

PULLED APART – FAMILY LIFE AS EXCLUSIVE CONCEPT

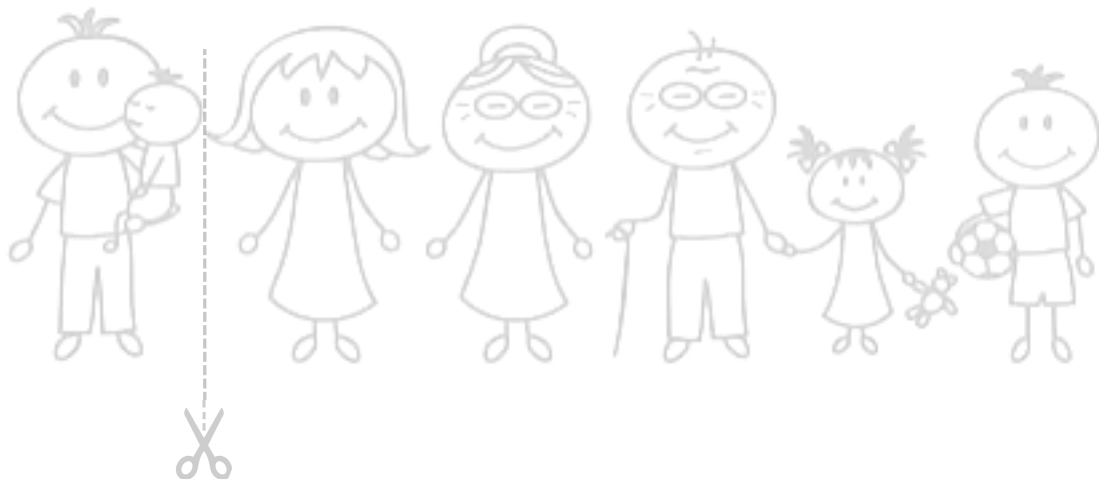


Fig. 1

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One of the primary purposes of civilization - and certainly its primary strength - is the guarantee that family life can flourish in unity, peace, and order.

Robert Kennedy – Former
attorney general of the United
States of America

Chapter I – Introduction

1.1. Introduction

In 2015, Mohab Alkatmeh walked towards his school in Hama, Syria. On his way, he was stopped by two people who put a gun against his head. He was blindfolded and kidnapped by the henchmen of Assad. For 10 days he was held captive before he was released. His life changed from being a student to a war refugee. He started his journey to Europe via dangerous border crossings and illegal boat rides. Once in Europe, he traveled by train to Amsterdam where he applied for asylum which was granted. Once settled he tried to reunite with his family but was unable to do so since no legal basis was found for family reunification.¹ He became an adult just months before his request to family reunification. Family reunification between adult children and their parents is only allowed in cases of established dependency that is more than normal emotional ties. This was not the case for Mohab Alkatmeh and therefore his request got rejected.

The right to Family reunification is essential as multiple international organizations have stressed its importance. The International Labor Organization (ILO) reported in 1975 that family reunion was essential for the well-being of migrant workers and key in the social adaptation to the host state. The ILO stated that “Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life.”² Family reunion as a basis of protection of the family is the key and will not only benefit migrants themselves but also the larger community as it can prevent social and psychological problems.³

In 1983, the United Nations High Commissioner for Refugees (UNHCR) stated that separation of families leads to hardship and creates obstacles to integrate in a new country. Family reunification is important in the resettlement process as it increases the social

¹ Munsterman, R. (2017, March 27). Het ongelooflijke verhaal van Mohab, een Syrische vluchteling die in een Nederlands opvangcentrum een app bouwde. Retrieved from <https://www.businessinsider.nl/het-ongelooflijke-verhaal-van-mohab-een-syrische-vluchteling-die-een-nederlands-opvangcentrum-een-app-bouwde/>.

² Cholewinski, R. (2002), Family Reunification and Conditions Places on Family Members: Dismantling a Fundamental Human Right. *European Journal of Migration and Law*. 4(1), p. 274.

³ Ibid, No. 2.

development of individuals, the social empowerment, and the economic integration.⁴ The European Commission reaffirmed in 1999 that family reunification is essential in making family life possible and to create social and cultural stability as it will help new citizens integrate in their new state of residence. This kind of integration for either refugees or migrants will benefit social cohesion and economic power which are both fundamental objectives of the European Community.⁵

While organizations stress the importance of family reunification it can be hard to get the application for family reunification granted as is the case of Mohab Alkatmeh. Exact numbers on admissions are hard to find as not many countries publish their application statistics on a regular basis. Statistics for the Netherlands exist from 2008 to 2011 where there was on average an 80 percent rejection rate for family reunification which were requested by minors. The Children's ombudsman issued a report stating migration policies need to change as this number was deemed shockingly high. Current numbers show a more positive trend as 75 percent of applications for regular family migrations were granted in 2017. However, only 20 percent of all refugee cases were granted, including the application to family reunification for refugees.⁶ Refugee organization "*vluchtelingenwerk Nederland*" claims the chances for granted family reunification are decreasing as the requirements are increasingly hard to reach and difficult to prove.⁷ Family reunification is not possible for everyone. Adult children, grandparents and other family members are generally not within the scope of family reunification except in cases of dependency with more than emotional ties.

However, many make an attempt to get their family reunited. Situations of war, conflict and unstable violent regimes lead to refugees that want to escape the dangerous environments which will lead to the separation of family members. Also, better economic prospects of other countries make people voluntary leave their home country and as a consequence sometimes have to leave their families behind. In 2016 more than 1.8 million migrants and refugees entered OECD countries for family reasons and this number increased

⁴ UN High Commissioner for Refugees (UNHCR) (1983), UNHCR Guidelines on Reunification of refugee families. Available at: <https://www.unhcr.org/3bd0378f4.pdf>

⁵ European Commission, *Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community*, 12 December 2002, No. 2002/C 325/01, article 2 and 3.

⁶ Ibid, No. 8. ; Immigratie en Naturalisatie Dienst (2019). IND jaarcijfers 2018. Available at: <https://ind.nl/nieuws/Paginas/IND-jaarcijfers-2018-Driekwart-aanvragen-bij-IND-vooral-voor-gezinshereniging,-studie-of-werk.aspx>.

⁷ Vluchtelingenwerk Nederland. (nd.), Hoe zit het nu écht: Gezinshereniging. Available at: <https://www.vluchtelingenwerk.nl/webartikel/hoe-zit-het-nu-%C3%A9cht-gezinshereniging>

to more than 2 million in 2017. Between 2016 and 2017 the percentage of family-based migration increased from 38% to 40%. Family formation and family reunification are by far the largest groups as they together represent 35% percent of all migration and refugee cases, which is the largest category. Larger than for example reasons of free movement (28%), humanitarian reasons (14%), of labor migration (11%).⁸

Many refugees and migrants apply for family reunification, but not all applications are granted. The scope of family life can be limiting. At the same time family life is socially constructed and is shaped by culture and law and therefore changes over time and between different regions. The dynamic character of family life requires a dynamic interpretation of the law to be able to fully provide the protection the ECHR implies to provide. An adequate interpretation of family life would be sufficiently corresponding with social reality. An inadequate interpretation could be problematic for the persons involved as this could lead to the inability to invoke the (indirect) right to family life. The interpretation of family life is core to the protection to the right to family life. The purpose of this thesis is to identify to what extent the legal interpretation of family life is adequate in light of sociological and judicial critiques in the context of family reunification.

1.2 Introduction Legal Framework

European countries experience a big influx in migrants and refugees related to family migration.⁹ As a response, multiple countries have limited their family reunification programs for both migrants and refugees. When stricter rules are applied, it will have implications on cases similar to Mohab Alkatmeh. An international framework would be beneficial to streamline international migration. Unfortunately, no comprehensive international framework manages family migration. Some international instruments include the protection of the family within the scope of their conventions and therefore family reunification can be indirectly included.¹⁰ Within the European Union, multiple documents refer to the right of the

⁸ Cleton, L., et. Al. (2017). *Gezinshereniging van derdelanders in Nederland*. Available at: https://ind.nl/Documents/EMN_rapport_studie_gezinshereniging.pdf ; Immigratie en Naturalisatie Dienst (2019). IND jaarcijfers 2018. Available at: <https://ind.nl/nieuws/Paginas/IND-jaarcijfers-2018-Driekwart-aanvragen-bij-IND-vooral-voor-gezinshereniging,-studie-of-werk.aspx>.

⁹ Ibid, no. 2.

¹⁰ Rohan, Mark (2014) "Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence," *Chicago Journal of International Law*: Vol. 15: No. 1, Article 15. Available at: <http://chicagounbound.uchicago.edu/cjil/vol15/iss1/15>

family life. The two most important documents related to family are the European Convention on Human Rights (ECHR)¹¹ and the Family Reunification Directive of the European Union. These two documents have a direct impact on national legislation of the European member states.

The Family Reunification Directive of the European Union focusses on family reunification. The directive is only applicable for legally residing third-country nationals who ask to be reunited with their third-country national family members. This directive is not applicable for citizens of any of the EU member states as article 3(3) states that the “directive shall not apply to members of the family of a Union citizen”.¹² The directive is only applicable for the nuclear family. The application of other family relations are left to the discretion of the state. Only refugees are given more favorable rules regarding migration as there is, for example, no need for a certain minimum income level and no need for compulsory civic integration abroad.¹³ They do however have to apply for family reunification within 3 months. Otherwise refugees have to meet the same conditions as regular migrants. The European Commission found that this directive showed minimal impact as it did not streamline family migration policies between countries.

National legislation of all European states have to meet the minimal requirements of the European Convention on Human Rights. Article 8 is the right to respect for private life and family life and is the most relevant article for family reunification. Article 8 states that “1. Everyone has the right to respect for his private and family life, his home and his correspondence.”.¹⁴ States have the inherent sovereign right to create and organize rules on who has the right to remain in their territories and under what circumstances. Policies regarding family reunification are left to the discretion of the state. However, rejections cannot violate article 8 of the ECHR as all states that are a party to the convention have committed to safeguard human rights that are listed in the convention and therefore also the right to respect for private and family life. The protection of these fundamental rights is always important, but especially when state interests conflict with those fundamental human rights.

¹¹ Ibid, No. 8, Article 8.

¹² Council directive 2003/86/EC on the right to Family Reunification. (2003) *Official Journal* L251/12.

¹³ Ibid, No. 8.

¹⁴ Ibid, No. 12.

1.3 Research Question

Article 8 ECHR does not provide a clear definition of family life. Different scholars point out that the current interpretation of family life by the European Court of Human Rights (ECtHR) is insufficient and should be broadened. One of the main arguments is that the current definition is not in line with a sociological understanding of family and therefore creates a gap between the legal interpretation and the social reality with inadequate human rights protection as result.¹⁵ This is the case when family reunification is not allowed because family life is not sufficiently established in legal terms, but family life is established in social reality. This thesis will study the legal interpretation of family life in the context of family reunification and relate this to sociologic and judicial critiques to study the adequacy of the definition. Therefore, the main question of this thesis is:

To what extent is the interpretation of family life by the European Court of Human Rights, as stated in article 8 ECHR, related to family reunification adequate in light of sociological and judicial critiques?

Q1: How is family life legally understood by the European Court of Human Rights in the Context of Family Reunification?

Q2: What are the sociological and judicial critiques on the legal interpretation to family life related to family reunification.

To answer this question this thesis will focus on the two sub-questions above to find a comprehensive answer. A final chapter will focus on the cases of *Senchishak vs. Finland*¹⁶ and *Anam vs. the United Kingdom*¹⁷ that will illustrate the gap between the legal definition of family life as understood by the European Court of Human Rights and the social reality.

¹⁵ Golding, M. P. (2009). *The Blackwell guide to the philosophy of law and legal theory*. Oxford: Blackwell, Chapter 1, Natural Law Theory

¹⁶ *Senchishak v Finland*, App No 5049/12, ECtHR judgment of 18 November 2014, para 55.

¹⁷ *Anam v UK*, App No 21783/08, ECtHR decision of 7 June 2011.

1.4 Methodology

To be able to study to what extent *the interpretation of family life by the ECtHR, as stated in article 8 ECHR, related to family reunification is adequate in light of sociological and judicial critiques*, this thesis will try to answer two sub-questions as stated earlier. The focus of this thesis will be only on family reunification as protected by article 8 of the ECHR. The Family Reunification Directive of the European Union is not included in this thesis as it has only a limited scope. EU citizens are excluded from the scope of the directive¹⁸ and it is not applicable in the whole European Union as it is not applicable in the United Kingdom, Ireland and Denmark. Article 8 of the ECHR offers minimum requirements to the protection of family life and the ECtHR can test whether or not the national legislation is in accordance with the ECHR. With the dynamic character of family life across Europe it is important that the minimum requirements and the social reality of family life are harmonized.

Chapter II and III will focus on *Q1: What is legally understood as 'family life' in by the European Court of Human Rights in the Context of Family Reunification?* Chapter II starts by providing a historic overview with a focus on the context and nature of article 8 ECHR. The legal framework will give context to the main question. After discussing the legal framework, the connection between family reunification and family life of Article 8 ECHR will be explained. The main source of information will be found in the legal texts itself and in the jurisprudence of the European Court for Human Rights supplemented by background texts such as legal commentary or legal scholars.

Chapter III has an explorative nature. It will be studied which interpretation of family life is used by the ECtHR related to family reunification. The selection of cases and jurisprudence is done by different criteria. The cases that are used are either referred to by different legal handbooks or by judgements themselves. They do not directly have to concern family reunification as the court will judge family reunification cases on the established case law relating to the establishment of family life. The interpretation of family life is important for the admissibility of cases for the court. Whether or not there was a violation of article 8 ECHR is due to factors such as proportionality and necessity in a democratic society. This is not

¹⁸ Ibid, No. 12

directly related to the interpretation of family life by the ECtHR and therefore will not be included in this thesis.

Chapter IV of this thesis focuses on *Q2: What are the sociological and judicial critiques on the interpretation of family life by the ECtHR' related to family reunification*. This chapter is explorative as it studies critiques by sociological and legal scholars and examine their interpretation of family life. Sociological and judicial critiques are examined separately. This section will focus on the groups that are possibly excluded and study if this is reasonable. Academic literature of different scholars will be used to analyze the scope of family life in the context of Article 8 ECHR.

Chapter V has an exemplary purpose as it highlights two cases related to the sociological and judicial critiques as there is a possible gap between social reality and the legal definition of family life. The first case is the case of *Senchishak vs. Finland*.¹⁹ This is the case of an elderly woman in Russia who applied to be reunified with her adult daughter in Finland and where family reunification was rejected. The second cases is *Anam vs. the United Kingdom*. This is a case of family reunification of adult relatives due to reliance upon each other.²⁰ These cases were selected because multiple scholars name these cases as landmark cases as they clearly show the working and considerations of the ECtHR related to family reunification.²¹ The considerations of the court are analyzed and contrasted with the sociological and judicial critiques that are put forward by multiple scholars and summarized in Chapter IV.

Chapter VI Will offer a final conclusion by summarizing the findings of the different chapters. It will provide an answer to the main question and discuss the shortcomings of this thesis.

¹⁹ *Senchishak v Finland*, App No 5049/12, ECtHR judgment of 18 November 2014, para 55.

²⁰ *Anam v UK*, App No 21783/08, ECtHR decision of 7 June 2011.

²¹ Draghici, C. (2018). Adult Children and Elderly Parents in Strasbourg Proceedings: A Misconstrued Approach to 'Family Life.' *International Journal of Law, Policy and the Family*, 32(1), 42–62. doi: 10.1093/lawfam/ebx018. ; Askola, H. (2016). (No) Migrating for Family Care in Later Life: *Senchishak v Finland*, Older Parents and Family Reunification. *European Journal of Migration and Law*, 18(3). doi: <https://doi.org/10.1163/15718166-12342106>.; Schabas, W. (2015). *European Convention on Human Rights: a commentary*. UK, Oxford University Press.; Alexandrescu, M. (2016). *The Refugee crisis in the European union: between the fundamental human rights and the efforts towards securitization*. Cluj-Napoca, CA Publishing, p. 391-392

Chapter II – Legal Framework

This part of the thesis studies (Q1) *How is family life legally understood by the European Court of Human Rights in the Context of Family Reunification?* To what extent someone is protected under the right to family life is completely dependent on the interpretation of family life itself. To study how family life is understood by the ECtHR in the context of family reunification, a deeper understanding of the context is needed.

2.1 Legal Framework

The ECHR is the backbone of European Human Rights protection. In the preamble of the ECHR, all the parties to the conference reaffirm that justice and peace in the world can only be achieved by protecting the fundamental freedoms and human rights. However, fundamental rights can become contested when the interest of the state is not in line with the purpose of the ECHR. One of the areas where this is the case, is in the field of migration law. States are allowed to put conditions and restrictions on the entry of people to its territory, as long as this is within the obligations of international law. Parties to the ECHR have to implement these human rights into their own national legal system. How they do that is up to the member state itself. This is called the margin of appreciation.

The margin of appreciation is the margin that the ECtHR gives to contracting parties to translate the obligations under the ECHR to their own domestic legislation. This means contracting states have some room for manoeuvre to fulfill their obligations under the ECHR²². The margin of appreciation is not used in the text of the convention itself. Organs from Strasbourg have developed the concept to deal with different kinds of cases over the years. The margin of appreciation is most commonly used in article 8 to 11 of the ECHR. All of these articles have a similar structure. The first paragraph states the rights, while the second paragraph provide possible exceptions. The structure of the two paragraphs makes it possible that different states have different interpretations to the obligations under the ECHR.²³

²² Greer, S. (2000). The margin of appreciation: interpretation and discretion under the European Convention on Human Rights. Council of Europe Publishing, No. 17.

²³ Ibid, No. 22.

There is no unlimited power of appreciation by the contracting states. The ECtHR is responsible to provide a final ruling on whether the contracting state upholds their obligations under the ECHR. When determining the breadth of the margin of appreciation, multiple factors are taken into account. When the individual's identity or existence is at stake, the margin of appreciation will be limited. Competing interests such as public and private interests, could trigger a wider margin of appreciation. However, it still has to be in correspondence with paragraph 8(2) as these are the only exceptions.²⁴ A wider margin of appreciation will be allowed for cases with a high moral or ethical character where there is no consensus among the contracting states. However, even when no consensus exists, the final evaluation of reasons for interference are subject to review by the ECtHR.²⁵

2.2 Article 8 ECHR

States do have certain international obligations towards refugees and migrants. Refugees and migrants that entered Europe also have inherent individual rights and are protected under the European Convention of Human Rights. But it remains unclear to what extent the member states have the obligation to protect the family union. There is no direct law that protects or takes care of family reunification. The term family reunification is not used within any of the human rights treaties and therefore hard to pinpoint directly. However, the fact that a right is not directly included in the ECHR does not mean that the indirect violation cannot occur. The most important article related to family reunification is article 8 of the ECHR which is the right to respect for private and family life. The latter part of this article, the right to respect for family life, gives an opening for the indirect right to family reunification.²⁶ Article 8 of the ECHR is the right to respect for private and family life. It states that:

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

²⁴ Schabas, W. (2015). *European Convention on Human Rights: a commentary*. UK, Oxford University Press.; Alexandrescu, M. (2016). *The Refugee crisis in the European union: between the fundamental human rights and the efforts towards securitization*. Cluj-Napoca, CA Publishing, p. 391-392.

²⁵ Ibid, No. 22.

²⁶ Ibid, No. 15, p. 271.

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.”²⁷

The first article of article 8 is divided into four categories namely private life, family life, home, and correspondence. The name of article 8 is the “the right to respect for private and family life”. Only private and family life are in the title and also receives more attention in jurisprudence than the other two categories.

Article 8 ECHR can be understood as entailing both a negative and positive obligation for the state. A negative obligation is when a state is not allowed to act in a way that interferes with a right without any sufficient justification. The European Court of Human Rights has stated that the objective of article 8 ECHR is to protect individuals against arbitrary interference of the state in the private or family life of an individual. Article 8(2) specifies that justified interference must be lawful. It specifies a list of possible state interests such as national security, public health and the prevention of disorder. If the state goes beyond the limits of article 8(2) there can be a violation of the person’s private or family life. As the state must refrain from interference in the private sphere of individuals this is described as a negative obligation.²⁸

A positive obligation is when a state must actively ensure that individuals can enjoy certain rights. In relation to article 8 ECHR, it shows that there is a positive obligation for states as well. As article 8 is there to protect the private and family life of individuals against arbitrary interference it implies that must be actively protecting as well. The European Court of Human Rights has explicitly noted that “Article 8(1) signifies firstly that the state cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 8(2). [...] the object of the Article is essentially that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.”²⁹ States have an obligation to provide effective protection of article 8 to the extent that

²⁷ Ibid, No. 11.

²⁸ Ibid, No. 35, p. 570.

²⁹ Marckx v. Belgium, Application No. 6833/74, ECtHR, 13 June 1970, §31.

individuals can fully enjoy their guaranteed rights. This active protection is considered a positive obligation.³⁰

The positive and negative obligations of the state under article 8 ECHR are hard to define. This is also not necessary as the function of both are similar in outcome. In both cases, it is essential to strike a fair balance between the interests of the state and the interests of the individual as they can be competing.³¹

2.3 Right to family reunification

The first time migration and article 8 were linked to each other was in the *Abdulaziz, Cabales and Balkandali v. United Kingdom* case (1985). The commission stated that “the right of a foreigner to enter or remain in a country was not guaranteed by the Convention, but immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a state where members of his family were living might raise an issue under article 8.”³² This is when the indirect right to family reunification was born. States are not directly bound by international law to guarantee a right to family reunification. However, the European Court for Human Rights has established that under certain circumstances the right of family reunification could be indirectly recognized under article 8 of the ECHR.³³

One of the essential parts of article 8 is whether or not there was established family life. Article 8 does not provide any definition or even an indication of what that family life would entail. When the court is asked to examine whether or not article 8 is violated in case of the refusal of family reunification by a member state, the court first has to examine whether or not there was existing family life. The court has referred to family life as an autonomous concept that depends on close personal ties but since no set definition was given the court had to create its own reasoning and case-law.³⁴

³⁰ Connelly, A. (1986), Problems of Interpretation of Article 8 of the European Convention on Human Rights. *International and Comparative Law Quarterly*. v35, p. 572-573.

³¹ Costello, C. (2016). *The human rights of migrants and refugees in European law*. Oxford: Oxford University Press. Ch. 4.

³² *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94

³³ *Ibid*, No. 2, p. 275-276.

³⁴ Kasper, K. (2013) ‘The main principles of family reunification before the European Court of Human Rights’, *migration to the center project*, p. 2

The ECHR is drafted in line with the principles of the Vienna Convention on the Law of Treaties (1969). There it is stated that the convention should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".³⁵ Connelly (1986) claims that the *travaux préparatoires* shows that Article 8 ECHR is based on article 12 of the UDHR. Parts have been rewritten and therefore now has slightly different wording.³⁶ Therefore article 12 might give some insight into the meaning of the concept of family life. Article 12 reads that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."³⁷ This does not further define family life and there is no case law that might help develop the concept of family life.

The European Commission stated that the purpose behind the ECHR is to protect and promote the common values of all member states that are connected to the western liberal democracy. In the preamble, this is described as the "common heritage of political traditions, ideals, freedom and the rule of law".³⁸ Some limits to the interpretation of family life are that it has to be in line with the ideals and traditions of the western liberal democracy. However, it does not give clear guidelines. Article 12 of the ECHR does define family a bit more as it there is stated that "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".³⁹ This then defines family in the most narrow way namely solely as the nuclear family of a heterosexual couple with children. But since no clear definition of family life can be found relating to article 8 in the treaty itself this thesis will study case law to find what interpretation of family life the ECtHR has.

³⁵ Ibid, No. 30.

³⁶ Ibid, No. 30. ; Collected Edition of the Travaux Préparatoires, Vol.I, p. 196.

³⁷ Ibid, No. 12, art. 12.

³⁸ Ibid, No. 30.

³⁹ Ibid, No. 11, article 12.

Chapter III – ECtHR Case law

3.1. Couples

In 1986 the ECHR established that marriage was not essential for the creation of family life. The Guide to article 8 of the ECHR, written by the Council of Europe, confirms this⁴⁰ and recalls the case of *Johnston and Others v. Ireland* (1986).⁴¹ The Court had to decide whether or not family life was established when a couple that had been living together for fifteen years. Because the couple showed commitment by living together for a long time the court decided that family life was established. Consequently, their family life fell within the scope of the protection of article 8. Schabas (2015) explains that the court established that family life is not just marriage-based relationships but also other factors that might establish family life.

Because the court looks beyond marriage-based relationships and focusses on *de facto* family ties in relation to family life the court has to look at other factors that result in *de facto* family ties. In the case of *Van der Heijden v. the Netherlands* (2012), the court noted that other factors such as the length of the relationship, whether the couple lives together or the commitment to have children could be considered.⁴² However, none of these indicators are decisive when it comes to established family life. Just having children alone is not sufficient to establish family life as there are cases of one-night stands that resulted in having a child, where family life was not established.⁴³ Many factors need to be taken into account to establish family life and none of them are consistently decisive. The court sums this up in the case of *Krušković v. Croatia* (2011) where the court said that ‘the notion of “family life” in Article 8 is not confined solely to marriage-based relationships but may also encompass other *de facto* “family ties” where sufficient constancy is present’.⁴⁴

Schabas notes that while all this is the case for heterosexual couples, for a long time this was not the case for same-sex couples.⁴⁵ The case of *Estevez v. Spain* (2001) was about the recognition of the relationship between a man and his deceased same-sex partner. The

⁴⁰ Council of Europe: European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, 31 December 2016

⁴¹ *Johnston and Others v. Ireland*, no. 9297/82, 18 December 1986

⁴² *Van der Heijden v. the Netherlands* [GC], no. 42857/05, 3 April 2012, § 50.

⁴³ *Ahrens v. Germany*, no. 45071/09, 22 March 2012

⁴⁴ *Krušković v. Croatia*, no. 46185/08, 21 June 2011, § 18

⁴⁵ *Ibid*, No 24, p. 389.

claim was about both unequal treatment of same-sex couples and submitted a complaint about “unjustified discrimination which infringed his right to respect for his private and family life”.⁴⁶ The court responded that the case was inadmissible due to the fact that the difference in treatment of family life fell within the state’s margin of appreciation. It was noted that there was a European trend towards judicial recognition of same-sex relationships however there was no consensus between all contracting states. Therefore, the relationship between the man and his deceased partner is outside of the scope of article 8 ECHR.⁴⁷

The guide to article 8 ECHR noted that court reviewed its opinion on the inclusion of same-sex marriages in the scope of article 8, in the case of *Schalk and Kopf v. Austria* (2010). Although the court still believed that the same-sex marriages are left to state regulation⁴⁸, it saw a transition in European attitudes towards same-sex relationships. Therefore, it would be “artificial to maintain the view that [...] a same-sex couple cannot enjoy family life for the purposes of Article 8. Consequently, the relationship of the applicants [...] falls within the notion of family life.”⁴⁹

In conclusion, family life is not solely based on marriage. Other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto “family ties”. There are other factors that could be considered. While the court first did not include same-sex couple within the scope of family life, this got reviewed in 2010 as there was a transition in European attitudes.

3.2 Relation to children

Other factors can be used to establish family life, such as the relationship between a child and a parent. It was early established that the “mutual enjoyment by parent and child of each other’s company is a fundamental element of family life”⁵⁰. However, this does not mean that this fundamental element is absolute. Family life can be ruptured or may not exist due to domestic judicial restrictions. The court made clear that the scope of family life in article 8 ECHR is broad and had to be studied on a case by case basis.

⁴⁶ *Mata Estevez v. Spain*, no. 56501/00, ECHR 2001-VI

⁴⁷ *Ibid*, No 46.

⁴⁸ *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010, § 60-61

⁴⁹ *Ibid*, No. 48, § 93–94

⁵⁰ *Eriksson v. Sweden*, 22 June 1989, Series A no. 156, § 58.

In the case of *Marckx v. Belgium* (1979) it was established that there is an instant family bond between a mother and a child which is unrelated to the marital status of the mother.⁵¹ An added important factor can be that the mother is still present in the life of the child. In this case, it was noted that Paula Marckx took responsibility for her daughter, Alexandra, from the moment of her birth and has continuously cared for her, with the result that a real family life existed and still exists between them.⁵²

Schabas noted that the court reached a similar conclusion in the case of *Berrehab v. the Netherlands* (1988).⁵³ The residence permit of the father was withdrawn and had to return to Morocco, after the divorce from his wife whom he has a child with. The Netherlands claimed that family life was ruptured because the father was living in Morocco. The court decided differently and stated that “A child born of a marital relationship is *ipso jure* part of that “family” unit from the moment and by the very fact of his or her birth”⁵⁴. The court does note that it is possible for family life between a parent and a child to get ruptured, however, it does not specify when that is the case. Instead, the court highlights the importance of *de facto* close personal ties in cases similar to this one.⁵⁵

Relating to non-biological children the question of whether or not family life is established becomes more difficult as can be found in the guide to article 8 ECHR.⁵⁶ In the case of *Moretti and Benedetti v. Italy* (2010) the court concluded that family life could be established between parents and their foster child they wanted to adopt. The parents proved their commitment towards the relationship by taking the child on holidays. Psychological reports state the deep integration between the foster child and the existing family.⁵⁷ The court took into account the best interest of the child, the personal ties between the child and the parents and the time the child was in contact with the existing family when evaluating whether or not family life was established.

Campanelli v. Italy (2017) is a case about a couple that wanted to have a baby and therefore resorted to Russia where an embryo of unknown donors was placed in a surrogate mother. After the baby was born the couple took the baby to Italy and registered the baby as

⁵¹ *Marckx v. Belgium*, no. 6833/74, 13 June 1970, § 31

⁵² *Ibid*, No 51.

⁵³ *Berrehab v. The Netherlands*, no. 10730/84, judgement of 21 June 1988, §21

⁵⁴ *Ibid*, No. 53.

⁵⁵ *Ibid*. No. 53.

⁵⁶ *Ibid*, No. 40, p. 54.

⁵⁷ *Moretti and Benedetti v. Italy*, no. 16318/07, 27 April 2010, § 48

their own. The local authorities removed the baby after 8 months from the parents as the surrogate procedure was illegal under Italian law. The court decided that no family life was established since there was no biological bond, the legal status of their relationship was insecure and the period of 8 months the baby lived with the parents was relatively short.⁵⁸ It was further noted that the right to family life does not equal a right to adopt or a right to establish a family. The court always looks at *de facto* relationships on a case by case basis in relation to existing law and therefore no overall conclusion can be drawn towards non-biological children and their parents.⁵⁹

As can be seen, mutual enjoyment by parent and child of each other's company is a fundamental element of family life. This is not absolute as family life can be ruptured in extreme cases. The court has a wide interpretation of family life related to children and their parents as also non-biological children can fall within the scope of family life. The court notes that the right to family life does not equal a right to adopt and therefore always looks at the *de facto* relationships on a case by case basis.

3.3. Other relationships

The establishment of family life between a couple or a parent and a child are well established. With other family relationships it is more difficult to prove family life. Family life between siblings can exist. Schabas⁶⁰ highlights the Mustafa and Armağan Akin v. Turkey case (2010). Here a couple with two children got divorced. Both parents got custody over one of the children and the children only got exchanged for small periods over the year. The father of the children claimed that this ruling would breach article 8 ECHR since both children were not able to see or interact with each other. The court decided that there was indeed a violation of the family life of the children.⁶¹

The relationship between grandparents and grandchildren can be established as shown in the T.S. and J.J. v. Norway case (2016). This is a case a grandmother wanted to stay in contact with her grandchild who was put in foster care after his mother died. The father was not able to take care of him. The court here confirmed that there may be family life

⁵⁸ *Paradiso and Campanelli v. Italy*, no. 25358/12, 24 January 2017, §141

⁵⁹ *Ibid*, No. 58, §141-142

⁶⁰ *Ibid*, No 24, p. 389.

⁶¹ *Mustafa and Armağan Akin v. Turkey*, no. 4694/03, 6 April 2010

between grandparents and grandchildren because there were “sufficiently close family ties between them. [...] cohabitation is not a prerequisite, as close relationships created by frequent contact is also sufficient. The grandchild and grandmother were in frequent contact before the child was put into foster care and therefore the court considered this relationship as established family life”.⁶²

The relationship between a grandmother and grandchild can be considered family life, however, the protection under article 8 ECHR is not as strong as between other relationships. The guide to article 8 ECHR explains that the principle of mutual enjoyment of the company between a child and a parent can be applied in the relationship between grandparents and their grandchildren. However, the court considers this relationship is of a different nature and therefore can count for lesser protection under the ECHR due to the higher level of separation.⁶³

Draghici (2018)⁶⁴ points out that recent case law of the ECtHR established that relations other than the nuclear family do not have the same level of protection as the nuclear family. The court established the element of “dependency with more than normal emotional ties”. It was introduced in the case of *Slivenko v. Latvia* (2003). Ms. T. Slivenko was born in Estonia in 1952 but moved with her parents to Latvia when she was one month old. When she became an adult, she met and married in 1980 N. Slivenko, a soviet military officer. In 1981, T. Slivenko gave birth to a daughter. After Latvian independence, the whole family was ordered to leave the country since N. Slivenko was a former soviet military officer. At the ECtHR, they claimed interference with their right to family life because of their relationship with her parents in Latvia. The court responded that “the existence of family life could not be relied on by the applicants in relation to the first applicant's elderly parents, adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family.”⁶⁵

Another case where more than emotional ties was not established was in the case of *Javeed v. the Netherlands* (2001). Ms. Javeed moved from the United Kingdom to the Netherlands in 1984 to take care of the four children of her brother whose wife departed.

⁶² *T.S. and J.J. v. Norway*, no. 15633/15, 3 November 2016, §23

⁶³ *Vesna Kruskic and others v. Croatia*, no. 10140/13, 24 November 2014, §110. ; *Ibid*, No. 40, p. 67-68.

⁶⁴ Draghici, C. (2018). Adult Children and Elderly Parents in Strasbourg Proceedings: A Misconstrued Approach to ‘Family Life.’ *International Journal of Law, Policy and the Family*, 32(1), 42–62. doi: 10.1093/lawfam/ebx018.

⁶⁵ *Slivenko v. Latvia*, no. 48321/99 EC, 9 October 2003, §97.

After a couple of years, the brother remarried and gained full custody of his children again. Therefore, there was no reason for Ms. Javeed to stay in the Netherlands. The court accepted that there was established family life. However, since the nieces grew up and almost reached maturity, this was not the case anymore. Since she was not taking care of the children anymore there was no establishment of more than normal emotional ties and therefore no ties of dependence. Consequently, the court decided the situation fell outside of the scope of article 8 and therefore declared the case inadmissible.⁶⁶

Draghici (2018) claims that it can be hard to prove a case of dependency. One of the rare cases that she puts out, where more than emotional ties were proved was the case of *Anam v. the United Kingdom* (2011).⁶⁷ Mr. Ruhul Anam was born in 1970 in Bangladesh and came with his parents to the United Kingdom in 1984. The whole family was allocated the right to remain in the country. The United Kingdom wanted to deport Mr. Anam due to his criminal behavior. The applicant claimed interference with his right to family life but since he was an adult, he had to prove more than normal emotional ties. He claimed he was more dependent on his family because of his mental health problems as he suffered from paranoid schizophrenia. The court decided that “regards the applicant’s alleged family life in the United Kingdom, the Court observes that the applicant claims to be particularly dependent on his mother and siblings because of his mental health problems [...]. The Court accepts that the applicant has a higher degree of reliance on his mother and adult siblings than other adults as a result of his diagnosed mental health problems and finds, for this reason, that family life exists between them”.⁶⁸

In conclusion, there are cases of siblings, grandparents and adult children that are considered to fall within the scope of family life as set out in article 8. However, these relationships are not as strong as those of the nuclear family. Therefore, the court created an additional element: the element of dependency with more than normal emotional ties. This extra threshold is hard to reach as the cases in the previous paragraphs exemplify.

⁶⁶ *Javeed v. The Netherlands*, no. 47390/99, 3 July 2001

⁶⁷ *Ibid*, No. 64, p. 46.

⁶⁸ *Anam v UK*, App No 21783/08, ECtHR decision of 7 June 2011.

3.4 Sub-conclusion

Relating to “Q1: *What is legally understood as family life by the European Court of Human Rights in the Context of Family Reunification?*” the overall conclusion is that the establishment of family life is mainly dependent on *de facto* relationship between persons. The case law of the ECtHR shows the concept of family life is broad and has to be studied on a case by case basis. However, some commonalities can be found. The relationship between couples is not solely based on marriage. Other indicators like the length of the relationship, cohabitation or commitment to have children can establish family life under article 8 ECHR. The mutual enjoyment by parents and children of each other’s company is a fundamental element of family life and therefore can only be ruptured in very specific cases. Historically family outside the nuclear family was also included under the protection of article 8, however, in more recent cases, the court put stricter conditions on extended family members like adult children or elderly parents. The court established the element of dependency with more than normal emotional ties before the relationship can be regarded as family life. Only very few cases reached this threshold and were therefore protected under the right to family life.

Chapter IV – Social & Judicial Critiques

This chapter will focus on *Q2: What are the sociological and judicial critiques on the legal interpretation to family life related to family reunification.* First, this chapter will go into sociological views on what a family could be. Next the focus will be on judicial critiques. The critiques focus on the position of groups that have an uncertain position under article 8 or have an additional threshold. Therefore, no critiques will focus on the nuclear family as these relationships are the best protected under article 8. Old critiques focus on the status of same-sex couples. However, in 2010 the court reviewed its opinion and therefore the same-sex couple also enjoy protection under article 8.

4.1 Sociological Critiques

Jayakody (2008) focusses on the dynamic nature of family life. Norms, beliefs, and perceptions of the notion of family life are changing and therefore also influence the behavior and relationships within a family. This is a global phenomenon as in most places the age at marriage has risen dramatically, as well as the level of premarital sex. Contraceptives became common, fertility rates dropped and the power relation between men and women is changing.⁶⁹

Concepts such as family and marriage are social constructs shaped by culture and law. Because the concept of family changes over time and between cultures, no universal definition of family has been agreed upon. Family relationships differ between countries. A spouse is generally accepted as the husband or wife who are in relationship with each other. A second wife would not be considered a spouse in France as polygamy is illegal. In Saudi Arabia, a second wife would be considered a spouse due to the fact the country has a broader understanding of marriage. Similar differences can be found in the concept of a child and in same-sex marriages. With the increased migration in the last decades, these cultural and legal concepts of the family become even more difficult to separate as they become more interlinked to other concepts of family such as polygamy.⁷⁰ The dynamic character of family

⁶⁹ Jayakody, R., Thornton, A., & Axinn, W. (2008). *International family change: ideational perspectives*. New York, NY

⁷⁰ Demleitner, N. (2003). How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers, p. 351-352.

life requires a dynamic interpretation of the law to be able to fully provide the protection the ECHR implies to provide.

Connelly (1986) advocates for a broad interpretation of family life to allow for different family formations because of the human need for close relationships. A narrow definition could work in an exclusive way as most Western Democracies restrict family life to the nuclear family which will result in blind spots for cultural differences.⁷¹ The argumentation that the ECHR should include different forms of family life such as non-western forms of family life, does not stand. The ECHR states that the purpose behind the ECHR is to protect and promote the common values of all member states that are connected to the western liberal democracy.⁷² This means that some utter boundaries of family life are given as it has to be in line with the ideals and traditions of the western liberal democracy is this is the purpose of the whole ECHR. This suggest the existence of a comprehensive European concept of family life.

Many studies show that a comprehensive European concept is non-existent. One study showed that there are clusters within Europe that have different cultural values towards family life.⁷³ Differences can be found between more conservative styles of family life, which are more predominant in South-, Central-, and Eastern Europe. While Western- and Northern Europe have a more liberal approach. This manifest itself in the different ages of marriage and the numbers of children born outside of marriage.⁷⁴ The ECtHR account for these discrepancies by giving the margin of appreciation in the legal interpretation of family life.

Studies have shown that there are multiple ways of caring for children. In many countries like the Netherlands, Hungary, and Poland there are grandparents that provide for some portion of child care compared to other countries where this is not the case. Research shows that this depends on social policies as well as social values and norms. Similar differences can be found when comparing the numbers of adult children still living with their aging parents or adult children caring for aging parents.⁷⁵ This shows that there are different

⁷¹ Ibid, no. 23, p. 388

⁷² Ibid, No. 30.

⁷³ Vlimmeren van, E., Moors, G., Gelissen, J., (2016). Clusters of cultures: diversity in meaning of family value and gender role items across Europe. *Qual Quant* (2017) 51:2737–2760.

⁷⁴ Oláh, L. (2015). Changing families in the European Union: trends and policy implications. *prepared for the United Nations Expert Group Meeting, "Family policy development: achievements and challenges"*. Available at: <https://www.un.org/esa/socdev/family/docs/egm15/Olahpaper.pdf>

⁷⁵ Jappens, M., Bavel van, J. (2012). Regional family norms and child care by grandparents in Europe. *Demographic Research*. 27(4), 85-120. Doi: 10.4054/DemRes.2012.27.4

forms and values within Europe towards the inclusion of adult relatives within the family life. This is more problematic since these kinds of relationships are not directly protected under article 8 ECHR as the court established the extra element of dependency with more than normal emotional ties.

While article 8 brings some elasticity to what a family is and could be, the relationship of adults and their aging parents are generally outside the scope of family life. While there is a parent to children relationship the author points out that there is a difference in view to this relationship once children reach majority. While there is a possible side road via the establishment of more than normal emotional ties, this is only used in the narrowest terms.⁷⁶ Draghici (2018) is in favor of expanding the interpretation of family life to what it historically was, based upon *de facto* emotional ties.⁷⁷ She describes a gap between the current legal interpretation of family life and the sociological meaning of family. The family could be defined as a group defined by shared identity, economic cooperation and caring. This could include childcare, financial support but also care for the elderly. Therefore, the interpretation of family life should also take similar indicators into more consideration.⁷⁸

4.2 Judicial Critiques

Besides sociological critiques on the interpretation of family life as stated in article 8 ECHR, there are also judicial critiques from multiple scholars and judges. The main focus is on the legal implications and concerns that arose due to the current interpretation of family life by the ECtHR.

One of the concerns relating to the current interpretation of family life is that it made claims by adult children and their aging parents destined to fail at the admissibility stage. As the court established a higher threshold for certain family ties, many cases do not reach the evaluation stage as they are declared as inadmissible. This does not allow for any further argumentation of the alleged interference as neither the nature, the rationale, nor the proportionality can be discussed. Draghici (2018) claims that for the real purpose of article 8, the protection of family life, the meaning of family life should not be decisive at the

⁷⁶ Ibid, No. 64.

⁷⁷ Ibid, No. 64.

⁷⁸ Ibid, No. 64.

admissibility stage. For full protection of the right to family life, the nature of the family life should be analyzed against the proportionality as stated in article 8(2).⁷⁹ In this way, there is no arbitrary cut off point in the interpretation of family life. Instead, every case will be studied on its merits at the proportionality stage of the procedure.

In a similar context to the previous problem is the overall problem of using family life as a condition. It is evident that in order to decide whether or not a violation of any right occurred, conditions have to be created as a measurement instrument. National conditions could range from mandatory insurances, stable resources, and set accommodation. Other conditions are already stated in article 8(2) and include domestic security and public health. These primal conditions are relatively clear-cut and lend itself to possible proportionality tests as described in the previous paragraph. However, it must be noted that conditions could also be described in a broader sense. The pure fact that a set definition of family could work exclusive, makes it a condition in itself. By limiting family reunification only to the nuclear family and possible exceptions due to dependency, creates an unnecessary condition to a basic right while article 8 itself does not require it.⁸⁰

Another critique towards the interpretation of family life is that the interpretation of family life has an unjust focus. Currently, the interpretation of family life is similar to the nuclear family or other family members with further established dependence. Especially family ties between adults and aging citizens are therefore hard to prove. Askola (2016) claims this is logical due to the aging population in European Societies. There is pressure on care institutions and on the welfare state as the population is aging. Older people are generally seen as a burden to the state as they are no active members of the economy and therefore unproductive. The vitality of the nation could be compromised if too many older people are migrating. Following this reasoning, migration policies based on demographic balance seems reasonable. However, what is not reasonable is that this balance now is included in the concept of the family life. Since the ECtHR introduced the test of “more than normal emotional ties” for family members outside of the nuclear family it introduces an unintended and hard to counter cut-off mark. This results in the marginalization of family ties to that of dependency but ignores the actual family ties based on intensity, durability or personal significance. The

⁷⁹ Ibid, No. 64. ; Ibid, No. 8, Article 8(2).

⁸⁰ Ibid, No. 2, p. 282.

current interpretation could underline the full protection of family life as the current interpretation has consequences in the stage of admissibility.⁸¹

A final legal argument relates to the mismatch in legal interpretations within Europe. Judge Kolver in the case of *Slivenko v. Latvia* described a discrepancy between the interpretation of family life by the ECtHR and the legal obligations of different national constitutions. As he describes “the tradition of the extended family [...] is enshrined in those countries' basic laws”.⁸² Multiple Eastern European country have similar articles in their constitution. In the Russian constitution, it is stated that Children over 18 years of age who are able to work shall provide for their parents who are unfit for work (Article 38 § 3). There is clear dependency between family members that is protected as a legal status of family ties between adult children and their parents. It is unlogical that a similar understanding is not followed by the ECtHR.

One could argue that this is only the case for Eastern European countries and that the ECtHR accounted for this by applying the margin of appreciation. This does not mean that there never will be a breach of article 8. It is up to the evaluation of the court whether or not this interpretation of family life is in accordance with the obligations under the ECHR. Difference in interpretation is not just the case for Eastern European Countries. Scholars claim that similar understandings can be found in other European countries as well. Perhaps not in legal structures but in general culture or society's expectations. In Belgian and Bulgarian traditions there is an expectation of solidarity within different vertical levels of the family. Furthermore, while there is a legal obligation to support minor children, there is a moral obligation in many countries, to return this support later in life.⁸³ This shows that within the European culture there is a sense of family connection between adult family members which is sometimes even protected within the law. Therefore, it is unlogical that the basic protection of family life as protected under the ECHR provides for an arbitrary interpretation of the concept of family life.

⁸¹ Askola, H. (2016). (No) Migrating for Family Care in Later Life: *Senchishak v Finland*, Older Parents and Family Reunification. *European Journal of Migration and Law*, 18(3). doi: <https://doi.org/10.1163/15718166-12342106>.

⁸² *Slivenko v. Latvia*, no. 48321/99 EC, 9 October 2003.

⁸³ *Ibid*, No. 64. ; *Ibid*, No. 8, Article 8(2).

4.3 Sub-conclusion

Multiple critiques have been found that answer “Q2: *What are the sociological and judicial critiques on family life related to family reunification.*”. From the sociological viewpoint the main critique is that the interpretation of family life is not in line with the different interpretations of family in social reality. There are different cultural interpretations of family life that vary across Europe. This makes it hard to create one narrow definition of family life as the ECtHR does now. The judicial critiques are focused on the procedure of family life. The current interpretation of family life results in the inadmissibility of many cases, while it could be argued a case should be judged upon by its merits. Especially when it involves an article with a proportionality test. A final critique is that the current interpretation is not in line with domestic legal interpretations of family life. Many eastern European countries have the family relations between adult children and aging parents established in their constitution. Therefore, it is atypical that the court uses the current interpretation on family life.

Chapter V – Two case studies

This chapter will highlight two cases that multiple scholars pointed out as landmark cases. Both cases involve adult citizens applying for family reunification but got rejected and claimed their right to family life was violated. The focus will be on the reasoning of the court and the sociological and judicial critiques as pointed out in Chapter IV.

5.1 Senchishak v. Finland (2014)

The applicant, Ms. Senchishak was born in 1942 in Russia and requested family reunification to live with her family in Finland.⁸⁴ The applicant has two daughters. One of the daughters went missing in 2003 and is expected to be deceased. Ms. Senchishak took care of the baby of her daughter when she went missing. Her other daughter moved to Finland in 1988 and received the Finnish nationality.⁸⁵ Ms. Senchishak lived in Russia with her husband. Due to a stroke in 2006, the right side of her body got paralyzed. Her husband took care of her until he died in 2007. After the passing of her husband she moved in with her grand-daughter in Vysborg, Russia, about thirty kilometers from the Russia-Finland border.⁸⁶ She entered Finland on a 30 days tourist visa on 7 December 2008 to live with her daughter in Espoo, Finland, about 200 kilometers from the border. She applied for a resident permit on ground of family reunification, however, this was rejected and was ordered to leave the country on 31 July 2009. She tried proving her dependency upon her daughter, but this did not change the situation. Finally, Ms. Senchishak argued for the ECtHR that this would be a violation of article 8.⁸⁷

The Finnish government had the opinion that family life between the mother and daughter was ruptured for more than 20 years due to the fact that the daughter moved to Finland. For that reason, there was no family life and subsequently no violation of article 8.⁸⁸ Ms. Senchishak had a different opinion. She claimed family life was never ruptured which can be proved by the fact that she and her daughter were able to continue their family relation by

⁸⁴ *Senchishak v. Finland*, no. 5049/12, 18 November 2014, §6

⁸⁵ *Ibid*, No. 84, §7

⁸⁶ *Ibid*, No. 84, §8

⁸⁷ *Ibid*, No. 8, article 3 & 8.

⁸⁸ *Ibid*, No. 84, §51

living together without having any problems. She continues that in Russia elderly citizens are seen as a group that needs extra protection, which is laid down in the Russian constitution. In Russia it is the task of the children to take care of their elderly parents when they become dependent due to old age or illness. Ms. Senchishak therefore argues that even in the case family life was ruptured, family life can become more important when people are aging and enter different life stages.⁸⁹

The Court starts by stating that Article 8 ECHR and family reunification as part of that, is not an absolute right to settle in a country of choice. Each state has the right to have its own migration policy and has a margin of appreciation on how to implement the requirements of article 8 within their domestic legislation. However, a rejection to family reunification can still result in a violation of article 8. The court quotes the case of *Al-Nashif v. Bulgaria* (2002) that family life is dependent on *de facto* relationship⁹⁰ but highlights that relationship between adults fall outside of the protection of article 8 ECHR unless there is dependency with more than normal emotional ties.⁹¹ The court concludes that dependency was insufficiently proved. The court accepted that Ms. Senchishak is dependent upon care, but there is no need that her daughter has to provide that care and therefore there is no element of dependency with more than normal emotional ties. The court also concluded that although the applicant and her daughter have been living together for five years, there is insufficient ground to reestablish family life. Therefore, the court found no established family life and found the case inadmissible.⁹²

Different critiques that are given in chapter IV are applicable in this case. One of the sociological critiques is that there are different cultural interpretations to family life. It is clear that the applicant has a view of family that extent the nuclear family and includes adult family members. It is therefore unfortunate that the court has a higher threshold for family reunification of adult family members. Judge Bianku and Kalaydjieva that were sitting in the chamber of the ECtHR in the case of Ms. Senchishak also note in their dissenting opinion that “a time comes when elderly parents do need the loving care of their adult children and actually receive it as a matter of moral duty and preserved feelings of affection”. They claim that to

⁸⁹ Ibid, No. 84, §53.

⁹⁰ *Al-Nashif v. Bulgaria*, Application No. 50963/99, Council of Europe: ECtHR, 20 June 2002, §112.

⁹¹ Ibid, No. 84, §55.

⁹² Ibid, No. 84, §57-58.

disregard moral and legal duty to provide care when there are *de facto* and *de jure* family relations, is illegally and morally incorrect. That no family life was established after living together for 5 years is somewhat arbitrary especially when the court continuously refers to *de facto* family ties. They have the opinion that there was no proper *in concreto* analysis of family life as living together for five years could be seen as sufficient to reestablish family life.⁹³

The major judicial critique here is that the interpretation of family life does not correspond with the interpretation and obligations of family life giving in the Russian constitution. The court has noted that there is no dependency of care as there are both private and public care institutions in Russia. However, within the Russian culture and legal structure of family life, it is the task of the children to take care of their aging parents as laid down in the Russian constitution. This leaves a gap between the interpretation of family life by the ECHR and the legal and social interpretation of family life in Russia.

5.2 Anam vs. the United Kingdom (2014)

Mr. Ruhai Anam was born in 1970 and was a Bangladeshi national. He arrived with his parents and siblings in the United Kingdom in 1984 and were granted residency. In 1994, Mr. Anam got married and had three children, but he has not seen any of them since their divorce in 2000. Mr. Anam criminal history started in 1995, when he was twenty-one years old. Until 2007 he was imprisoned on and off for convictions of shoplifting, offences of dishonesty and assault. Due to his criminal activities a deportation order was served on 5 February 2008. Mr. Anam appealed, which was dismissed in the same year. For the ECtHR he claimed that the deportation would interfere with article 8 ECHR.

The court again starts with reaffirming family life is dependent on the *de facto* relationships and later reaffirms that no family life exists between parents and adult children or between adult siblings unless there an additional element of dependence. Mr. Anam noted that he would like to see his children, however he was not allowed contact with them as result of multiple court orders. He was still in contact with his mother and sibling who were still living in the United Kingdom. Mr. Anam claimed he was dependent on his family because of his

⁹³ Ibid, No. 95, Dissenting opinion.

mental health problems as he suffered from paranoid schizophrenia. He was diagnosed after spending time in a mental hospital in 2005. While there were options for treatment and medication in Bangladesh, they were not to the same standard as in the United Kingdom. The court recognized this and therefore “accepts that the applicant has a higher degree of reliance on his mother and adult siblings than other adults as a result of his diagnosed mental health problems and finds [...] that family life exists between them”.⁹⁴

Relating to sociological and judicial critiques it can be observed that the court still uses different requirements for the nuclear family and adult family members. The court gives an additional element of dependency, which makes it more difficult to prove family life. Furthermore, it remains arbitrary why this additional element is introduced as a proportionality test is already included in article 8.

5.3 Sub-Conclusion

In two cases the court took a similar starting point but had a different result. In both cases the court started by stating that no family life exists between adult family members without an additional element of dependency that is more than normal emotional ties. In both cases this gives some space to establish family life with adult family members. In the case of *Senchishak v. Finland* dependency was insufficiently proven, but in the *Anam v. the United Kingdom* case the court actually accepted the additional element of dependency due to the mental health problems. This is a rare case where dependency with more than normal emotional ties was actually sufficiently established.⁹⁵

The first case was about family reunification because of the care as the applicant needed from her daughter as the applicant was partly paralyzed due to a stroke. In the second case there was dependency of care as the applicant was diagnosed with schizophrenia and was dependent upon care of his mother. Some parallels and differences can be found. Both cases focus on the need for care by family members and try to prove the additional element of dependency by stating this need for care. The need for care is different as the first applicant had a physical disability, where the second applicant had a mental disability. Another

⁹⁴ *Anam v UK*, App No 21783/08, ECtHR decision of 7 June 2011.

⁹⁵ *Ibid*, No. 64.

difference that can be observed is that in the first case, the court noted that there are options for both private and public care institutions in Russia. In the second case the court noted that there are options for care in Bangladesh, however they are not to the same standard as they are in the United Kingdom.

To determine family life on the basis of different types of disability seems arbitrary. The consideration about the level of care in the country of origin seems more appropriate. However, such a consideration would be more applicable to article 3 the prohibition of torture. To reduce family life in these case to the question whether or not care is possible in the country of origin seems not relevant for the scope of article 8. This has no relationship to the *de facto* family ties that the court reaffirms time after time. In this way family life between adult family members is almost impossible to establish as *de facto* the additional element of dependency is unworkable.

Chapter VI - Conclusion

This thesis started with an anecdote of Mohab Alkatmeh, a Syrian refugee who applied for family reunification in the Netherlands. Unfortunately for him, his application was rejected due to the fact that he became an adult just months before he initiated his application. Most migration and asylum applications are related to family life but as for the case of Mohab Alkatmeh, it can be difficult to get it granted. States have the inherent sovereign right to create rules on who has the right to remain in their territories and under what circumstances. Policies regarding family reunification are left to the discretion of the state. However, no domestic legislation can interfere with the ECHR. Article 8 of the ECHR is the right to respect for private and family life. This gives an indirect right to family reunification.

The ECtHR can decide that domestic legislation does not fit the minimal requirements of the right to family life. This requires an interpretation of the concept of family life. Family life is socially constructed and shaped by culture and law and therefore changes over time and between different regions. The dynamic character of family life requires a dynamic interpretation of the law to be able to fully provide the protection the ECHR implies to provide. Inadequate interpretation could be problematic for the persons involved as this could lead to the inability to invoke the (indirect) right to family life. The interpretation of family life is core to the protection to the right to family life. The main question of this thesis was: ***To what extent is the interpretation of family life by the European Court of Human Rights, as stated in article 8 ECHR, related to family reunification adequate in light of sociological and judicial critiques?***

Two sub-questions were formulated. Question 1 was “How is family life legally understood by the European Court of Human Rights in the Context of Family Reunification?”. A legal framework was established that explained the indirect right to family reunification and that family reunification is essential for social adaptation to the host state as well as for cultural stability and economic integration. No clear guidelines are given on how to interpret the concept family life only that it has to be in line with the ideals and traditions of the western liberal democracy. ECtHR gives a margin of appreciation to contracting parties to translate the obligations under the ECHR to their own domestic legislation in their own interpretation but there is no unlimited power of appreciation by the contracting states. The ECtHR is responsible

to provide a final ruling on whether the contracting state upholds their obligations under the ECHR.

The court had to establish its own interpretation of family life which can be found in the case law of the court. The court early established that *de facto* “family ties” where the most important in the question whether or not family life was established. Family life can compass of many different combinations of family members. The best protected groups under family life is the nuclear family couples who may or may not have minor children. Same-sex couple were not included at first within the scope of family life as the ECtHR found that no European consensus was found on the matter and therefore referred back to the margin of appreciation of member state in this matter. Later the court reviewed this opinion and granted same-sex couples the same protection under article 8.

The relationship between other family members such as siblings, adult children, grandparents or ageing parents can be considered family life as well, however in more recent case law the court established that there was higher level of separation and therefore introduced an additional element more than normal emotional ties that had to be established. Case law shows that it is hard to prove such dependency, therefore these groups generally fall outside the scope of article 8. Therefore, the answer to sub-question 1 is that the court understands family life, in the context of family reunification, as *de facto* family relations. The nuclear family is better protected as other relationships need to prove an additional element of dependency with more than normal emotional ties.

The second part of the thesis focused on sociological and judicial critiques and answered sub-question two “*What are the sociological and judicial critiques on the legal interpretation to family life related to family reunification?*”. Scholars point out that family is a dynamic concept that changes over time, area, and cultures. To fully provide the protection that the ECHR implies, a dynamic interpretation of the law is needed as well. Family life needs to be coherent with the ideals and traditions of the western liberal democracy, but there are still different concepts of family in Europe as there is a difference between the more traditional view in South- and Eastern Europe and the more liberal interpretation in Western- and Northern Europe. Difference can also be found in the way grandparents are included in care for children. The sociological concept of family is more related to shared identity, economic cooperation and caring.

Judicial critiques claim that the definition of family life should not be decisive at the admissibility stage. The nature of the family life should be analyzed against proportionality as stated in article 8(2). All cases should be based on its merits rather than a possible arbitrary interpretation of family life. The way the ECtHR defines family could work exclusive. Article 8(1) does not require conditions, while article 8(2) does provide conditions for the state. The current interpretation of family life creates an unnecessary condition to a basic right. A final critique is that there is a discrepancy between the interpretation of family life by the ECtHR and the legal obligations by different national constitutions as multiple countries based their caring system on the relation between family members. This is currently not protected as family life due to the interpretation of the ECtHR.

The answer to sub-question two is that sociological critiques focus on the broad and dynamic identity of family life, while the current interpretation is restrictive. The legal critiques focus mainly on the problem of extra conditions while there is already a proportionality test. Finally, the discrepancy between domestic obligations and international law is highlighted.

The cases of *Senchisha v. Finland* and *Anam v. the United Kingdom* showed the reasoning of the court. Basic principles of *de facto* family ties and additional element of dependency were included. The case of *Senchisha v. Finland* was declared inadmissible as no dependency with more than normal emotional ties was established even though she was paralyzed and dependent on care. In the case of *Anam v. the United Kingdom* the court ruled that family life was established and that requirements of dependency were met due to his schizophrenia. No clear lines are given to the nature of this dependency and to prove this is very difficult.

The main questions of this thesis was “*to what extent is the interpretation of family life by the European Court of Human Rights, as stated in article 8 ECHR, related to family reunification adequate in light of sociological and judicial critiques?*”. Considering the conclusion of both sub-questions, the conclusion of this thesis is that the interpretation of family life by the ECtHR related to family reunification is somewhat inadequate. The interpretation of family life includes the nuclear family which is completely adequate as most of the family relationships are included and will be judged upon their merits. Where the interpretation becomes less adequate is in relation to other family members such as sibling, adult children, grandparents and aging parents. The additional element of dependency results

in the *de facto* exclusion of these relationships within the concept of family life. This means that they are not protected under article 8. This is inadequate as it is not in line with the social reality of family life as many European countries culturally include these family relationships for either care, economic cooperation or shared identity. Legally these other family relations are included in multiple countries as is stated in different European constitutions. It is true that these national interpretations could fall under the margin of appreciation of the state. However, the ECtHR is responsible to provide a final ruling on whether the contracting state upholds their obligations under the ECHR and could give a broader interpretation to family life as this would be more adequate with the European social reality.

This thesis only focused on family life as described in article 8 ECHR and the sociological and judicial critiques. When family life is not established, family reunification is not possible. Still a violation under article 8 could be found due to the violation of a person's private life. deportation cases⁹⁶ already follow this reasoning, however reunification under private life is not established yet. Further research should clarify this possibility. The interpretation of family life of the ECtHR was mostly based upon cases by the ECtHR. However, it should be noted that it is impossible to include all cases for this analysis and therefore a selection of cases was made with help of different scholars and legal guidelines. This could mean new case law or cases showing different opinions are excluded which could slightly reshape the current conclusion. Similar to this is the selection of scholars for the critiques. Further research should be done to further confirm the findings of this thesis.

⁹⁶ Anam v UK, App No 21783/08, ECtHR decision of 7 June 2011.

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Fig. 1: <https://www.hiclipart.com/free-transparent-background-png-clipart-dewsi>

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