



**SATELLITE SEMINAR  
JEAN MONNET CHAIR  
EUROPEAN MIGRATION  
STUDIES**

**DREUFARE**  
*Drivers of European Family  
Reunification*

**MARCH 9 - APRIL 1, 2022**



**LE NORME CHE DEFINISCONO IL RICONGIUNGIMENTO FAMILIARE**

**LEGAL FRAMEWORK ON FAMILY REUNIFICATION**

16.3.2022 – DREAUFARE



# TOPICS COVERED IN THE SEMINAR

- Family **reunification**
- International HR framework
- **EU common rules on family reunification** (Directive 2003/86/EC)
- **Italian legal framework** on family reunification
- Family reunification for **refugees**
- Current trends and **case law**

## CATEGORIES OF FAMILY MIGRATION

- Family formation
- Accompanying family
- **Family reunification**
- International adoption



measures adopted  
“in conformity with  
the obligation to  
protect the family  
and respect family  
life enshrined in  
many instruments of  
international law”

- UNESCO defines “family reunion/reunification” as “**the process of bringing together family members, particularly children, spouses and elderly dependents**”. Exercise of fundamental right to family life
- **EU/Italian law: family reunification vs. family cohesion.** The first is a procedure enabling a TCN, legally residing in Italy, to receive **an authorisation for the entry and consequent residence** for some of his family members. The second is the application made from a TCNs **to join or stay** with his/her family member who is a EU/Italian citizen.



# RIGHT TO FAMILY LIFE AND FAMILY REUNIFICATION

## INTERNATIONAL HR TREATIES

- **Art. 17 and 23 International Covenant on Civil and Political Rights:** No one shall be subjected to arbitrary or unlawful interference with his family. **HRC – General Comment No. 15 on the position of aliens** > while it acknowledges that states may control entry of aliens to their territory, it notes that, “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of ... respect for family life arise”.
- **Convention on the right of the child.** Article 9 of the CRC obliges states to ensure that, “a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child”. Article 10 states that States should deal with children’s family reunification in a positive, humane and expeditious manner. Article 22 states that States are required to “trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family”.
- **International Convention on the Protection of Rights of all Migrant Workers and Members of their Families (ICMW).** Article 14, Article 44.
- NB. Non self executing provisions; “facilitate” family reunification (instead of “ensure”).

# RIGHT TO FAMILY LIFE AND FAMILY REUNIFICATION

## ARTICLE 8 ECTHR

- According to the established case-law of the ECtHR, **Article 8 does not guarantee a right to family reunification**. “Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple’s choice of country for their matrimonial residence or to authorise family reunification on its territory.” (recently *Biao v. Denmark*, *Jeunesse v. the Netherlands*, *Tuquabo-Tekle and Others v. the Netherlands*). However, this statement does not prevent the Court from finding violations of the right to respect for family life in cases where family reunion has been denied.
- Recent judgments indicate a **shift in the Court’s approach**. Whilst in earlier judgments an obligation to accept family reunification seemed to be assumed if this was the *only* way to (re)establish family life (*Gül v. Switzerland*, *Ahmut v. the Netherlands*), it was regarded as sufficient in later cases that this was the *most adequate* way to family life (*Jeunesse v. the Netherlands*, *Tuquabo-Tekle and Others v. the Netherlands*).
- In the cases where the ECtHR has assumed a right to family reunification, there **were “insurmountable obstacles“ or “major impediments“ preventing the family from living together in another state**. Most commonly, the Court has found such obstacles to exist when there were other children living in the Contracting State, who could not be expected to leave this state either due to the firm bonds established there or due to their family ties to other persons living there. NB. Where children are involved, their best interests must be taken into account and must be given special weight according to Article 3 of the *Convention on the Rights of the Child*.

# EU LAW ON FAMILY REUNIFICATION: EU CITIZENS

\* RIGHT TO FAMILY LIFE: ART.  
7 CHARTER

- **Family regularisation** is when the resident sponsor wishes to regularise – as a family member – the situation of a family member who is already in the territory either in some other capacity or in an irregular situation.
- **Family reunification** describes situations where the person who is resident in an EU Member State or a CoE member state wishes to be joined by family members left behind when he or she migrated.
- Under EU law, the rules set out in the **Free Movement Directive (2004/38/EC)** apply to third-country nationals who are family members of EU nationals, and who have exercised their right to free movement. **The qualifying family members** are spouses, children under the age of 21, children aged over 21 years but dependent, dependent direct relatives in the ascending line and those of the spouse or partner.
- Under EU law, the Free Movement Directive's provisions relating to the family members of EEA nationals exercising treaty rights make **no distinction between family regularisation and reunification**; it is the relationship between the family member and the EU citizen sponsor that is determinative

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# EU LAW ON FAMILY REUNIFICATION: THIRD COUNTRY NATIONALS

- **Family reunification directive (2003/86/CE):** *family reunification* means the entry into and residence in a Member State by family members of a **third country national residing lawfully** in that Member State in order **to preserve the family unit**, whether the family relationship arose before or after the resident's entry (art. 2, let.d)
- This Directive apply where the sponsor is holding a **residence permit issued by a Member State for a period of validity of one year or more**. This Directive does not apply to members of the family of a Union citizen – to asylum seekers or temporary protection applicants + The Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions
- **Family members whose entry and residence shall be authorised:** sponsor's spouse, minor unmarried children (of the sponsor and his/her spouse), including adopted children.\*
- **Family members whose entry and residence may be authorised:**
  - a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;
  - b) adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.





# EU LAW ON FAMILY REUNIFICATION: THIRD COUNTRY NATIONALS

- Application for entry and residence may be submitted **either by the sponsor or his/her family member**
- The application **shall be submitted and examined when the family members are residing outside the territory** of the Member State in which the sponsor resides. By way of derogation, a MS may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.
- MS may apply requirements and impose **conditions as to the housing, resources and integration measures**. MS require the person to provide evidence that the sponsor has: (a) **accommodation** regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned; (b) sickness insurance; (c) stable and regular **resources** which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the MS
- Member States may require third country nationals to comply with **integration measures**, in accordance with national law.

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- The **ECSR** has stated the following as regards conditions and restrictions of family reunion:
  - a) refusal on health grounds only for specific illnesses that endanger public health;
  - b) a requirement of suitable housing should not be too restrictive;
  - c) a requirement of a period of residence of more than 1 year for is excessive and, consequently, in breach of the ESC;
  - d) migrant workers who have sufficient income to provide for the members of their families should not be automatically denied the right to family reunion because of the origin of such income;
  - e) a requirement that members of the migrant worker's family sit language and/or integration tests in order to be allowed to enter the country, or once they are in the country in order to be granted leave to remain, may constitute a restriction likely to deprive the obligation laid down in Article 19 (6) of its substance and is consequently not in conformity with the ESC.
- According to the ECSR, **refugees** are to enjoy to the full extent the right to family reunification under the ESC. While facilitating family reunification, states have to respond to the specific needs of refugees and asylum seekers

## RIGHT TO FAMILY REUNION UNDER THE EUROPEAN SOCIAL CHARTER (ART. 19)

\* ECSR, CONCLUSIONS 2011,  
BELGIUM, ART. 19 (6)

\* CSR, CONCLUSIONS 2011,  
STATEMENT OF INTERPRETATION  
ON ART. 19 (6).

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# ITALIAN LAW ON FAMILY REUNIFICATION / COHESION

- **Family members of Italian / EU citizens:** Directive 2004/38/CE >> **D. Lgs. 30/2007, cfr. art. 10, 23**( same rules apply to family member of Italian citizens even if they did not exercise their right to free movement)
- **Family members of TCN: Art. 28 – 30 D. Lgs. 286/98**
- Right to family reunification for TCNs sponsors who **reside legally on the ground of a permit to stay longer than 1 year** (for work, study, international protection, family or religious reasons)
- **Family members for which reunification is possible:**
  - a) spouse;
  - b) unmarried children of the sponsor and the spouse (with consensus from the other parent) – including in case of adoption of guardianship (kafala system)
  - c) adult unmarried children of the sponsor or his or her spouse, where they are **objectively unable to provide for their own needs on account of their state of health** (+ “total disability”);
  - d) dependent parents, when they not have other direct relative (children) in the country of origin OR they are older than 65 y.o. and the other relatives cannot provide proper support

# ITALIAN LAW ON FAMILY REUNIFICATION

- **Procedure: activated on the part of the sponsor; 2 steps procedure** (application for “nulla osta” at *Prefettura* + application for family visa to Italian authorities in the country of residence of the family member)\*
- **Proof of family status – through documents or DNA tests:** Art 29, para 1 bis: « If the family status can not be documented in a sure way through certificates issued by competent foreigner authorities, due to the lack of a recognised authority or however when there are founded doubts on the authenticity of the above mentioned documentation, the diplomatic or consular representatives provide for the issuing of certificates, pursuant to article 49 of decree n. 200 of the President of the Republic dated 5 January 1967, **on the basis of a DNA exam** (deoxyribonucleic acid) **at the expenses of the applicant\***
- **Requirements** for presenting a family reunification application: a) **accommodation** that meets health and safety standards (ascertained by municipality offices); b) a minimum annual **income** deriving from legal sources not inferior to the annual amount of the social cheque; c) health insurance for parents older than 65
- The application is rejected if it is ascertained that the marriage or the adoption took place for the sole purpose of enabling the interested party to enter or reside in the State’s territory (issue of marriages of convenience – EC ‘double lock safeguard’)

# REUNIFICATION SUR PLACE / COHESION

- **Italian/EU national > Cohesion**: family reunification with EU or Italian citizens based on directive 2004/38/UE: no requirement for nulla osta/family visa – they can apply for a short Schengen visa to enter in the territory and can then apply for “carta di soggiorno”. Wider spectrum of family members compared to art. 29 (including registered partnerships, dependent adult children over 21 yo, dependent parents)  
  
+ **right to family unity with** Italian first and second degree relative (parents, grand parents, children, siblings) – “cohabitation” is required\*
- **Family reunification “sur place”**: the sponsor is a TCN legally residing on the territory. The family member is the **spouse** (who have been legally residing on the ground of a different permit that expired less than a year before the application), and “cohabitation” is required

## FAMILY REUNIFICATION OF REFUGEES/BENEFICIARIES OF INTERNATIONAL PROTECTION

- No explicit provision in Geneva Convention
- UNHCR, Note on family reunification (UNHCR, August 1981); UNHCR, Guidelines on reunification of refugee families (UNHCR, July 1983);
- In its 2001 background note on family reunification in the context of resettlement and integration, UNHCR identifies five guiding principles which promote and facilitate family reunification:
  - a. The family is the natural and fundamental group unit of society and is entitled to protection by states.
  - b. The refugee family is essential to ensure the protection and well-being of its individual members.
  - c. The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific.
  - d. Humanitarian considerations support family reunification efforts.
  - e. The refugee family is essential to the successful integration of resettled refugees.

# FAMILY REUNIFICATION OF REFUGEES UNDER ARTICLE 8 ECTHR

- In the cases where the ECtHR has assumed a right to family reunification, there were “insurmountable obstacles“ or “major impediments“ preventing the family from living together in another state.
- Insurmountable obstacles preventing return to the country or origin can regularly be assumed in the case of refugees and beneficiaries of subsidiary protection. As long as the risk of persecution or of suffering serious harm persists and as long as there is no third country where the family could live together (typically the spouse’s home country), the weighing of interests should generally result in the acceptance of a right to family reunification in the Contracting State, especially where children are concerned and as long as the family relationship has already existed before the flight.
- As the ECtHR made clear in *Tanda-Muzinga v. France*, refugees are a vulnerable category, and it is necessary for them to benefit from family reunification procedures that are more favourable than those provided for other migrants. Moreover, it referred to Article 10 of the Convention on the Rights of the Child which provides that applications for family reunification should be dealt with “in a positive, humane and expeditious manner”.

# FAMILY REUNIFICATION FOR REFUGEES – EU LAW

ART. 7 CHARTER;  
ART. 24 CHARTER  
DIRECTIVE  
2011/95/UE

- (Recital 36) Family members, merely due to their relation to the refugee, **will normally be vulnerable to acts of persecution** in such a manner that could be the basis for refugee status.
- The definition of family member in Article 2(j) of the QD refers to “members of the family of the beneficiary of international protection who are present in the same Member State in relation to the applicant for international protection” (spouse, children, parents of an unmarried minor). The aim of that definition is to exclude “from family unification, under this Directive, family members that are in the host country for different reasons (e.g. work) or that are in another Member State or in a third country”.
- NB. The definition of family member refers to relationships that “**already existed in the country of origin**” (different from FRD)
- Article 23. MS shall ensure that family unity can be maintained. MS shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 (residence permit

- The Member States may authorise family reunification of **other family members** not referred to in Article 4, if they are **dependent** on the refugee.
- If the refugee is an unaccompanied minor, the Member States: may authorise the entry and residence of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.
- Where a refugee cannot provide official **documentary evidence** of the family relationship, the Member States shall **take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship**. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.
- By way of derogation the Member States shall not require the refugee and/or family member(s) to provide the requirements set out in Article 7 (house, medical insurance, income)
- **Beneficiaries of subsidiary protection ?**

# FAMILY REUNIFICATION FOR REFUGEES – EU LAW

DIRECTIVE 2003/86/EC –  
CHAPTER V



# ITALIAN RULES ON FAMILY REUNIFICATION FOR BENEFICIARIES OF INTERNATIONAL PROTECTION

- Refugees are **exempted from the requirements** of adequate house, sufficient resources (annual income) and health insurance for parents over 65 yo, provided for in Article 29, para 3
- According to Article 29 bis, para 2, “Should the refugee not be able to provide official documents proving his family bonds, **due to his status, or lacking a recognised authority or due to the alleged unreliability of the documents** issued by the local authority, **the diplomatic or consular representatives issue certifications**, pursuant to article 49 of decree n. 200 of the President of the Republic dated 5 January 1967, on the basis of verifications deemed necessary, carried out at the expenses of the parties involved. Moreover, **it is possible to make use of other means capable of proving the existence of the family bond**, among which elements obtained from documents issued by international organisms considered eligible by the Ministry of Foreign Affairs.
- The rejection of the application cannot be motivated exclusively due to the absence of probative documents.
- Article 22, D. lgs. 251/2007: Derogation both for refugees and for **beneficiaries of subsidiary protection status** – their situation is equal

# OBSTACLES – FAMILY REUNIFICATION REFUGEES

- Family reunification, in particular for refugees, is integral to the effective enjoyment of the human right to respect for their family life and to their integration in host societies. However, refugees face many obstacles with regard to the protection of their right to family, in family reunification procedures. Some of the main critical issues are common with (other) family members, while some are specific of beneficiaries of international protection, because of their peculiar situation.
- Main restrictive trends identified by a COE, “Realising the right to family reunification of refugees in Europe”) are:
  1. Differential treatment between **refugees and subsidiary protection holders** (see the case of Germany)\*
  2. Extended family members: **Most national legislation only includes immediate family members in the entitlement to family reunion**. A recent report concluded that “[c]riteria for determining dependence vary widely across Europe, creating a lottery for applicants who seek to be reunified with their family (beyond the nuclear family)”. There often harsh **restrictions on adult children, siblings and elderly**.
  3. Many European states limit refugees’ privileged access to family reunification to the so-called “**pre-flight family**”. However, this ignores the reality that many refugees may have spent long periods in exile or in flight, and have formed families outside the country of origin
  4. **Legal and practical barriers**: formal or informal waiting period; financial cost barriers; particular difficulties in providing official documentation to substantiate their family relationships (empirical studies demonstrate that, all too often, applications are refused for lack of documentation, without providing the opportunity to submit alternative evidence)
  5. **Challenges in refugees’ country or region** of origin hindering family reunification. Some European states do not accept identity and marriage documentation from refugees’ countries of origin, particularly if they are viewed as weak states such as Somalia or Afghanistan, considering the documentation to be unreliable

# CASE LAW ON REFUGEES FAMILY REUNIFICATION – CJEU

- **CGUE, Chakroun, C-578/08, par. 43:** *Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof. [application of limits under art. 7]*
- **CGUE, O.S., C-356/11 and C-357/11, par. 78,79,** *“Article 7(1)(c) of Directive 2003/86 cannot be interpreted and applied in such a manner that its application would disregard the fundamental rights set out in those provisions of the Charter. The Member States must not only interpret their national law in a manner consistent with European Union law but also **make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union**”*
- **CGUE, E., C-635/17** > rejection of the application for family reunification lodged, on behalf of E., by A., an Eritrean national **benefiting from subsidiary protection** in the Netherlands and claiming to be E.’s **aunt and guardian**.
- Application presented by beneficiary of subsidiary protection: *the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law in situations in which, even if the facts of the case in the main proceedings do not fall within the field of application of EU law directly, **provisions of EU law have been rendered applicable by domestic law***

# CASE LAW ON REFUGEES FAMILY REUNIFICATION – CJEU

- Absence of documentary evidence – evaluation of evidence
- 1. the provisions of Directive 2003/86 must be interpreted and applied in the light of Article 7 and Article 24(2) and (3) of the Charter, as is moreover apparent from recital 2 and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life
- 2. As regards the examination by the competent national authorities of the probative value or plausibility of the evidence, statements or explanations thus provided by the sponsor, the necessary case-by-case assessment requires those authorities to take account **of all the relevant aspects, including the age, gender, education, background and social status of the sponsor or the family member concerned as well as specific cultural aspects**
- Article 11(2) of Directive 2003/86 must be interpreted as precluding the application (for fam reun) from being rejected **solely on the ground that the sponsor has not provided official documentary evidence** of the death of the minor's biological parents and, consequently, that she has an actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities **solely on the basis of the general information available concerning the situation in the country of origin**, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin.

# CASE LAW ON REFUGEES FAMILY REUNIFICATION – ITALIAN COURTS

- **Court of Appeal of Rome, n. 284/2020:** The case concerned an Afghan citizen with refugee status who had applied for and obtained the *nulla osta* to be reunited with his two parents living in Afghanistan. However, the Italian Embassy in Kabul had rejected the visa application on the grounds that there was insufficient documentary evidence of family ties, of his parents' status as 'dependent family members' and of the absence of the applicant's brothers in Afghanistan.
- 1. the Court reiterated the important principle of Article 29-bis, which introduces a special evidentiary facility for refugees applying for family reunification and specifically provides that: consular representations must provide assistance and support applicants in finding the necessary documentation, other means of proof may also be used to demonstrate the existence of the requirements for reunification and – in any case – it is excluded that the application for reunification is rejected for the sole lack of documentary evidence of family ties.
- According to the Court of Appeal of Rome, in the present case it was necessary to take into consideration, in evaluating the documentary evidence produced, the situation of internal conflict that still exists in the country, to recognise the existence of serious deficiencies in the registry system and also any discrepancies in the transliteration of the names of family members. All these circumstances cannot legitimately lead to the denial of the right to family reunification for holders of refugee status.
- Finally, the Court reiterated that in the case of parents over 65 years of age, it is not necessary to demonstrate the condition of "dependent family member", but the age of the parent at the time of the decision must be taken into account

# CASE LAW ON REFUGEES FAMILY REUNIFICATION ITALIAN COURTS

- **Court of Appeal of Rome, n. 2975/2020:** Family reunification of a Somali refugee with his mother younger than 65. The applicant had argued that his mother had been living for years in a refugee camp in Kenya and was seriously ill. Proof of filiation was provided by DNA testing.
- As regards proof of the absence of other family members who could take care of the mother, as she was unable to produce a family certificate or the death certificates of her relatives, the mother had resorted to a **self-certification made before a notary in Nairobi and stamped by the Somali Embassy** in which she declared that, following the death of the other family members, the applicant was her only child.
- According to the Court of Appeal, in the absence of any findings to the contrary, the declarations had to be considered to be true, since the Administration was entitled to carry out – even in the course of the proceedings – the necessary investigations to examine whether the declarations were true.
- **Court of Appeal of Rome, n. 2912/2020:** family reunification of a Somali beneficiary of subsidiary protection. The application was rejected because according to the administration there was no proof of the dependency of the family member on the applicant.
- As regards the suitability of the remittances to prove dependent living, the Court's decision had also been based **on further circumstantial evidence**, such as the widowhood of the appellant's mother, her precarious state of health, and the lower cost of living in the country where she lived. Moreover, well-known facts concerning the scarcity of work opportunities in Somalia were brought to light, all the more so for an elderly widow, alone and suffering from heart disease, with the result that it was presumable that the woman could not obtain any income.
- In the light of these considerations, since the existence of the requirements for family reunification had to be considered adequately proven by presumption, **it was up to the administration contesting the circumstance to offer proof to the contrary.**

# CASE LAW ON REFUGEES FAMILY REUNIFICATION – ITALIAN SUPREME COURT

- **Cass. civ. 20127/2021**: Pakistan sponsor applied for family reunification of his dependent parent (mother) younger than 65 yo + other children in the country of origin (not economically independent).
- According to article 29, para 3: fam reunification is not possible for dependent parents who have other children in the country of origin.
- The Court held that art. 29 must be interpreted according to the general principles of directive 2003/86/CE >> based on which family reunification with elderly may generally be requested where they are **dependent** on the refugee, **in the absence of financial support from other children** in the country, and where the applicant can demonstrate that he is supporting them
- Articles 29(d) and 29 bis **must be interpreted in the light of the right to family unity**, without it being necessary, in this case, to make a reference to the Court of Justice for a preliminary ruling: It should be noted, in this regard, that the two hypotheses provided alternatively by the first rule referred to take on a meaning consistent with Article 8 ECHR and with the general principles of the directive examined, through two implicit underlying expressions: for the first hypothesis (dependent parents without children in the country of origin), it is implied "**that they are unable to provide for their own support**"; for the second hypothesis (parents over 65 when the other children are unable to provide for themselves for serious health reasons), it is implied "**even when they are not dependent**"

# TEMPORARY PROTECTION AND FAMILY REUNIFICATION

- **Directive 2001/55/EC: ‘temporary protection’** means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons
- **Right to family (reunification) unity:** in cases where families **already existed in the country of origin and were separated due to circumstances surrounding the mass influx**, the following persons shall be considered to be part of a family:
  - (a) the spouse of the sponsor or his/her unmarried partner in a stable relationship; the minor unmarried children of the sponsor or of his/her spouse;
  - (b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time
- Infra EU States or involving also other third countries?