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

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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.

[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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