin liittyviä eurooppalaisia oikeussääntöjä löytyy EU-oikeudesta, Euroopan ihmisoikeussopimuksesta (SopsS 19/1990, jäljempänä EIS) ja uudistetusta Euroopan sosiaalisesta peruskirjasta (SopS 78–80/2002, jäljempänä ESP). Lisäksi lasten oikeuksien yleissopimuksella (SopS 59–60/1991, jäljempänä LOS) on ollut merkitystä Euroopan ihmisoikeustuomioistuimen (EIT) perheenyhdistämistä koskevissa tapauksissa. Vaikka tässä kirjoituksessa keskitytään EU-oikeuden vaatimuksiin, on hyvä tuntea pääpiirteissään myös kansainvälisen oikeuden normeja, erityisesti Euroopan neuvoston piirissä tehtyjä ihmisoikeussopimuksia, koska ne usein vaikuttavat EU-oikeuden taustalla minimistandardeina. Monen EU:n perusoikeuskirjassa (2007/C 303/01) olevan sosiaalisen oikeuden taustalla minimitason määrittäjänä on ESP ja vapausoikeuden taustalla EIS (Euroopan unionin perusoikeuskirjan selitykset 2007/C 303/02).

EIS ei varsinaisesti suojele oikeutta perheenyhdistämiseen, kun taas ESP nimenomaisesti säätää siirtotyöläisten perheenyhdistämisen helpottamisesta (19 art.). Sosiaalista peruskirjaa ei kuitenkaan ole pidetty oikeu-

dellisesti yhtä merkittävänä kuin EIS:ää, mikä perustuu sopimuksen vähemmän velvoittavaan kirjoitusasuun ja valtioiden mahdollisuuteen valita niitä velvoittavat artiklat. Lisäksi ESP:tä rasittaa siirtotyöläisten ja heidän perheidensä suojelemista koskeva, sopimusosapuolten kansalaisiin rajoitettu henkilöllinen soveltamisala (I osa 19 kohta; II osa 19 art.). Kuitenkin niiltä osin kun ESP soveltuu ja luo selkeitä sääntöjä, se on oikeudellisesti velvoittava.

ESP:n 19 artiklan 6 kohdassa velvoitetaan valtiota ”helpottamaan mahdollisuuksien mukaan sellaisen ulkomaalaisen työntekijän perheen yhdistämistä, jolla on lupa asettua vastaanottavan valtion alueelle”. Termi mahdollisuuksien mukaan (*as far as possible*) on monitulkintainen, kuten myös lupa asettua (*permitted to establish*). Euroopan sosiaalisten oikeuksien komitea on tarkentanut artiklan tulkintaa johtopäätöksissään toteamalla, että vaadittu tuloraja ei voi olla niin rajoittava, että se estäisi minkä tahansa perheenyhdistämisen (Johtopäätökset XIII-1, Alankomaat). Tämäkin sääntö on vaikeatulkintainen, mutta sitäkin on komitea myöhemmin selventänyt sosiaaliavustuksen huomioimisen osalta. Komitea katsoo, että ulkomaalaisilta työntekijöiltä ei tulisi kieltää perheenyhdistämistä, jos heillä on riittävät tulot, jotka perustuvat lain mukaan heille kuuluviin etuuksiin, mukaan lukien sosiaaliavustuksiin (*social assistance*). Viimeisimmissä johtopäätöksissään esimerkiksi Itävallan osalta komitea on katsonut, että sosiaaliavustusten pois sulkeminen tulojen laskemisessa on omiaan pikemminkin haittaamaan kuin helpottamaan perheenyhdistämistä. (Johtopäätökset XIX-4, Itävalta.)

Vaikka Euroopan ihmisoikeussopimuksessa ei varsinaisesti säännellä sosiaalisista oikeuksista tai ulkomaalaisten perheenyhdistämisestä, on EIT joissain tapauksissa katsonut sopimuksessa turvattujen oikeuksien olevan vaarassa myös tämän tyyppisissä tilanteissa. Erityisesti maksuihin perustuvia sosiaalisia oikeuksia EIT on suojannut ensimmäisen lisäpöytäkirjan omaisuuden suojan (1 art.) tai perhe-elämän suojan (8 art.) avulla. Usein kyseessä on yhdenvertaisen kohtelun vaatimus (14 art.), milloin riittää, että intressin voidaan katsoa kuuluvan jonkin ihmisoikeussopimuksessa turvatun oikeuden alaan (ks. esim. EIT: Gaygusuz v. Itävalta 1996 ja Petrovic v. Itävalta 1998). EIT katsoo perhe-etuuksien ilmentävän 8 artiklassa turvattua perhe-elämän suojaa (EIT: Petrovic v. Itävalta 1998 ja Niedzwiecki v. Saksa 2005). Ulkomaalaisten oikeuteen sosiaaliturvaan ja perhe-etuuksiin liittyvät tapaukset ovat lisääntyneet vasta viime aikoina. Tuomioistuin on turvannut muun muassa pakolaisten (EIT: Fawsie v. Kreikka 2010 ja Saidoun v. Kreikka 2010) ja EU:n assosiaatiosopimusmaiden kansalaisten (EIT: Dhahbi v. Italia 2014) oikeutta yhdenvertaiseen kohteluun perhe-etuuksien kohdalla. Tästä EIT:n oikeuskäytännöstä ei kuitenkaan voi

vetää johtopäätöksiä työmarkkinatuen tai muiden sosiaalietuuksien huomioon ottamiseen toimeentulovaatimuksen yhteydessä.

Perheenyhdistämiseen liittyvät tapaukset koskevat lähinnä 8 artiklan perhe-elämän suojaa. EIT ei ole kuitenkaan katsonut kyseisen artiklan suojaavan ulkomaalaisten oikeutta valita sopivinta asuinpaikkaa perheelleen mutta se antaa kuitenkin suojaa perustelematonta epäyhdenvertaista kohtelua vastaan (EIT: Abdulaziz, Cabales ja Balkandali v. Yhdistynyt Kuningaskunta 1985). Alun perin konkreettista suojaa perheenyhdistämisessä saattoi saada vain tapauksissa, joissa oli kyse kansainvälisestä suojelusta ja palauttamiskiellon (*non-refoulement*) periaatteesta (3 art.) (Lambert 1999). Myöhemmin EIT on myös kahdessa 8 artiklaan liittyvässä perheenyhdistämistapauksessa tuominnut perheenjäsenen oleskeluluvan epäämisen EIS:n vastaiseksi lähinnä lapsen edun periaatteen nojalla ja lasten oikeuksien yleissopimukseen viittaamalla (EIT: Sen v. Alankomaat 2001 ja Tuquabo-Tekle v. Alankomaat 2005). Vaikka kyseiset tuomiot ovat vahvistaneet lapsen edun tärkeyttä, ne eivät kuitenkaan ole oleellisesti muuttaneet perusperiaatteita (Spijkerboer 2009). EIS 8 artikla ei edelleenkään sisällä oikeutta perheenyhdistämiseen ja EIT edelleen lähtee argumentoinnissaan liikkeelle siitä, että valtioilla on suvereeni oikeus päättää ulkomaalaisten maahantulosta. Tuo oikeus ei kuitenkaan ole ehdoton, vaan sitä rajaa valtion velvollisuus huomioida yleinen suhteellisuusperiaate ja arvioida päätösten kohtuullisuutta yksittäistapauksissa.

Ihmisoikeustuomioistuin ei ole tiettävästi käsitellyt montaa tulorajaan liittyvää tapausta. EIT on kuitenkin tapauksessa Konstatinov vs. Alankomaat (2007) lausunut toimeentulovaatimukseen liittyen, että pääsääntöisesti se ei pidä suhteettomana vaatimusta riittävästä toimeentulosta, joka perustuu muuhun kuin sosiaaliavustuksiin. Tällaisissakin tapauksissa on kuitenkin punnittava yksityistä ja julkista intressiä ottaen huomioon ainakin perheenkokoajan suhteet vastaanottajavaltioon, kuten hänen mahdollisuutensa ja pyrkimyksensä ansaita toimeentulonsa työnteolla, sekä hänen lainkuuliaisuutensa. Lisäksi tulee arvioida perheen mahdollisuutta viettää perhe-elämää muussa maassa. (EIT: Konstatinov vs. Alankomaat 2007, 50–52 kohta.)

Tarkasteltaessa ihmisoikeusvelvoitteita niin kansallisen kuin EU-oikeudenkin näkökulmasta ihmisoikeuksien jakamattomuusperiaate edellyttää sekä vapausoikeuksien että sosiaalisten oikeuksien huomioimista (ks. esim. Nieminen 2005 ja Scheinin 2006). Liisa Nieminen viittaa yllä mainittuun EIT:n tapaukseen Petrovic vs. Itävalta (1998), jossa ihmisoikeustuomioistuin katsoi vanhempainloman ja siihen liittyvien etuuksien olevan osa ihmisoikeussopimuksen 8 artiklan turvaaman perhe-elämän suojaamisvelvoitteen täyttämistä (Nieminen 2005, 48; ks. myös tapaus

EIT: Konstantin Markin vs. Venäjä 2012). Sosiaalisten oikeuksien liittäminen vapausoikeuksiin on ollut mahdollista erityisesti EIS:n syrjintäkiellon (14 art.) tarkastelun yhteydessä. EIS ei siis varsinaisesti vaadi esimerkiksi perhe-etuuksien olemassaoloa, mutta jos sellaisia kansallisessa lainsäädännössä tarjotaan, EIT edellyttää niiden saamisessa yhdenvertaisuutta lain edessä. Niin sosiaalisissa oikeuksissa kuin perheenyhdistämisessäkin yhdenvertaisuus on lähtökohta, josta poikkeamiseen tulee olla hyväksyttävä peruste (perheenyhdistämisen osalta ks. esim. EIT: Hode ja Abdi vs. Yhdistynyt kuningaskunta 2012 ja Biao vs. Tanska 2016). Jakamattomuusperiaatteen ohella siis myös yhdenvertaisuusperiaate ohjaa lainsäätäjän ja lainsoveltajan toimintaa. Velvoittavimpana ja konkreettisimpana ihmisoikeusperiaatteena on kuitenkin rajoittavien toimenpiteiden suhteellisuus ja erityisesti yksittäisten päätösten kohtuullisuus.

EU-oikeus ja perheenyhdistämisen tuloraja

Kuten edellisessä luvussa on todettu, eurooppaoikeuden ihmisoikeusvelvoitteista ei juurikaan voi joidenkin yleisten periaatteiden lisäksi johtaa konkreettisia sääntöjä ja tulkintaohjeita juuri perheenyhdistämisen tulorajan lainmukaisuuden arvioimiseen. EU-oikeus puolestaan säätää nimenomaisesti toimeentulovaatimuksesta perheenyhdistämisdirektiivin (2003/86/EY) 7 artiklassa. Tuossa artiklassa luetellaan sallittuja perheenyhdistämisen rajoituksia, joita jäsenvaltiot voivat säätää omassa lainsäädännössään. Direktiivin 7 artiklan 1 kohdan c alakohdassa sallitaan jäsenvaltion mahdollisuus vaatia todisteita siitä, että perheenkokoajalla on "vakaat ja säännölliset tulot ja varat, jotka riittävät perheenkokoajan ja hänen perheenjäsentensä ylläpitoon ilman, että heidän on turvauduttava asianomaisen jäsenvaltion sosiaalihuoltojärjestelmään". Tässä osiossa tarkastellaan, miten EU-oikeudessa suhtaudutaan toimeentulovaatimukseen ja ulkomaalaisten sosiaalietuuksien nauttimiseen sekä arvioidaan niiden suhdetta oleskelulupaan.

Riittävän tulotason määrittämisestä direktiivissä mainitaan, että "jäsenvaltioiden on arvioitava näiden tulojen ja varojen luonne ja säännöllisyys, ja ne voivat ottaa huomioon kansallisten vähimmäispalkkojen ja eläkkeiden tason sekä perheenjäsenten lukumäärän" (7 art. 1 kohdan c alakohta). EUT on puolestaan on todennut, että rahamääräisesti ilmaistu tuloraja saa olla vain viitemäärä eikä se saisi muodostaa ehdotonta rajoitusta perheenyhdistämiselle (2010 annettu EUT:n tapaus C-578/08 Chakroun, 48 kohta; KOM(2014) 210, 15). Tämänkin edellytyksen soveltamiseen liit-

tyy direktiivin 17 artiklassa säädetty velvollisuus yksilökohtaiseen kohtuullisuuden arviointiin:

> ”Päättäessään hakemuksen hylkäämisestä, oleskeluluvan peruuttamisesta tai uusimatta jättämisestä taikka perheenkokoajan tai hänen perheenjäsentensä maasta poistamisesta jäsenvaltioiden on otettava asianmukaisesti huomioon asianomaisen henkilön perhesiteiden luonne ja kiinteys ja jäsenvaltiossa oleskelun kesto sekä perheeseen liittyvät, kulttuuriset ja sosiaaliset siteet kotimaahan.”

Tällä artiklalla on yhteys EIT:n oikeuskäytännössä vakiintuneisiin harkinnan kriteereihin (Carrera 2009, 383–387; KOM(2014) 210, 29).

Viime aikoina EUT on tulkintakäytäntönsä kautta tuonut esiin oleskeluoikeuden ja sosiaalietuuksien yhteen kietoutumisen. Jo kuuluisassa tapauksessa Dano (C-333/13, annettu 2014) tuomioistuin vahvisti, että vapaan liikkuvuuden direktiivin (2004/38/EY) yhdenvertaisen kohtelun vaatimus (24 art.) koskee vain niitä unionin kansalaisia, jotka täyttävät direktiivissä mainitut oleskelun edellytykset. Lisäksi tuore tapaus Alimanovic (C-67/14, annettu 2015) selventää maksuihin perustumattoman, työttömyysturvaan liittyvän sosiaalietuuden luonnetta ja sen suhdetta vapaan liikkuvuuden edellytyksiin. Vaikka vapaa liikkuvuus on alue, jota ei yleensä voi rinnastaa kolmansien maiden kansalaisten maahantuloon, on Alimanovicin tapauksessa kuitenkin relevanttia tuon työttömyysetuuden luonne. Molemmissa tapauksissa oleskeluoikeutta rajoittaa toimeentulovaatimus, jonka mukaan jäsenvaltiolla ei ole velvollisuutta sallia oleskelua, jos toimeentulo perustuu sosiaaliavustuksiin. Näin ollen EU:n vapaan liikkuvuuden ja kolmansien maiden kansalaisten maahanmuuton sääntelyssä oleelliseksi on muodostunut yhdenvertaista kohtelua edellyttävien, kustannuksia korvaavien etuuksien ja pois suljettujen sosiaalietuuksien määrittely.

Tapauksessa Alimanovic oli kyse Ruotsin kansalaisista, jotka olivat lyhyen ajan Saksassa työskenneltyään jääneet työttömäksi ja hakeneet pitkäaikaistyöttömille tarkoitettua maksuihin perustumatonta etuutta, joka muistuttaa Suomen työmarkkinatukea. Tuomioistuin katsoi, että työttömyysetuuden luonteen määrittämisessä on oleellista, onko etuuksien ensisijaisena tehtävänä nimenomaisesti ihmisarvoisen elämän mahdollistavan toimeentulon takaaminen vai pyritäänkö niillä helpottamaan pääsyä työmarkkinoille (42 kohta). Sekä tuomioistuimen että julkisasiamiehen näkemys oli, että kyseinen etuus on sosiaaliturvan yhteensovittamisesta annetun asetuksen (883/2004) 70 artiklan 2 kohdassa tarkoitettu erityinen maksuihin perustumaton rahaetuus, mutta samalla se on lisäksi katsottava

vapaan liikkuvuuden direktiivin 24 artiklan 2 kohdassa tarkoitetuksi sosiaaliavustukseksi (43–46 kohta). Näin EUT katsoi, että työmarkkinatuen kaltaista etuutta ei tarvitsisi ottaa tulona huomioon, kun arvioidaan toimeentulovaatimuksen täyttymistä.

Kolmansien maiden kansalaisten perheenyhdistämiseen liittyvää tulorajaa tarkastellaan varsinaisesti EUT:n tapauksessa Chakroun (C-578/08, annettu 2010), jossa tuomioistuin arvioi vaaditun tulotason lainmukaisuutta sekä sosiaalihuoltojärjestelmään turvautumisen ja erityisesti riittävän tulotason käsitteitä. Tuomioistuimen mukaan kyseisellä käsitteellä on EU:n oikeudessa oma itsenäinen merkityksensä, eikä sitä voida määritellä viittaamalla kansallisen oikeuden käsitteisiin (45 kohta). EUT arvioi Alankomaissa vaaditun tulotason lainmukaisuutta vertaamalla tulorajan tasoa vähimmäispalkkaan, koska sillä jäsenvaltio oli itse määrittänyt perheenyhdistämisen tulorajan. Ratkaisuna tapauksessa oli se, että lainsäädännössä ei tulisi vaatia perheenyhdistäjältä 120 prosenttia vähimmäispalkasta, jos 100 prosenttia on arvioitu riittämään muille perheille (51 kohta).

EUT:n yhdistettyjen tapauksien O., S. ja L. vs. Maahanmuuttovirasto (C356/11 ja C357/11, annettu 2012) mukaan perheenyhdistämisdirektiivin edellyttämän perheenyhdistämistä koskevien hakemusten tulorajaan liittyvän harkinnan kohteena ovat lähtökohtaisesti perheenkokoajan tulot ja varat eivätkä sen kolmannen maan kansalaisen tulot ja varat, jolle oleskeluoikeutta perheenyhdistämisen perusteella haetaan (72 kohta). Komission näkemyksen mukaan jäsenvaltiot voivat kuitenkin huomioida myös hakijan eli ulkomailla olevan puolison tulot, sillä sitä ei ole erikseen kielletty (KOM(2014) 210, 15).

Tuoreessa EUT:n tapauksessa Khachab (C-558/14, annettu 2016) tuomioistuin on tarkentanut perheenyhdistämisdirektiivin salliman toimeentulovaatimuksen täyttymisen arviointiin liittyviä oikeudellisia rajoja. Kolmannen maan kansalainen Khachab on oleskellut Espanjassa yli viisi vuotta ja näin ollen hänellä on pysyväislaatuinen oleskelulupa. Tapauksen tietojen mukaan hän on työskennellyt lyhyen aikaa pariin otteeseen ja maksanut sosiaaliturvamaksuja noin viiden vuoden ajan. Hänen perheenyhdistämishakemuksensa kuitenkin hylättiin sen perusteella, että Espanjan lainsäädännön mukaan perheenkokoajan kykyä ylläpitää perheenjäseniään arvioidaan vuodeksi eteenpäin ja arviossa voidaan huomioida perheenkokoajan taloudellinen tilanne puoli vuotta taaksepäin. Tuomioistuin katsoi, että vaikka kyseisessä säännöksessä ei nimenomaisesti säädetä tällaisesta mahdollisuudesta, sanamuodon mukaan tulkittaessa on pidettävä hyväksyttävänä, että vaadittuihin tuloihin ja varoihin on liityttävä tiettyä pysyvyyttä ja jatkuvuutta (30 kohta). Näin ollen EUT katsoi Espanjan lainsäädännön täyttävän perheenyhdistämisdirektiivin vaatimukset mutta

muistutti myös direktiivin 17 artiklan mukaisesta yksilöllisestä kohtuullisuusharkinnasta (43 ja 48 kohta).

Kohtuullisuuden ja suhteellisuuden arviointi EU-oikeudessa

EUT:n oikeuskäytännössä vaatimus tapauskohtaisesta harkinnasta ja intressien punninnasta on perheenyhdistämisdirektiivin yhteydessä alun perin esitetty direktiivin tiettyjen kohtien kumoamiskannetta käsitelleessä tapauksessa parlamentti vs. neuvosto (C-540/03, annettu 2006). EUT:n mukaan perheenyhdistämisdirektiivin 17 artiklan luettelemat harkinnan kriteerit vastaavat niitä kriteereitä, joita Euroopan ihmisoikeustuomioistuin käyttää tarkistaessaan, onko jäsenvaltio punninnut asianmukaisesti esillä olevia intressejä (56–64 kohta). Tapauksissa O., S. ja L. vs. Maahanmuuttovirasto EUT painotti yksilöllisen kohtuullisuusharkinnan merkitystä todetessaan, että ”toimivaltaisten kansallisten viranomaisten on direktiivin 2003/86 täytäntöönpanossa ja perheenyhdistämistä koskevien hakemusten tutkimisessa arvioitava tasapainoisesti ja järkevästi kaikkia käsillä olevia etuja ja otettava erityisesti huomioon asianomaisten lasten etu” (81 kohta). Lisäksi EUT totesi, että toimeentulovaatimusta implementoitaessa, tulkittaessa ja sovellettaessa tulee ottaa huomioon EU:n perusoikeuskirjan perhe-elämän edistämistä (*promoting*) ja lasten edun huomioimista turvaavat artiklat (7 art. ja 24 art. 2 ja 3 kohta) (80 kohta). Perheenyhdistämisdirektiivin 17 artiklaan ja EIT:n kriteereihin perustuvalla tapauskohtaisella yksilöllisellä harkinnalla voidaan nähdä olevan kohtuullisuusharkinnan luonne.

Sitä vastoin kolmansien maiden kansalaisten perheenyhdistämisen rajoitusten suhteellisuutta EU:n yleiseen suhteellisuusperiaatteeseen viitaten arvioidaan varsinaisesti vasta tapauksessa K ja A (C-153/14, annettu 2015). Tapauksessa K ja A tuomioistuin arvioi erityisesti suhteellisuusarvioinnin avulla perheenyhdistämisdirektiivissä sallitun ennakollisen kotouttamistoimenpiteen eli kielikokeen käyttämistä perheenyhdistämisen ehtona. Alankomainen tuomioistuin on tapauksessa kysynyt nimenomaisesti, ”loukkaavatko Alankomaiden viranomaiset suhteellisuusperiaatetta, koska perheenjäsenet, jotka haluavat muuttaa Alankomaihin, vapautetaan tästä koevelvoitteesta ainoastaan tiukkojen edellytysten täyttyessä” (17 ja 18 kohta). Lisäksi tapauksessa arvioidaan ennakollisten kotouttamistoimien maksujen suhteellisuutta yleisellä tasolla (17 kohta). Suhteellisuutta arvioidessaan EUT viittasi tapauksessa komissio vs. Alankomaat (C-508/10, annettu 2012) käytettyyn suhteellisuustestiin. Tuossa tapauksessa EUT viittaa unionin oikeuden perusperiaatteisiin kuuluvaan suh-

teellisuusperiaatteeseen (75 kohta). Tämä pitkään oleskelleita kolmansien maiden kansalaisia koskenut tapaus ja kolmansien maiden kansalaisten perheenyhdistämistä koskeva tapaus K ja A osoittavat, että EU-oikeuden yleinen suhteellisuusperiaate soveltuu myös maahanmuuton kontekstiin.

K ja A -tapaukseen ratkaisuehdotuksen antanut julkisasiamies Juliane Kokott arvioi suhteellisuutta kolmen vaiheen kautta. Ensin hän arvioi rajoituksen tavoitteiden hyväksyttävyyttä, sitten keinon soveltuvuutta tuon tavoitteen saavuttamiseen (34 kohta) ja viimeiseksi tapauskohtaista päätöksen kohtuullisuutta artiklaa 17 soveltaen (39 kohta, tuomio 60 kohta). Tuomioistuin puolestaan kuvailee yleisiin periaatteisiin pohjautuvaa suhteellisuusarviointia siten, että rajoitusten tavoitteiden on oltava toteutettavissa kansallisessa lainsäädännössä säädettyjen keinojen avulla, eikä näillä keinoilla saa ylittää sitä, mikä on tarpeen (*necessary*) kyseisten tavoitteiden saavuttamiseksi (51 kohta). Julkisasiamies olisi ollut valmis jättämään lopputuloksen pohdinnan kansallisille viranomaisille, mutta tuomioistuin arvioi asian itse ja päätyi siihen, että Alankomaiden lainsäädäntö ja sieltä löytyvä kohtuullistamislauseke ei vaikuttanut turvaavan tarpeeksi rajoituksen suhteellisuutta (63 kohta). Tuomioistuimen mielestä lainsäädäntö on suhteellisuusperiaatteen mukainen, kun se mahdollistaa kohtuullisuusarvioinnin yksittäistapausten yhteydessä. Lisäksi kohtuullisuusarviointi ei saa olla niin tiukkaa, että se ei ottaisi huomioon kohtuullistamista kaikissa niissä tapauksissa, joissa rajoitus tekisi perheenyhdistämisen mahdottomaksi tai suhteettoman vaikeaksi. (60–63 kohta.)

Tulorajan lainmukaisuuden ja suhteellisuuden arviointi

Tulorajan suhde toimeentulotukeen

EUT:n tapauksessa Chakroun tuomioistuin siis arvioi minimipalkan suhdetta perheenyhdistämisen tulorajaan, koska jäsenvaltio itse oli käyttänyt sitä riittävän toimeentulon määrittämisessä. Tuomioistuin ei pitänyt EU-oikeuden mukaisena sitä, että perheenyhdistämisessä vaadittiin tuloa, joka olisi 120 prosenttia minimipalkasta, kun 100 prosentin oli arvioitu riittävän elinkustannusten kattamiseen kansalaisten kohdalla. Suomessa perheenyhdistämisen tuloraja perustuu puolestaan viimesijaisen toimeentulotuen tasoon, mikä on määritetty laissa toimeentulotuesta (L 1412/1997). Näin ollen on relevanttia verrata perheenyhdistämisen tulorajaa toimeentulotuen tasoon. Maahanmuuttovirasto on määrittänyt tulorajan yhdessä sosiaali- ja terveysministeriön kanssa, ja se löytyy Maahanmuuttoviraston julkaisemasta toimeentuloedellytyksen soveltamisohjeesta (MIGDno/2013/1032) ja viraston internetsivuilta (Maahan-

muuttovirasto 2015). Tulorajan euromäärät perustuvat arvioon erikokoisten kotitalouksien välttämättömistä elinkustannuksista, mikä on arvioitu kulutustutkimuksen avulla (Uvi Dnro3/010/2004, liite 2). Tuloraja nousee jokaisen perheenjäsenen kohdalla. Esimerkkitapauksemme kaltaisen kahden aikuisen ja kahden lapsen perheen tulee ansaita 2 600 euroa nettona eli noin 3 169 euroa bruttona kuukaudessa (21,5 prosentin vero). Taulukossa 1 on kuvattu vaaditut tulot henkilöä kohti kuten Maahanmuuttoviraston taulukossa (MIGDno/2013/1032; Maahanmuuttovirasto 2015).

Taulukko 1. Perheenyhdistämisen tulorajan määräävät kulut henkilöä kohti.

Henkilö	€/kk
1. aikuinen	1 000
2. samaan talouteen kuuluva aikuinen	700
1. alaikäinen perheenjäsen	500
2. alaikäinen perheenjäsen	400
3. alaikäinen perheenjäsen	300
4. alaikäinen perheenjäsen	200
5. alaikäinen perheenjäsen	100
6. alakäisestä perheenjäsenestä eteenpäin	0

Ulkomaalaislain toimeentulovaatimuksen (39 §) ja näin myös tulorajan tarkoitus on ehkäistä sellaisten tilanteiden syntymistä, että ulkomaalainen joutuisi turvautumaan toimeentulotukeen. Tulorajan tason sitominen toimeentulotuen saamiseen on perheenyhdistämisdirektiivin kanssa sopusoinnussa. Toimeentulotukilain (L 1412/1997) mukaan ”toimeentulotuen avulla turvataan henkilön ja perheen ihmisarvoisen elämän kannalta vähintään välttämätön toimeentulo” (1 §). Toimeentulotuen perusosan suuruus on määritelty toimeentulotukilain 9 §:ssä. Toimeentulotukeen liittyvässä lainsäädännössä valmisteluvastuu on sosiaali- ja terveysministeriöllä, joten välttämättömien elinkustannusten arviointi luultavasti perustuu samankaltaisin laskelmiin kuin perheenyhdistämisen tuloraja. Toimeentulotuenkin kohdalla otetaan huomioon perheenjäsenten lukumäärä. Jos henkilön tai perheen tulot eivät yllä ilmoitettuun euromäärään, ovat he oikeutettuja saamaan toimeentulotukea, niin että perustarpeet tulee tyydytetyiksi. Taulukossa 2 (s. 158) esitetään toimeentulotuen arvioinnissa käytettyjä laskennallisia kuluja (Kuntainfo 5/2014).

Taulukon 2 mukaan perhe, jossa on kaksi aikuista ja kaksi alle 10-vuotiasta lasta, saa toimeentulotukea, jos perheen nettotulot ovat vähemmän kuin 2 242,82 euroa kuukaudessa, eli noin 2 690 euroa kuukaudessa

(20 prosentin vero). Voidaan huomata, että toimeentulotuessa arvioidut riittävät tulot ovat pienemmät kuin perheenyhdistämisen tulorajan kohdalla. Perheenyhdistämiseen vaaditaan 117 prosentin toimeentulotuessa riittäviksi arvioiduista tuloista. Riittävät tulot on siis ohjeen mukaan alun perin arvioitu kulutustutkimuksen kautta ja korkeampia rajoja ulkomaalaisten kohdalla on perusteltu sillä, että tuolloin laskelmat perustuivat kolme vuotta vanhoihin tietoihin ja hinnat olivat nousseet. Lisäksi arvioitiin monien toimeentulotuella elävien saavan myös toimeentulotukea muihin perusmenoihin, kuten asumiseen ja terveydenhoitokuluihin. (Uvi Dnro3/010/2004, liite 2.) On tosiaan niin, että toimeentulotuen perusosa ei sisällä niin sanottuja muita perusmenoja, kuten asumiskuluja ja suuria terveyskuluja, joihin voi erikseen saada toimeentulotukea (toimeentulotukilaki 7 b §). Näin ollen perheenyhdistämisen tulorajan taso ei vaikuta olevan suhteeton verrattuna toimeentulotuen tasoon. On myös hyvä huomata, että toimeentulotuen tasoon kohdistuu korottamispaine.

Taulukko 2. Toimeentulotuessa huomioon otettavat kulut henkilöä kohti.

Henkilö	€/kk
Yksin asuva	485,50
Muu 18 vuotta täyttänyt	412,68
10–17-vuotias lapsi	
1. lapsi	339,85
2. lapsi	315,58
3. lapsi	291,30
Alle 10-vuotias lapsi	
1. lapsi	305,87
2. lapsi	281,59
3. lapsi	257,32

Työmarkkinatuen rinnastaminen toimeentulotukeen

Ulkomaalaislaissa ilmaistu toimeentulovaatimus siis edellyttää riittäviä tuloja perheen elättämiseen, jotta ulkomaalainen ei joudu turvautumaan toimeentulotukeen tai vastaavaan muuhun toimeentuloa turvaavaan etuuteen (39 §). Kuten edellä on jo esitetty, ulkomaalaislain mukaan tällaisena etuutena ei pidetä kustannuksia korvaavia sosiaaliturvaetuuksia (39 § 2 mom.) ja Maahanmuuttoviraston ohjeen mukaan tuloiksi voidaan laskea joitain sosiaalietuuksia, kuten perhe-etuudet, mutta ei työmark-

kinatukea. Esimerkkitapauksessamme Dalisayn perheenyhdistäminen olisi mahdollista tulorajan puolesta, jos puolisolle Suomessa maksettava työmarkkinatuki (aikaisemmin kotouttamistuki) huomioitaisiin perheen tuloiksi. Perheen tulot koostuisivat näin pääasiassa Dalisayn palkasta ja noin viidesosaltaan puolison saamasta työmarkkinatuesta. Nykykäytäntö ei kuitenkaan mahdollista tätä, koska Maahanmuuttoviraston ohjeen mukaan työmarkkinatuki ilmeisesti rinnastetaan laissa mainittuun vastaavaan muuhun toimeentuloa turvaavaan etuuteen. Lainsäätäjä ei ole kuitenkaan tarkentanut termin sisältöä, joten asian selvittämiseksi on tarpeen tarkastella muita sallittuja oikeuslähteitä. Maahanmuuttoviraston työmarkkinatuen luonteesta tekemän tulkinnan pitävyyttä tarkastellaan seuraavaksi oikeuskirjallisuuden valossa.

Sosiaalioikeuden kirjallisuus ei tunne termiä toimeentulotukea vastaava muu toimeentuloa turvaava etuus, eikä työmarkkinatukea yleensä pidetä toimeentulotukeen rinnastettavana etuutena. Toisaalta työmarkkinatuen luonne näyttää joistakin asiantuntijoista eräänlaiselta välimuodolta sosiaaliavustuksen (toimeentulotuen) ja sosiaalivakuutuksen välimaastossa. Kaarlo Tuori ja Toomas Kotkas jakavat sosiaaliturvan kolmeen kategoriaan: 1) sosiaalivakuutus, 2) sosiaaliavustus ja 3) sosiaalihuolto. Toimeentulotuki on heidän kategorisoinnissaan sijoitettu sosiaalihuoltoon, jossa muut tukimuodot ovat lähinnä kunnallisia palveluita. Rahalliset etuudet ovat joko maksuihin perustuvaa sosiaalivakuutusta, kuten työttömyyspäiväraha, tai verorahoitteista sosiaaliturvaa, kuten lapsilisä. Tuorin ja Kotkaksen jaottelussa työmarkkinatuki on sijoitettu sosiaalivakuutuksen kategoriaan, mutta he myöntävät, että siinä on myös piirteitä kategorian 2 sosiaaliavustuksesta. (Tuori ja Kotkas 2016, 16 .) Myös Raija Huhtanen sijoittaa työmarkkinatuen sosiaalivakuutukseen, mutta hän erottaa asumisperusteisen kansanvakuutuksen ja maksuperusteisen vakuutuksen. Näin ollen hän sijoittaa työmarkkinatuen kansanvakuutukseen. Myös Huhtanen pohtii sitä, että kansanvakuutus muistuttaa sosiaaliavustusta, koska se on kokonaan verorahoitteinen. Hänen jaottelussaan toimeentulotuki on oma kategoriansa, johon ei kuulu muita etuuksia. (Huhtanen 2012, 54–56.)

Vakuutustieteessäkin sosiaaliturva jaetaan kolmeen kategoriaan samantyyppisesti kuin oikeustieteessä. Vakuutustieteen näkökulmasta oleellista on sosiaaliturvan rahoitusperusta. Verorahoitteisen sosiaaliavustuksen ja sosiaalihuollon erottaa puolestaan se, että jälkimmäinen on tarveharkintaista. (Rantala ja Kivisaari 2014, 87.) Tässäkin jaottelussa työmarkkinatuen asemoiminen on haastavaa, koska se on vain osittain tarveharkintainen. Toisaalta vakuutusoikeudessa keskeistä on tiettyjen riskitilanteiden turvaaminen. Työmarkkinatuki onkin monesti luokiteltu samaan ryhmään kuin muu työttömyysturva eli sosiaalivakuutukseen.

(Päivänsalo ja Luukkonen 2014, 434–439.) Verorahoitteisuus kuitenkin perustelee työmarkkinatuen luokittelua ennemmin sosiaaliavustukseen tai sosiaalihuoltoon (Ylikännö 2012, 147; Rantala ja Kivisaari 2014, 87). Minna Ylikännö huomauttaa, että työmarkkinatuki luotiin alun perin osaksi työttömyysvakuutusta ja sillä on monia yhtymäkohtia muihin työttömyysvakuutusetuuksiin, esimerkiksi vastikkeellisuus (Ylikännö 2012, 159). Myös työmarkkinatuen tarveharkintaisuutta on lähiaikoina vähennetty (työttömyysturvalain muutos 1005/2012; HE 115/2012 vp).

Pentti Arajärvi on jaotellut sosiaaliturvan eri muotoja hieman tarkemmin. Hän erottaa sosiaalivakuutuksen ja sosiaaliavustuksen lisäksi muun muassa kustannuksia korvaavat etuudet. Hän sijoittaa työmarkkinatuen ja toimeentulotuen samaan sosiaaliavustuksen kategoriaan. Hän kuitenkin pitää toimeentulotukea hieman erilaisena siksi, että se on viimekätinen etuus ja tiukan tarveharkintainen. (Arajärvi 2011, 6–10.) Arajärven mukaan kustannuksia korvaavat etuudet auttavat pienentämään elinkustannuksia, kun taas toimeentulotuki yleensä kattaa kaikki elinkustannukset. Selkeitä kustannuksia korvaavia etuuksia Arajärvelle ovat muun muassa lapsilisä ja asumistuki. (Arajärvi 2011, 8–9.) Tällainen kustannuksia korvaavien etuuksien tarkastelu sopii perheenyhdistämisen kontekstiin, sillä samaa termiä käytetään toimeentulovaatimuksesta säätävässä ulkomaalaislain 39 §:n 2 momentissa.

Maahanmuuttajien näkökulmasta sosiaaliturvaa on varsinaisesti tarkasteltu kuitenkin Berit Kiurun Euroopan muuttoliikeverkostolle (EMN) tekemässä raportissa (2014). Siinä oleellisena luokittelevana tekijänä on sosiaaliturvan saamisperuste, joita ovat asumisperusteisuus ja työperusteisuus. Myös rahoitusperuste on keskeinen erottava tekijä, mikä kuvastaa maahanmuutto-oikeuden periaatetta itsenäisestä toimeentulosta negatiivisten julkisen talouden vaikutusten estämiseksi. (Kiuru 2014, 49.) EMN:n raportissa työmarkkinatuki on sijoitettu yhdessä muiden työttömyysetuuksien kanssa työperusteiseen sosiaaliturvaan (Kiuru 2014, 11). Tässä raportissa kuitenkin seurataan EU- ja ETA-maiden kesken käytettyä MISSOCin (Mutual Information System on Social Protection) jaottelua eikä tarkoituksena ole ollut ottaa kantaa sosiaaliturvan jaotteluun Suomessa. Tuossa MISSOCin jaottelussa (2012) työmarkkinatuen sijoittaminen tiettyyn sosiaaliturvan kategoriaan on ilmeisesti ollut ongelmallista. Nimittäin yhtäältä työmarkkinatuki on esitetty muiden työttömyysturvaetuuksien yhteydessä (MISSOC 2012, X luku), ja tämä perustuu luultavasti etuuden myöntämisperusteiden samankaltaisuuteen. Toisaalta tässä samaisessa MISSOCin ryhmittelyssä työmarkkinatuki näyttää kuuluvan myös erilliseen vähimmäistoimeentulon kategoriaan (MISSOC 2012, XI luku). Työmarkkinatuki on siis sekä oikeuskirjallisuuden että ulkomaa-

laisten sosiaaliturvaa tarkastelevien selvitysten mukaan aidosti monitulkintainen etuus. Työmarkkinatuki on ikään kuin kustannuksia korvaavien ja vähimmäistoimeentuloa turvaavien etuuksien välimaastossa.

Kohtuullisuusarvioinnin suhteellisuus

Kuten yllä on todettu, EU-tuomioistuin edellyttää, että perhesiteen perusteella haetun oleskeluluvan epäämistä harkittaessa on arvioitava ”tasapainoisesti ja järkevästi kaikkia käsillä olevia etuja ja otettava erityisesti huomioon asianomaisten lasten etu” (O., S. ja L. 2012, 81 kohta). EUT:n näkemyksen mukaan lainsäädäntö on suhteellisuusperiaatteen mukaista, kun se mahdollistaa kohtuullisuusarvioinnin yksittäistapausten yhteydessä (K ja A 2015, 60–63 kohta). Seppo Laakson mukaan suomalaisessa hallintotoiminnassa erityisesti kielteisten päätösten suhteellisuusarviointi on itse asiassa oikeudellinen velvollisuus (Laakso 2006, 329). Myös ulkomaalaislakia sovellettaessa tulee noudattaa hallintolakia (L 434/2003) ja siinä säädettyä suhteellisuusperiaatetta (6 §) eli hallinnon yleistä suhteellisuusperiaatetta. Laakson mukaan ulkomaalaislain 5 § ilmentää suhteellisuusperiaatetta ulkomaalaishallinnossa. (Laakso 2006, 330.) Tuossa pykälässä säädetään ulkomaalaisten oikeuksien kunnioittamisesta eräänlaisena välttämättömyysvaatimuksena: ”lakia sovellettaessa ei ulkomaalaisen oikeuksia saa rajoittaa enempää kuin on välttämätöntä” (ulkomaalaislaki 5 §).

Laakson mukaan yksittäistapauksellista kohtuusharkintaan oikeuttavaa yleistä säännöstä ei suomalaisessa hallinto-oikeudessa ole (Laakso 2006, 337). Toomas Kotkas sen sijaan näkee yksittäistapauksellisen harkinnan olevan yksi harkinnan laji ainakin sosiaalioikeudessa (Kotkas 2014, 48–50). Näin näyttää asia olevan myös ulkomaalaishallinnossa, koska kansainvälisen ja eurooppalaisen oikeuden kehityksen myötä erityisesti ihmisoikeusherkkien kysymysten yhteydessä laki edellyttää kohtuusharkintaa. Suomen ulkomaalaislaissa on yleisen suhteellisuusperiaatteen ilmaisevan 5 §:n lisäksi erityisiä kohtuullistamispykäliä, joista perheenyhdistämistapauksissa sovellettavia ovat 66 a § ja 114.2 § sekä tulorajan tarkasteluun liittyvä kohtuullistamislauseke 39 §:n 1 momentissa.

Ulkomaalaislain 66 a § edellyttää, että ”luvan myöntämättä jättämistä harkittaessa on otettava huomioon ulkomaalaisen perhesiteiden luonne ja kiinteys, hänen maassa oleskelunsa pituus sekä hänen perheeseen liittyvät, kulttuuriset ja sosiaaliset siteensä kotimaahan”. Lisäksi 114 §:n 2 momentissa säädetään kansainvälistä tai toissijaista suojelua saaneiden perheenyhdistämisessä tehtävästä kokonaisharkinnasta, mikä jää tämän artikkelin rajauksen ulkopuolelle. Oleellinen sitä

vastoin on ulkomaalaislaissa oleva toimeentuloedellytystä koskeva kohtuullistamislauseke: ”toimeentuloedellytyksestä voidaan yksittäisessä tapauksessa poiketa, jos siihen on poikkeuksellisen painava syy tai lapsen etu sitä vaatii” (39 § 1 mom.).

Suomessa hallintoviranomaisilla ja tuomioistuimilla näyttää siis olevan lainsäädännön mukaan hyvät edellytykset arvioida niin yleisempää suhteellisuutta kuin tapauskohtaista kohtuullisuutta ulkomaalaisten perheenyhdistämistapauksissa. Lisäksi voidaan ajatella, että kohtuullisuuden ja suhteellisuuden arviointi on myös Suomea velvoittava eurooppaoikeudellinen vaatimus. On myös hyvä huomata EUT:n todenneen, että lainsäädännön tasolla turvatun menettelysäännön lisäksi kohtuullisuusarviointi ei saa käytännössä olla niin tiukkaa, että se ei ottaisi huomioon kohtuullistamista kaikissa niissä tapauksissa, joissa rajoitus tekisi perheenyhdistämisen mahdottomaksi tai suhteettoman vaikeaksi (K ja A 2015, 60–63 kohta). Tärkeää on siis tarkastella myös tuomioistuinkäytäntöä, jonka kautta nähdään, kuinka suhteellisuutta ja kohtuullisuutta viime kädessä arvioidaan. Ulkomaalaislain 5 §:n suhteellisuusperiaatetta ja 114 §:n 2 momentin kohtuullisuusvaatimusta onkin äskettäin käytetty korkeimmassa hallinto-oikeudessa esimerkiksi tapauksessa KHO:2015:107 osoittamaan, että hyväksyttävän matkustusasiakirjan vaatiminen Somalian kansalaisilta rajoittaa kyseisen ryhmän oikeutta perheenyhdistämiseen enemmän kuin on välttämätöntä.

Edellä mainittuihin ulkomaalaislain suhteellisuus- ja kohtuullisuuspykäliin liittyy enenevässä määrin oikeuskäytäntöä. Aineellisen suhteellisuuden arviointi vaatisi kuitenkin perusteellisempaa tutkimusta. Edilex-palvelussa kyseessä oleviin pykäliin liittyvien tapauksien perusteella näyttää kuitenkin siltä, että perheenyhdistämistapauksissa lapsen etu voi saada enemmän painoarvoa kuin muut huomioon otettavat tekijät, mutta sekin on edellyttänyt toimeentuloedellytyksestä poikkeamista ilmeisesti vain lapsen terveydellisistä syistä (KHO:2010:18; KHO:2014:51). Dalisayn esimerkkitapauksen kaltaisia ulkomaalaisten työntekijöiden perheenyhdistämistapauksia, joissa olisi arvioitu toimeentulovaatimuksen kohtuullisuutta, ei löydy julkaistuista oikeustapauksista.

Viranomaisten ja tuomioistuinten välillä, kuten myös tuomioistuinten kesken, vaikuttaa olevan erilaisia tapoja lähestyä kohtuullisuusarviointia. Kahdesta julkaistusta oikeustapauksesta näkee, että jotkut hallinto-oikeudet soveltavat kohtuullisuusharkintaa laveammin kuin Maahanmuuttovirasto tai korkein hallinto-oikeus (KHO). Tapauksessa KHO:2010:18 Maahanmuuttovirasto katsoi vastineessaan Helsingin hallinto-oikeuden soveltavan ”ulkomaalaislain 39 §:ssä säädettyä poikkeusmahdollisuutta turvatun toimeentulon vaatimuksesta säännönmukaisesti laajemmin kuin

lainsäätäjä on tarkoittanut". Lisäksi Maahanmuuttovirasto näki, että hallinto-oikeus soveltaa virheellisesti ulkomaalaislain 66 a §:ä. Viraston mukaan "hallinto-oikeus on antanut hakijana olevalle ulkomaalaiselle subjektiivisen oikeuden asettautua Suomeen avioitumisen perusteella. Tämä ilmenee siten, että hallinto-oikeus on harkinnassaan sivuuttanut hakijan oman velvollisuuden turvata toimeentulonsa Suomessa". Maahanmuuttovirasto vaati todellista kokonaisharkintaa, jossa otetaan huomioon hakijan puolesta puhuvien seikkojen lisäksi hakijan ja perheenkokoajan oma toiminta ja oikeutetut odotukset viettää kiinteää perhe-elämää Suomessa. Lisäksi virasto on tapauksessa kommentoinut, että vaatimus ottaa huomioon lapsen etu ei edellytä, että lapsen huoltajalla olisi lapsen tilanteen perusteella subjektiivinen oikeus puolison saamiseksi Suomeen.

Tapauksessa KHO:2013:97 Maahanmuuttovirasto puolestaan arvosteli Helsingin hallinto-oikeuden tekemää kokonaisharkintaa puutteelliseksi siitä syystä, että tämän mukaan lapsen oikeus asua Suomessa on niin vahva, että se syrjäyttää lähtökohtaisesti kaikki muut asiassa huomioon otettavat seikat. Voi olla, että hallinto-oikeudet ovat taipuvaisia soveltamaan suhteellisuusperiaatetta ja perus- ja ihmisoikeusnäkökohtia yhteneväisemmässä linjassa muihin oikeudenaloihin nähden, kun taas KHO pitää yllä minimalistista linjaa perus- ja ihmisoikeusvelvoitteisiin nähden (ks. myös Pirjatanniemi 2014). Toisaalta monen tutkijan mielestä myös hallinto-oikeudet soveltavat perus- ja ihmisoikeusnäkökohtia liian suppeasti (Halme-Tuomisaari 2016, 189–190). Tällainen perus- ja ihmisoikeusminimalismi ulkomaalaisasioissa näkyy myös vuonna 2016 toteutetussa perheenyhdistämislainsäädännön kiristämisessä (L 505/2016), jossa oli kyse toimeentulovaatimuksen henkilöllisen soveltamisalan laajentamisesta kansainvälistä ja tilapäistä suojelua saaviin. Lainsäädäntöehdotuksesta (HE 43/2016 vp) lausunut perustuslakivaliokunta katsoi, että vaikka mainitut tavoitteet olivat ongelmallisia perus- ja ihmisoikeuksien turvaamisvelvoitteen (PL 22 §) näkökulmasta, ei ehdotus ollut varsinaisesti ristiriidassa kansainvälisten velvoitteiden kanssa (PeVL 27/2016 vp, 2). Perustuslakivaliokunta kuitenkin katsoi, että toimeentuloedellytyksen suuruuden määräytymiseen vaikuttavista perusteista tulisi säätää täsmällisemmin ja kohtuullisuuden arvioinnissa tulisi huomioida haavoittuvassa asemassa olevat (PeVL 27/2016 vp, 3–4).

Johtopäätökset

Esimerkkitapauksena käytetyn filippiiniläisen sairaanhoitajan Dalisayn perheenyhdistämisen kohtalo näyttää suomalaisen viranomais- ja oikeus-

käytännön valossa vaikealta. Eurooppalaisesta sosiaalioikeudesta nouseva velvollisuus helpottaa perheenyhdistämistä näyttäisi Suomessa toteutuvan hyvin siltä osin kuin tulorajan tarkastelussa otetaan huomioon kustannuksia korvaavat etuudet. Maahanmuuttoviraston ohjeiden mukaan tulevaisuudessa saatavista etuuksista ei kuitenkaan huomioida automaattisesti muuta kuin lapsilisä. Jos asumistuki huomioidaan, se voi joissain tapauksissa mahdollistaa tulorajan saavuttamisen. Dalisayn tapauksessa hänen palkkansa ja puolison todennäköinen työmarkkinatuki tai kotihoidon tuki nostaisivat ruokakunnan tulot sen verran suuriksi, ettei saatava asumistuki todennäköisesti auttaisi tulorajan saavuttamisessa paitsi siinä tapauksessa, että perhe asuu pääkaupunkiseudulla.

Tuloraja on siis niin korkea, ettei esimerkiksi lähihoitaja tai edes sairaanhoitaja voi aina saada oleskelulupaa perheelleen. Oikeuskäytäntö on vahvistanut, että oleskelulupaa hakevan puolison tulot voidaan ottaa huomioon perheenkokoajan tulojen lisäksi, mutta käytännössä harvalla perheenjäsenellä on ulkomailta käsin mahdollisuus saada töitä Suomesta. Oleskeluluvan perheenjäsenenä saaneena ulkomaalainen on oikeutettu rajoittamattomaan työntekoon Suomessa, kuten myös saamaan työllistymispalveluita. Jos hänellä on jatkuva oleskelulupa, hänellä on myös oikeus työmarkkinatukeen työnhaun ajalta. Työmarkkinatuen huomioon ottaminen perheen tulona edistäisi perheenyhdistämistä.

Työmarkkinatuen huomioon ottaminen tulorajan tarkastelussa voisi olla Suomen lain mukaan mahdollista, mutta se on kuitenkin Maahanmuuttoviraston soveltamisohjeen mukaan pois suljettua. Perheenyhdistämisen tulorajaa tarkasteltaessa oleellista on ulkomaalaislain 39 §:n 2 momentin viittaus toimeentulotukeen tai vastaavaan muuhun toimeentuloa turvaavaan etuuteen. Työmarkkinatuen pitäminen toimeentulotukea vastaavana etuutena ei kuitenkaan saa tukea oikeuskirjallisuudesta. Toisaalta juuri työmarkkinatuen asema sosiaaliturvajärjestelmässä tuntuu kaikille asiantuntijoille olevan hankala kysymys. Ongelmana perinteisessä kirjallisuudessa on sosiaaliturvan tarkastelu puhtaasti kansalaisen näkökulmasta eikä laajemmin koko väestön näkökulmasta, jolloin tulisi huomioida myös ulkomaalaisoikeudelliset kysymykset. Vaikka oikeuskirjallisuutta pidetään laintulkinnassa sallittuna oikeuslähteenä, on epäselvää, voiko tässä tapauksessa oikeuskirjallisuuden sosiaalietuuksien luokittelulla nähdä muuta kuin pedagogista merkitystä.

Eurooppaoikeuden mukaan toimeentulovaatimus on lähtökohtaisesti hyväksyttävä rajoitus, mutta tuloraja ei saa olla ehdoton. Ihmisoikeustuomioistuin ei juurikaan tarkemmin kuvaa toimeentulovaatimukseen liittyviä periaatteita. Euroopan sosiaalisessa peruskirjassa sitä vastoin säädetään perheenyhdistämisen helpottamisesta (19 art.), ja Sosiaalisten oikeuksien

komitea on tarkentanut sallitun toimeentulovaatimuksen kriteerejä. ESP:n oikeudellinen velvoittavuus ja erityisesti henkilöllinen soveltamisala perheenyhdistämisessä on kuitenkin epäselvä. EU:n perheenyhdistämisdirektiivi puolestaan säätää oikeudellisesti sitovasti toimeentulovaatimuksesta ja sen hyväksyttävästä tasosta. Toisin kuin ihmisoikeusjärjestelmä, EU-direktiivi pyrkii nimenomaisesti turvaamaan perheenkokoajan oikeuden perheenyhdistämiseen. EU-tuomioistuin onkin viime aikoina kehittänyt oikeusohjeita perheenyhdistämisdirektiivin tulkinnasta ja erityisesti siinä sallittuihin luvan saamisen ehtoihin, kuten tulorajaan, liittyen.

EU-oikeudessa on määrätty kolmansien maiden kansalaisten yhdenvertaisesta oikeudesta sosiaaliturvaan, mutta työmarkkinatuen kohdalla on epäselvää, kuuluuko se yhdenvertaisen kohtelun piiriin vai EU-oikeuden ulkopuolelle jäävään sosiaaliavustukseen, mistä Suomessa käytetään yleensä termiä sosiaalihuolto. EUT on viimeaikaisessa oikeuskäytännössä kuitenkin tapauksessa Alimanovic (C-67/14, annettu 2015) katsonut, että työmarkkinatuen kaltaista etuutta ei tarvitsisi ottaa tulona huomioon tarkasteltaessa toimeentulovaatimuksen täyttymistä. Tapauksessa Chakroun (C-578/08, annettu 2010) EUT lisäksi tarkasteli tulorajan lainmukaisuutta direktiivin valossa yhdenvertaisuutta korostaen niin, että sen mukaan maahanmuuttajien perheiltä ei voi vaatia parempaa tulotasoa kuin minkä on arvioitu riittävän kansalaisille perheen elättämiseen. Vaikka verrattaessa suomalaisen toimeentulotuen ja perheenyhdistämisen tulorajan tasoa voidaan nähdä pieni ero, hälvenee tuo ero tarkemmassa toimeentulotuen määräytymisen tarkastelussa. Lisäksi, jos otetaan huomioon Euroopan sosiaalisten oikeuksien komitean Suomelle äskettäin antama päätös, voidaan nähdä jopa painetta nostaa sekä toimeentuloturvaa että perheenyhdistämisen tulorajaa.

EU-oikeudesta ja eurooppaoikeudesta laajemminkin voi johtaa perus- ja ihmisoikeusulottuvuuden sisältävissä ulkomaalaisasioissa vaatimuksen yksittäistapausten kohtuullisuuden arvioinnista, mikä on luonteeltaan tiettyjen kriteereiden huomioon ottamista sekä yksilön ja julkisen intressin välistä punnintaa. EUT on tapauksessa Chakroun edellyttänyt, että oli sitten kyse sosiaalihuollosta tai ei, tulee perheenyhdistämisen epäämisen kohtuullisuutta aina arvioida tapauksen tosiseikkojen ja perheenyhdistämisdirektiivin 17 artiklan kriteerien valossa. EUT:n mukaan pysyväisluonteisesti maassa oleskelevien kolmansien maiden kansalaisten perheenyhdistäminen on pääsääntö, jonka edessä myös toimeentulovaatimus ja tuloraja joustavat. Perheenyhdistämisdirektiivissä sallittujen rajoitustenkin kohdalla tulee siis harkita kohtuullisuutta ja suhteellisuutta.

Eurooppaoikeudessa on lähestytty maahanmuuton kontrollin suhteellisuutta ja lainsäädännön hyväksyttävyyttä laajemminkin kuin vain yksit-

täistapausten kohtuullisuusharkinnan kautta. Varsinkin EU-tuomioistuin on viime aikoina soveltanut EU-oikeuden yleistä suhteellisuusperiaatetta. Suhteellisuuspunninta on oleellista juuri julkisen vallan käytössä, jota maahanmuutto-oikeus ja perheenyhdistämisen rajoittaminen on. Tuomioistuimissa tehtävän suhteellisuusarvioinnin kautta voi siis tulevaisuudessa muodostua oikeudellisia normeja ja periaatteita, jotka tulee ottaa huomioon niin perheenyhdistämisen rajoituksista säädettäessä kuin lainsäädäntöä sovellettaessa. Vähimmäisvaatimuksena lainsäädännön suhteellisuudesta on kohtuullisuusharkinnan mahdollistaminen viranomaisharkinnassa. Lisäksi EU-tuomioistuin on vaatinut, että kohtuullisuusarviointi ei saa käytännössä olla niin tiukkaa, että se ei ottaisi huomioon kohtuullistamista kaikissa niissä tapauksissa, joissa rajoitus tekisi perheenyhdistämisen mahdottomaksi tai suhteettoman vaikeaksi. Tulevaisuuden haasteena onkin erilaisten tekijöiden asianmukainen huomioon ottaminen.

Suomalaisesta hallinto- ja tuomioistuinkäytännöstä ei ole tarpeeksi tietoa, jotta kohtuullisuusharkinnan sisällöllistä suhteellisuutta voisi luotettavasti arvioida. Vaikuttaa kuitenkin siltä, että perheenyhdistämistapauksissa toimeentulovaatimuksesta poiketaan lähinnä vain lapsen edun nimissä, ja silloinkin tiukasti esimerkiksi lapsen terveydellisistä syistä. Helsingin hallinto-oikeus tuntuu ottaneen hieman lievemmän linjan joissain perheenyhdistämistapauksissa, mutta Maahanmuuttovirasto on kritisoinut sitä kokonaisharkinnan yksipuolisuudesta (KHO:2010:18; KHO:2013:97). Vaikuttaa kuitenkin ennemminkin siltä, että Suomessa ei oteta riittävästi huomioon perheenyhdistäjän siteitä Suomeen. Arvioitaessa avustusten myöntämisestä ja niiden huomioimisesta koituvaa rasitusta yhteiskunnalle, huomioon voisi ottaa esimerkiksi julkisiin varoihin perustuvien tulojen suhteellisen osuuden perheen kokonaistuloista. Näin tulisi otettua paremmin huomioon se, että ulkomaalaiset työntekijät palkallaan kustantavat suurimman osan perheensä elatuksesta Suomessa ja maksavat veroja.

Dalisayn perheen kaltaisessa tapauksessa voisi ottaa huomioon sen, että pienen palkan takia perhe joutuu ainakin alussa osittain turvautumaan yhteiskunnan tukeen. Työmarkkinatuki, joka aikaisemmin olikin juuri ulkomaalaisten työmarkkinoille pääsyä ja kotoutumista edistävä kotouttamistuki, voitaisiin pikemminkin nähdä investointina ja uuden työvoiman houkuttelemisena Suomeen. Lisäksi perheen Suomeen tulo edistäisi jo Suomessa työskentelevän ulkomaalaisen kotoutumista ja halukkuutta jäädä Suomeen töihin pidemmäksi aikaa. Tuskin on kenenkään osapuolen etu, jos tänne rekrytoidut ja täällä lisää kouluttautuneet ulkomaalaiset työntekijät palaavat lyhyen ajan päästä kotimaahansa.

Lain soveltamisessa ja kohtuullisuusharkinnassa tulisikin paremmin hyödyntää lainsäädännön jo suomat mahdollisuudet. Käsittääkseni nykyi-

nen lainsäädäntö ei suoranaisesti estä esimerkiksi työmarkkinatuen huomioimista perheen tulona. Muitakin lapsiperheille oleellisten etuuksien, kuten alle kolmivuotiaiden lasten kotihoidontuen, huomioimista perheen tulona tulisi edistää. Jotta hakija osaisi vedota tällaiseen mahdollisuuteen, tulisi neuvontaa ja ohjeistusta parantaa huomattavasti nykyisestä. Valtiolla on velvollisuus huolehtia tiedottamisesta ulkomaalaisille työntekijöille heidän oikeuksistaan ja velvollisuuksistaan rekrytointiprosessin yhteydessä (yhdistelmälupadirektiivi 2011/98/EU, 11 art. d alakohta). Julkisen vallan tulisi samalla huolehtia siitä, että ulkomaalaisia rekrytoitaessa heille kerrotaan myös ikävistä seurauksista ja vaihtoehdoista. Perheenyhdistämisen edellytykset tulisi olla selkeästi tiedossa, ettei synny kohtalokkaita virhearviointeja ja turhia pettymyksiä niin EU- tai ETA-alueen ulkopuolelta tuleville työntekijöille kuin suomalaisille työnantajillekin.

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PUBLICATION
II

Lainsäädännön hukattu kotouttamispotentiaali: Perheenyhdistäminen, lainvalmistelu ja arjen turvallisuus

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Lainsäädännön hukattu kotouttamis-potentiaali

Perheenyhdistäminen, lainvalmistelu ja arjen turvallisuus

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Tässä luvussa tarkastellaan perheenyhdistämiseen liittyvää arjen turvallisuutta ja kotoutumista lainsäädäntötutkimuksen näkökulmasta. Viimeisen kymmenen vuoden aikana ulkomaalaislainsäädäntöön on tehty tiukennuksia, joilla on ollut vaikutusta erityisesti kansainvälistä suojelua saavien perheenyhdistämiseen. Erityisen vaikuttavana tiukennuksena on ollut toimeentuloedellytyksen ulottaminen myös kansainvälistä suojelua saavien perheenjäsenten oleskelulupiin (laki 505/2016). Tämän edellytyksen käyttöönottoa on perusteltu muun muassa kotoutumisen edistämisellä (HE 43/2016 vp, 18). Suomessa vuonna 2016 tehdyn lainsäädäntömuutoksen vaikutuksia kotoutumiseen ei kuitenkaan ole riittävästi selvitetty lainsäädäntövaiheessa eikä myöhemmin. Perustuslakivaliokunta ei ole ottanut kantaa tämän perustelun järkevyyteen tai hyväksyttävyyteen (PeVL 27/2016 vp). Tämän luvun tarkoituksena on kartoittaa olemassa olevaa tutkimusta perheenyhdistämisen rajoittamisen vaikutuksista kotoutumiseen sekä arvioida lainvalmistelun laatua.

Oikeustieteilijät ovat huomauttaneet, että erityisesti EU:n perheenyhdistämisdirektiivin soveltamisalalla rajoitusten perusteleminen kotoutumisen edistämisellä on välttämätöntä, jotta ne voidaan katsoa hyväksyttäviksi (Jesse 2017, 290). Niiltä osin, kun direktiivi ei sovellu, kuten esimerkiksi toissijaista suojelua saavien kohdalla, sovellettavaksi tulee kuitenkin Euroopan ihmisoikeustuomioistuimen luomat oikeusohjeet. Niiden mukaan perhe-elämää rajoittavan toimenpiteen tulee olla suhteellisuusperiaatteen mukainen eli sen tulee toteuttaa hyväksyttäviä tavoitteita sekä olla sopiva ja oikeasuhtainen keino päämäärän saavuttamiseksi (Palander 2018, 399). Oleellista siis on, voiko toimeentulovaatimuksella vaikuttaa kotoutumiseen, ja jos voi, onko

saavutettava hyöty niin merkittävä, että sillä voi perustella Euroopan ihmisoikeussopimuksen 8. artiklassa suojatun perhe-elämän rajoittamisen. Lisäksi tulee kiinnittää huomiota ihmisoikeussopimuksen 14. artiklaan eli perhe-elämän suojan yhdenvertaiseen toteutumiseen eri suojelukategorioiden välillä. Tässä luvussa ei kuitenkaan tarkastella oikeudellisia velvoitteita sisällöllisesti tai oikeusdogmaattisesti vaan pikemmin lainvalmistelun laadun näkökulmasta.

Tässä luvussa tarkastellaan ensin lainvalmistelun ohjeita ja lainsäädäntöteoreettisessa tutkimuksessa esiin nostettuja relevantteja ongelmakohtia. Tutkimuksen ja ohjeiden mukaan lainvalmistelijan tulisi pyrkiä selvittämään lainsäädännön yhteiskunnallisia vaikutuksia, joihin sisältyvät myös vaikutukset eri väestöryhmiin. Vaikka ohjeissa puhutaan pääasiassa kansalaisista, tulisi lainsäätäjän huomioida myös vaikutukset maassa oleskeleviin ulkomaalaisiin (ks. myös Palander 2019). Tästä syystä tässä luvussa selvitetään olemassa olevaa tutkimusta perheenyhdistämislainsäädännön vaikutuksista ulkomaalaisten kotoutumiseen ja arjen turvallisuuteen erityisesti Suomen kontekstissa, mutta tuoden esille myös muualla tehtyä tutkimusta. Vaikutukset kotoutumiseen ja arjen turvallisuuteen tarkastellaan eri alaluvuissa, koska turvallisuuteen käsitteenä liittyy eroja niin vaikutusten vakavuuden kuin niiden arvottamisen näkökulmista. Arjen turvallisuuden ja kotoutumisen sisällöllisten erojen lisäksi myös lähdeaineistossa itsessään käytetyt termit ovat ohjanneet niiden mukaan ottamista ja sijoittamista. Arjen turvallisuus ymmärretään tässä hyvinvoinnin sekä henkisen ja fyysisen turvallisuuden kautta.

Kuten tämän kirjan johdannosta käy ilmi, turvallisuus liittyy monella tapaa maahanmuuttoon sekä siihen liittyvään hallintoon ja politiikkaan. Turvallisuustutkimuksen ja maahanmuuttotutkimuksen risteämisen seurauksena on Suomessakin syntynyt uutta tutkimusta, jonka suuntauksena on kriittinen maahanmuuton kriminalisoimisen, turvallistamisen ja rajojen tutkimus (ks. esim. Gozdecka ja Kmak 2018; Könönen 2019; Leinonen ja Pellander 2020; Palander ja Pellander 2019; Tiilikainen 2015). GLASE-hankkeessa tehdyn tutkimuksen mukaan Suomen turvallisuuspolitiikassa on viime aikoina kiinnitetty enenevässä määrin huomiota maahanmuuttoon ja reaktiot vuoden 2015 tapahtumiin voidaan jossain määrin nähdä turvallistamisena, mistä helposti seuraa poikkeuksellisia ja suhteettomia ratkaisuja

(Palander ja Pellander 2019). Turvallistaminen leimaa tiettyjä ryhmiä epäilyksen alaisiksi ja pyrkii näin oikeuttamaan rajoitukset ja erilaisen kohtelun (Nanopoulos ym. 2018, 14). Kun pelko hallitsee politiikan tekoa, perustavaa laatua olevat oikeudet, kuten yhdenvertaisuus ja vapaus, helposti vaarantuvat (Huysmans 2004, 338).

Suomessa vuonna 2016 tehdyssä perheenyhdistämisen kiristyksessä ei kuitenkaan ole päällisin puolin kyse turvallistamisesta, koska kansallisen turvallisuuden kysymykset eivät nouse esille lainvalmisteluasiakirjoissa. Tietynlainen kriisitietoisuus on kuitenkin tässäkin lakimuutoksessa läsnä ja ilmenee viittauksina vuoden 2015 turvapaikanhakijamääriin ja Suomen houkuttelevuuteen turvapaikanhakumaana, sekä siihen liitettyyn tarpeeseen rajoittaa perhesidehakemusten ja myönnettävien oleskelulupien määrää (HE 43/2016 vp, 1). Turvallistamista tai ei, perheenyhdistämisen tiukentamisen yhteydessä ei ole kiinnitetty tarpeeksi huomiota ihmisoikeusvelvoitteisiin (Sormunen 2017). Turvallistamisen sijaan tai sen ohella ongelmaksi voidaan nähdä inhimillisen turvallisuuden ja arjen turvallisuuden heikko huomioiminen lainsäädäntötyössä. Tässä luvussa siis pikemmin kartoitetaan, mitä turvallisuushuolia perheenyhdistämiseen ja perheestä erossaoloon liittyy erityisesti ulkomaalaisten näkökulmasta.

Tutkimuskirjallisuuden tarkastelussa keskitytään pääasiassa empiiriseen tutkimukseen toimeentulovaatimuksen ja perheestä erossaolon vaikutuksista. Helga Eggebø ja Jan-Paul Brekke (2018; 2019) ovat koonneet ja tyypitelleet viimeaikaista tutkimuskirjallisuutta perheenyhdistämisen kotoutumisvaikutuksista, ja heidän mukaansa relevantti kirjallisuus voidaan jakaa perheenjäsenten kotoutumisen tutkimukseen ja perheenyhdistämisen sääntelyn vaikutusten tutkimukseen. Perheenyhdistämisen estymisen ja perheen erossaolon vaikutusten tutkimusta on kuitenkin vähemmän (ks. myös Bonjour ja Kraler 2015; Miettinen ym. 2016). Varsinkin tutkimus perheenyhdistämisen sääntelyn vaikutuksista kotoutumiseen on vähäisempää. Eggebøn ja Brekken (2019) mukaan perheen kotoutumiseen liittyvät tutkimukset keskittyvät yleensä vain työllistymiseen ja tulevat siihen johtopäätökseen, että kotoutumista tulisi tarkastella muistakin näkökulmista. He nostavat hyväksi esimerkiksi Charsleyn ja muiden (2016) tutkimuksen, jossa on pyritty huomioimaan myös sosiaalisia, kulttuurisia, poliittisia, rakenteellisia ja identiteettiin kohdistuvia vai-

kutuksia. Myös vaikutuksia perheenkokoajan kotoutumiseen tulisi tarkastella laajemmin kuin työllistymisen näkökulmasta, ja siksi tässä vaikutuksia lähestytään arjen turvallisuuden näkökulmasta. Suomesta löytyykin jonkin verran tämän tyyppistä tutkimusta (ks. myös Leinonen 2019), jota tässä on tarkoitus kartoittaa.

Lainsäädännön yksilöön kohdistuvien vaikutusten lisäksi tarkastellaan lainsäädännön rakenteellista vaikutusta kotoutumiseen sen kotouttamispotentiaalin kautta. Teoreettisena viitekehyksenä käytetään Moritz Jessen (2017) ajatusta lainsäädännön potentiaalista eli mahdollistavasta roolista kotoutumisen edistämisessä. Hänen mukaansa lainsäädäntö ja hallintokäytäntö voivat vaikuttaa joko kotoutumista edistävästi tai heikentävästi. Yhdenvertaisuus näyttäytyy hänen tutkimuksessaan kotoutumista edistävänä tekijänä. Lainsäädännön vaikutukset kotoutumiseen ovat siis monen tasoisia ja näillä eri ulottuvuuksilla on myös yhtymäkohtia. Oleellisinta on kuitenkin määrittää, voidaanko vaikutukset kotoutumiseen nähdä pääasiassa positiivisena vai negatiivisena.

Ensimmäisessä alaluvussa perustellaan vaikutusten arvioinnin tärkeyttä ja sen laatukriteereitä lainsäädäntötutkimuksen kautta. Seuraavissa alaluvuissa kartoitetaan olemassa olevaa kirjallisuutta perheenyhdistämisen edellytysten ja estymisen vaikutuksista ulkomaalaisiin perheenkokoajiin niin kotoutumisen, hyvinvoinnin kuin arjen turvallisuuden näkökulmista. Lopuksi arvioidaan muodostuvaa kokonaiskuvaa perheenyhdistämisen vaikutuksista kotoutumiseen ja analysoidaan lakimuutoksen laatua lainsäädäntötutkimuksen periaatteiden ja lainsäädännön kotouttamispotentiaalin valossa.

Lainvalmistelun periaatteista

Lainvalmistelijoilla ja lainsäätäjällä on paljon vapauksia työssään, eikä niin sanottuja menettelysääntöjä juurikaan ole, mutta oikeuskirjallisuudesta, ministeriöiden omista ohjeista ja kansainvälisoikeudellisista velvoitteista voidaan muodostaa käsitys hyvän lainvalmistelun periaatteista. Lainvalmistelun sääntelyteoreettisessa tutkimuksessa on kehitelty rationaaliseen valintaan perustuvaa ihannemallia, jonka mukaan lainsäätäjä ensin tunnistaa yhteiskunnallisen ongelman ja hah-

mottelee tavoitteen sen korjaamiseksi. Sen jälkeen lainsäätäjä arvioi erilaisia toimintavaihtoehtoja ja niiden vaikutuksia sidosryhmiä konsultoiden sekä lopulta valitsee optimaalisen säädösehdotuksen. (Tala ym. 2011.) Raamit lainsäätäjän harkinnalle asettaa perustuslaki, perusoikeudet sekä kansainvälisen ja EU-oikeuden velvoitteet, mitkä tulee ottaa huomioon jo lainsäädäntötyön varhaisessa vaiheessa (ks. OM 2013). Hankalissa tapauksissa, missä on kyse perus- ja ihmisoikeuksista, mutta missä lainsäätäjällä on vapaus käyttää harkintaa, tulee erilaiset intressit ja vaikutukset selvittää ja punnita, sekä tehdyt ratkaisut perustella (OM 2013, 4.1.18).

Viime vuosina on kiinnitetty erityisen paljon huomiota vaikutusten arvioinnin kehittämiseen. Oikeusministeriön (OM) laatimassa vaikutusten arvioinnin ohjeessa (OM 2007) edellytetään erityisesti taloudellisten, ympäristö- sekä hallintoon kohdistuvien vaikutusten arviointia. Lisäksi ohjeen mukaan tulee arvioida muita yhteiskunnallisia vaikutuksia, jotka kohdistuvat esimerkiksi terveyteen, yhdenvertaisuuteen, lapsiin, sukupuolten tasa-arvoon, työllisyyteen ja työelämään, rikostentorjuntaan ja turvallisuuteen sekä kansalaisten asemaan ja kansalaisyhteiskunnan toimintaan (OM 2007, 33). Ohje on yksilöön ja erityisesti ulkomaalaisiin kohdistuvien vaikutusten arvioinnin suhteen kuitenkin riittämätön (ks. lisää Palander 2019) ja paremmin ohjeistusta ihmisiin kohdistuvien vaikutusten arviointiin saa sosiaali- ja terveysministeriön vuonna 2016 julkaisemasta oppaasta (STM 2016). Siinä kehotetaan myös välillisten vaikutusten arviointiin, missä auttaa ilmiölähtöinen lähestymistapa (STM 2016, 13).

Vaikutuksia voidaan ohjeiden mukaan selvittää sidosryhmien, asiantuntijoiden ja tutkijoiden kuulemisilla (OM 2007; STM 2016, 18; VN 2016). Matti Niemivuo (2002) on kirjoittanut, että vaikutusten arvioimiseksi ja sääntelyvaihtoehtojen kartoittamiseksi lainvalmistelijan tulisi lisäksi tuntea säänneltävään alaan liittyvää tutkimusta. Niemivuo (2002, 200) toteaa tarvittavan niin oikeustieteellistä kuin yhteiskuntatieteellistä tutkimusta. Lainvalmistelija voi myös itse selvittää tai tilata ulkopuolisilta toimijoilta selvityksiä eri vaikutuksista. Tähän tarkoitukseen käytetään esimerkiksi valtioneuvoston kanslian tutkimustoimintaa. Varsinaisessa hallituksen esityksessä ei ole kuitenkaan tarkoitus tuoda yksityiskohtaisesti ja laajasti esille olemassa olevaa tutkimusta tai selvityksiä. Hallituksen esitys ei ole tutkimus-

raportti (HELO 2018, 13), vaan siinä tuodaan esille tiivistetysti pääasialliset vaikutukset ja arvioinnin keskeiset tulokset sekä se, miten vaikutukset on arvioitu, mitä tietolähteitä on käytetty sekä minkälaisia epävarmuuksia arviointiin liittyy (HELO 2018, 23–24).

Käytännön lainvalmistelussa keskeisenä ongelmana on nähty juuri vaikutusten ja vaihtoehtojen puutteellinen arviointi. Auri Pakarinen (2011b) toteaa, että ohjeiden tasolla vaikutuksia otetaan huomioon hyvin, mutta käytännön tasolla painotetaan taloudellisia vaikutuksia. Yksilöihin ja kansanryhmiin kohdistuvia vaikutuksia arvioidaan niukasti, ja usein ne jäävät arvioimatta kokonaan. Pakarinen on kuitenkin optimistinen ja näkee, että erityisesti osallistumisen kulttuuri ja sidosryhmien kuuleminen ovat hänen mukaansa Suomen vahvuuksia. (Pakarinen 2011b, 62–63.) Sidosryhmien osalta erityisesti etujärjestöjen kuuleminen on keino selvittää eri ryhmiin kohdistuvia vaikutuksia. Tärkeää on myös tunnistaa kaikki ryhmät, joihin vaikutuksia kohdistuu (Rantala 2011, 78). Tutkimustiedon avulla voidaan selvittää mahdollisia vaikutuksia erityisesti niiden oikeuksia omaavien ryhmien osalta, joiden ääni ei ole edustettuna (Rantala 2011, 80). Lainvalmistelijan tulee sitten arvioida, mikä painoarvo erilaisille intresseille annetaan. Pakarinen (2011a) on todennut, että keskeiset etujärjestöt pitävät tärkeänä, ettei heitä ainoastaan kuulla vaan että heidän näkemyksillään olisi myös vaikutusta (ks. myös Keinänen 2011, 148).

Kati Rantala (2011, 77) muistuttaa, että lainvalmistelun ideaalimallit eivät toimi, tai ne ovat resurssien hukkaa, jos poliittinen ohjaus on liian voimallista. Hänen mukaansa tavoitteet voivat olla siinä määrin arvolatautuneita, että rationaaliselle valinnalle ja neutraalille vaikutusten arvioinnille ei anneta mahdollisuutta. Kalle Määttä (2009) kirjoittaa, että sääntelyteoreettisessa tutkimuksessa ei pitäisi ottaa lainsäädännön tavoitteita annettuna. Joissakin tapauksissa lain tavoitteet voivat olla selkeästi ilmaistut, mutta ne eivät vastaa lain tosiasiallisia tavoitteita. Määttä (2009, 18) käyttää tällaisesta tavoiteristiriidasta nimitystä lainsäädäntöilluusio. Rantala (2011, 82) peräänkuuluttaa avoimuutta ja oikeutta tietää lakihankkeiden ratkaisuihin vaikuttaneet tosiasialliset taustat ja tavoitteet. Hän haluaisi tietää, minkälaista tutkimustietoa, kentältä nousevaa hiljaista tietoa ja eri intressiryhmien näkemyksiä on tai ei ole otettu huomioon.

Vaikka lainsäädäntö on instrumentaalinen keino tiettyihin tavoitteisiin pääsemiseksi ja tavoitteiden määrittely pitkälti politiikkaa, tulee tavoitteidenkin täyttää tiettyjä kriteereitä. Erityisesti jos kyse on perus- tai ihmisoikeusrajoituksista, ylikansallinen lainsäädäntö ja oikeuskäytäntö määrittävät sallitut tavoitteet. Perhe-elämään puututtaessa hyväksyttävät tavoitteet ovat kansallisen ja yleisen turvallisuuden tai maan taloudellisen hyvinvoinnin turvaaminen, epäjärjestyksen tai rikollisuuden estäminen, terveyden tai moraalin suojaaminen, tai muiden henkilöiden oikeuksien ja vapauksien turvaaminen Euroopan ihmisoikeussopimuksen (8. art.) mukaan. Suhteellisuusperiaatteen mukaan keinojen tulee olla sopivia tavoitteen saavuttamiseksi, ja vasta sen jälkeen tarkastellaan keinojen vaikutusten suhdetta tavoitteisiin. Tässä suhteellisuuspunninnassa on annettava oikea painoarvo muun muassa perus- ja ihmisoikeusvaikutuksille. Punninnassa voi myös esiintyä monenlaisia turvallisuusintressejä, jotka lainsäätäjän tulee asianmukaisesti huomioida (ks. esim. Lonka 2016, 34–38).

Vaikka kyse ei olisi perus- ja ihmisoikeuksien suojaamasta perhe-elämästä, tulee lainvalmistelijan ottaa kokonaisharkinnassa huomioon yksilöihin ja ryhmiin kohdistuvat vaikutukset. Koska perheenyhdistämislainsäädännön vaikutukset kohdistuvat pääasiassa maahan muuttaneisiin ulkomaalaisiin ja heidän perheenjäseniinsä, tulisi lainvalmistelussa pyrkiä selvittämään myös heihin kohdistuvia vaikutuksia. Vaikka varsinaiset lainvalmistelijan ohjeet eivät selkeästi tue muihin kuin kansalaisiin kohdistuvien vaikutusten arviointia, viimeaikaiset sektorikohtaiset ohjeet vahvistavat sitä näkökulmaa, että kaikkien Suomessa oleskelevien intressit ja vaikutukset on arvioitava ja otettava huomioon. Tarkasteltavana olevassa perheenyhdistämislainsäädännön tiukentamisessa tulee siis ottaa huomioon myös ulkomaalaisiin kohdistuvia vaikutuksia. Niistä arvioidaan seuraavaksi kotoutumiseen ja turvallisuuteen liittyviä vaikutuksia tieteellisen kirjallisuuden kautta.

Perheenyhdistämisen vaikutukset kotoutumiseen

Kotoutumisen edistäminen on keskeinen tavoite ulkomaalaishallinnossa, ja onnistunut kotoutuminen luo myös arjen turvallisuutta. Hallituksen esityksen (HE 43/2016 vp) mukaan perheenyhdistämisen edellytysten kiristämisen yhtenä tavoitteena on edistää niin kansainvälistä suojelua saavien kuin heidän perheenjäsentensä kotoutumista. Toimeentulovaatimuksen ajatellaan lisäävän ulkomaalaisten työssäkäyntiä, minkä puolestaan oletetaan edistävän kotoutumista (HE 43/2016 vp, 18 ja 21). Vaikutuksia kotoutumiseen ei ole kuitenkaan perusteltu tarkemmin tai tarkasteltu muista näkökulmista. Työllistyminen on tärkeä tekijä kotoutumisessa, mutta yhteiskuntaan sopeutumiseen ja hyvinvointiin vaikuttavat myös monet muut tekijät (Gauffin ja Lyytinen 2017; Saukkonen 2013; Sotkasiira 2018). Alitolppa-Niitamo (2005, 37) on todennut, että kotoutuminen nähdään yleensä joko uhkien ja ongelmien tai työvoimaresurssin kouluttamisen kautta, mutta helposti unohdetaan kotoutuvien inhimilliset tarpeet, toiveet ja odotukset. Hänen mukaansa näihin kuuluu muun muassa oikeus tasa-arvoon, hyvinvointiin ja läheisiin ihmissuhteisiin. Huttunen (2010) on pyrkinyt tuomaan esille, kuinka ylirajaiset perhesuhteet vaikuttavat kotoutumiseen.

Tarkastelussa olevan perheenyhdistämislainsäädännön muutoksen vaikutuksista ei tehty selvitystä lainvalmisteluvaiheessa. Lakimuutoksen jälkeen vuonna 2016 sisäministeriölle tehdyssä (VN-TEAS) selvityksessä (Miettinen ym. 2016) on arvioitu perheenyhdistämisen mahdollisten lisäedellytysten vaikutuksia. Vaikka kyseessä ei ollut varsinainen toimeentulovaatimuksen vaikutusten jälkiseuranta, selvityksessä arvioitiin myös tuon edellytyksen vaikutuksia. Selvityksessä on pyritty ottamaan huomioon perheenkokoajiin ja perheenjäseniin kohdistuvat vaikutukset niin kotoutumisen kuin hyvinvoinnin osalta (Miettinen ym. 2016, 34). Arvion mukaan työllistymistilastojen ja palkkatulojen perusteella todennäköisesti vain 27 prosenttia kansainvälistä suojelua saavien perheenjäsenistä voisi saada oleskeluluvan, ja niistä, joita toimeentuloedellytys koskee, vain alle kaksi prosenttia voisi saada perheenjäsenen Suomeen (Miettinen ym. 2016, 15–17).

Kyseisen selvityksen mukaan suomalaista tutkimusta perheenyhdistämisen eri edellytysten vaikutuksesta kotoutumiseen ei juuri-

kaan ole. Ongelmaksi nähdään myös se, että olemassa oleva tutkimus ”perustuu joko asiantuntijoiden esittämiin näkemyksiin tai pienehköihin maahanmuuttajaväestöltä kerättyihin haastatteluihin tai kyselytutkimuksiin”. Selvityksessä todetaan, että toimeentuloedellytyksellä on jonkin verran työllisyyttä lisäävää vaikutusta, mutta siihen vaikuttavat myös tietyt työllistymisen esteet erityisesti juuri kansainvälistä suojelua saavien kohdalla. Toisaalta työllistyminen ja korkean tulorajan tavoittelu voi heikentää kotoutumista, jos ei ole aikaa opiskella. Selvityksessä todetaankin, että todennäköisesti perheen yhteen saamisen estyminen tai sen pitkittyminen vaikuttaa kansainvälistä suojelua saaviin kielteisemmin kuin muihin maahanmuuttajaryhmiin. (Miettinen ym. 2016, 46–47.)

Suomessa on kuitenkin tehty aiheesta tutkimuksia ja selvityksiä, joita olisi voinut hyödyntää lainvalmistelussa. Edellä mainittuja pienehköjä haastattelututkimuksia perheestä erossaolon vaikutuksista on runsaasti (esim. Huttunen 2005; Onodera ja Peltola 2016; Tiilikainen 2007), mutta monessa tutkimuksessa tämä seikka on ollut vain sivujuonne. Varsinaisesti teemaan pureutuvia tutkimuksia on esimerkiksi vuonna 2011 julkaistu selvitys, jota varten Pääkaupunkiseudun sosiaalialan osaamiskeskus (Socca) on haastatellut perheenyhdistämisen läpikäyneitä perheitä. He ovat kertoneet, että yhdistämisprosessi on ollut vaikea ja henkisesti raskas. Huolena on myös ollut perheenjäsenten turvallisuus ja hyvinvointi. Jotkut ovat kertoneet, etteivät ole voineet keskittyä kotoutumiseen. Tutkimuksen mukaan jatkuva huolehtiminen ja ikävöiminen vaikuttivat perheenkokoajien omaan elämään ja kotoutumiseen, erityisesti suomen kielen oppimiseen. Selvityksessä todetaan, että kaikki haastateltavat kokivat vaikeuksia keskittyä mihinkään kunnolla, koska ajatukset pyörivät perheessä. (Socca 2011, 10.)

Lainsäädännön valmistelun aikaan myös Terveyden ja hyvinvoinnin laitoksella on tutkittu somali- ja kurditaustaisten maahanmuuttajien primääri- eli lapsuusperheestä erossa olemista tilastollisin menetelmin. Tutkimusaineiston rajoituksista johtuen ydinperheestä eli puolisosta tai lapsista erossa oloa ei tässä tutkimuksessa kuitenkaan voitu selvittää. Kotoutumista arvioitiin tekijöillä yksinäisyys, kielitaito ja työssäolo, sekä hyvinvointia tekijöillä vakavat masennus- ja ahdistuneisuusoireet, univaikeudet ja koettu elämänlaatu (Rask ym.

2016, 273). Hankkeen raportin mukaan lapsuusperheestä erossa olemisella on tilastollinen yhteys kotoutumiseen erityisesti pakolaistaustaisten kohdalla ja erityisesti suhteessa sisaruksiin (Rask ym. 2016, 277–281). Sisaruksista erossaoloon liittyviin ongelmiin on kiinnitetty huomiota myös haastattelututkimuksen kautta (Jokinen ym. 2019a).

Suomessa on jo vuonna 2002 selvitetty alaikäisten yksintulleiden kokemuksia. Selvityksessä on noussut esiin alaikäisten huoli muualla olevien perheenjäsenten hyvinvoinnista sekä paine auttaa heitä. Monella nuorella on ollut koulussa keskittymisvaikeuksia. (Helander ja Mikkonen 2002, 75.) Tuolloin alaikäisillä perheenkokoajilla on ollut lähes rajoittamaton oikeus perheenyhdistämiseen ja se on nähty osana turvapaikkaprosessia (Helander ja Mikkonen 2002, 39), mutta silti perheenyhdistämisprosessi on ollut haastava. Vuoden 2010 lakimuutoksen, eli perheenkokoajan vireillepano-oikeuden poistamisen, jälkeen perheenyhdistämisprosessista on tullut entistä hankalampaa ja monen nuoren perheenjäsenet ovat saaneet kielteisen päätöksen, mikä on vaikuttanut nuorten hyvinvointiin. Toisaalta myös perheenyhdistämisen jälkeen nuoret kohtaavat haasteita ja paineita, kun he ovat alussa vastuussa perheenjäsentensä orientoitumisesta ja kotoutumisesta. (Björklund 2015, 45–46.) Haasteita ja paineita tuo kuitenkin myös vastuu ylirajaisen perheen toimeentulosta ja hyvinvoinnista, jos perheenjäseniä ei saa luokseen. Jotkut nuoret lähettävät rahaa tai keräävät varoja esimerkiksi talon ostamiseksi perheenjäsenilleen. (Hiitola 2019, 196.) Perheestä erossaolo niin oleskelun alkuvaiheessa kuin myöhemmin elämässä voi aiheuttaa voimakasta ikävää. On myös hyvä huomata, että vaikka kotoutumista tapahtuu perheestä erossa kasvaessakin, taustalla voi silti säilyä ikävä ja huoli perheenjäsenistä (Hiitola 2019; Kauko 2015, 42).

Monessa muussa Pohjoismaassa tai Euroopan maassa perheenyhdistämisen edellytyksiä on tiukennettu ja toimeentulovaatimusta laajennettu jo aikaisemmin, joten näistä maista löytyy enemmän tutkimusta aiheesta (Bonjour ja Kraler 2015; Eggebø ja Brekke 2019). Lainvalmistelussa onkin tyypillistä tehdä kansainvälistä vertailua, jotta voisi lainata politiikkaideoita muualta tai ennakoida vaikutuksia. Hallituksen esityksessä on kuitenkin tehty kansainvälistä vertailua vain perheenyhdistämisen edellytysten osalta, eikä ollenkaan vaikutusten osalta. Esityksessä on muun muassa selostettu, kuinka Ruot-

sissa oli suunnitteilla rajoittaa perheenyhdistämistä tilapäisesti (2016–2018) niin, että kansainvälistä suojelua saavilta edellytettäisiin turvattua toimeentuloa. (HE 43/2016 vp, 14–16.) Ruotsin osalta ei tiettävästi ole tutkimusta tuon tilapäisen toimeentulovaatimuksen vaikutuksista, mutta Norjassa ja Tanskassa se on ollut voimassa pidempään.

Norjassa ja Tanskassa on havaittu lyhyellä aikavälillä työllisyyttä jossain määrin lisäävä vaikutus, mutta samaan aikaan perheenyhdistämishakemusten ja myönnettyjen oleskelulupien määrä on vähentynyt (Bratsberg ja Raaum 2010; Larsen ja Lauritzen 2014). Vaikutukset kohdistuvat enemmän naispuolisiin sekä muihin kuin länsimaalaisiin perheenkokoajiin (Eggebø 2013b, 20–22; Larsen ja Lauritzen 2014). Tutkijat arvelivat tulorajan lisänneen perheiden erossaoloa ja sen aiheuttamaa stressiä ja epäoikeudenmukaisuuden tunnetta niiden keskuudessa, joilla ei ollut mahdollisuutta täyttää toimeentulovaatimusta (Bratsberg ja Raaum 2010; Eggebø 2013a). Tanskassa tehdyn tutkimuksen mukaan perheenyhdistämiseen paremman kotoutumisen nimissä tehdyt rajoitukset eivät ole tavoitteista huolimatta lisänneet avioliittoja etnisten vähemmistöjen ja etnisten tanskalaisten välillä, vaikka puoliso kyllä otetaan harvemmin vanhempien entisestä kotimaasta. Sitä vastoin rajoituksilla on ollut vaikutusta avioliittoihin etnisten vähemmistöjen kesken tai sitten avioliitot solmitaan myöhemmin. (Schmidt ym. 2009.)

Myös Alankomaissa ja Britanniassa tiukemmat perheenyhdistämisen edellytykset ovat johtaneet kasvavaan perheiden erossaoloon, kun perhesideperustaisten oleskelulupien määrät ovat vähentyneet. Vaikutukset ovat kohdistuneet muita enemmän köyhempiin ihmisryhmiin kuten ei-länsimaalaisiin, nuoriin ja naisiin (Leerkes ja Kulu-Glasgow 2011, 119). Työllisyys on lisääntynyt ja maahan muuttavien perheenjäsenten keskimääräinen koulutustaso on kohonnut (Entzinger ym. 2013), mutta tutkijoiden käsityksen mukaan toimet eivät silti ole edistäneet kotoutumista (Strik ym. 2013, 24; Wray ym. 2015, 15). Haastattelututkimuksen mukaan moni pariskunta oli kokenut perheenyhdistämisprosessiin liittyviä vastoinkäymisiä, jotka olivat vaikuttaneet hyvinvointiin (Leerkes ja Kulu-Glasgow 2011, 119). Lapsilla on Britanniassa havaittu olevan nukkumis- ja syömisongelmia, käyttäytymisongelmia ja syrjäytymistä sekä stressiä ja syyllisyyden-

tuntoa perheen erossaolosta. Lisäksi perheenkokoajat ovat työskennelleet pitkää päivää saavuttaakseen korkean tulorajan. (Wray ym. 2015, 37–58.)

Vaikutukset arjen turvallisuuteen

Maahanmuuttopolitiikassa on kansallisen turvallisuuden ohella useita relevantteja turvallisuusnäkökohtia, ja inhimillinen turvallisuus, niin ulkomaalaisten kuin kansalaisten, on ollut osa maahanmuuttopolitiikkaa ainakin jo ensimmäisestä ulkomaalaislaista (400/1983) lähtien (Palander ja Pellander 2019, 187–189). Turvallisuusnäkökohdat tulee ottaa huomioon, kohdistuvat ne keneen tahansa. Palanderin ja Pellanderin (2019, 184) tutkimuksen aineistossa kiinnitetään huomiota pääasiassa Suomesta turvaa hakevien turvallisuuskysymyksiin erityisesti palauttamista harkittaessa, mutta Suomen ulkopuolella olevien perheenjäsenten turvallisuuteen kiinnitetään huomiota vain eduskunnan keskusteluissa, ei lainsäädännössä tai oikeuskäytännössä. Kyseisessä tutkimuksessa käytetty turvallisuus-termin ympärille rakennettu tutkimusmenetelmä ei kuitenkaan tavoita kaikkia inhimilliseen turvallisuuteen liittyviä seikkoja, ja niitä tuleekin tarkastella syventyen paremmin itse ilmiöön. Kansainvälistä suojelua saavien ulkomaalaisten perheenyhdistämiseen liittyy heidän oma suojeluasemansa sekä heidän perheenjäsentensä turvallisuus oleskeluvaltiossa.

Pakolaisuuden taustalla on usein fyysinen turvallisuusuhka, joka ajaa ihmiset pois kodeista, kaupungeista ja jopa maasta. Moni pakenee perheen kanssa, mutta osalle se ei ole mahdollista, vaan he suunnittelevat järjestävänsä muut perheenjäsenet turvaan perheenyhdistämisen kautta (Tiilikainen ja Fingerroos 2019; Vanhanen 2019). Odottamaan jääneiden perheenjäsenten olosuhteet voivat olla kotimaassa tai kauttakulkumaassa hengenvaarallisia (Leinonen ja Pellander 2020; Vanhanen 2019, 198). Perheenyhdistämisen hakemisen käytännön haasteet voivat luoda turvallisuusuhkia perheenjäsenille. Perheenjäsenten turvallisuus voi vaarantua kotimaassa, kun he matkaavat hakemaan passia toiseen kaupunkiin, tai toisessa valtiossa, kun he matkaavat Suomen lähetystöön jättämään hakemusta tai tunnistautumaan (Hiitola 2019; Palander ym. 2019; Tapaninen 2016, 154–156).

Laillisten maahantuloväylien tukkiminen perheenjäseniltä voidaan nähdä heidän fyysistä turvattomuuttaan lisäävänä tekijänä. Mahdollista myös on, että he perheenyhdistämismahdollisuuden poistuessa lähtevät hakemaan turvapaikkaa itse tai turvautuvat salakuljettajien apuun hakeutuakseen perheenjäsenensä luo (Leinonen ja Pellander 2020; Tapaninen 2016, 156). Eurooppalaisessa tutkimuksessa on myös viitteitä siitä, että perheenyhdistämisen kiristäminen lisää laitonta maahantuloa ja maassa oleskelua (Leerkes ja Kulu-Glasgow 2011). Myös hallituksen esitykseen pyydetyissä lausunnoissa viitattiin salakuljettajien käytön sekä laittoman maahantulon ja paperittomuuden lisääntymiseen (ks. esim. UNHCR ja Siirtolaisuusinstituutti). Perheenjäsenten mahdolliset turvapaikkahakemukset on kyllä huomioitu lain esitöissä, mutta vain hakemusmäärien kasvun näkökulmasta eikä siihen liittyville turvallisuusnäkökohdille ole annettu painoarvoa päätöksenteossa (HE 43/2016 vp, 25–26).

Varsinkin viranomaisten selvityksissä ja lainvalmisteluaineistossa huomiota kiinnitetään myös perheenyhdistämisen mahdollisiin negatiivisiin vaikutuksiin. Vuoden 2016 hallituksen esityksessä on pohdittu toimeentuloedellytyksestä poikkeamista yksin saapuneiden alaikäisten kohdalla, mutta sen on katsottu olevan muuttohalukkuutta lisäävä vetotekijä, joka voisi altistaa lapsia hyväksikäytölle (HE 43/2016 vp, 23). Hallituksen esityksessä on myös mainittu lumeavioliittojen ja muiden väärinkäytösten estäminen oleskelulupajärjestelmän yleisen hyväksyttävyyden ja kansalaisyhteiskunnan luottamuksen säilyttämiseksi (HE 43/2016 vp, 27). Lumeavioliitot voivat liittyä pakkoavioliittoihin tai jopa ihmiskauppaan (Koskenoja ym. 2018, 76–78). Lasten kohdalla vanhemmat tai muut sukulaiset ovat voineet osaltaan vaikuttaa lapsen uhriutumiseen, jolloin perheenyhdistäminen voi jopa edesauttaa lapsen uudelleenuhriutumista (EMN 2009, 27). Lain esitöissä ei kuitenkaan ole tuotu esille sitä, millä tavalla ja missä laajuudessa toimeentuloedellytys estäisi lumeavioliittoja ja muita väärinkäytöksiä.

Vaikka perheenyhdistämisen tiukentamisen vaikutuksia on vaikea tutkia, todentaa tai ainakaan yleistää, voidaan eurooppalaisen tutkimuksen valossa selvänä vaikutuksena nähdä hakemusmäärien ja toteutuneiden perheenyhdistämisien väheneminen (Bratsberg ja Raaum 2010; Eggebø 2013b, 20–22; Leerkes ja Kulu-Glasgow 2011,

111–114). Suomessakaan perheenyhdistämishakemusten ja toteutuneiden perheenyhdistämisten määrä ei ole kasvanut samassa suhteessa kansainvälistä suojelua saaneiden määrään verrattuna (ks. Migri 2019). Perheenjäsenet elävät siis erossa toisistaan ja tutkimuskirjallisuuden mukaan sillä voi olla vakavampiakin seurauksia yksilön hyvinvoinnille kuin kotoutumisen vaikeutuminen. Näitä vaikutuksia voidaan tarkastella arjen turvallisuuden näkökulmasta. Arjen turvallisuus pitää sisällään niin fyysistä kuin henkistä turvallisuutta ja hyvinvointia (Tiilikainen 2020, 148). Alitolppa-Niitamo (2005) pitää turvallisuudentunnetta oleellisena hyvinvoinnin tekijänä.

Arjen turvallisuutta uhkaavat esimerkiksi mielenterveysongelmat. Jatkuva huoli perheenjäsenistä, unettomuus ja painajaiset vaikuttavat mielenterveyteen (Rousseau ym. 2004; Schweitzer ym. 2006; Wilmsen 2013). Lisäksi erityisesti lasten ja nuorten kohdalla hylätyksi tulemisen tunne ja syyllisyys omasta pelastumisesta voivat vaikuttaa mielenterveyteen (Rousseau ym. 2004). Miller ja muut (2018) ovat huomanneet, että perheestä erossaolo voi traumatisoida samaan tapaan kuin fyysinen hyökkäys. Rousseau ja muut (2001, 56) ovatkin kutsuneet tätä länsimaisen maahanmuuttohallinnon väkivallaksi. Toisaalta perheen läsnäolo voi myös olla eheyttävä tekijä muusta syystä traumatisoituneelle. Sotatraumoista kärsivälle yksinäisyys ja perheestä erossa olo ”on kuin valkokangas, jolle traumaattiset kuvat ja äänet heijastuvat uudelleen ja uudelleen” (emt., 56).

Suomessa ammatti- ja mielenterveyskuntoutusta käsitelleessä selvityksessä on tuotu esille, että huoli muualla olevista perheenjäsenistä tai pitkä perheenyhdistämishakemuksen käsittelyaika voi sairastuttaa ja viedä kaikki voimavarat (Buchert ja Vuorento 2012, 30). Myös Valtiontalouden tarkastusvirasto on kotouttamiseen liittyvässä tarkastuskertomuksessaan todennut, että ”mielenterveysongelmat voivat olla este uuden kielen oppimiselle, työn ja kansalaisuuden saannille sekä omalle ja perheen kotoutumiselle” (VTV 2014, 8). Viimeaikaisissa haastattelututkimuksissa on havaittu voimakasta huolta sekä unettomuus-, masennus- ja ahdistuneisuusoireita (Jokinen ym. 2019a; 2019b; Leinonen ja Pellander 2020; Rask ym. 2016, 284). Perheenyhdistämisen helpottamisen ja siitä tiedon jakamisen koetaan olevan tarpeellinen keino ehkäistä mielenterveysongelmia (Castañeda ym. 2018).

Arjen turvallisuuteen vaikuttavat haasteet voivat myös olla ontologisia eli liittyä esimerkiksi identiteetin muodostumiseen ja kuulumisen tunteeseen (Giddens 1991; Rytter 2013; Scott 2019). Kuulumisen tunteeseen vaikuttaa niin oman oleskeluluvan jatkuvuus eli oleskeluturva (Bech ym. 2017, 19; Jesse 2017, 359) kuin perheenjäsenten mahdollisuus saada oleskelulupa. Tutkimuksen mukaan identiteettihaasteita voivat erityisesti kohdata nuoret maahanmuuttajat, jotka elävät ilman perhettään, joiden perheenjäsen on kuollut tai jotka eivät ole kotoutuneet hyvin. Toki myös haastavissa perhetilanteissa elävät, erityisesti toisen polven maahanmuuttajat, voivat kokea kuulumattomuuden tunnetta (García Magariño ja Talavero Cabrera 2019, 72–73). Perheellä tiedetään olevan sekä positiivisia että negatiivisia vaikutuksia syrjäytymiseen ja jopa radikalisoitumiseen (Spalek 2016), mutta perheenyhdistämisen tai sen estymisen vaikutuksia tästä näkökulmasta ei ilmeisesti ole tutkittu.

Perheenyhdistämisen tiukentamisella on tavoiteltu signaalivaikutusta mahdollisten uusien turvapaikanhakijoiden suuntaan (ks. Miettinen ym. 2016, 35–36), mutta yhtä lailla sillä viestitään maassa jo oleville ulkomaalaisille, että heitä tai heidän perheenjäseniään ei haluta maahan. Joissain Euroopan maissa näin ovat kokeneet myös monet kansalaiset, joiden perheenyhdistäminen on kaatunut tulorajaan tai muihin edellytyksiin (Wagner 2015, 1521–1522). Lisäksi tanskalaisessa tutkimuksessa on todettu, että rajoittava perheenyhdistämisen sääntely voi aiheuttaa myös laajempaa mielipahaa etnisissä vähemmistöryhmissä ja heikentää kansallista yhtenäisyyttä. Epäoikeudenmukaiseksi ja syrjiväksi koettu lainsäädäntö ja viranomaistoiminta voi synnyttää vihan tunnetta (Schmidt 2014, 139).

Perheenyhdistämislainsäädännön kotouttamispotentiaali

Hallituksen esityksessä mainitaan perheenyhdistämislainsäädännön muuttamisen tavoitteeksi myös luvan myöntämisen edellytysten yhdenmukaistaminen eri oleskelulupakategorioiden välillä (HE 43/2016 vp, 18 ja 27). Ulkomaalaislaissa toimeentulovaatimukseen liittyy poikkeus kansainvälisen suojelun lupakategorioita koskien, ja ai-

kaisemmin tämä poikkeus on ulotettu myös kaikkien kansainvälistä suojelua saavien perheenjäseniin. Lainsäätäjä ei kuitenkaan enää nähnyt oikeudellista estettä poistaa laista tämä toimeentulovaatimuksen poikkeus perheenjäsenten kohdalla (HE 43/2016 vp, 27). Oikeudelliseksi esteeksi nähtiin vain pakolaisia koskeva EU:n perheenyhdistämisdirektiivissä säännelty velvollisuus mahdollistaa perheenyhdistämisen hakeminen ilman toimeentulovaatimusta kolmen kuukauden sisällä pakolaisaseman myöntämisestä. Tämä on siis asettanut kansainvälistä suojelua saavat keskenään erilaiseen asemaan perheenyhdistämisedellytysten suhteen. Lisäksi toimeentuloedellytys asettaa ulkomaalaiset perheenkokoajat eri asemaan Suomen kansalaisten kanssa.

Yhdenvertaisuus on tärkeä lainsäädäntöä ohjaava periaate, mutta sen voidaan myös ajatella olevan kotoutumista edistävä tekijä. Jessen (2017) mukaan lainsäädäntö luo mahdollisuusrakenteita (*opportunity structures*), jotka joko tukevat tai jarruttavat kotoutumista ja osallisuutta yhteiskunnassa. Hänen mukaansa parhaimman kotouttamis- tai kotoutumispotentiaalin (*integration potential*) mahdollistaa reilu ja yhdenvertaisuutta edistävä lainsäädäntö. Kotoutujan oikeudellinen asema niin maassa oleskelun kuin taloudellisten ja sosiaalisten oikeuksien suhteen määrittää kotoutumisen mahdollisuuksia. Jesselle (2017, 359) oleellisia ulkomaalaisen kotoutumispotentiaalia vahvistavia tekijöitä ovat oleskeluturva, työskentely- ja opiskeluoikeus sekä erityisesti oikeus kielikoulutukseen. Hän näkee myös perheenyhdistämisen mahdollisuuden tärkeänä viestinä osallisuudesta ja kyseenalaistaa esimerkiksi Alankomaissa sovelletun perheenyhdistämisen ennakollisen kotoutumisedellytyksen. Jesse (emt., 290) kirjoittaa, että perheenyhdistämisen hankaloittaminen tai viivästyttäminen tuskin aidosti edistää kotoutumista.

Perheenkokoajalle käytännössä suunnattu toimeentulovaatimus voidaan siis ymmärtää keinoksi valikoida sopivia ja toivottuja maahanmuuttajia heidän kotoutumispotentiaalinsa mukaan. Lainsäädännön kotouttamispotentiaalia on eri maiden perheenyhdistämispolitiikassa kuitenkin lähestytty myös oleskeluluvan hakijan kotoutumispotentiaalin kautta. Esimerkiksi Tanskassa, Ranskassa, Saksassa ja Alankomaissa oleskeluluvan edellytyksenä perheenjäseniltä vaaditaan ennakollisen kieli- ja kulttuurikokeen läpäisemistä (ks.

esim. Jesse 2017). Oleskeluluvan edellytykset nähdään kotouttamisen välineenä ja ennakollisena valikointikeinona. Bech ja muut (2017, 7) analysoivat muiden Pohjoismaiden lainsäädäntöä kotouttamisen näkökulmasta ja tuovat esille, että Tanskan lainsäädännön mukaan oleskeluluvan saaminen lapselle edellyttää lapsen olevan alle 15-vuotias sillä perusteella, että nuoremmilla lapsilla on paremmat edellytykset kotoutua.

Bechin ja muiden (2017, 7) mukaan Tanskan lainsäädäntö edellyttää, että joissain tilanteissa myös lapsen kotoutumispotentiaalia itsessään arvioidaan oleskeluluvan kriteerinä. Suomessa Anna-Kaisa Kuusisto on kiinnittänyt huomiota siihen, että yksintulleiden alaikäisten perheenyhdistämisasioissa lainsoveltajan tekemään lapsen edun arviointiin tuntuu sekoittuvan kotoutumisen edellytysten arvioiminen tavalla, joka ei kuulu oleskelulupapäätöksentekijän toimivaltaan. Hänen mukaansa ulkomaalaishallinnossa vallitsee institutionaalinen asenne, mikä kuvastaa pelkoa ja epäluuloa kulttuurisista yhteentörmäyksistä, pitäen sitä suurempana uhkana kuin lapsen kasvuun kohdistuvia kielteisiä vaikutuksia. (Kuusisto-Arponen 2016, 93–97.)

Bech ja muut (2017) näkevät, että perheenyhdistämiseen liittyy valikoivuutta niin maassa oleskelevan perheenkokoajan kuin ulkomailla olevan perheenjäsenen kotoutumispotentiaalin suhteen. Jos aikaisemmin perheenyhdistämistä pidettiin perus- ja ihmisoikeutena, nyt logiikkana on, että se tulee ansaita (emt., 3). Oikeudellisesti mikään ei kuitenkaan ole varsinaisesti muuttunut, vaan erityisesti kansainvälisen suojelun tilanteessa perhe-elämän suoja luo ihmisoikeusvelvoitteita ja edellyttää suojeluasemien yhdenvertaista kohtelua (Rohan 2014; Ihmisoikeuskomissaari 2017). Maassa oleskelevan perheenkokoajan näkökulmaa, hänen ihmisoikeuksiaan tai häneen kohdistuvia vaikutuksia ei kuitenkaan selvitetä tai seurata (ks. myös Jesse 2017, 290). Saksassa tehdyn tutkimuksen perusteella Robinson (2017) kirjoittaa, että perheenyhdistäminen ja täysi pakolaisoikeuden suoja vaikuttavat kuitenkin olevan keskeisiä tekijöitä pakolaisten kotoutumispotentiaalin ja henkisen hyvinvoinnin kannalta.

Monissa maissa oikeuksien suhteen onkin vahvistumassa tietynlainen ansaintaperiaate (*deservingness*), jonka mukaan ulkomaalaisen tulee ansaita oikeutensa esimerkiksi työnteolla sekä sitä kautta verojen ja sosiaalimaksujen maksamisella (Kostakopoulou ym. 2009).

Toisaalta perheenyhdistämislainsäädännössä on myös monessa Euroopan valtiossa tapahtunut tietynlaista mallikansalaisuutta tavoitteleva suunnanmuutos (*civic integration* tai *civic turn*), mitä kuvaa hyvin juuri kotoutumisedellytysten eli esimerkiksi kielitaitovaatimusten asettaminen oleskeluluville (Borevi ym. 2017; Carrera ja Wiesbrock 2009; Jesse 2017; Joppke 2007). Sergio Carrera (2014, 152) on kommentoinut, että myös EU:n kotouttamispolitiikassa on tapahtunut käännös, jossa kotouttamisedellytysten tavoitteena ei olekaan inkluusio vaan ne toimivat turvallisuuden, maahanmuuton ja identiteetin kontrollin välineenä. Bech ym. (2017) tulevatkin tutkimuksessaan siihen johtopäätökseen, että Tanskan, Norjan ja Ruotsin perheenyhdistämislainsäädännön muutosten taustalla on pikemminkin ollut maahanmuuton määrän kontrolli kuin minkäänlainen kotouttamispyrkimys.

Perheenyhdistämisen sääntelyn yhteydessä ihmisten yhdenvertaisuuden sijaan tarkastellaan usein järjestelmien yhdenmukaisuutta. Esimerkiksi Suomessa perheenyhdistämisen tiukennuksilla haettiin yhdenmukaisuutta muiden verrokkimaiden eli lähinnä Pohjoismaiden kanssa, mikä perusteltiin vetovoimatekijöiden vähentämisellä (HE 43/2016 vp, 18). Vertailu Pohjoismaiden kesken saattaa kuitenkin antaa vääristyneen kuvan, sillä tutkimuksen mukaan Tanskassa on länsimaiden tiukin perheenyhdistämislainsäädäntö ja myös Norja on hyvin lähellä tuota linjaa (Bech ym. 2017, 6). Ruotsi on tutkimusten mukaan pitänyt pisimpään kiinni perhe-elämän kunnioittamisesta ja perheenyhdistämisen helpottamisesta sekä perustanut kotouttamispolitiikkansa oleskeluturvan ja yhdenvertaisten oikeuksien pohjalle (Bech ym. 2017; Wiesbrock 2011). Silti Ruotsikin on äskettäin muuttanut kansainväliseen suojeluun ja perheenyhdistämiseen liittyvää sääntelyään asettamalla toimeentulovaatimuksen ja rajoittamalla tilapäisesti (2016–2019) toissijaista suojelua saavien perheenyhdistämistä (Bech ym. 2017, 19). Ruotsissa on kuitenkin jo palattu kansainvälistä suojelua saavien yhdenvertaiseen kohteluun toimeentulovaatimuksen helpottamisen osalta.

Johtopäätökset

Lainsäädäntötutkimuksen ja lainvalmistelun ohjeistuksen näkökulmasta perheenyhdistämisen toimeentulovaatimusta laajentaneessa lainsäädäntöhankkeessa ei ole asianmukaisesti selvitetty perheenkokoajiin ja heidän perheenjäseniinsä kohdistuvia vaikutuksia. Vaikutusten tarkastelua suhteessa kotoutumiseen ei ole tehty tarpeeksi monipuolisesti ja perheestä erossaolon vaikutusta perheenkokoajan kotoutumiseen ja hyvinvointiin ei ole pohdittu ollenkaan. Lisäksi perheenkokoajien ja perheenjäsenten turvallisuuteen kohdistuvat vaikutukset sivuutetaan tavalla, mikä kertoo turvallisuushuolien rajoittuvan pääasiassa kansalaisiin ja erityisesti jo maassa oleskeleviin (ks. myös Baldaccini ym. 2007). Katsaus tutkimuskirjallisuuteen kuitenkin osoittaa, että tietoa toimeentuloedellytyksen vaikutuksista olisi ollut saatavilla niin kotimaassa kuin ulkomailla. Vaikka hallituksen esityksessä ei olekaan tarkoitus käydä tarkoin läpi olemassa olevaa tutkimusta, tulisi lainlaatijan kuitenkin tuntea sitä ja tuoda esille keskeisimmät vaikutukset.

Tutkimuskirjallisuuden mukaan perheenyhdistämisen rajoittamisella ja toimeentulovaatimuksella on havaittu vaikutuksia, jotka voidaan nähdä kotoutumista heikentävinä tekijöinä. Tällaisia vaikutuksia ovat esimerkiksi ikävä, huoli, keskittymiskyvyn puute ja nukkumisvaikeudet. Osa vaikutuksista on vakavampia, kuten masentuneisuus ja ahdistuneisuus. Monessa tutkimuksessa on tunnistettu mielenterveysongelmiin liittyviä oireita, mitä usein käsitellään arjen turvallisuuden kontekstissa. Arjen turvallisuuden haasteet voivat myös olla ontologisia eli identiteettiin ja osallisuuteen liittyviä ongelmia. Perheenyhdistämisen rajoittamiseen liittyy kuitenkin myös fyysiseen turvallisuuteen kohdistuvia vaikutuksia. Perheenjäsenet kohtaavat usein vaaraa matkustaessaan kotimaassaan hankkiakseen asiakirjoja ja ulkomaille tehdäkseen perheenyhdistämishakemuksen sekä oleskellessaan ulkomailla odottaessaan haastatteluja tai päätöstä. Tällä on myös heijastusvaikutusta Suomessa olevaan perheenkokoajaan, mikä taas vaikuttaa arjen turvallisuuteen. Kielteiset vaikutukset kotoutumiseen ja arjen turvallisuuteen tulisi ottaa huomioon lainvalmistelussa ja niitä tulisi pyrkiä vähentämään.

Ulkomaisen tutkimuskirjallisuuden mukaan perheenyhdistämisen toimeentuloedellytyksellä on myös positiivisia vaikutuksia kotoutumiseen. Perheenkokoajien työllisyys on lisääntynyt ja maahan saapuvien perheenjäsenten koulutustaso on noussut. Perheenkokoajien kotoutumiskouluttautumisen arvellaan kuitenkin kärsineen pitkien työpäivien takia, sillä korkeiden tulorajojen takia monet joutuvat tekemään useaa matalapalkkaista työtä. Suomalaisessa tutkimuksessa on puolestaan viitteitä siitä, että nuoret luopuvat kouluttautumisunelmistaan korkean tulorajan vuoksi. Ulkomailla havaittuja vaikutuksia ovat myös perheenyhdistämishakemusten väheneminen, ulkomaalaisten kanssa solmittujen avioliittojen väheneminen ja erityisesti ei-länsimaalaisten, naisten ja nuorten perheenyhdistämisen vaikeutuminen. Näiden vaikutusten nähdäänkin olleen perheenyhdistämislainsäädännön muutosten varsinaisia tavoitteita (Strik ym. 2013), sillä todisteita kotoutumisen edistymisestä ei löydy muuta kuin työllistymisen osalta, ja senkin vaikutuksen arvellaan olevan lyhytjänteistä.

Perheenyhdistämisen sääntelylogiikka monissa maissa nojaa siis ajatukseen, että maassa oleskelevat ulkomaalaiset kotoutuisivat paremmin, jos ei-länsimaalaisten, pakolaistaustaisten ja matalapalkkaisten henkilöiden perheenjäsenet eivät muuttaisi maahan (Strik ym. 2013, 24). Näiden perheenjäsenten kotoutumispotentiaalin nähdään olevan alhaisempi kuin muiden. Suomessa ei kuitenkaan ole otettu käyttöön perheenjäseniin kohdistettuja ennakollisia kotoutumisedellytyksiä, vaan keinona on perheenkokoajaan kohdistettu toimeentulovaatimus. Näin Suomessa sääntelylogiikkana on, että perheenkokoajan kotoutumispotentiaali on parempi, jos hän on työssä ja tienaa keskivertosuomalaisen tavoin. Suomessa onkin lähestytty perheenyhdistämisen edellytyksiä ansaintalogiikan kautta, ilman niin sanottuja sivistämis- tai kotoutumisedellytyksiä. Kotoutumisen ymmärrys jää tässä mallissa kuitenkin liian kapeaksi, mikä voi useiden kohdalla lopulta kääntyä kotoutumisen kannalta haitalliseksi eikä perheenkokoajan kotoutumispotentiaalia hyödynnetä täysimääräisesti.

Mikäli kotoutumista tarkastellaan laajemmin kuin vain työnteon kannalta, ei perheenyhdistämisen toimeentuloedellytyksellä voida nähdä olevan kotoutumista edistävää vaikutusta. Myös Suomen osalta vaikuttaisi siltä, että varsinaiset tavoitteet ovat muualla. Muita mainit-

tuja tavoitteita perheenyhdistämisen kiristämiselle vuoden 2016 lakimuutoksessa olivat maahanmuuton hallinta ja kustannusten vähentäminen (HE 43/2016 vp, 1). Maahanmuuton hallinta tässä tapauksessa tarkoittaa Suomeen suuntautuvan maahanmuuton ja turvapaikanhaun määrän vähentämistä. Tavoitteet ovat kuitenkin jossain määrin ristiriitaiset, ja niissä näyttää painottuvan kotoutumisen edistämisen sijaan maahanmuuton kontrolli (ks. myös esim. Bonjour 2010). Ylikansallisia velvoitteita ja perus- ja ihmisoikeuksia kunnioittavan politiikan tavoitteena ei saisi olla vain perheenyhdistämisen vähentäminen. Juuri siksi myös kotoutumisen edistäminen mainitaan lainsäädäntömuutoksen tavoitteena, mutta kyseessä tuntuu olevan vain illuusio hyväksyttävästä tavoitteesta.

Lainsäädäntötutkimuksen näkökulmasta keskeisiä ongelmia tässä lainsäädäntöhankkeessa ovat yksilöön eli tässä tapauksessa ulkomaalaisiin kohdistuvien vaikutusten arvioinnin puuttuminen, tavoitteiden ristiriitaisuus ja liiallinen poliittinen ohjaus. Lainvalmistelun ideaalimallin mukaiselle neutraalille vaikutusten arvioinnille ei ole annettu edes mahdollisuutta. Tutkittuun tietoon perustuvalla päätöksenteolla viitataan usein juuri empiiriseen, tilastolliseen tai kokeelliseen tutkimuksen hyödyntämiseen (Raivio 2014, 13), mutta nyt tarkasteltavassa säädöshankkeessa ei ole riittävästi huomioitu olemassa olevaa empiiristä tutkimusta. Yksilöön tai ryhmiin kohdistuvien vaikutusten osoittamiseen tarvitaan havainnoivaa sosiologista, antropologista tai psykologista tutkimusta. Tämä tutkimus osoittaa, että sellaista tutkimusta on ollut saatavilla lainvalmisteluvaiheessa. Tällaisen tutkimuksen tulosten yleistettävyys voi toki olla ongelmallista, mutta tilastollisella tutkimuksella ei saada tarvittavan syvällistä analyysiä yksilöön kohdistuvista vaikutuksista. Kuitenkin jos kyse on perus- ja ihmisoikeuksista, pienempikin joukko haastateltavia voi olla riittävä osoittamaan ongelman, koska perus- ja ihmisoikeusloukkaus yhdenkin ihmisen kohdalla on jo ongelma.

Lainsäädäntötyön puutteisiin on hankala puuttua lainvalvonnan keinoin, koska ohjeet eivät ole oikeudellisesti velvoittavia. Toisaalta lainsäätäjää koskee perus- ja ihmisoikeuksien suojaamisvelvoite, jonka mukaan valtion tulee kunnioittaa alueellaan oleskelevien henkilöiden yksityis- ja perhe-elämän suojaa. Tuon kunnioituksen osoittamiseksi tulisi vähintään pyrkiä selvittämään vaikutukset yksilön

elämään. Lainvalmistelijan olisi tullut tarkastella törmäyskurssilla olevien oikeuksien ja periaatteiden merkitystä, painoarvoa ja suhdetta. Tässä lainsäädäntöhankkeessa vastakkain ovat muun muassa olleet suojeluasemien samankaltaisuuden periaate ja ulkomaalaisoikeudellinen toimeentulovaatimus yleisenä oleskeluluvan edellytyksenä. Tällaisessa periaatteiden törmäystilanteessa olisi tärkeää selvittää ihmisoikeusjärjestelmän oikeusohjeet toimeentulovaatimukseen ja erityisesti yhdenvertaisuusperiaatteeseen liittyen. Lainvalmistelijan tulisikin ottaa huomioon monenlainen tieteellinen tutkimus, jotta päätöksenteko perustuisi kokonaisvaltaisesti tutkittuun tietoon.

Nyt kun vahinko on jo tapahtunut, tarvitaan seurantatutkimusta ja perus- ja ihmisoikeuksien toteutumisen jälkikäteistä arviointia. Myös Eggebø ja Brekke (2019) peräänkuuluttavat pitkäjänteistä vaikutusten arviointia ja odottamattomienkin seurauksien selvittämistä. Tässä luvussa esitellyt uudemmat tutkimukset palvelevat jälkikäteistä arviointia, ja niistä on nähtävissä haitallisia vaikutuksia perheenkokoajien hyvinvointiin ja kotoutumiseen. Negatiiviset vaikutukset ovat usein seurausta perheenjäsenien kohtaamista turvallisuushaasteista. Perheenyhdistämisen rajoittaminen ja hankaloittaminen vaikuttaa monen ulkomaalaisen ja heidän perheenjäsentensä arjen turvallisuuteen.

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PUBLICATION
III

Recognizing Insecurities of Family Members Abroad: Human Rights Balancing in European and Finnish Case Law

Jaana Palander

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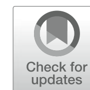
Chapter 3
Recognizing Insecurities of Family Members Abroad: Human Rights Balancing in European and Finnish Case Law



Jaana Palander

3.1 Introduction

Research has shown that migrants' wellbeing in receiving countries is affected in many ways by the difficulties of their family members and the challenges of family reunification (e.g., Palander, 2021; Strik et al., 2013; Wray et al., 2015). The hardship and insecurities faced by family members who apply for residence permits and wait for decisions abroad have been described in some earlier research in Finland (e.g., Hiitola, 2019; Leinonen & Pellander, 2020) and are also examined in various chapters of this book. In this chapter, I will investigate if and how the circumstances of family members abroad are taken into account in the case law of the European Court of Human Rights (ECtHR), as well as in the administrative decision-making and court proceedings of family reunification applications in Finland. The point of view is thus that of decision-makers inside national boundaries, and the applicant's location outside the state's territory is legally relevant from the perspective of rights protection. I will also explain the possible legal reasons for the circumstances of family members abroad not being taken into account and how they could be better considered.

I use the term 'family members abroad' to refer to applicants for family reunification staying outside the country they are seeking to enter. The focus of my analysis is on forced migrants, since their family members are most likely to face insecurities, but forced migration has not been a strict criterion for selecting court cases for analysis. Human rights are not determined by migration category, but categories do matter more at the national level. The ECtHR more or less accepts this use of differentiated categories at the national level, but adjusts its standards to protect people who are more vulnerable. Often, in family reunification cases, the sponsor or applicant has received international protection or been an asylum seeker.

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Family members abroad may also be forced migrants in a wider sense, without proper migration status or internally displaced.

Research has shown that legislation and administrative practices related to migration have tightened in various countries, leaving many families separated. For example, even those who have received international protection may not be able to bring their family members to Finland (Hiitola, 2019; Miettinen et al., 2016). Many observers argue that states undermine, if not violate, human rights when they obstruct family reunification, especially when preventing minors from enjoying family unity, which constitutes a failure to respect the best interest of the child (e.g., Saarikoski, 2019; Sormunen, 2017, pp. 406–407; Wray et al., 2015, pp. 102–103). The analysis presented in an issue paper (Costello et al., 2017) published by the Council of Europe Commissioner for Human Rights on the human rights aspects of family reunification of people receiving international protection suggests that despite states' strong moral obligation to facilitate family reunification, clear legal human rights obligations are challenging to formulate out of ECtHR case law. In this chapter, I will look at the question of human rights obligations from a slightly different angle than in previous research by focusing on family members abroad.

From a legal point of view, recognizing the situation of family members abroad is problematic because states usually do not have human rights obligations towards people outside their territory. However, extraterritorial human rights obligations do exist in some circumstances. This chapter will investigate whether family reunification can be considered such an issue, and what this means for human rights adjudication, in which the interests of different actors are weighed in search of a fair balance. The existing literature on extraterritoriality and human rights (e.g., Da Costa, 2013; Gondek, 2009) concentrates on issues other than migration control, while the existing research on the nexus of migration and extraterritoriality (e.g., Gammeltoft-Hansen, 2011) is more related to border management than to residence permit applications. For example, Gammeltoft-Hansen reveals protection and obligation gaps in human rights adjudication in the context of offshore migration control (Gammeltoft-Hansen, 2011, p. 237) and asks questions such as 'does rejection of onward passage by an immigration officer entail effective control in the personal sense?' (Gammeltoft-Hansen, 2010, p. 77).

To date, typical mechanisms of migration control such as residence permit applications have not featured in court cases related to extraterritoriality, nor has the ECtHR referred to extraterritorial obligations in migration cases. As a result, the topic has failed to attract interest in the legal literature. Da Costa (2013, pp. 9–14) writes that the extraterritoriality of human rights obligations is truly a controversial and debated issue, and Gondek (2009, p. 379) calls for more research on such controversial subjects. This chapter thus contributes to the general discussion on extraterritorial human rights obligations, while also bringing a new aspect to the research on human rights and family reunification.

The research questions guiding this chapter are as follows:

1. What are the general legal human rights principles relevant to the situation of family members abroad?

2. What are the legal principles used by the ECtHR to assess human rights compliance in family reunification cases?
3. How does the ECtHR take into account the situation of family members abroad in its balancing test?
4. How are the insecurities of family members abroad taken into account in national decision-making?

I will approach these questions with legal methods; for the first two questions, the method is a theoretical analysis of legal sources, while the last two questions are tackled with a more descriptive empirical legal analysis of court decisions. The theoretical analysis of guiding legal principles focuses on European human rights law, although many core principles are universal. Typically in legal human rights research, human rights obligations are taken as a yardstick to measure the legitimacy of state practice. However, I do not consider a proper analysis of human rights compliance possible at this point since there are no clear human rights standards for this specific context. Therefore, the focus is not on human rights compliance, but on detecting and conceptualizing a less-studied aspect of law and practice related to family reunification. Thus, the approach in this chapter is mostly theoretical, with the empirical material intended to show the types of situations in which the theoretical framework could be applied. The case law of the ECtHR serves to show that there is some support for applying the theory of extraterritorial human rights obligations. The case law of Finnish courts provides examples of relevant cases at the national level, where the human rights concerns of family members emerge and where the theory could be applied.

For determining the relevant human rights standards, I will concentrate on ECtHR case law and the adjudication of the rights laid out in the European Convention on Human Rights (ECHR). Academic literature on family life, refugee rights and extraterritorial human rights obligations is of great relevance as well. For a national point of view, I considered Finnish case law on family reunification, analysing all (221) Helsinki Administrative Court cases from 2017, the year the court started to receive complaints related to the large influx of asylum seekers in 2015. Documents related to these cases are not available to the public, but a research permit from the court has allowed me to access them. I also examined the publicly available Supreme Administrative Court cases from the years 2017 to 2021. The court cases described below are representative of my overall findings within this sample, but when making conclusions, it must be taken into account that the sample contains only negative residence permit decisions.

In the next section, I will analyse the relevant general principles of international law, especially the extraterritoriality principle, and show how that principle applies to the family reunification context. The extraterritoriality principle opens up the possibility to take family members' interests into account in a new way. The following section explains how the ECtHR has developed a balancing of interests in family reunification cases and the factors that allow the court to take into account the situation of family members abroad. I provide selected examples from the jurisprudence of the ECtHR of cases in which the situation of family members abroad has

gained a certain weight. Towards the end of the chapter, I turn to the national context, with a similar analysis of cases heard by the Helsinki Administrative Court and the Finnish Supreme Administrative Court. The conclusion offers a final analysis of the significance of the extraterritoriality principle for acknowledging the interests of family members abroad.

3.2 Relevant Principles of International Law

State sovereignty is perhaps the most referred to principle in the context of migration control. It is a starting point for the international system, but it is not a legal rule directly affecting decision-making. However, it is definitely implicit in the subsidiarity principle, for example, and in the principle of margin of appreciation, which emphasize a national perspective in adjudication. In becoming a contracting party to a convention and accepting the obligations of international law, states give away some of their sovereignty. The degree to which a state has sovereignty or is constrained by international law is always contextual. The scope of contracting states' human rights obligations is also determined by the territoriality principle.

From a general point of view, the *territoriality* (or *territorial*) *principle* of international law means that sovereign states exercise authority within their own territory. From the point of view of human rights law, it means that states are responsible for the human rights of people within their territory. Article 1 of the ECHR states that the state parties to the convention 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The term 'jurisdiction' does not have a clear legal definition, but in subsequent case law, the meaning has been clarified to be essentially territorial.[1] The territoriality principle is the default starting point when determining the scope of state obligations, but there are also exceptions, which will be discussed later.

According to the territoriality principle, states do not have responsibility for the human rights of people outside their territory. This is also reflected in states' migration control and admission policies. For example, states do not need to consider an applicant's right to work, right to a basic education or right to a healthy environment when deciding on residence permits. Securing those rights is the obligation of the origin country, since every state is obliged to secure the human rights of people in its territory. The exclusion of the migration context from full human rights protection has its roots in the early history of the central human rights instruments, including the ECHR. Although it was rather clear that the protection of human rights had to be extended to everyone present in a state's territory irrespective of their nationality, migration control was considered to be beyond the scope of human rights supervision (Dauvergne, 2008; Dembour, 2015).

[1] ECtHR, Banković and Others v Belgium and Others, decision, 12 December 2001, paras. 61 and 67.

This argument was successfully applied by governments before the ECtHR until the seminal case *Abdulaziz, Cabales and Balkandali*[2] in 1985. The case was brought by three women considered foreigners but with strong connections to the United Kingdom whose husbands were not granted residence permits (entry clearance) to live with their wives. The court stated that the exclusion of a person from a state where members of his family were living might raise an issue under ECHR Article 8 (the right to respect for private and family life), and that such was the case in the issue at hand (para. 59). Interestingly, the court stressed the fact that in this case, 'the applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived of the society of their spouses there' (para. 60). The rights holder in relation to the ECHR was thus the sponsor residing in the receiving country.

Human rights protection and the state's obligation in family reunification cases are thus based on the interests of the person already in the country. What about the interests and human rights of family members outside the country? Should they be recognized as well and taken into account in decision-making? To answer this question, it is necessary to take a closer look at the territoriality principle and its possible exceptions. Gammeltoft-Hansen writes that the 'the law on jurisdiction is geared to avoid overlapping or competing claims to jurisdiction by several states', but also to avoid a gap in human rights protection (Gammeltoft-Hansen, 2010, p. 78). The ECtHR seems to have two tests for determining jurisdiction: a state's control over a territory or control over a person (Gondek, 2009, p. 373). Determining control over a person is still quite exceptional and difficult to justify. However, recent developments in human rights adjudication concerning extraterritoriality offer possibilities to argue for a more lenient approach to the idea of territorial jurisdiction.

In the case *Hirsi Jamaa v Italy*,[3] the ECtHR pointed out that 'the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them' (para. 72). Exceptions to the territoriality principle in state jurisdiction are well-explained in the *Al-Skeini* case[4] (paras. 134–140). All of the described exceptions concern acts of the contracting state in a foreign territory. One such exception concerns the acts of diplomatic or consular agents stationed in a foreign territory 'when these agents exert authority and control over others' (para. 134). Although from the point of view of international law, embassies and consulates are not the territory of the sending state,[5] their agents act under the jurisdiction of the sending state. However, this does not seem to mean that anyone who steps into a foreign embassy acquires the rights or human rights protection they would in the national territory of that state.

[2] ECtHR, Abdulaziz, Cabales and Balkandali v the United Kingdom, 28 May 1985.

[3] ECtHR, Hirsi Jamaa and Others v Italy, 23 February 2012.

[4] ECtHR, Al-Skeini and Others v United Kingdom, 7 July 2011.

[5] Vienna Convention on Diplomatic Relations 1961, art. 21.

Gondek (2009) explains that a more lenient interpretation of human rights jurisdiction would always accept jurisdiction when a state has the authority to make a decision that affects a person's life and rights. He refers to the case *Ilascu*,[6] where Judge Loucaides stated, in his partly dissenting opinion, that '"jurisdiction" means simply actual authority, which is the possibility of imposing the will of the state on any person, whether exercised within the territory of a High Contracting Party or outside that territory. Everyone directly affected by any exercise of authority by such a party in any part of the world is therefore within the state party's jurisdiction' (as cited in Gondek, 2009, p. 375). Gammeltoft-Hansen describes this approach as a '*functional* conception of extraterritorial jurisdiction', which 'applies the basic principle of human rights law that power entails obligations' (Gammeltoft-Hansen, 2010, p. 80).

A slightly stricter approach, the 'gradual' approach to jurisdiction, argues that a state's obligation under Article 1 of the ECHR to secure the convention rights of a given person applies proportionately to the control in fact exercised over that person. Gondek explains that if the control is as extensive as occupation or territorial control, then all rights and obligations apply; if the control is more limited, a person is within jurisdiction only with regard to particular rights and obligations (Gondek, 2009, p. 376). The ECtHR has ruled that 'whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.' In this sense, therefore, the court has now accepted that convention rights can be 'divided and tailored'.[7] Possible restrictions to the extraterritoriality of human rights obligations would thus limit the material scope so that not all human rights would be applicable (Da Costa, 2013, p. 302).

Gammeltoft-Hansen (2011) has pointed out that the question of extraterritorial rights is truly complicated and that there is no easy way out, as experts are not ready to abandon the territoriality principle in international human rights adjudication. Gammeltoft-Hansen comes to the conclusion that balancing the territorial paradigm with the emerging functional understanding of territoriality has to be entrusted to national and international judicial bodies, along with the extraterritorial application of the non-refoulement principle and human rights obligations (Gammeltoft-Hansen, 2011, pp. 246–248). This is exactly what the ECtHR has been doing in family reunification cases. Therefore, it is important to look at the case justifications to see the court's actual approach to balancing different interests, rights and principles. Similarly, the practice of national courts is of interest.

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[6] ECtHR, Ilascu and Others v Moldova and Russia, 8 July 2004.

[7] ECtHR, Hirsi Jamaa and Others v Italy, 23 February 2012, para. 74. See also ECtHR, Al-Skeini and Others v United Kingdom, 7 July 2011, paras. 136–137.

3.3 Balancing Interests in the European Court of Human Rights

In the aforementioned 1985 case *Abdulaziz, Cabales and Balkandali*, the ECtHR's first family reunification case, the court comes to the conclusion that there was no 'lack of respect' for family life and no breach of Article 8 of the ECHR taken alone (para. 69). Although the court judged in a separate assessment that the United Kingdom's national rules violated Article 14, the prohibition of discrimination between sexes, the rules that separated families were not a problem per se. It is possible to distinguish three factors that decisively affected the outcome concerning Article 8 alone (para. 68). First, the case was not about an already-existing family left behind, but a recently married couple wanting to choose their place of residence. Second, the applicants did not bring forward any obstacles to developing their family life elsewhere. Third, there was no element of arbitrariness, in that according to national law, the spouses' admittance could not have been expected. This case thus placed emphasis on the possibility of enjoying family life elsewhere (Storey, 1990).

When the ECtHR delivered the *Gül* case[8] in 1996, it established for the first time that determining state obligations in the context of family reunification requires balancing 'between the competing interests of the individual and of the community as a whole' (para. 38). Around the same time, in the case *Ahmut*,[9] the court clearly stated that the question concerned a positive obligation (para. 63), indicating that the state should promote the enjoyment of family life in certain situations. Although the ECtHR now explicitly referred to balancing in *Gül* and *Ahmut*, it proceeded in a similar manner as in *Abdulaziz, Cabales and Balkandali*, applying the aforementioned 'elsewhere' approach. In *Gül*, the ECtHR considered that the central question was whether family reunification with a son left behind would be the only way to develop family life (para. 39). The court paid specific attention to the immigration status and protection needs of the parents, who lived in Switzerland, and to the possible obstacles to developing family life in the origin country, Turkey. The parents did not have a settled status in Switzerland, no longer had a need for international protection and faced no obstacles to returning to their origin country. The mother's epilepsy was not considered an obstacle, as the court felt medical care would be available in Turkey (para. 41). The court stated: 'Having regard to all these considerations, and while acknowledging that the Gül family's situation is very difficult from the human point of view, the Court finds that Switzerland has not failed to fulfil the obligations arising under Article 8 para. 1' (para. 43). The case concentrated on the consequences of the parents' return to Turkey and suggested that even very difficult situations would not necessarily raise human rights obligations.

[8] ECtHR, Gül v Switzerland, 19 February 1996.

[9] ECtHR, Ahmut v the Netherlands, 28 November 1996.

The first family reunification case to find that a state had violated a positive obligation to promote family life was *Sen*[10] in 2001, in which a Turkish couple who had settled in the Netherlands wanted to bring their eldest child to live with the rest of the family. In this case, the ECtHR suggested that the right to respect for family life should be given more attention than in previous cases and not only considered from the point of view of immigration control. Some new balancing aspects are mentioned: the court takes into account the age of the children, their situation in the country of origin and the children's dependence on their parents (para. 37). In its overall assessment, the ECtHR came to the conclusion that major obstacles to developing family life existed for the family in the country of origin and that the receiving state was the most adequate place for family reunion. The decisive factor, and the differentiating factor in relation to *Ahmut*, seems to be the couple's two other children, who were born in the Netherlands (para. 40). Although the situation of the child in Turkey was not decisive, it was still established as a relevant factor. The ECtHR noted that the Dutch authorities had considered but not found credible the parents' claim of no longer having adequate care for the child in Turkey (paras. 18, 21).

In the cases mentioned above, we can see more and more factors being taken into account in the court's balancing. In a case related to regularization of status based on the enjoyment of family life in the Netherlands, *Rodrigues da Silva and Hoogkamer*[11] in 2006, the ECtHR listed the following factors to be taken into account: (a) the extent to which family life is effectively ruptured, (b) the extent of the ties in the contracting state, (c) whether there are insurmountable obstacles to living in the country of origin for one or more members of the family, (d) whether there are factors of immigration control or public order weighing in favour of exclusion and (e) whether the persons involved in creating family life were aware of their family member's precarious immigration status (para. 39). Later, in 2014, the ECtHR restated these factors in another family reunification case, *Biao*.[12] In the case of *Jeunesse*[13] in 2014, the court introduced a new notion, the cumulative assessment of relevant factors, which seems to allow fairer balancing in family reunification cases (paras. 121–122).

In a recent judgement, *M.A.*,[14] in 2021, the ECtHR restated the principle of cumulative assessment (para. 135). The court considered that the three-year waiting period for family reunification imposed on a Syrian man who had received temporary international protection in Denmark and was seeking reunification with his wife was against the state's human rights obligations mainly because the decision-making process did not allow for a proper individual assessment of relevant factors, such as the situation in the country of origin (para. 192). However, the ECtHR did

[10] ECtHR, Sen v the Netherlands, 21 December 2001.

[11] ECtHR, Rodrigues da Silva and Hoogkamer v the Netherlands, 31 January 2006.

[12] ECtHR, Biao v Denmark, 25 March 2014, para. 53

[13] ECtHR, Jeunesse v the Netherlands, 3 October 2014.

[14] ECtHR, M.A. v Denmark, 9 July 2021.

not provide an example of how this assessment should have been done. The Danish authorities had noted the good health of both family members, which was reiterated by the ECtHR (paras. 19, 181), but any other factors related to the situation of the family member abroad were not considered. It was not disputed by any party, however, that the couple faced insurmountable obstacles in continuing family life in the origin country (paras. 184, 188). This has usually been a decisive factor, and was apparently in this case, as well, although the court was not very clear in its reasoning.

In *M.A.*, the ECtHR also considered how Article 3 of the ECHR on the prohibition of torture and inhuman treatment, when combined with the non-refoulement principle, narrows the margin of appreciation allowed the state in the balancing exercise. However, the focus is on the potential consequences of return for the sponsor, and not on the situation of family members in the origin country or elsewhere. Strikingly, Article 3 and Article 8 (on the protection of family life) are juxtaposed by stating that it is acceptable to reduce the number of family reunifications in favor of protecting more people (para. 145). However, the court does not explicitly recognize that when Article 3 considerations are relevant for the sponsor, they are often also at play for the family member. Allowing family reunification has the potential to protect the Article 3 rights of many family members.

As described above, the ECtHR assesses the human rights compliance of state policies through a fair balance test, in which the situation in the origin country is relevant. That aspect is most often assessed from the point of view of the sponsor, however, though it is the family members abroad who are requesting residence permits. This is probably due to the general principle of international law whereby human rights are attributed to people within a state's territory and the obligation to protect human rights is on that state. Therefore, the ECtHR principally secures the rights of migrants in the territory of contracting parties. However, there are some cases where the court has paid considerable attention to the interests and insecurities of family members abroad.

3.4 The Weight of Insecurities of Family Members Abroad

In the 2005 case *Tuquabo-Tekle*,[15] a child was left behind in the care of relatives in Eritrea while the child's mother, stepfather and siblings settled in the Netherlands. In this case, the ECtHR paid attention to the situation of the child in the origin country. On the one hand, the girl was already 15 years old and therefore less dependent on her parents. On the other hand, she had reached the age when it is common for girls in Eritrea to get married. The girl was staying with her grandmother, who had taken her out of school, and the girl's mother was worried that she was going to be married off. The court stressed that the mother had never intended to live without her children, but had had to flee from Eritrea when her husband was killed during

[15] ECtHR, Tuquabo-Tekle and Others v the Netherlands, 1 December 2005.

the civil war; further, it was not her first attempt at family reunification (para. 45). The mother had first applied for asylum in Norway and had been granted a humanitarian residence permit there. Later she married a refugee living in the Netherlands and moved there. She was able to get a residence permit for her other child, who had been waiting in Ethiopia, but could not get a passport to her daughter still living in Eritrea. All of this was taken into account when assessing the existence of family life (paras. 48–50). However, the decisive factor in this case seems to be the best interests of the family's children who were born in the Netherlands (paras. 47–48). The husband's refugee status may have also weighed in the assessment of major impediments to the enjoyment of family life in the origin country.

In the case *Osman*[16] in 2011, the ECtHR was faced with the situation of a 17-year-old Somali girl in Kenya who was seeking a residence permit in Denmark, where her family was living and she had previously lived as well. Her father had sent her to care for her grandmother in a refugee camp in Kenya because she had had problems integrating in Denmark. Her visit to Kenya was supposed to be temporary, but her Danish residence permit expired and she could not return regularly to Denmark. The applicant alleged that when 'the Danish authorities became aware of her situation, they had an obligation to protect her best interest, namely to reinstate her residence permit, allow her to resume her education, and reunite her with her mother and siblings in Denmark' (para. 46). The court recognized the right of parents to make decisions about their children's upbringing while also noting that the refusal of a residence permit was made according to national law; in its decision-making the court stressed the weight of the child's best interest and found a violation of her right to respect for private and family life (paras. 73, 76). Although the court attributed substantial weight to the girl's circumstances abroad, her strong ties to Denmark were important as well, making it difficult to analyse the significance of the insecurities she experienced in the refugee camp.

In the case *I.A.A.*[17] in 2016, the ECtHR considered the situation of five Somali children living in Ethiopia who had requested family reunification in the United Kingdom. Interestingly, the UK government invoked Article 1 of the ECHR, claiming that the ECtHR did not have jurisdiction over this issue; the court dismissed this claim (paras. 26–27). In this case, the children had applied for family reunification with their mother, who was living in the United Kingdom with her new husband (a refugee) and three other of her children. The applicants had moved to Ethiopia with their aunt, who had been taking care of them. Later the aunt returned to Somalia, and the children were left in Ethiopia in the care of the oldest sibling. Eventually, this sibling left the others, and 'her current whereabouts [were] unknown' (para. 18). The circumstances of the children are not described further, but the ECtHR echoes the national tribunal in stating that the situation was 'certainly "unenviable"' (para. 46).

[16] ECtHR, Osman v Denmark, 14 June 2011.

[17] ECtHR, I.A.A. v the United Kingdom, 8 March 2016.

The court's judgement in *I.A.A.* is alarming for many reasons. In the context of this chapter, the most relevant and worrying aspect is how the ECtHR undervalued the difficult circumstances of the children. Although the situation of the children was acknowledged, it did not prompt a consideration of Article 3, nor seem to gain significant weight in the court's balancing. Article 3 was invoked by the ECtHR when noting that the domestic tribunal had not considered whether the family could safely relocate to Somalia. However, the court decided to assess this rather lightly, stating that 'in a number of recent judgments the Court has found that removals there would not breach Article 3 of the Convention' (para. 45). The ECtHR also considered that 'while it would undoubtedly be difficult for the applicants' mother to relocate to Ethiopia, there is no evidence before it to suggest that there would be any "insurmountable obstacles" or "major impediments" to her doing so' (para. 44).

A case somewhat similar to *Tuquabo-Tekle* also came before the ECtHR in 2016: the case of *El Ghatet*.[18] In this case a 15-year-old boy applied for a residence permit in Switzerland based on family links with his father, who had entered Switzerland as an asylum seeker, received a residence permit through marriage and later received Swiss nationality. The court restated the principles established in earlier cases and emphasized the importance of the proper assessment of the best interest of the child and of taking into account the circumstances of the minor children concerned: 'especially their age, their situation in their country of origin and the extent to which they are dependent on their parents' (para. 46). In this case, although the court recognized the father's background as an asylum seeker, it was not convinced that the father had always intended to live in Switzerland with his son (para. 48). The court concluded that in the light of the established criteria, the circumstances of the case might not amount to a violation on the part of the state. However, the court considered that the authorities did not sufficiently balance the relevant interests and demonstrate that they would have taken the best interest of the child into account (paras. 52–53). This case is a departure from earlier practice in that the court expressly considered the welfare and best interest of the child outside the jurisdiction of the state and attributed decisive weight to this procedural fault.

The ECtHR case law described above shows that the situation of family members abroad can be taken into account when assessing the fair balance of interests. The situation of family members abroad has been a relevant factor in some cases when assessing ties to the origin country and obstacles to returning or staying abroad. The threshold for such obstacles has been high, although sponsors afforded international protection, especially refugee status, have been in a better position. There seems to exist a line of reasoning that would place more significant weight on a situation that could trigger Article 3 of the ECHR concerning the prohibition of torture and inhuman treatment, but this is explicitly applied only in assessing the possibility of return for the sponsor and not in considering the situation of family members abroad. Although we can see from these cases that the obstacles and insecurities of family members abroad have been referred to in national proceedings, the

[18] ECtHR, El Ghatet v Switzerland, 8 November 2016.

ECtHR has not been very clear on their significance in its own balancing exercise. This may lead states to disregard the insecurities and difficulties faced by family members abroad. To gain some insight to this question, we will next look how these aspects are present in the national case law on family reunification in Finland.

3.5 Rights of Family Members Abroad in Finnish Courts

In 2017, the Helsinki Administrative Court considered a case[19] in which an Afghan national who had received subsidiary protection wanted to invite his 16-year-old sister to live in Finland with his family. Their mother had died and their father had disappeared, and according to the brother, he was considered her guardian. The sister's initial residence permit application in 2011 was rejected because the Finnish Immigration Service (Migri) did not consider her a member of her brother's family. According to Migri, the sponsor had cut family ties when he fled Afghanistan in 2008, leaving his sister with their uncle. Migri also determined that the sister was not a relative fully dependent on the sponsor. In 2015, the sister applied again. According to her brother, her situation had considerably worsened. He explained that his sister was living with their uncle's family under hard conditions, where she was enslaved, mistreated and threatened with forced marriage. She had attempted suicide with rat poison. The brother had been paying high sums of money for her maintenance, including extortion payments to the Taliban, but the uncle was not properly providing for her health or education, and the brother felt she was no longer safe in Afghanistan. Nonetheless, Migri and the Administrative Court did not consider her to be fully dependent on her brother and rejected the application and the complaint.

In this case, the Administrative Court focused on the question of full dependency between the siblings. In Finnish migration law, siblings are not considered family members, but 'other relatives', who must be fully dependent on the sponsor to be granted a residence permit (Ulkomaalaislaki [Aliens Act] 301/2004, § 115). This is broadly in line with the ECtHR case law. The difficulties of the sister were acknowledged in the judgement, but seemed to have no effect on the court's assessment. The court was satisfied that the sister was living with her uncle and gave her living conditions no role in its deliberation: the court did not consider that the inhuman treatment of the sister abroad was of concern to Finnish authorities.

Extraterritorial aspects are also apparent in a case[20] concerning the family reunification of an Afghan refugee whose family members were denied permits by Migri. The sponsor had received a residence permit and refugee status based on religious conversion. In the decision concerning the sponsor's refugee status, the authorities considered that the person would be in danger if returned to Afghanistan. However,

[19] Helsingin hallinto-oikeus [Helsingin HAO] 30 January 2017, diary no. 10060/16/3101.

[20] Helsingin HAO 9 May 2017, diary no. 14078/16/3101.

Migri did not seem to take into consideration how the religious conversion of the head of the family would affect the rest of the family in Afghanistan. In addition, Migri considered the family bond broken when the sponsor fled the country, leaving the rest of the family behind. The Administrative Court, however, considered that the family bond could not be deemed broken, since the separation was due to compelling reasons, and quashed Migri's decision in 2017. The family members received residence permits and the family was allowed to reunite, but the Administrative Court did not grant refugee status to the family members. The court acknowledged that the family members might face harassment and pressure to abandon the head of the family, but felt they would not face the same risk of persecution as the sponsor.

In this case, the determination of refugee status for the family members seems insignificant, since they nonetheless were able to flee to Finland, but the court's decision demonstrates that the challenges faced by the applicants as family members of a religious convert were not taken seriously, as they were not afforded refugee status. Besides downplaying the consequences for family members, this is also against the principles of the Refugee Convention, which recommend 'ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country'.[21] According to the United Nations Refugee Agency handbook guiding the convention's interpretation, the dependants of a recognized refugee are normally granted refugee status (United Nations High Commissioner for Refugees [UNHCR], 2019, para. 184).

In another case first heard by the Turku Administrative Court, an Iraqi man received refugee status in Finland and succeeded in reunifying with his spouse and child, but was not able to bring his elderly parents to Finland. In 2020, the case was accepted for revision by the Supreme Administrative Court,[22] but without success for the applicants. In this case, the applicants and the sponsor's family had lived together in Iraq before the sponsor escaped to Turkey and applied for asylum with the UNHCR. Later, his wife and child followed him to Turkey; his parents also visited them, but decided to return to Iraq for medical care for their many serious health issues. The elderly applicants told the court that they had been harassed in Iraq to pressure their son to return and because the persecuting agents thought that they were hiding their daughter-in-law. The sponsor was therefore afraid for their security, and as their only child, felt responsible for taking care of them. Although the court acknowledged the claim of insecurity, it did not consider it legally significant, instead concentrating on the questions of dependence and the disruption of family life between the applicants and their son.

Two recent cases from the Supreme Administrative Court show that the situation of family members abroad can also be relevant when assessing the income requirement. According to Finnish migration law, refugees' family members are not

[21] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc A/CONF.2/108/Rev.1 (25 July 1951), sec. IV, recommendation B (1).

[22] Korkein hallinto-oikeus, KHO 2020:69, 10 June 2020.

required to meet the income requirement for residence permits if they apply within 3 months of the refugee being notified of being granted a residence permit (Aliens Act, § 114). Drawing principles from European Union case law,[23] the Supreme Administrative Court stated in these cases that proof of income cannot be required if the late submission of an application is objectively excusable. The court stressed that in this assessment, all factors need to be taken into account, including the factual circumstances of family members attempting to submit applications at embassies abroad.

The first of these two recent income requirement cases[24] concerned a sponsor with refugee status whose wife had to travel from Eritrea to Ethiopia to submit her family reunification application. The submission was made 7 months late, largely due to the border between Eritrea and Ethiopia being closed. Though the closure was taken into account, the court considered that she did not apply quickly enough after the borders opened. The appellants also described the difficult situation of the wife as a refugee herself, alone in Ethiopia, but the court did not find this relevant.

In the other similar case,[25] the Supreme Administrative Court considered that the applicants' late submission was excusable because it was made shortly after the deadline and because the date of submission was disputed. In this case, the family members contacted the Finnish embassy in Ethiopia 8 days past the deadline because they needed to acquire documents proving legal stay in the country from the Ethiopian authorities before making an appointment. The applicants brought up the difficulties they had faced in Ethiopia, but the lower court did not consider the circumstances relevant. The Supreme Administrative Court based its decision on other aspects of the case and did not comment on the difficult situation of the family as refugees in a foreign country.

The court cases from Finland, like the cases of the ECtHR, show a hesitant approach to the interests of family members abroad. The cases also show some of the challenges applicants face in proving they had compelling reasons to separate, including when the sponsor sought protection elsewhere, leaving family members behind in a difficult situation. As we see from other chapters in this book, that is indeed quite often the case in situations of persecution or indiscriminate violence. Many cases before the Finnish courts have involved extended family members, suggesting that the situation of extended family members abroad is seen as less significant in the assessment of residence permit applications than the situation of core family members. The Finnish courts do assess the situation abroad when deciding on refugee status for family members, but the threshold for persecution seems to be high. In addition, this decision is made only after granting family reunification, and those same factors might not be considered in the residence permit process. In other words, an assessment of the need for international protection is not part of the

[23] Court of Justice of the European Union, case C-380/17, K and B v Staatssecretaris van Veiligheid en Justitie, 7 November 2018.

[24] KHO 2021:98, 7 July 2021.

[25] KHO 2021:99, 7 July 2021.

family reunification process, but is done afterwards. This chapter suggests, though, that a similar assessment should also be conducted when making decisions on residence permits.

3.6 Conclusion

In this chapter, I have explored the question of how the interests and insecurities of family members abroad are recognized in legal and administrative decision-making in the family reunification process. In family reunification cases, it is the interests and rights of the migrant sponsor already in the country that are the basis for human rights obligations. However, can the interests and rights of the family members abroad be taken separately into account, although human rights protection is usually only attributed to people within a state's jurisdiction? I started by explaining the general legal principle of the territorial application of human rights, as well as the exceptions to this principle that create extraterritorial obligations. Although the ECtHR has not explicitly connected extraterritoriality to family reunification, nor, to my knowledge, has the literature discussed it in this context, general legal principles apply to all fields of law.

Drawing on literature on other legal contexts, it seems that a functional conception of extraterritorial jurisdiction could bring family members abroad within the jurisdiction of ECHR contracting parties. When a state has the authority to make decisions that affect the lives and rights of those outside its territory, it also has the obligation to respect human rights in its decision-making. However, human rights protections in such cases might not be as strong as in the territorial application of human rights. As Gondek notes, jurisdiction is a question separate from state responsibility (Gondek, 2009, p. 370). Jurisdiction is the permission or obligation to take certain interests or rights claims into account, but a state's responsibility might still be limited for contextual reasons or due to the competing interests at stake. The territoriality and extraterritoriality principles thus affect the balancing of interests often undertaken by the ECtHR. According to the literature on extraterritoriality, some rights, such as the right to life (ECHR art. 2) and the prohibition of torture and inhuman treatment (ECHR art. 3) should be given more weight even in the extraterritorial application.

The fair balance test has developed in the ECtHR's practice over the past few decades. Recently, the court has added cumulatively to the types of interests taken into account and in some cases has sought the most adequate way to secure family life and family unity. However, the threshold for state responsibility is high, and the assessment of insurmountable obstacles (the elsewhere approach) remains central. In my view, the interests, insecurities and refugee status of family members abroad should be significant in assessing applicants' ties to the origin country and the obstacles to enjoying family life elsewhere. If concerns related to Article 3 of the ECHR arise, it should suffice to demonstrate insurmountable obstacles. However, in many cases these aspects are taken into account only as concerns the sponsor's

ability to return, and not from the point of view of the family members abroad. As Costello et al. (2017, p. 12) point out, family reunification can sometimes accomplish the same ends as humanitarian evacuation from conflict zones or refugee camps. However, the situation should not need to be that drastic for a cumulative assessment to find a state responsible for allowing family reunification. The assessment of insurmountable obstacles would then work as a backstop activated especially in the case of people receiving or needing international protection.

My review of both ECtHR and Finnish case law has demonstrated that the situation of family members abroad has occasionally been referred to by the courts when balancing interests and when assessing the existence of insurmountable obstacles to enjoying family life elsewhere, dependence on the sponsor or the reasonableness of certain restrictions. Based on this sample, it seems that the ECtHR has given more weight to the difficulties of family members abroad than the national Finnish courts have. The case law of the ECtHR shows that the cumulative assessment of relevant factors allows the situation of family members abroad to be taken into account when determining the most adequate place to continue family life together. There is room, however, to further develop the assessment of insurmountable obstacles by better acknowledging the hardships of family members abroad. The lack of clear legal rules means that an assessment of the human rights compliance of national practice with regard to this specific aspect of extraterritorial obligations is not currently feasible. Nonetheless, the national Finnish case law shows that despite occasionally considering the difficulties of family members abroad, the courts' cumulative assessment and consideration of family hardship is either lacking or has a very high threshold.

In both the ECtHR and in Finnish courts, judges have sometimes concentrated on detailed restrictions, such as time limits. Based on above mentioned cases, it seems that the courts in Finland are sometimes lost in details and tend to overlook the assessment of fair balance and insurmountable obstacles. While the Finnish Supreme Administrative Court has taken the actual situation of applicants abroad into account when assessing the reasonableness of the 3-month time limit for exemption from the income requirement for refugees' family members, the court disregards the ultimate test of a cumulative assessment of the most adequate place to enjoy family life. The difficult situation of the family members abroad should have also been relevant from the point of view of assessing the applicants' ability to enjoy family unity, not only for assessing the excusability of delays in submission. The possibility to continue family life elsewhere should be the centre of adjudication for determining the responsibility of the host state to secure family unity, analogous to its importance when using the extraterritoriality principle to assess which country must fill voids in human rights protection.

Within this sample of court cases from the ECtHR and from Finland, the situation of family members abroad was seldom seen as significant, although the applicants often referred to such issues. However, if a factor is acknowledged in a decision, it is legally relevant. The challenge is thus to determine the proper weight to be given to such a factor. If we accept Gammeltoft-Hansen's (Gammeltoft-Hansen, 2011) conclusion that it is the courts that should determine the reach of

states' human rights obligations towards people outside state territory, a review of case law indicates that the territoriality principle is still rather strong. However, the theory on extraterritorial human rights obligations can offer guidance and add to the balancing test by emphasizing the responsibility of a state when considering factors threatening life, health and security. Although based on the sample used in this chapter, we cannot know if the authorities have given proper weight to the insecurities faced by family members abroad in positive decisions, we can see that there are some cases where these aspects have not been properly recognized. Therefore, it is important that further theoretical research emphasize this obligation and that empirical research be undertaken to investigate whether decision-makers respect the rights of family members abroad.

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PUBLICATION
IV

Family Reunification Restrictions and the Politics of Belonging in Finland

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Family Reunification Restrictions and the Politics of Belonging in Finland

*Jaana Palander**

Abstract: *In this paper, I show how the law reflects belonging to society through family reunification legislation in Finland. I present the legal framework of residence permit types and categories relevant for family reunification, as well as the legal restrictions on family reunification, focusing specifically on the income requirement. Drawing on the theory of politics of belonging, I identify hierarchies of legal belonging in family reunification law. Allowing a migrant's family members to enter the country shows acceptance and potential for belonging to the society. In contrast, denial and restriction of family reunification of certain categories of migrants can be considered a manifestation of exclusive politics of belonging. Legal belonging is progressive, and time is a significant factor in distinguishing the different residence permit types that construct the hierarchy of belonging. This article shows how the income requirement disrupts the general logic of progressive belonging in the case of the category of international protection. I also point out the discrepancy between legal and sociological understandings of belonging.*

Keywords: *family reunification, belonging, integration, recognition, residence permit*

1. Introduction

This article shows how the law reflects belonging to society through family reunification legislation. Belonging has many dimensions, such as belonging to a society or family, as well as both individual and structural perspectives. While this article approaches the question mainly from a structural viewpoint, it also acknowledges the importance of family reunification for an individual's feeling of belonging to a society.

Attracting and retaining migrants is considered necessary to counter the demographic challenges Finland, among other countries, is facing, and a receptive society has been identified as essential for a successful migration policy (Sorsa, 2020). To foster feelings of belonging among the immigrant population, more focus needs to be directed to the question of two-way integration, which encompasses the actions of the receiving society and its structures in addition to those of migrants. Integration and belonging are thus closely connected concepts. The concept of belonging, however, captures better the subjective and imaginary side of politics. Therefore, in this article, I will leave aside the extensive literature on integration and family reunification (e.g. Strik et al, 2013; Bonjour and Kraler, 2015) and concentrate on belonging and family reunification.

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Family reunification is the administrative procedure by which foreigners apply for a residence permit on the grounds of family ties to a person residing in the host country – in this case, Finland. The person residing in Finland can be a foreigner or a Finnish citizen, with foreigners further categorised by different immigration statuses. In the context of family reunification, the person residing in Finland is referred to as the sponsor. Although the family member abroad is the applicant in the family reunification procedure, the conditions for family reunification are dependent on the immigration status of the sponsor. From the point of view of basic and human rights, the question is as much about the sponsor's right to family life and family unity as it is about the rights of the family member applying for a residence permit. In the same vein, it is as much about the sponsor's perceived belonging to society as it is about whether the incoming family member belongs.

The theoretical foundation for this article lies in the theory of politics of belonging (Geddes and Favell, 1999; Castles and Davidson, 2000; Yuval-Davis 2006, 2011). According to Yuval-Davis (2006, p. 204), politics of belonging is about constructing the 'imagined community' (Anderson, 1991) of 'us and them', which also includes former and future generations. Although citizenship and citizenship rights are usually at the centre of research on the politics of belonging, Yuval-Davis (2006, p. 208) has also recognised the relevance of questions of immigration and spatial rights, such as the right to migrate, the right of abode and the right to plan a future where you live. A society's politics of belonging can impose 'requisites of belonging' (Yuval-Davis, 2006, p. 209), and the conditions for family reunification can be seen as such requisites. The theory of politics of recognition (Taylor, 1994) is also a relevant approach that has already been used by Mustasaari (2017) to study family reunification legislation. As Mustasaari (2017) points out, concepts such as belonging or recognition can better address the problems of migrants and their position in the society than legal concepts. However, for the purposes of this article, belonging captures better the interdisciplinary objective of connecting immigration legislation with social policy while acknowledging the agency and wellbeing of the migrant.

The main research question for this article is: how does Finnish migration law reflect belonging to society through family reunification legislation? While much of the research on politics of belonging has focused on political discourses, I will be concentrating on legal texts. This approach, concentrating on legal structures, can also be called *legal belonging* (see e.g. Marglin, 2021). I will investigate the hierarchies of belonging through both legal systematisation and political theorising, describing the logic and inconsistencies behind these hierarchies. I will also compare the legal hierarchy of belonging to the results of earlier sociological research (see e.g. Koskela, 2014), which has suggested that hierarchies of belonging in Finland are constructed roughly from humanitarian migrants at the bottom through labour migrants to Finnish citizens at the top.

This article develops the theoretical discussion on the connection between belonging and family reunification (e.g. Wray, 2011; Block, 2012; Rytter, 2013; Staver, 2014; Pellander, 2016; Mustasaari, 2017). In so doing, it adds to the existing research by emphasising the temporal aspect of belonging. I am also building on my own previous research examining the legal potential for integration in the light of preparatory legislative work on family reunification legislation in Finland (see Palander, 2021).

In the following, I first explain the theoretical framework of belonging and its connection with family reunification. I review the literature that is relevant to belonging and family reunification, focusing especially on recent Nordic and Finnish literature. Second, I present the legal framework of family reunification in Finn-

ish law, referencing EU law and international agreements when relevant. Third, I apply the theory of politics of belonging to analyse hierarchies of belonging and the structural inconsistencies that have been created by some recent developments. In this final part, I also discuss the benefits of using the concept of belonging over legal concepts such as equality. I argue that family reunification restrictions reflect weaker legal belonging and reveal inconsistencies in the logic of belonging, which may have wider personal and societal consequences.

2. Belonging and Family Reunification

In the migration studies literature, belonging is most often approached from an individual viewpoint. In studies on transnational family life, family separation is almost taken for granted, and the focus is often on multiple places and multiple belongings (Vasta, 2013; Röttger-Rössler, 2018). Research confirms that it is people, and especially family members, who make living in a place meaningful and foster a sense of belonging (Marin, 2003; Tuan, 2011; Siim, 2013). Therefore, one's sense of belonging to one's country of residence would most likely be fostered by family reunification. Although access to any right, or bundle of rights, is relevant for research on politics of belonging, family reunification is an especially significant right for its special connection with belonging.

Yuval-Davis (2006) emphasises the difference between an individual's sense of belonging and the politics of belonging. However, a sense of belonging and the politics of belonging can also be connected in various ways. Jenkins (2000) writes about 'dialectical interplay between internal and external identification' when investigating the impact of categorisation on identity. Simonsen (2017) and Erdal et al (2018) connect the sense of belonging with having host country citizenship. In the case of family reunification, it is the sponsor's sense of belonging, as the subject of mobility and object of state control, that may be affected by the categorisation of migrants in family reunification legislation. The legislation thus either enhances or hinders individuals' potential for belonging.

The politics of belonging is most commonly discussed in the context of enfranchisement and other political rights and responsibilities, with citizenship often seen as the pinnacle of belonging. However, the idea of social citizenship (Marshall, 1950; Brubaker, 2010; Kovacheva et al, 2012) suggests that membership and belonging to a society can also be manifested through other rights. From the point of view of human rights, Crowley (1999) has pointed out that, since the development of international human rights obligations, the citizenship paradigm as a mark of belonging may no longer be as relevant. Human rights are tied to the territory of a state, encompassing everyone within the jurisdiction. Although family reunification can be considered a human right for a very narrow group of vulnerable migrants (see e.g. Costello et al, 2017), a more general facilitation of family reunification would show greater respect for human rights and stronger legal belonging for migrants.

Block has investigated membership and belonging in light of family reunification policy in her analyses of discursive political frames in Germany (Block, 2012) and in various other European countries (Block, 2015). She has also emphasised the connection between a sponsor's individual membership in society and the corresponding right to remain with family migration rights. Block analyses the various restrictions on family reunification as enforcing norms of social, economic and ethnic membership, with an emphasis on the socioeconomic dimensions. In a similar way, Staver (2014) has connected belonging to the self-subsistence requirements for family reunification in her analysis of discourse and policy in Denmark, Norway and the United Kingdom. She found that migrants have less or no access to social benefits and are required to carry their financial burdens independently,

indicating that the state does not see them as fully belonging.

Recent research on family reunification and belonging in the Finnish context has highlighted the discriminatory effects of politics of belonging. Pellander (2016) and Mustasaari (2017) both examined legal documents and discourses of belonging in relation to the receiving country's acceptance of certain family types or family members. Pellander connects administrative acceptance of certain types of migrant families with cultural citizenship. Mustasaari goes beyond immigration law, also analysing the recognition of family relations and marriages in civil law. Both scholars focus on the 'real family ties' condition for family reunification, which is not clearly defined in law and thus leaves a lot of discretion to individual decision-makers. They show how belonging is gendered and racialised in discourses and administrative practice.

The focus of this study is broader than that of Pellander and Mustasaari, in that it considers the big picture of who is allowed and who is denied family reunification. I will also examine belonging from the point of view of a different condition for family reunification, the income requirement. Further, I will consider how the economic turn in immigration policy contradicts the underlying logic of residence permit types. In contrast to previous studies, my approach is based on the legal potential for belonging. This approach is adopted from Jesse (2017) by modifying his concept of legal potential for integration. Potential for belonging refers to the connection between individual sense of belonging and politics of belonging. As family reunification is a right regulated by law, facilitating the entry of family members shows respect for family life as well as acceptance and belonging to society. In addition, having one's family in the host country strengthens one's ties with the country and affects one's sense of belonging to that place. The legal framework on family reunification, studied in the next section, will thus shed light on the perceived belonging of migrants, as well as the legal potential for their belonging.

3. The Legal Framework on Family Reunification

3.1 The Right to Family Reunification

Finnish statutory migration law consists of the Aliens Act (301/2004) and separate laws focusing on certain categories of migrants.[1] Family reunification is provided for both in the Aliens Act and in some separate laws. The Aliens Act is a general law, meaning that if a separate special law does not otherwise apply, the Aliens Act applies. Chapter 4 of the Aliens Act concerns residence permits in general (for typical migrants in various categories), Chapter 6 concerns refugees and other people in need of international protection and Chapter 10 concerns EU citizens and others with free movement rights in Finland. Separate laws with provisions on family reunification have been issued for students, researchers, trainees, voluntary workers, intra-corporate transfer workers and seasonal workers.

Chapter 4 of the Aliens Act, which concerns residence permits in general, provides for family reunification in Section 45 on temporary residence permits and Section 47 on continuous residence permits. These sections allow family reunification whenever a sponsor has been issued a temporary, continuous or permanent residence permit. Family members are defined to be spouses and children under the age of 18 (Aliens Act, Section 37). Other dependent relatives may be allowed reunification as well, depending on the category of the sponsor. The duration of the family member's residence permit corresponds to that of the sponsor. Further restrictions to or facilitation of family reunification are laid out for certain categories of migrants. Separate laws can also impose restrictions on or facilitate family reunification; however, if a

1. The English text of the Act is available at https://finlex.fi/en/. In the translated version, amendments up to law 1163/2019 are included.

separate law does not explicitly deny family reunification, the terms of the Aliens Act apply. Therefore, while the category of a migrant matters in terms of different levels of access to family reunification, the foundation for the right to family reunification is constructed around the type of residence permit, that is, whether it is temporary, continuous or permanent.

Foreign family members of Finnish citizens must apply for a residence permit as well and are issued a continuous residence permit based on Aliens Act Chapter 4, Section 50. Other dependent relatives are also allowed family reunification. Based on Chapter 10, Section 158 a, family members of EU citizens or other people benefiting from the EU free movement regime do not need a residence permit, only a visa if required for travel. Family members can follow a sponsor who fulfils the conditions for free movement and need to register if planning to stay more than three months (Aliens Act, Section 155 a). The definition of a family member for free movement situations includes spouses, children under 21 and parents, as well as other dependent relatives (Aliens Act, Section 154). If a sponsor does not meet the conditions for free movement, family members must apply for a residence permit and are allowed family reunification based on Chapter 4, Section 50 a.

Chapter 6, concerning refugees and other people in need of international protection, provides for family reunification in Section 112 on categories of temporary protection and Section 113 on continuous protection permits. Section 112 enumerates three different categories of temporary protection and states that one of them (the temporary protection category based on the EU Temporary Protection Directive (2001/55/EC)) is entitled to family reunification. Section 113 enumerates the four categories of international protection that are issued a continuous residence permit, which include refugees and people receiving subsidiary protection. One of the categories is based on Aliens Act Section 93, which is a national temporary protection scheme that can be used to issue either temporary (based on Section 112, family reunification not allowed) or continuous permits. All of these continuous categories are allowed family reunification. The scope of family members is the same as in Chapter 4, Section 37, mentioned above. Other dependent relatives are also allowed residence permits. In addition, a continuous permit can be issued to people initially receiving temporary protection after three years if the need for protection still exists. They are then allowed family reunification, but not reunification of other relatives.

3.2 Denial of Family Reunification

In general, if a category of migrants is denied the right to family reunification, this is mentioned explicitly in the migration legislation. The only exception seems to be Chapter 6, Section 112, which instead explicitly provides for family reunification for only a specific subcategory of migrants receiving temporary protection. The right to family reunification is denied to foreigners who have been issued a return decision but have not yet been able to return due to health reasons or practical impediments to return, such as unsafe travel connections (Aliens Act, Section 51.4). Other groups of foreigners not allowed family reunification are those issued temporary residence permits intended for victims of trafficking (Aliens Act, Section 52 a.4) or labour exploitation (Aliens Act, Section 52 d.3). These permit categories are intended to facilitate criminal investigations or court proceedings. However, victims of human trafficking found to be in a particularly vulnerable position can be issued a continuous residence permit (Aliens Act, Section 52 a.2) and are allowed family reunification (Aliens Act, Section 52 a.4).

The separate Law on the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers (907/2017) denies family reunification to third-country nationals who habitually reside outside the EU and EFTA countries and work

temporarily in Finland (Section 13). Seasonal work can last up to 9 months within a 12-month period (Section 16). For work of less than 90 days, a visa (or for those who do not need a visa, a seasonal work certificate) is enough, but for work of more than 90 days, a seasonal worker's residence permit is needed. Government Proposal 80/2017 vp (p. 71), the preparatory works of the Act on Seasonal Workers, explains that the denial of family reunification is justified by the nature of seasonal work, which is temporary and short in duration.

The Law on the Conditions of Entry and Stay of Third-Country Nationals for the Purposes of Research, Study, Training and Voluntary Service (719/2018) repeats the right to family reunification set out in the Aliens Act but makes the family reunification of those participating in a working holiday program dependent on agreement between the contracting states (Section 16). Until recent amendments (277/2022), Section 16 provided only for the right to family reunification of researchers, appearing to exclude other categories of migrants. However, other migrants subject to this law were nonetheless allowed family reunification based on the Aliens Act. Either this connection between the general law and special law was misunderstood by earlier lawmakers, or they deliberately wanted to limit the material reach of the law to that of Directive (EU) 2016/801, which concerns researchers' right to family reunification.

In Chapter 6 of the Aliens Act, the categories excluded from family reunification are not explicitly mentioned, but are instead omitted from those allowed family reunification. In Section 112, family reunification is allowed only for those issued temporary protection based on Section 109 (i.e., Directive 2001/55/EC). The other temporary categories in Section 112, which are based on Sections 89 and 93, are not mentioned and are, therefore, as explained in Government Proposal 28/2003 vp, the preparatory works of the Aliens Act, denied family reunification. Section 89 deals with persons excluded from refugee status but unable to return, for example, due to a threat of torture or other inhuman treatment (i.e. non-refoulement). Section 93 establishes a category called 'other humanitarian migration', which allows the government to decide to give protection in special circumstances. Although the right to family reunification in this case is not provided for in the law, the government can decide on the entry of family members when establishing the temporary protection scheme (Government Proposal 28/2003 vp).

As mentioned above, some categories of sponsors are allowed reunification with relatives other than core family members (meaning spouse and children). Usually, this means parents or siblings of adult sponsors, but in some cases, it can mean the siblings of child sponsors. The only categories that can sponsor extended family members are Finnish citizens (Aliens Act, Section 50), people initially granted a continuous permit based on international protection (Aliens Act, Section 113) and EU citizens (Aliens Act, Section 154). Other categories are denied reunification with other relatives. However, there is a peculiar detail concerning temporary protection categories. If a migrant receives a continuous permit after three years' temporary residence, they are not allowed reunification with other relatives even though this is possible for other categories receiving continuous international protection. However, a person initially issued a continuous permit based on the 'other humanitarian migration' category (Section 93) can sponsor extended family members.

3.3 Restrictions to Family Reunification

As described above, most migrants and their family members are, in principle, allowed family reunification, especially if they hold a continuous residence permit. However, actual access to family reunification is controlled and often obstructed by various conditions. When analysing the structural belonging of migrants, it is necessary to consider the actual possibility of getting one's family to Finland, which is

limited considerably by the general conditions for residence permits. These general conditions are laid out in Chapter 4 of the Aliens Act and apply to all residence permits unless otherwise stated in other sections or separate laws. These conditions include applying from abroad at a designated embassy, having real family ties, not being a threat to national security and fulfilling the self-subsistence or income requirement. Different categories of sponsors have different conditions. Here, I will concentrate on the income requirement in particular because it is considered to be one of the most restrictive conditions and effectively limits many migrants' access to family reunification (see Miettinen et al, 2016).

Family reunification for some privileged categories is thus facilitated by allowing residence without an income requirement. Self-subsistence or meeting the income requirement is a general requirement applicable to all residence permits unless otherwise specified (Aliens Act, Section 39). The level of required income varies slightly across categories, such as between students and workers. According to Aliens Act Section 39.1, it is possible to disregard the income requirement 'for especially weighty reasons or for the best interest of the child'. Section 39 also establishes a general exception from the income requirement concerning the categories of international protection laid out in Chapter 6. However, in 2016, Section 39 was amended (505/2016) to add: 'unless [Section] 114.4 or [Section] 115.2 rule otherwise'. This introduced an income requirement for family reunification to sponsors who have received international protection. This issue is discussed in more detail below.

The income requirement means that to be allowed family reunification, the family needs to meet a predetermined monthly income level. The required income rises with each additional family member. Based on the table published by the Finnish Immigration Service (n.d.), a family with two adults and two children would need a steady income of 2,600 euros net per month. Some social security benefits, such as the child allowance, can be considered income, but not, for example, unemployment benefits (Aliens Act, Section 39.2). The income usually consists of the sponsor's salary, but other types of secure income, such as rent, can also be taken into account. The applicant family member's salary can also be included if they are able to arrange a work contract before coming to Finland. In principle, a financial sponsor outside the family is not accepted, but some exceptions have been allowed in court practice.

Sponsor categories exempt from the income requirement are Finnish citizens (Aliens Act, Section 50), former Finnish citizens or people with Finnish ancestry (Aliens Act, Section 47), Ingrian Finns and people from the former Soviet Union who have served in the Finnish army (Aliens Act, Section 48) and Nordic citizens (Aliens Act, Sections 50 a and 158 a). Other EU/ETA citizens have lower income requirements, with the self-subsistence principle mentioned in the law but no income requirement systematically applied (Aliens Act, Sections 158 a and 159 a). In EU law, and especially within free movement law, family reunification is considered an essential element for integration and a driver of mobility and, therefore, should be facilitated.

As mentioned above, the Aliens Act was amended in 2016 to require sponsors who have received international protection to meet the income requirement by default. However, the law provides for some minimal exceptions stemming from EU law and international human rights law. Refugees or quota refugees whose family members apply within three months of the sponsor receiving a residence permit are exempt from the income requirement (Aliens Act, Section 114.4). This exemption applies only to family that already existed at the moment of flight from the origin country or at the time of being accepted as a quota refugee. In addition, the law requires that the applicant and sponsor have no special ties to any third country

where family reunification may be possible (Section 114.4.3).

It is important to note that people receiving subsidiary protection are not exempt from the income requirement. As mentioned above, sponsors issued a continuous residence permit based on international protection are allowed family reunification of other relatives. However, the income requirement applies. Only the siblings of orphan children who have received international protection or a residence permit based on individual compassionate grounds are exempt from the income requirement (Aliens Act, Sections 52 and 115). Parents of a minor receiving international protection must meet the income requirement. There has thus been a change in approach, from special treatment and protection of people receiving international protection to a seemingly equitable but restrictive policy. Indeed, one of the government's stated objectives for this legislation was to reduce the number of applications for international protection and the cost of hosting family members (Government Proposal 43/2016 vp).

4. Hierarchies of Belonging Through Family Reunification

Immigration law creates hierarchies of belonging based on residence permit categories and types. In Finnish immigration law, there is always the right to family reunification when the sponsor has a continuous or permanent residence permit or Finnish nationality. However, the right is denied to some categories of temporary permit holders. Some temporary permit holders are allowed family reunification and thus given the possibility to foster belonging. Others are denied family reunification, such as rejected applicants who cannot be returned, which reflects their perceived non-belonging to society.

Both temporary and continuous residence permits are fixed term, and they are usually first issued for one year (Aliens Act, Section 53). The fundamental difference between temporary and continuous permits is the purpose and nature of the stay. For some privileged categories of labour migrants or foreigners with Finnish roots, the permit is issued for two years. Continuous categories of international protection receive initial permits for four years. After two or three years on a temporary permit, a migrant can receive a continuous residence permit (Aliens Act, Sections 54 and 113). The continuous permit thus represents stronger belonging to the society. Surprisingly, receiving a permanent residence permit does not affect the right to family reunification. However, receiving Finnish citizenship is significant because it removes various conditions.

Place is a central factor in research on belonging, but time also plays a key role. It makes sense, on the individual level, that with the passing of time, one's sense of belonging to one's place of residence would grow stronger. In a similar logic, on the legal level, migrants who have been issued a continuous and therefore longer-lasting permit are perceived as belonging more strongly to society and therefore more easily allowed family reunification. However, the benefit of the passing of time for belonging is moot in the case of continuous permits, since benefits such as family reunification are granted from the beginning of the stay. It can therefore be said that the continuous permit creates the legal potential for belonging.

From the point of view of sponsoring residence permits, the hierarchy of legal belonging seems to be constructed with temporary residents at the bottom, continuous residence permit holders slightly higher up, above them people receiving continuous international protection and finally, on top, Finnish citizens. Remarkably, the legal hierarchy differs from the sociological hierarchy described by Koskela (2014), according to which people receiving international protection are considered less welcome than people with migrant worker status. However, the recent extension of the family reunification income requirement to people re-

ceiving international protection has narrowed the gap between legal and sociological hierarchies of belonging.

As discussed by Farzamfar and Phillips in their articles in this issue, this restrictive turn is due to deterrence policies related to the numerous entries of asylum seekers to the EU in 2014–2015. Restrictions to family reunification were implemented as indirect deterrence measures (Gammeltoft-Hansen and Tan, 2017) to reduce the number of arriving asylum seekers by making Finland a less attractive country for international protection (see Palander, 2021). However, the actual impact of these policies is mainly directed to people staying in the country and to their family members, instead of new asylum seekers.

The conditions for family reunification, especially the income requirement, significantly restrict access to family reunification and affect the hierarchy of legal belonging. People with continuous or even permanent residence permits might not be able to meet the income requirement with their salaries, especially if they have many children. A family with two adults and two children is expected to earn more than the median national salary or would need to have two jobs (Palander, 2017). Though people receiving subsidiary protection are issued continuous residence permits for four years, research has shown that the income requirement is a major obstacle for most sponsors in this category (Miettinen et al, 2016). In addition, research has shown that foreigners have more difficulties in finding work, advancing in their career as well as receiving equal pay (Kanninen et al, 2022). Especially vulnerable are children and young adults, who are expected to work in order to support their family members abroad or to sponsor them for Finnish residence permits. However, research has shown that child sponsors are often exempt from the income requirement (Non-discrimination Ombudsman, 2020).

Another interesting detail is that usually, if the sponsor is exempt from the income requirement, his or her family members are as well, but in the case of international protection, and especially subsidiary protection, the income requirement applies to family reunification despite not being required for a permit for international protection. People with these types of permits may have found work, developed strong personal ties, acquired good language skills and even earned a degree in Finland. However, their belonging to society remains partial as long as their family lives elsewhere.

Although the importance of formal citizenship for belonging has been somewhat downplayed in the literature, it is still significant in the context of family reunification in Finland. For many categories of migrants, citizenship is the only solution to family separation because then the income requirement does not apply. Foreigners can obtain citizenship after living in Finland for five years if they fulfil other conditions such as language skills (Citizenship Act 359/2003, Section 13). There is a self-subsistence requirement for naturalisation as well, but it is not as strict or high as in the case of family reunification.

If human rights are taken as a normative framework, however, belonging and the enjoyment of rights should not depend on citizenship. The hierarchy of belonging based on residence permit type supports the idea that a continuous or permanent residence permit should be enough to demonstrate sufficient belonging and to recognise the right to family life. The guiding principles of the current legal framework also imply that the most vulnerable, such as people needing international protection, should be treated preferentially. This could imply that even temporarily protected people should have facilitated access to family reunification, and certainly those who have been issued a four-year continuous permit. Living four or five years without family members is unreasonable and can affect one's sense of belonging.

Although Pellander (2016) and Mustasaari (2017) identified economic gatekeeping and moral struggles of recognition in their analyses of the income requirement, they concentrated on race and gender in their analyses of belonging. This article demonstrates hierarchies of belonging based on temporal and socio-economic factors. Even if a sponsor's family life has been shown to be genuine and in accordance with prevailing societal norms, their spouse or child can be considered a financial burden to the state and thus perceived as not belonging, a logic similar to that described by Block (2012) and Staver (2014), as well as Stybnarova in this same issue. Differential treatment based on socio-economic status is common in Finnish immigration law, and the indirect consequences of this can also be racial or gendered.

In Finland, the self-subsistence requirement has been elevated to a general principle of migration law, and paid employment seems to be the ultimate goal for integration. Yuval-Davis (2006) has also noted that neoliberal forces have strengthened the connection between work and welfare, observing that deservingness for social benefits presupposes work and contribution through taxes. This is one of the underlying principles of the EU free movement regime as well. However, in the Finnish system of family reunification for third country nationals, a job is not enough – it also needs to be well-paid. Finland's politics of belonging thus aims at fostering the belonging of well-earning migrant workers. The challenge is that migrants who do not have access to family reunification may nonetheless choose to stay in Finland, with their sense of belonging negatively affected by the forced separation.

Ideal integration, belonging and recognition have often been connected with equality (Taylor, 1994; Alba and Foner, 2015; Jesse, 2017). Equality is an important value, but in the context of immigration control, non-discrimination law often fails to remedy the negative effects of the inherent structural discrimination in the immigration law. It is well-established in legal studies that the rights of migrants are enjoyed progressively, as some research has shown in the case of Germany, for example (Horváth and Rubio-Marín, 2010; Farahat, 2014). Belonging can also be approached progressively, and the system of different types of residence permits in Finland is a good example of this. However, the idea of progressive belonging is disrupted by unreasonable income requirements that limit the potential for belonging of low-income workers and those who cannot work.

5. Conclusion

In principle, Finnish migration law allows family reunification for almost all categories of migrants. Only a few temporary residence permit category holders with weaker ties to Finland are denied family reunification, and thus not recognised as belonging to Finnish society. In contrast, all continuous and permanent categories, as well as Finnish and EU citizens, have the right to family reunification. Based on the right to family reunification, the hierarchy of belonging has low-skilled or low-paid migrant workers and students at the bottom, highly skilled workers and entrepreneurs next, then people receiving international protection, and Finnish citizens on the top. The picture gets messier when actual access to reunification and the effect of the conditions set by law are considered. Privileged groups considered belonging to Finland are exempt from some conditions. Most categories are required to fulfil an income requirement, which creates differential treatment between different socio-economic groups. The 2016 amendment to the Aliens Act added a new group, those receiving international protection, to the categories of migrants facing restricted family reunification. This brought a change to the logic of entitlement to family reunification: people receiving international protection no longer receive preferential treatment. This change has narrowed the gap between legal and sociological understandings of belonging.

The strict income requirement disrupts the logic of structural belonging created by the system of temporary and continuous types of residence permits. Although a person may be considered to be continuously or even permanently staying in Finland, their family reunification can be effectively obstructed by the income requirement. In some cases, this inconsistency is caused by international and EU law obligations that have been implemented without deeper structural analysis of the legal order, but it has also been caused by the political desire to reduce immigration of undesired categories. Indirect deterrence policies aimed at discouraging new asylum seekers have also affected those who have received international protection in Finland. The indirect effect of this deterrence policy, combined with rigorous socio-economic gatekeeping, undermine the structural belonging of people working in low-income jobs, as well as their personal sense of belonging. Although this treatment might not constitute illegal discrimination, it may not be wise in this era of demographic challenges, when facilitating integration as well as retaining integrated migrants is considered important. Immigration law should follow the politics of progressive belonging and respect the principles of equality and proportionality, as well as safeguard the coherence of the legal system.

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