



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF D.H. AND OTHERS v. SWEDEN

(Application no. 34210/19)

JUDGMENT

Art 8 • Positive obligations • Family life • Refusal of family reunification request of refugee and her two children who failed to fulfil maintenance requirement and applied outside the three-month exemption period • Principles set out in *Dabo v. Sweden* applied • Lack of objectively excusable reasons for failure to submit family reunification request before introduction of impugned legislation • Applicants could lodge a fresh request for family reunification at any time • Individualised assessment • Legal amendments allowing full or partial exemptions from maintenance requirement if “exceptional reasons” exist • Fair balance struck between competing interests at stake • Wide margin of appreciation not overstepped

Prepared by the Registry. Does not bind the Court.

STRASBOURG

25 July 2024

FINAL

16/12/2024

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of D.H. and Others v. Sweden,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ivana Jelić, *President*,
Alena Poláčeková,
Krzysztof Wojtyczek,
Lətif Hüseyinov,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,

and Ilse Freiwirth, *Section Registrar*,

Having regard to:

the application (no. 34210/19) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the first applicant (A.G.), her two children (the second and third applicants, D.H. and A.H.), and her mother (the fourth applicant, L.G.), all Eritrean nationals, on 19 June 2019;

the decision to give notice to the Swedish Government (“the Government”) of the application;

the parties’ observations;

the joint comments submitted by the Harvard Law School Project on Disability and the Centre for Disability Law and Policy at the University of Galway, which were granted leave to intervene by the President of the Section;

Having deliberated in private on 2 July 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The first applicant, who was granted asylum in Sweden, complains about the refusal to grant her family reunification with her two children and her mother, on the ground that she, at the relevant time, failed to fulfil the maintenance requirement. The applicant relied on Articles 8 and 14 of the Convention.

THE FACTS

2. The first applicant was born in 1984 in Eritrea. She lives in Vallentuna, Sweden. Her two children were born in 2009 and 2011, and her mother was born in 1956. The second, third and fourth applicants live in Sudan. The applicants were represented by Mr Ola Linder, a lawyer practising in Farsta.

3. The Government were represented by their former Agent, Ms Helen Lindquist, of the Ministry for Foreign Affairs.

4. The facts of the case may be summarised as follows.

5. On 12 September 2014 the first applicant entered Sweden and requested asylum, which was granted to her on 23 December 2015.

6. In a meeting with the Swedish Migration Agency (*Migrationsverket*) on 18 January 2016, the first applicant, who was assisted by an interpreter, was informed, among other things, about the procedure for applying for family reunification.

7. On 20 July 2016 the Law concerning temporary restrictions on the granting of permanent residence permits for asylum seekers (*Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*, 2016:752 – henceforth “the Temporary Restrictions Act”) entered into force (and remained in force until 19 July 2021).

8. On 15 February 2017 the first applicant, on behalf of her two children, requested that they be granted residence permits in Sweden on the basis of family reunification. On 26 February 2017 the first applicant’s mother applied for a residence permit on the same ground.

9. The children and the mother were interviewed at the Swedish Embassy in Khartoum on 15 February and 31 July 2017 respectively.

10. In support of their applications, the first applicant explained that she had left her hometown in Eritrea in 2006 and moved to the capital, Asmara, where she had worked as a maid. In 2008 she had left Eritrea and moved to Sudan, where she had made a living by selling coffee, tea and bread. She had lived with her children in Sudan. The children’s father had left the family in 2011 and they had not heard from him for many years. When the first applicant left Sudan in 2014 her mother had arrived from Eritrea in order to take care of the children in Sudan. The children went to school. In connection with the application for family reunification the first applicant had made contact with the children’s father and was informed that he lived in Israel with his new family. He had given his consent for the children to live in Sweden with their mother. The first applicant stated that she had a disability and therefore needed her mother to join the family in Sweden so that she could help her to take care of the children.

11. On 4 June 2018, the Migration Agency rejected their applications for the following reasons.

12. Under Chapter 5, section 3, subsection 1(1) and (2) of the Aliens Act, a residence permit may be granted to a foreign national who is the spouse or child of a person who is resident in Sweden. A residence permit may also be granted to a foreign national who is a close relative of someone who is residing in Sweden if they have been members of the same household and there exists a special relationship of dependence between them that already existed in the country of origin (see Chapter 5, section 3a of the Aliens Act).

13. However, by virtue of section 9, subsection 1 of the Temporary Restrictions Act, a residence permit could be granted only if the sponsor resident in Sweden could show sufficient income to maintain him- or herself

and any person being sponsored (henceforth “the income requirement”) and had accommodation of a sufficient size and standard for him- or herself and those being sponsored (henceforth “the accommodation requirement”, with these requirements together being henceforth “the maintenance requirement”).

If the sponsor resident in Sweden had been granted refugee status, as the first applicant had been, or subsidiary protection, the maintenance requirement only applied if the application for a residence permit was submitted more than three months after the sponsor had been granted refugee or subsidiary protection status (see section 10, subsection 3(1) of the Temporary Restrictions Act).

14. The applications for residence permits submitted by the first applicant’s children and mother were lodged more than three months after the first applicant had been granted a residence permit in Sweden as a refugee [rather the applications were lodged after the entry into force of the Temporary Restrictions Act]. The exemption from the maintenance requirement in section 10, subsection 3(1) of the Temporary Restrictions Act therefore did not apply.

15. The first applicant was living on social welfare, which was not considered a work-related benefit comparable to a salary, and she had rented a one-bedroom flat, which was not considered accommodation of a sufficient size and standard for them all to live there together. Furthermore, the rental contract expired in August 2018.

16. The Migration Agency found that the first applicant had failed to fulfil the maintenance requirement. Her children and mother (at the time aged 6, 8 and 62) could not, therefore, be granted residence permits under section 3, subsection 1(1) and (2) of the Aliens Act. The Migration Agency did not consider that that decision was contrary to section 13 of the Temporary Restrictions Act or to Sweden’s commitments under any international conventions.

17. Regarding the first applicant’s mother, the Agency also noted that she had not been living in the same household as the first applicant before the latter moved to Sweden. Moreover, the application for family reunification was submitted more than fourteen months after the first applicant had been granted a residence permit. The Agency therefore considered that there existed no special relationship of dependence between the first applicant and her mother that had already existed in the country of origin (or Sudan), as covered by Chapter 5, section 3a, of the Aliens Act. Thus, there were no legal grounds on which to grant the first applicant’s mother a residence permit on the basis of family ties.

18. On 14 June 2018, the applicants appealed against the Migration Agency’s decision to the Migration Court (*Migrationsdomstolen*), where they maintained that the first applicant had not been informed about a time-limit for applying for family reunification in order to be exempted from the

maintenance criteria. Furthermore, she had reduced mobility in her right foot, a side effect of having suffered from polio at the age of 4, which limited her chances of finding suitable employment. For example, she could not carry things, clean or climb. She had been granted a special transportation permit (*färdtjänstillstånd*) and an electric moped in order to get around more easily. However, she had not received sufficient support during the establishment process and had had to move between different homes, which had led to her suffering from depression, because of which she had been forced to stop attending language classes that she had been taking. They submitted four medical certificates regarding the first applicant's physical and psychological health. One certificate set out that she had been unable to attend half of the classes between July 2017 and March 2018. Another, dated 2 July 2018, confirmed that the first applicant would not be able to carry out any work requiring a lot of standing, walking or carrying, but that she was able to carry out work while sitting down, such as office or administrative posts. The applicants relied on Article 8 of the Convention, taken alone and in conjunction with Article 14.

19. On 1 October 2018 the Migration Court upheld the Migration Agency's decision of 4 June 2018, considering that the applicants' submissions could not alter the assessment. It found that the decision to refuse family reunification could not be considered to be in breach of the Convention.

20. The applicants requested leave to appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*), which was refused on 19 December 2018.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

21. The relevant domestic law and practice, European Union law, international law and material, comparative law and statistics were recently set out in *Dabo v. Sweden*, no. 12510/18, §§ 24-66, 18 January 2024.

22. It will be recalled that under Chapter 5, section 3, subsection 1(2), of the Aliens Act, unless otherwise provided for in sections 17-17b of Chapter 5, a residence permit is to be granted to a child who is an alien, is unmarried and has a parent who is resident in or has been granted a residence permit to settle in Sweden.

23. Under Chapter 5, section 3a, of the Aliens Act, unless otherwise provided in Chapter 5, section 17, subsection 2, a residence permit may be granted to an alien who is, other than through the relationships referred to in section 3 or [section 3a / section 17, subsection 2], a close relative of someone who is resident in or who has been granted a residence permit to settle in Sweden if he or she has been a member of the same household as that person and there exists a special relationship of dependence between the relatives that previously existed in the country of origin.

24. On 20 July 2021 the Temporary Restrictions Act ceased to apply. At the same time, new provisions were introduced into the Aliens Act regarding the maintenance requirement for family reunification (see *Dabo*, cited above, §§ 46-49).

25. The rules on the maintenance requirement if an application for family reunification was made more than three months after the sponsor was granted a residence permit as a refugee were retained (Chapter 5, sections 3b and 3d of the Aliens Act). However, under Chapter 5, section 3f of the Aliens Act, full or partial exemptions from the maintenance requirement could be granted if there were “exceptional reasons” to do so. The provision allowed such exemptions where it would be unreasonable to enforce the requirement. This could apply to, for example, retired people who did not have an income at the required level or people who were unable to earn an income because of a permanent disability (see *Dabo*, cited above, § 49).

26. It should also be noted (*ibid.*, § 60) that the Court of Justice of the European Union (the CJEU), in its judgment of 7 November 2018 in *K and B*, C-380/17, EU:C:2018:877 about a request for family reunification with a third country national who had been granted subsidiary protection, found that Article 12(1) of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter the Family Reunification Directive) did not preclude national legislation under which an application for family reunification lodged on behalf of a member of a refugee’s family on the basis of the more favourable provisions for refugees of Chapter V of that Directive could be rejected on the ground that the application was lodged more than three months after the sponsor had been granted refugee status, where it was possible to lodge a fresh application under a different set of rules (specifically those laid down in Article 7(1) of the Directive), provided that the relevant legislation:

(i) laid down that that ground for rejection could not apply where particular circumstances made the late submission of the initial application objectively excusable;

(ii) laid down that the persons concerned must be fully informed of the consequences of the decision rejecting their initial application and of the measures which they could take to make an effective application for family reunification; and

(iii) ensured that sponsors who had been recognised as refugees continued to benefit from the more favourable conditions for the exercise of the right to family reunification applicable to refugees, as specified in Articles 10 and 11 or in Article 12(2) of the Directive.

27. Both the Council of Europe Commissioner for Human Rights and the UN High Commissioner for Refugees (UNHCR) were concerned about a strict application of the calculation of the three-month time-limit and recommended that it be abolished altogether (see *Dabo*, cited above, §§ 61 and 62).

28. By decision of 31 March 2021 the Migration Court of Appeal found, in another case, which concerned a family where the sponsor had arrived in Sweden more than three months after he had been granted a residence permit as a quota refugee in Sweden, that there had been objectively excusable reasons for his not having applied for family reunification within the set three-month time-limit and that therefore the maintenance requirement should not be applied. The Migration Court of Appeal referred, *inter alia*, to the judgment by the CJEU in *K and B* (see paragraph 26 above).

29. The United Nations Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD” – adopted by the United Nations General Assembly on 13 December 2006, Resolution A/RES/61/106) is designed to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity. All Council of Europe member States except for Liechtenstein are parties to the CRPD. The relevant parts of the Convention read as follows:

Article 5

“1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”

Article 23

“1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar

institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.”

30. In its views adopted on 31 August 2018 concerning communication No. 39/2017, *Domina and Bendtsen v. Denmark*, Admissibility and merits (UN Doc. CRPD/C/20/D/39/2017), the Committee on the Rights of Persons with Disabilities found that Denmark had failed to fulfil its obligations under article 5 (1) and (2) read alone and in conjunction with article 23 (1) of the CRPD in connection with the following circumstances. A Danish National, Mr Bendtsen, had been involved in a severe car accident in 2009, which had left him with permanent brain damage, and he had, on that basis, received social benefits from May 2009, as he could not support himself through employment. On 13 April 2013 he had married Ms Domina, a Ukrainian national. On 30 May 2013 they had applied for family reunification. Documentation and information about Mr Bendtsen’s physical and mental health had been included in the application submitted to the immigration authorities. The application had been rejected on 29 August 2013 by the Danish Immigration Service on the basis that Mr Bendtsen had received social benefits within a period of three years prior to the date on which family reunification could be granted. Reference had been made by the authorities to section 9(5) of the Aliens Act, under which a residence permit based on family reunification could not be granted if the applicant’s spouse had received social benefits within a period of three years prior to the application. That decision had been upheld by the Immigration Appeals Board on 3 December 2014. The applicant in that case had brought proceedings before the Danish courts in vain. The couple had had a son in 2015. The CRPD Committee noted in particular that at the time of the application for family reunification Mr Bendtsen had been receiving social benefits on the basis of his disability and he had not been in a position to take up employment.

THE LAW

I. PRELIMINARY OBJECTION

31. The Government submitted that the matter had been resolved, and that the case should therefore be struck out under Article 37 § 1 (b) of the Convention. The Temporary Restrictions Act had ceased to apply on 20 July 2021, and from then on the Aliens Act contained a specific exemption clause under Chapter 5, section 3f, which could be relied on in situations like the present one, where the sponsor had little or no income (see paragraph 25 above) or submitted that there were objectively excusable reasons for submitting the application for family reunification after the three-month time-limit. The applicants could thus be expected to reapply for family reunification.

32. The applicants disagreed and pointed out that the Government had neither acknowledged the alleged violation of the Convention nor granted redress for the refusal to grant them family reunification owing to the impossibility for the first applicant of complying with the maintenance requirement.

33. The Court reiterates that in order to assess whether the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention, the Court must answer two questions in turn: firstly, whether the circumstances complained of by the applicant still exist and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Kaftailova v. Latvia* (striking out) [GC], no. 59643/00, § 48, 7 December 2007).

34. The applicants' requests for family reunification of 15 and 26 February 2017, which are at issue in the present application, were refused by a decision that became final on 19 December 2018, during the period where the Temporary Restrictions Act was in force. The length of the proceedings thus lasted one year and ten months.

35. Thereafter, the Temporary Restrictions Act continued to be in force for another two years and seven months, until it ceased to apply on 20 July 2021. The Court therefore considers that the refusal of 19 December 2018, together with the continued application of the Act, unavoidably had an impact on the overall period of, in total, four years and six months, during which the family was separated. In these circumstances, the Court cannot find that the effects of a possible violation of the Convention were redressed by the fact that the Temporary Restrictions Act ceased to apply, or by the fact that the applicants can reapply for family reunification under the new legislation. The applicants were therefore entitled to complain to the Court that the refusal to grant them family reunification was contrary to Article 8, taken alone, and in conjunction with Article 14 of the Convention (see, *mutatis mutandis*, *M.A. v. Denmark* [GC], no. 6697/18, § 23, 9 July 2021; *Konstantin Markin*

v. Russia [GC], no. 30078/06, § 88, ECHR 2012 (extracts); and *Tanda-Muzinga v. France*, no. 2260/10, § 58-59, 10 July 2014).

36. Accordingly, the Court dismisses the Government's objection.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicants complained that the Swedish authorities' refusal to grant them family reunification, which became final on 19 December 2018, had violated their right to respect for family life as guaranteed by Article 8 of the Convention, which reads as follows:

“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.”

A. Admissibility

38. The Government disagreed with the applicants' submission.

39. They noted, in particular, that the first applicant had not lived with her mother, the fourth applicant, since 2006. The latter had arrived in Sudan in 2014, when the first applicant left for Sweden, and they had not pointed to any dependence or special relationship which could justify the right to a residence permit under national legislation, or fall under the right to respect for “family life” within the meaning of Article 8 of the Convention.

40. The Court reiterates that while in some cases it has held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence, in a number of other cases it has not insisted on such further elements of dependence with respect to young adults who were still living with their parents and had not yet started a family of their own (see, for example, *M.T. and Others v. Sweden*, no. 22105/18, § 76, 20 October 2022, and *Savran v. Denmark* [GC], no. 57467/15, § 174, 7 December 2021, albeit concerning expulsion).

41. It notes that the first applicant claimed that, because of her disability, she needed her mother to join the family in Sweden in order to be assisted in taking care of the children.

42. The Court observes, though, as did the Migration Agency (see paragraph 17 above), that the first applicant and her mother never lived together in Sudan. Thus, they did not share the same household before the first applicant moved to Sweden. Moreover, from 2011 to 2014 the first applicant was capable of taking care of her two small children alone.

43. In these circumstances, as regards the fourth applicant, the Court finds that the complaint is incompatible *ratione materiae* with Article 8 of the Convention within the meaning of Article 35 § 3 (a), and must be declared inadmissible in accordance with Article 35 § 4.

44. As regards the remainder of the applicants, the Court finds that the application is neither manifestly ill-founded nor fourth inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible in respect of them.

B. Merits

1. The parties' submissions

45. The applicants maintained that the Swedish authorities had failed to engage in a thorough balancing test to weigh up the interests at stake, notably those of the children. Moreover, the family had been separated for a long time and, owing to the first applicant's disability, it would be impossible for her to fulfil the maintenance requirement.

46. The applicants pointed out that when the first applicant was granted a residence permit on 23 December 2015, the maintenance requirement and the three-month rule did not apply. Moreover, although she might have received information on 18 January 2016 about the procedure for applying for family reunification, it had been difficult for her to comprehend because she had received so much other essential information at the same time. It appears that the applicants also submitted that they had not been aware of the amendment of the relevant Swedish legislation which had entered into force on 20 July 2016. Thus, there had been objectively excusable reasons for their not having submitted the application for family reunification before that date.

47. In the applicants' view, the first applicant had made continuous efforts to become employed and economically independent. Thus, among things, she had participated in a Swedish language course from November 2016 to June 2017. She had been unable to attend some or all of the classes from July 2017 until March 2018 because she had been suffering from stress. She had re-entered school in September 2019 and had finished a language course in October 2021. She had participated in a work-orientated course from September to October 2020, and she had studied English from November 2021 to April 2022.

48. The Government maintained that the refusal to grant the applicants family reunification had been in accordance with the law and had pursued the legitimate aim of protecting the public interest in controlling immigration, and that a fair balance had been struck between the various interests at stake.

49. They pointed out that both the income and accommodation aspects of the maintenance requirement introduced by the Temporary Restrictions Act were based on similar provisions in the Family Reunification Directive, which applied to all the member States of the European Union, and that if the

application for family reunification in this case had been lodged before the entry into force of the Temporary Restrictions Act (the applicants had had more than seven months to do so, from 23 December 2015 to 20 July 2016), the maintenance requirement would not have applied.

50. Furthermore, the first applicant had been able to work most of her life and support her family. She had not substantiated her submission that she had actively sought gainful employment after 23 December 2015, when she became entitled to work in Sweden. Nor had she submitted any medical certificate confirming that she was unable to work because of a disability.

51. In the Government's view it also had to be taken into account that the children had been living with their grandmother as a family unit in the country where they had been born. They had been going to school there. None of them had had any health issues.

52. Lastly, the maintenance requirement was not a permanent obstacle to the reunion of the first applicant and her family.

2. *The third parties' submissions*

53. In their joint submissions the third parties, the Harvard Law School Project on Disability and the Centre for Disability Law and Policy at the University of Galway focused on the applicants' complaint under Article 14 read in conjunction with Article 8 of the Convention (see paragraphs 81 to 83 below).

3. *The Court's assessment*

(a) **The general principles**

54. The relevant principles were recently set out in the case of *Dabo* (cited above, §§ 88-93). In respect of the scope of the margin of appreciation to be afforded to the competent national authorities in cases like the present one, the Court found as follows:

"105. In the light of the considerations above, the Court considers that the member States should be afforded a wide margin of appreciation in deciding that, after being exempted from any maintenance requirement for three months, refugees should have to satisfy such a condition when subsequently seeking family reunification. A refugee will most likely stay permanently in the host country, which will have taken and will take various measures to secure successful integration, including the granting of family reunification without any maintenance requirement during the first three months after the sponsor is granted refugee status. The Court does not consider it unreasonable that, subsequently, in order to be granted family reunification, a refugee sponsor should be required to demonstrate that he or she has a sufficient independent and stable income, without recourse to welfare benefits, in order to meet the basic living expenses of the family members with whom he or she seeks reunification (see, *mutatis mutandis*, *B.F. and Others v. Switzerland*, [nos. 13258/18 and 3 others, § 95, 4 July 2023]; *Haydarie v. Netherlands* (dec.), no. 8876/04, 20 October 2005]; *Konstatinov v. the Netherlands*, no. 16351/03, § 50, 26 April 2007]; and *Hasanbasic v. Switzerland*, no. 52166/09, § 59, 11 June 2013)).

106. The Court observes that the Council of Europe Commissioner for Human Rights and the UNHCR have both expressed specific concern that it may be impossible for many beneficiaries of international protection to fulfil the Swedish maintenance requirement and that it does not sufficiently take into account the particular circumstances of persons who have been forced to flee. They have also found the three-month exemption period too short or too inflexibly applied, and have recommended that the time-limit be abolished (or presumably extended) (see paragraphs 61-62 above).

107. The Court points out in this respect, as also stated in *M.A. v Denmark* (cited above, §§ 162 and 192-93) and *B.F. and Others v. Switzerland* (cited above, § 105), that insurmountable obstacles to enjoying family life in the country of origin progressively assume greater importance in the fair-balance assessment as time passes. In particular, where the refugee resident in the territory of the host State is and remains unable to meet income requirements, despite doing all that he or she reasonably can to become financially independent, continuing to apply the maintenance requirement without any flexibility could potentially lead to the permanent separation of families.”

(b) The application of those principles to the present case

55. Since the first applicant’s two children had not previously resided in Sweden, the case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with its positive obligations under Article 8 of the Convention. The crux of the matter is therefore whether the Swedish authorities struck a fair balance, subject to their margin of appreciation, between the competing interests, on the one hand those of the first applicant in being reunited with her family members and on the other those of the State in controlling immigration in the general interests of the economic well-being of the country (see, *Dabo*, §§ 94-95).

(i) The time-limit for being exempted from the maintenance requirement

56. The applicants did not question the calculation of the three-month time-limit, but they maintained that there had been objectively excusable reasons for their not having submitted their application for family reunification before the entry into force of the Temporary Restrictions Act (see paragraph 46 above).

57. The Court finds it regrettable that neither the Migration Court, in its judgment of 1 October 2018, nor the Government in their observations to the Court, addressed that issue specifically. The Court will therefore proceed on the assumption that the Migration Court either failed to examine the applicant’s argument, or that it dismissed it as being immaterial, without providing any reasons, implied in its decision that the application of the maintenance requirement could not be considered contrary to section 13 of the Temporary Restrictions Act or Sweden’s commitments under any international conventions.

58. In the present case, the first applicant was granted a residence permit in Sweden on 23 December 2015. Accordingly, the three-month time-limit set out in section 10 of the Temporary Restrictions Act did not as such apply

to her because it had already run out when the Temporary Restrictions Act entered into force on 20 July 2016 (the Act did not provide an extra three months for persons granted asylum before the said date).

59. It is undisputed in the present case that the applicants could have applied for family reunification in the period between 23 December 2015 and 20 July 2016, that is approximately seven months, during which reunification would not have been subject to the maintenance requirement.

60. The Court also notes that in a meeting with the Migration Agency on 18 January 2016 the first applicant was informed, among other things, about the procedure for applying for family reunification (see paragraph 6 above).

61. Furthermore, the applicant has not asserted that it was impossible to seek assistance or legal advice in order to understand the Swedish legislation on family reunification.

62. In these circumstances the Court is not convinced that there existed objectively excusable reasons for the applicants' failure to submit the application for family reunification before the entry into force of the Temporary Restrictions Act or that for that reason alone the domestic courts should have exempted the applicants from complying with the maintenance requirement.

(ii) The maintenance requirement

63. The application for family reunification was lodged on 15 February 2017. It was refused by the Migration Agency on 4 June 2018 and the Migration Court on 1 October 2018, as the first applicant could not fulfil the maintenance requirement (see paragraphs 8 to 19 above). At the relevant time the first applicant was living on social welfare, which was not considered a work-related benefit comparable to a salary, and she had rented a one-bedroom flat, which was not considered accommodation of a sufficient size and standard for them all to live there together. Furthermore, the rental contract had been due to expire in August 2018. Neither the Migration Agency nor the Migration Court considered the refusal to grant family reunification to be contrary to section 13 of the Temporary Restrictions Act or to Article 8 of the Convention.

64. The Court observes that the request of 15 February 2017 for family reunification was the first application lodged by the applicants. At that time, the first applicant had been living in Sweden for approximately fourteen months. When the refusal to grant family reunification became final, on 19 December 2018 (see paragraph 20 above), the first applicant had held a residence permit as a refugee in Sweden for three years.

65. The applicants could have lodged a fresh request for family reunification at any time, which would have meant that the domestic authorities had to re-examine whether the first applicant fulfilled the maintenance requirement or whether she could and should be exempted from it (see *Dabo*, cited above, § 112).

66. The first applicant was 33 years old at the relevant time. In Eritrea she had worked as a maid. After moving to Sudan in 2008 she made a living by selling coffee, tea and bread until she left for Sweden in 2014 (see paragraph 10 above). The children's father had left the family in 2011, and the first applicant thus supported her family alone for at least three years, until she left for Sweden, a trip that she apparently managed by herself.

67. The first applicant stated to the Swedish authorities that she had reduced mobility in her right foot, a side effect of having suffered from polio at the age of four, which limited her chances of finding suitable employment. In support thereof she submitted a medical certificate of 2 July 2018, confirming that she would not be able to carry out work which required a lot of standing, walking or carrying, but that she was able to carry out work while sitting down, such as office and administrative posts. She also submitted a medical certificate setting out that she had been unable to attend some or all of her language classes from July 2017 until March 2018, apparently owing to stress.

68. The first applicant was also granted a special transportation permit and an electric moped in order to get around more easily.

69. The Court notes, however, that by the time the decision to refuse family reunification became final on 19 December 2018 the applicants had failed to submit any evidence that the first applicant was incapable of working, or that she had done all that could reasonably be expected of her to earn sufficient income to cover her and her family's expenses (see *Dabo*, cited above, § 113, and compare and contrast *B.F. and Others v. Switzerland*, nos. 13258/18 and 3 others, §§ 127 and 133, 4 July 2023).

70. The Court also notes that there is no indication that the Temporary Restrictions Act did not allow for an individualised assessment of the interests of family unity in the light of the specific situation of the persons concerned under section 13 of the Act, or that such an assessment was not carried out in the applicants' case (see *Dabo*, cited above, § 114).

71. In addition, after 19 July 2021 the Aliens Act was amended so that under Chapter 5, section 3f, it became possible to grant full or partial exemptions from the maintenance requirement if there were considered to be "exceptional reasons" to do so, particularly in situations where the requirement would appear unreasonable, for example, in the case of retired or permanently disabled people (see paragraph 25 above).

(iii) Other relevant circumstances

72. It is not in dispute that there were "insurmountable obstacles" to the applicants enjoying family life in Eritrea. The first applicant's children were born and raised in Sudan, where they were taken care of by their mother until 2014, and thereafter by their maternal grandmother, who came from Eritrea to Sudan for that specific purpose, so that the applicant could travel to Sweden and apply for asylum. The Court is mindful of the strong ties between the

children, their mother and grandmother. However, there is no indication that the applicants were unable to maintain contact, or that the first applicant could not visit her children in Sudan. Moreover, the applicants have not pointed to any particular dependence between the first applicant and her children, or to any difficulties that might have arisen from the fact of their living apart. The Court also observes that the best interests of a child, of whatever age, cannot constitute an unassailable consideration that requires the admission of all children who would be better off living in a Contracting State (see, among other authorities, *Dabo*, cited above, § 120; *M.T. and Others v. Sweden*, cited above, § 82; and *I.A.A. and Others v. the United Kingdom* (dec.), 25960/13, § 46, 8 March 2016).

73. The first applicant's children living abroad in respect of whom family reunification had been requested had never been to Sweden and had no ties to the country other than their relationship to their mother, the first applicant, who was residing there (see *Dabo*, cited above, § 118). It is noteworthy, though, as stated above, that the applicants could have lodged a new request for family reunification at any time. That option is still open to them.

(iv) Conclusion

74. Having regard to the foregoing, the Court concludes that in the circumstances of the present case the domestic authorities struck a fair balance between the interests of the applicants and those of the State in controlling immigration, and that they did not overstep the margin of appreciation afforded to them when refusing the request for family reunification.

75. It follows that there has been no violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

76. The applicants also complained that the decision to refuse family reunification, which became final on 19 December 2018, had amounted to indirect discrimination in breach of Article 14 read in conjunction with Article 8 of the Convention. The former reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

1. The parties' submissions

77. The applicants maintained that they had been discriminated against on the basis of the first applicant's disability. They also argued that the burden of proof should be shifted to the Government.

78. The Government submitted that the complaint should be declared inadmissible. The first applicant had failed to substantiate that she had been unable to work because of her disability or that she had tried to apply for any employment since being granted a residence permit in December 2015. Accordingly, she had failed to demonstrate that she could not find employment and fulfil the maintenance requirement owing to her disability, or that the legislation should have been interpreted in a less restrictive manner because of her disability.

79. Moreover, the applicants' situation had already been assessed under section 13 of the Temporary Restrictions Act, under which a residence permit could have been granted if a refusal would have been contrary to Sweden's international obligations.

80. Lastly, as of 20 July 2021, when the Temporary Restrictions Act ceased to apply, Chapter 5, section 3f, of the Aliens Act introduced exemptions from the maintenance requirement if there were "exceptional reasons" to do so, which covered, among other things, cases of permanent disability.

2. *The third parties' submissions*

81. In their joint third-party submission, the Harvard Law School Project on Disability and the Centre for Disability Law and Policy at the University of Galway referred, among other things, to the Court's case-law, in which the importance of the CRPD had been recognised (see paragraph 29 above).

82. In respect of the maintenance requirement for granting family reunification to persons with disabilities, they pointed to the finding by the CRPD Committee in the case of *Domina and Bendtsen v. Denmark* (see paragraph 30 above).

83. In conclusion, the third parties argued that under the CRPD, which provided protection equivalent to that provided by the Convention, the member States have the following obligations:

- i. ensure that the maintenance requirements for granting family reunification do not bar applicants with disabilities, based on their receipt of social assistance relating to their disabilities;
- ii. provide reasonable accommodations to facilitate family reunification to persons with disabilities, including by modifying reunification rules and procedure that may prevent persons with disabilities from enjoying their rights on an equal basis with others;
- iii. ensure non-discrimination with regard to members of groups who are more likely to experience multiple or exacerbated forms of discrimination and other human rights violations, notably women with disabilities.

3. The Court's assessment

84. Referring to its finding above (see paragraph 43), as regard the fourth applicant, the Court finds this complaint incompatible *ratione materiae* with Article 14 read in conjunction with Article 8 of the Convention within the meaning of Article 35 § 3 (a). It must therefore be declared inadmissible in accordance with Article 35 § 4.

85. As regards the remainder of the applicants, the relevant principles have been set out in, for example, *Biao v. Denmark* [GC] (no. 38590/10, §§ 88-95, 24 May 2016); *Arnar Helgi Lárusson v. Iceland* (no. 23077/19, § 55-56, 31 May 2022); and *Çam v. Turkey* (no. 51500/08, § 54, 23 February 2016). In particular, the Court reiterates that “discrimination” means treating differently, without an objective and reasonable justification, people in relevantly similar situations, and that a difference in treatment is devoid of any “objective and reasonable justification” where it does not pursue a “legitimate aim” or there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently people whose situations are significantly different. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified (see, for example, *Biao v. Denmark*, cited above, § 92).

86. At the outset, the Court observes on the one hand that it is undisputed that the first applicant's mobility was reduced to some extent, that she was unable to perform some kinds of work, including hard physical labour, and that she did not succeed in finding employment in the period from 23 December 2015, when she was granted a residence (and work) permit, until 19 December 2018, when the decision to refuse family reunification became final.

87. On the other hand, the applicants have not submitted any substantiation of their claim that the first applicant was disabled to such an extent that she was unable to work, or that she had applied for work in vain.

88. Moreover, although the Swedish authorities did not immediately exempt the first applicant from complying with the maintenance requirement due to her reduced mobility, it can hardly be said that they failed to support the first applicant in qualifying for and obtaining employment within a field suitable to her, which could allow her in the future to comply with the maintenance requirement. Thus, the first applicant was offered Swedish language courses (followed after December 2018 by both Swedish and English courses, and a work orientated course) (see paragraph 47 above). She was also granted a special transportation permit and an electric moped in order to get around more easily (see paragraph 18 above).

89. Likewise, it is noteworthy that during the relevant period the first applicant lived on social welfare (see paragraph 15 above), which had not been granted on the basis of disability or because the first applicant was not in a position to take up employment (see, *a contrario*, the situation in communication No. 39/2017, *Domina and Bendtsen v. Denmark*, cited in paragraph 30 above).

90. In these circumstances, the Court is not convinced that the applicants have demonstrated a failure on behalf of the Government to treat the first applicant differently because of her reduced mobility or of her incapacity to perform various types of jobs.

91. In any event, the Court is also satisfied that the authorities did assess whether the applicants' individual circumstances, their interests and dependence on each other (or lack thereof) fell under section 13 of the Temporary Restrictions Act, and whether the refusal to grant residence permits to the first applicant's family would be contrary to Sweden's commitments under the Convention.

92. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 8 admissible in respect of the first, second and third applicants, and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 25 July 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Registrar

Ivana Jelić
President