Projet IPV_Migrants

CERV-2022-DAPHNE - project n°101097049

Work Package 2

State of play

Deliverable D2.4 – Analysis of the legal framework as a source of violence

2023.08.30

Mouvement pour l'égalité entre les femmes et les hommes

Collectif des femmes

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The Legal Framework on Family Reunification in Belgium as a Source of Domestic Violence

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Introduction

The objective of this study is to consider the role of the legal framework specific to migration and its influence on intimate partner violence (further qualified as domestic violence[1]). It aims to illustrate how specific migration policies can contribute to causing and exacerbating the effects of domestic violence in migrant households. The aim is therefore to examine the Belgian legislation governing family relationships for migrants in the context of family reunification.[2]

This legal framework may generate tensions within the couple, and even lead to situations of violence, as we shall see below. On arrival in Belgium, the sponsor may prevent any attempt at emancipation or integration of the partner, usually a woman[3]. Migrant women experience multiple forms of discrimination, as women, as foreigners and as foreign women.[4]

For this reason, we will conduct a two-stage analysis. Firstly, we will study and describe the restrictive legal framework for family reunification under the Belgian Aliens law and the conditions of this process. Secondly, once this right has been acquired, we will look at how the conditions for maintaining the legal stay and acquiring independent residency can give rise to tensions or imbalances within the couple.

Maria, for example, is a Bolivian national who joins her husband, Luca, who has an unlimited residence permit in Belgium for several years. The family reunification procedure took a long time to finalise because of the material requirements of Belgian law. Upon her arrival in Belgium, a disagreement arose. Luca confiscates Maria's passport and prevents her from going out and taking language classes. He later starts to insult and threaten her. When she tries to defend herself or tells him she is going to lodge a complaint, he threatens to inform the local authorities that she is no longer living with him so that she would no longer be able to stay in Belgium. They have to live together for at least five years for her to be granted an autonomous and independent resident status. At some point, she leaves him, seeks refuge in a centre for victims of violence and asks for help. Her husband notifies the local authorities, which find that she is no longer living at the address. Will she be authorised to stay in Belgium?

This example illustrates a frequent situation for women counselled by the Collectif des Femmes, and a situation to which migrant women are sometimes confronted. Another frequent situation is that of foreign women married to a Belgian or EU citizen and who are victims of domestic violence. These women find themselves in a situation of double

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[1] We understand domestic violence as a violation of human rights and in particular women's rights, see J. Freedman, *Domestic violence through a human rights lens*, Routledge, 2021. This is the legal term we will use throughout the study. In the literature, the term "intimate partner violence" is used instead.

[2] While the aim of the overall project is to examine intimate partner violence, the legal framework only concerns certain intimate partners, as we shall see later. The legal framework for family reunification covers married couples, certain registered partnerships equivalent to marriage and legal cohabitation.

[3] The sponsor is the person who has residence status in Belgium.

[4] A migrant is any person who does not have Belgian nationality. Among these, a distinction is made between EU citizens and non-EU citizens. In this contribution, a foreign national is defined as a citizen of a country outside the European Union. We will examine these different situations provided for by the law of 15 December 1980 in the context of the family reunification procedure.

vulnerability. Firstly, they generally find obstacles in accessing their rights and a lack of information to assert these rights. Secondly, in the specific context of family reunification, they have an administrative dependence on their spouse or partner since their right to residency relies on a marital relationship and sustained cohabitation.

The Belgian legislation on family reunification provides specific protection for victims of domestic violence. In certain cases, victims of domestic violence can be granted an autonomous residence permit. However, this procedure lacks transparency and is difficult in practice. Because of their precarious residency and their administrative dependence on their partner, victims are often afraid to lodge a complaint or even to leave the marital home. They then face a dilemma: to lodge a complaint and protect themselves, or to continue to suffer violence until they obtain a permanent residency.

This article does not concern the fight against domestic violence as such, but attempts to respond to concerns linked to the fact that the law of 15 December 1980, through its strict legal framework and numerous conditions, sometimes creates situations of violence between partners, particularly in the context of family reunification. Paradoxically, the law addresses these situations of violence by specifically providing for this exception and the possibility of independent residence for victims of domestic violence. In other words, while the law sometimes generates violence, it comes to the rescue of these specific situations by offering an autonomous stay to protect victims from violence and administrative dependence. But at what cost? Often, the partner who has been a victim of violence will have to prove it, which means filing a complaint or having a medical examination as soon as possible. This leads to social and legal insecurity or possibly secondary victimisation.

In addition, marriage or specific partnership is required for family reunification. There is no right of residence for unmarried couples wishing to reunite, except in the case of family reunification with a sponsor who is a Union citizen (*de facto* partner). This excludes from the benefit of the provisions **couples who are not legal cohabitants or legally married**. For example, the law does not account for a *de facto* couple comprising a migrant and a Belgian. As a result, the right to family reunification is not recognised. In conclusion, the law does not consider foreign nationals who are victims of domestic violence outside this strict framework. This study will therefore focus on marriages and specific partnerships (see Chapter 1).

This article will also not cover people who come to Belgium to seek international protection because of domestic violence suffered in their home country. Many women flee their family home in their country of origin for fear of forced marriage or domestic violence, without the national authorities taking any measures to protect them. It is not uncommon for a woman wishing to lodge a complaint with the police to be sent home on the grounds that it is a problem to be dealt with in the private sphere. These situations are taken into consideration by the Belgian asylum authorities, who examine the application for international protection and decide on the need for protection. These women are likely to obtain international protection because of their membership of the social group of women or because of a political opinion, for example. It should be noted that migrant women seeking international protection are sometimes also victims of violence on their migration journey and upon arrival in the host country.[5]

[5] See two articles on the subject of women who are victims of violence on the migration and asylum route: S. Sarolea, Z. Crine, F. Raimondo, "Through the Eyes of the 'Vulnerable': Exploring Vulnerabilities in the Belgian

Finally, this contribution will look at the framework for family reunification, particularly for spouses and partners, and the implications for the couple's children.

We will examine the legislation on family reunification and the exception on grounds of domestic violence, as well as the application of these rules by the Aliens Office and in the rulings handed down by the competent court in the context of appeals by the Aliens Litigation Council (ALC[6]).

It should be recalled that any woman, whether Belgian or foreign, can lodge a complaint if she is a victim of violence. However, it is difficult for migrant women who do not legally reside in Belgium or who are in a precarious situation to lodge a complaint for fear that their administrative situation will be considered rather than the violence they have suffered. Administrative violence is therefore added to domestic violence.

In chapter 1, we will analyse the figures and a brief history of the right to family reunification, the concept of family and the conditions to obtain autonomous residency (independent of their spouse or partner), which responds to an initial concern (violence of the legislative framework *stricto sensu*). Chapter 2 will look at the protection clause in cases of domestic violence, the possibility of obtaining an autonomous residence permit and the difficulties associated with this procedure. Finally, chapter 3 will address the end of the legal stay, along with the limits linked to fundamental rights.

Chapter I: Regulatory Framework for Family Reunification and its Consequences

This first chapter traces the history of and conditions for family reunification under the Aliens Law of 15 December 1980. Although family relations are not governed solely by this law,[7] certain provisions concern family reunification and are designed to be very restrictive. All of these rules govern the conditions under which non-nationals can obtain residency in Belgium, enabling them to join family members already living there. These conditions illustrate the difficulties and obstacles faced by the sponsor and the partner to reunite and form a family in Belgium. It is a demanding, potentially stressful, and uncertain process for the family members concerned. The conditions are strict and numerous. They differ according to the status of the sponsor as foreigner, sedentary Belgian (meaning that he or she has not experienced free movement in the EU), or EU citizen (as explained below).

The law sets out the definition of family, the conditions for family reunification and the procedure for applying, including proof of family ties. In this chapter, we will first analyse the situation of family members of a foreigner residing in Belgium, of a Union citizen, and of a Belgian.

Asylum System", VULNER, 2022 and J. Freedman, "Sexual and gender-based violence against refugee women: A hidden aspect of the refugee 'crisis'", 2016, Reproductive Health Matters, Published by Elsevier BV.

[6] The official name of this jurisdiction in French is, Conseil du Contentieux des étrangers (CCE). But will be referred to as Aliens Litigation Council (ALC).

[7] Law of 15 December 1980 on the entry, residence and removal of foreign nationals, *M.B.*, 31 December 1980. Other sources include the Civil Code, which lays down rules on preventing sham marriages and fraudulent recognition of filiation.

After looking at the figures for long-stay visas granted on the basis of family reunification and a brief description of the Law of 15 December 1980 (section 1), we will examine the concept of spouse/partner (section 2), the material conditions (section 3) and the family reunification procedure (section 4) in order to report on the impact of this procedure on the couple (section 5).

Section 1: Figures and Brief Description of the Law

a) Key Figures

Family reunification is one of the only legal ways to enter Belgium. It accounts for a significant proportion of migration to Belgium. According to the MYRIA report, 15,317 family reunification visas were issued in 2021, representing 43 % of all granted long-stay visas.[8] In 2021, 2,977 visas were granted for family reunification with a beneficiary of international protection (refugee or subsidiary protection applicant). More than half of these were granted to people of Syrian nationality (33 %) or Palestinian origin (21 %). The increase for Syrians and Palestinians contrasts with the sharp fall in Afghan beneficiaries (just under 12 % of these visas in 2021).

b) Brief Description of the Law

The Law of 15 December 1980 is a complex piece of legislation that has evolved in line with the Belgian political context. Successive reforms have made the legal framework relating to family reunification more restrictive and selective, as well as increasingly complex.[9] As a result of these changes, it has become almost illegible. Major changes were made to the law as part of the transposition of the two directives on family reunification.[10] Initially, this transposition was only partial and did not require sponsors to meet any material conditions. In 2011, financial conditions and conditions relating to adequate accommodation were added. The Belgian system has therefore transposed the minimum standards set out in the directives.[11]

Sedentary Belgians who wish to bring their family over are treated in the same way as foreign nationals and are subject to the same conditions.[12] The rules applicable to the family of foreign nationals or sedentary Belgians are much stricter than those applicable to "Union citizens", both in terms of the definition of the family and the material and procedural conditions (see

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[8] MYRIA, "La migration en chiffres et en droit", *Les Cahiers du rapport annuel*, 2021.

[9] G. Orsini, S. Smit, J.-B. Farcy and L. Merla, "Institutional racism within the securitization of migration. The case of family reunification in Belgium", *Ethnic and racial studies*, Vol. 45, No. 1, 02.01.2022, pp. 153–172.

[10] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *O.J.*, L 158, 30.04.2004, and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *O.J.*, L 251, 3.10.2003, pp. 12–18.

[11] Law of 8 July 2011 amending the law of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals with regard to the conditions for family reunification, *M.B.*, 12.09.2011. Following this reform, the number of applications has decreased by 50 % for family members of Moroccan nationals. It has also decreased for Turkish nationals and family members of sedentary Belgians.

[12] Law of 15 December 1980, art. 40*ter* § 2. The law distinguishes between limited and unlimited stay. Limited stay typically concerns students or highly qualified workers whose residence is valid for one year and is renewable under certain conditions. Unlimited stay concerns third-country nationals such as refugees.

below). The "reverse" discrimination that particularly affects nationals is still relevant following the 2011 reform of family reunification. However, the Constitutional Court views the difference in treatment between EU citizens and Belgians as justified.[13]

Family reunification is a long and demanding process, particularly in the case of family members of third-country nationals. There are numerous formal and substantive requirements for applying, and the time limits for examining the application are not very precise (see below).[14] When family members finally obtain this right and arrive in Belgium, they have often not seen the sponsor in years. This is particularly the case for family reunification with persons benefiting from international protection. Asylum procedures can take several months or even years to be examined, which makes the separation between spouses or partners that much longer.

Once acquired, the right of residence under family reunification is temporary. The conditions for obtaining the right to family reunification must be met for a **period of five years** before residence becomes unlimited or permanent. Residence is "controlled" by the administrative authority.[15] It is therefore, by its very nature, precarious.

For the family member being reunited, this period is long and can generate a certain amount of anxiety due to the precariousness of the stay.[16] The law considers the couple, their "joint settlement" or actual cohabitation, and their economic independence (the criteria are slightly less demanding if the sponsor is an EU citizen). Such dependence on the couple for the acquisition of the right of residence is likely to create uneven power dynamics and dominance. This is also the case when settlement or integration in Belgium does not go as planned.

The law provides for situations where permanent residence can be obtained before the five-year period, in particular in cases of domestic violence.[17]

Furthermore, holding a temporary residence permit for five years also raises questions about integration, particularly through work. Even though there are provisions that exempt the family members from requiring a work permit,[18] access to work remains impossible for family members of students or salaried workers whose stay is restricted.

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[13] C.C., 26 September 2013, no. 121/2013, B.49 to 55. The Court accepts the differentiated treatment between Belgians and EU citizens because the criterion for distinction is objective (the latter having exercised the right to free movement, not the former). This easier access to nationality legitimised the conditions imposed on family reunification with a Belgian. The measures were therefore deemed proportionate.

[14] K. Melis, "Les méandres des délais en matière de regroupement familial", *R.D.E.*, 2018, no. 199, pp. 347–363.

[15] See the Law of 15 December 1980, art. 10: in the case of third-country nationals, the minister or his delegate may carry out checks or have checks carried out with a view to extending or renewing the residence permit, in order to verify whether the foreign national meets the conditions of article 10.

[16] G. Bossu, "Does 'transnational parenthood' due to the asylum seekers migratory journey strengthen or distance pre-established family ties?", Faculty of Psychology and Education Sciences, Université catholique de Louvain, 2017, Prom. Laura Merla.

[17] Law of 15 December 1980, art. 42*sexies*.

[18] Royal Decree of 2 September 2018 implementing the Law of 9 May 2018 on the occupation of foreign nationals in a special residence situation, *M.B.*, 17.09.2018, art. 10, 8°.

Section 2: Concept of Family Member in Law

The migrant's family is clearly defined by law and is reduced to the nuclear family if the sponsor is a foreigner.[19]

As already mentioned, an unofficial relationship involving a migrant does not allow the spouse or partner to be brought in through family reunification. Consequently, only domestic violence in the situations envisaged by the law is eligible for protection.

What is the concept of spouse and which families are covered by family reunification?

a) Spouse, Partnership equivalent to marriage, and Partner

The law refers to the spouse by marriage.[20] The marriage may take place before or after the applicant settles in the country of residence. The directive does not specify whether family reunification applies to heterosexual couples only. In a judgment of 5 June 2018, the Court of Justice ruled that "the concept of spouse is gender-neutral" and therefore "includes" same-sex spouses.[21]

In Belgian law, a couple therefore includes both homosexual and heterosexual relationships, based on marriage or partnership.[22] The concept of "partner equivalent to spouse" refers to partnerships that create a relationship that has the same legal effects as marriage (which is not existent in Belgium).[23] Other partners may also benefit from family reunification provided they meet additional conditions. In Belgium, it applies to legal cohabitation. The partners must be unmarried, living together, both single and not in a long-term relationship with a third party. Above all, they must prove that they have a stable and lasting relationship which is duly established.[24] This proof can be provided by various means: either the partners have cohabited in Belgium or in another country in a legal and uninterrupted manner for at least one year prior to the application; or they have known each other for at least one year and provide proof that they have maintained regular contact by telephone, mail or e-mail, that they have met three times prior to submitting the application and that these meetings lasted a total of forty-five days or more; or they have a child together.

Both spouses or partners must be over 21 years of age. This minimum age is reduced to 18 if the marriage or partnership predates the applicant's arrival in Belgium. If the couple does not meet this strict age requirement, family reunification will not be considered. On the other hand, if the sponsor is a citizen of the Union, the concept of partner also includes the *de facto* partner.[25]

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[19] L. Merla and S. Sarolea, "Migrantes ou sédentaires: Des familles ontologiquement différentes", in A. Fillod-Chabaud and L. Odassoin, *Faire et défaire les liens familiaux*, PUR, 2019, pt 14.

[20] Law of 15 December 1980, art. 10 § 1, 4°, 1st indent.

[21] CJEU (G.C.), 5 June 2018, *Coman and Others,* C-673/16, and M. Fallon, "Observations under CJEU, 5 June 2018, Gr. Ch., Coman, C-673/16, EU:C:2018:385", *Cahiers de l'EDEM*, June 2018.

[22] Law of 15 December 1980, art. 10, § 1, 4°, 1st indent.

[23] Civil Code, art. 1475 *et seq*.

[24] Law of 15 December 1980, art. 10 § 1, 5°.

[25] *Ibid.*, art. 47/1.

b) Other Family Members

Only the nuclear family of the foreign sponsor is considered: biological or adopted minor children and disabled adult children. Since 2011, Belgians who have not exercised their freedom of movement and who wish to bring in their family have been treated in the same way as foreign nationals reuniting.[26] The Belgian's children must be under 21 to benefit from family reunification or must fulfil financial conditions. Only the ascendant of a Belgian minor child has the right to join the child.

For EU citizens, children over the age of 21 must be dependent on the Union citizen, and the family is also extended to the members of the household, without necessarily having to demonstrate any specific biological or legal link.[27] An EU citizen's ascendant is also authorised to join them, provided that they are dependent on the Union citizen. This is the notion of extended family.

Section 3: Material Conditions

The other conditions are material conditions. To be eligible for family reunification, the sponsor must be well off and well housed. As already mentioned, the legislator did not require the sponsor to meet any socio-economic conditions before July 2011. In 2011 the material conditions of directive 2003/86 were transposed in the hope of reducing the number of people arriving on the basis of family reunification.[28] These include the obligation to demonstrate regular, stable and sufficient means of subsistence, adequate housing and health insurance.[29]

The law stipulates that, to be sufficient, the amount must represent 120% of the social integration income.[30] This is higher than the net minimum wage of a full-time worker.[31] This requirement does not seem to take account of the socio-economic realities of the labour market, in the case of third-country nationals who are in the process of integrating into society.[32] In addition, regular and stable resources seem to exclude temporary work and

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[26] *Ibid.*, art. 40*ter*. This is reverse discrimination to the disadvantage of Belgians. The Constitutional Court accepts the difference in treatment between citizens of the Union and Belgians, based on the criterion of the sedentary nature of the Belgian citizen (C.C., 26 September 2013, no. 121/2013 and C.C., 24 October 2019, no. 149/2019).

[27] Law of 15 December 1980, art. 47/1.

[28] Proposed law amending the law of 15 December 1980, *Doc*, Ch. 2010-2011, no. 53-0443/018, p. 8: "The number of people settling on Belgian territory as part of family reunification considerably exceeds the number of asylum seekers. In 2009, the Aliens Office granted 9,993 visas for family reunification, while the diplomatic and consular services abroad processed approximately 14,000 applications. [...] This is why the proposed law aims to amend the law of 15 December 1980 […]."

[29] Directive 2003/86, art. 15; Law of 15 December 1980, art. 40*ter* § 2.

[30] Law of 15 December 1980, art. 10 § 5.

[31] The social integration income was increased on 1 January 2023. For a person with a family, this corresponds to € 1,640; 120% of this amount is € 1,968 (www.droitsquotidiens.be/fr/question/quel-est-le-montant-du-ris-pour-chaque-categorie). This is a very substantial amount. For more on this subject, see C. Flamand, "Trajet migratoire et regroupement familial: obstacles et perspectives", in S. Sarolea (coord.), *Immigrations et droits, Questions d'actualités*, Brussels, Larcier, November 2018, pp. 45-97.

[32] S. Carpentier, "Lost in transition – Essays on the socio-economic trajectories of the social assistance beneficiaries, 2016.

presuppose long-term employment.[33] It should be noted that the condition of sufficient resources does not apply if the foreign national or sedentary national is only joined by their minor children or those of their spouse or partner (assimilated to the spouse).

In addition to socio-economic conditions, adequate accommodation is required. Sufficient accommodation must meet "for the foreign national and for the members of his family applying to join him, the basic requirements of safety, health and habitability" set out in the Civil Code. It must exist on the date of the application for family reunification, even though the family members residing abroad will not arrive until months later. This places a considerable financial burden on the applicant.

A more favourable regime has been introduced for beneficiaries of international protection. In order to facilitate family reunification, the Belgian law transposing the directive exempts refugees and beneficiaries of subsidiary protection from the material conditions imposed on other foreign nationals, provided that the family ties predate their entry into Belgium.[34] It allows a period of one year for beneficiaries of this protection to apply without further conditions. This derogation is justified by the very nature of refugee status and is based on recital 8 of Directive 2003/86[35] and the case law of the European Court of Human Rights (ECtHR).[36]

Section 4: Procedure in Brief

This section provides a brief overview of the family reunification procedure and describes the various stages involved.

a) Fees

Since 2014, a financial condition has been required in order to apply for family reunification.[37] This fee cannot be imposed on a minor or on family members of beneficiaries of international protection. This amount adds to the other material requirements and is an undeniable obstacle to family reunification, with the immediate consequence of deterring immigration for more precarious families.

b) Integration Condition

December 2016 saw the addition of integration conditions for third-country nationals as part of family reunification (minors, refugees and EU citizens and their families are exempt)[38]. The conditions seem to be limited to the signing of a declaration by which foreigners indicate that they understand the values and fundamental norms of society and that they will act in accordance with them. However, could non-compliance be considered to terminate the

[33] C. Flamand, "Trajet migratoire et regroupement familial", *op. cit.*, pp. 45-97.

[34] Law of 15 December 1980, art 10 § 2, 5th indent.

[35] "The situation of refugees should be given particular attention, because of the reasons which forced them to flee their country and which prevent them from leading a normal family life there. More favourable conditions should therefore be provided for the exercise of their right to family reunification."

[36] ECtHR, *Mungezi v. France*, 2014, § 54.

[37] This amounts to € 363 for any adult making a claim.

[38] Law of 15 December 1980, art. 1/2.

residence of the person reunited as long as they are not in possession of an autonomous residence permit? The Court of Justice has pointed out that the integration conditions that a Member State chooses to impose aim to facilitate the integration of third-country nationals, and not to constitute an obstacle to obtaining a more stable residence permit.[39] It considers the measure to be proportionate. This was confirmed by the Constitutional Court, which found that the measure was not disproportionate.[40] Nevertheless, the inclusion of this provision adds further pressure on people seeking the right to live with their families.

c) Place of Applications

People wishing to apply for family reunification must do so from their country of origin, unless they are already residing in Belgium.[41] Belgium does not provide for any procedure other than this appearance in person at the Belgian diplomatic representation in the country of origin or, in the absence of such a representation, the one in the nearest country. This posed numerous problems, particularly for the family members of a refugee applicant. Following a recent ruling by the Court of Justice,[42] the country will have to review its approach. The Court ruled that appearance in person cannot be required where it is not possible or is excessively difficult in a given context.[43]

d) Proof of Ties

Family reunification requires proof of the alleged family ties. In principle, this proof can be civil status documents (birth certificate, marriage certificate) or judgments (child custody rights). Documents issued abroad are subject to a double legalisation procedure, by the foreign authorities that issued the documents and by the Belgian authorities (embassy or consulate), or must be apostilled.[44] Legalisation procedures are extremely lengthy and costly. They can take months, forcing family members to travel hundreds or even thousands of kilometres if there is no Belgian consulate in their country of residence (Moscow for Bishkek, for example; Addis Ababa for Mogadishu, etc.).[45] The documents are then subject to a recognition procedure by the Belgian authorities in accordance with the Code of Private

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[39] CJEU, *C and A*, 2018.

[40] C.C., 4 October 2018, no. 126/2018; J.-B. Farcy, "Conditions d'intégration et droit de séjour autonome en matière de regroupement familial: oui, mais…", *Cahiers de l'EDEM*, November 2018.

[41] Law of 15 December 1980, art. 12*bis* § 1, para. 2.

[42] CJEU, 18 April 2023, *X., Y., A. and B. v. Belgian State (Afrin)*, Case C-1/23. The Court held that "[…] it is essential for the Member States to show, in such situations, the necessary flexibility to enable the persons concerned actually to be able to lodge their application for family reunification in good time, by facilitating the lodging of that application and by permitting, in particular, the use of remote means of communication" (§ 51).

[43] L. Leboeuf, N. Decabooter, I. Vandenberghe, "Member States may not, without exception, require personal appearance at a consulate abroad for the purpose of submitting an application for family reunification", *Cahiers de l'EDEM*, May 2023.

[44] Law of 5 June 1975 approving the Convention Abolishing the Requirement that Foreign Public Documents be Legalised, and the Annex thereto, done at The Hague on 5 October 1961, *M.B.*, 7 February 1976, *err*. *M.B.*, 10 March 1976. The apostille is a simplified form of legalisation. List of countries covered by the apostille: www.hcch.net/fr/instruments/conventions/status-table/print/?cid=41.

[45] C. Flamand, "Trajet migratoire et regroupement familial", *op. cit.*

International Law.[46] If these documents are not in one of Belgium's national languages or in English, they must be translated and certified.[47]

These formal conditions are intended to be interpreted loosely for family members of refugees due to the inherent difficulties in obtaining civil status documents in their country of origin.[48] The General Commissariat for refugees and stateless people (CGRS) is responsible for producing civil status documents for refugees and beneficiaries of subsidiary protection.[49]

Belgian law grants the minister discretionary power to assess the need to have recourse to other means of proof than official documents.[50] The case law considers that the possibility of carrying out investigations in place of a civil status record is not binding on the Belgian State. It is only a possibility when no official document can be produced.[51] However, when the authorities call into question the authenticity of a birth certificate, they must request other types of proof[52] such as interviews, investigations, or DNA tests (in the case of proof of parentage). These are costly and must be covered by applicants.

In addition, there are practical difficulties associated with obtaining a passport in the country of origin, as well as the fact that Belgian diplomatic posts are sometimes far away or non-existent in the country of origin, forcing people to travel to a neighbouring country to complete the paperwork.

The legal requirements and their practical application result in strong requirements in terms of family reunification, which is an immigration case, i.e. a case where the stay of one of the family members depends on the establishment of a relationship.

e) Deadlines

Once the application has been completed, it is sent by the diplomatic representation to the Aliens Office for review. Review times are long. Although the law sets deadlines for examining these applications, these deadlines may be extended.[53] In the case of family members of foreign nationals, if a decision is not taken within 15 months, residency must be granted.[54]

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[46] J.-Y. Carlier and S. Sarolea, *Droit des étrangers*, Bruxelles, Larcier, 2016, p. 655. Law of 16 July 2014 on the Code of Private International Law, *M.B.*, 27 July 2004, art. 30.

[47] *Family reunification of recognised refugees in Belgium*, CBAR, Brussels, 2010.

[48] Directive 2003/86/EC, *op. cit.* art. 11.

[49] International Convention relating to the Status of Refugees, 28 July 1981, Geneva, art. 25.

[50] Law of 15 December 1980, art. *12bis*; Royal Decree of 8 October 1981 on access to the territory, residence, establishment and expulsion of foreign nationals, *M.B.*, 27 October 1981, art. 44.

[51] ALC, 20 January 2011, no. 54 612.

[52] ALC, 24 October 2013, no. 112 748.

[53] Law of 15 December 1980, art 12bis§ 2 and § 3.

[54] C. Mascia, "Administrer le regroupement familial, Construire l'indésirable, justifier l'indésirabilité", Editions de l'Université de Bruxelles, 2022, p 64-68. CJEU, Diallo, 27 June 2018 (C-246/17) and CJEU, X, 20 November 2019 (C-706/18). The Court of Justice considers, however, that the automatic granting of a right of residence does not meet the requirements of the Directive and that Belgium should reconsider its approach.

For family members of EU citizens, this period is six months. At the end of this period, in the absence of a decision by the authorities, the law automatically grants the right of residence.[55]

Section 5: Impact of the Law's Conditions on Family Life

This procedure can therefore take several months or even years to reach a favourable conclusion. It is a process over which the people concerned have little control. The timetable is dictated by the administration. This is a potential source of tension and insecurity for all family members, both in the country of origin and in the country of residence of the sponsor. In some cases, concerns about the ongoing procedure and the long wait will have changed the relationship between partners. This wait is sometimes added to a previous separation, particularly in the case of a sponsor who has refugee status. While the right to family reunification is an essential right for maintaining family life, the multiplicity of conditions makes this right difficult to access, creating obstacles that are sometimes insurmountable for migrants without means (material conditions are an obstacle to family reunification).

However, at the end of this procedure, the difficulties are not resolved. In fact, the conditions for acquiring residency must be met for five years before the family member obtains permanent and autonomous residency. Migrants face major challenges and their legal situation is precarious and unpredictable.

Family life is under pressure. It is not uncommon for the demands of the law to exacerbate tensions between partners or unequal power relationships within them, and end up creating conditions conducive to domestic violence. Women who are victims of violence then face a double violence: the violence they experience and an institutional violence linked to the current legislation and its consequences in terms of residency. Victims of violence feel insecure: having just arrived in the country, in addition to the violence they experience, they fear they will lose their residence permit, which adds to their ignorance of their rights in the face of the violence they have suffered. The result is increased vulnerability.

This strict and demanding legal context sets the scene for the reception of migrants in Belgium and their "undesirability". As Carla Mascia points out, the procedure is not facilitated because the migration is unwanted by the Belgian authorities.[56] It should be noted that the latest government agreement in 2020 will further review the conditions for family reunification.[57]

A study by Stoyanova has shown how the secure rules on family reunification reinforce the precariousness within migrant couples and, consequently, the escalation of tensions between

[55] Royal Decree of 8 October 1981, Art. 52, § 4. However, this automatic system has been called into question by the CJEU, Diallo, 27 June 2018 (C-246/17) and CJEU, X, 20 November 2019 (C-706/18). The Court of Justice considers that the automatic granting of a right of residence does not meet the requirements of the directive and believes that Belgium should reconsider its approach.

[56] C. Mascia, *op. cit.* See also J.-B. Farcy, G. Orsini, S. Smit, Institutional racism within the state of exception: a study of the impact of law on migrants' everyday lives in Belgium, 2020.

[57] The right to family reunification is under pressure. The government agreement of 30 September 2020 provides for "assessing the conditions for family reunification in the light of the legislation of neighbouring countries and reviewing them if necessary in order to make them more consistent".

partners.[58] This is reflected from an analysis of the strict conditions imposed by the law, confirming the undesirability of migrants who do not fit the profile of a well-off, united family. According to Giacomo Orsini, "more restrictive rules regulating family reunification in the country must be understood as yet another institutional attempt to repress the arrival and residence of undesirable foreigners in Belgium".[59]

Chapter 2: The Protection Clause

After examining the conditions and procedure for family reunification, we will look at the residence obtained and the exceptions provided for by law, in particular that relating to domestic violence. After recalling the principle in law, we will look at the limits of the protection to victims and the procedure to be followed, which also raises difficulties.

Section 1: Principle in Law

As already mentioned, all the conditions laid down by law must be met for a period of five years, in terms of both material conditions and living together.[60] The person reunited is issued with a one-year residence permit, an A card, which can be extended by the Aliens Office as long as the conditions are met. Residence obtained through family reunification is "controlled" by the administrative authority… and is therefore inherently precarious. This also has potential consequences for family life, given the resulting administrative dependence of couples and the possible domination of one partner over the other.

If a separation occurs before this deadline or if the sponsor can no longer justify certain material conditions (income or sufficient accommodation), the law provides that the Aliens Office may terminate the residency of the sponsored persons. The law makes an exception to this rule in cases of domestic violence.[61] This exception is known as the "protection clause". It allows women to be protected in the event of an abusive relationship, so that they do not have to tolerate such violence in order to preserve their right to stay in the host country. The clause allows the person claiming domestic violence to be authorised to stay independently of the sponsor, provided that they can convince the Aliens Office that the violence is real.

It should be noted that the concept of cohabitation is interpreted differently in the case of a third country sponsor and an EU or Belgian citizen sponsor.[62] Cohabitation means **actual and lasting** cohabitation between the spouses when the sponsor is from a third country, i.e. living together under the same roof.[63] The law provides for residence to end if there is no longer any marital or family life. However, the concept of absence of family life is interpreted differently when the migrant is a family member of an EU citizen. According to the case law,

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[58] V. Stoyanova "On the Bride's side? Victims of domestic violence and their residence rights under EU and Council of Europe Law". Netherlands Quarterly of Human Rights 37(4): 311-3352019.

[59] Orsini, G. et al., *op. cit.*

[60] Since 2013, the period of time and maintenance of conditions before obtaining an independent residence has been increased from 3 to 5 years.

[61] Law of 15 December 1980, art. 11§ 2 and 42 *quater*§ 4, 4°.

[62] This is defined as actual cohabitation if the sponsor is a foreigner, and a joint installation if the sponsor is a citizen of the European Union or a Belgian.

[63] ALC, no. 25.007 of 25 March 2009; CE, no. 79.187 of 9 March 1999.

the joint residence required in this case does not imply permanent cohabitation, but it does **presuppose a minimum level of cohabitation and a willingness to settle with the EU citizen, which must be reflected in the facts.**[64] The end of residence is referred to for family members of EU citizens in the event of the end of joint residence, divorce, annulment of marriage or the end of a registered partnership.

a) Scope of the End-of-Stay Exception Due to Domestic Violence

There is a little difference in the scope of the protection clause between the regimes applicable to family members of third-country nationals or family members of Union citizens (who are not European), in cases of domestic violence.

Under Article *42 quater* which concerns the Belgian national or Union citizen, the exception applies only if there is a divorce, the end of a registered partnership or no joint residence.

On the other hand, under Article 11(2), in the case of a foreign sponsor, the exception applies to all situations in which the conditions of Article 10 are no longer met (except in the case of fraud). This includes, in particular, ending residence because lack of material conditions.

b) Description of Domestic Violence

While the applicable directives set out particularly difficult situations, citing domestic violence as an example, the Belgian legislator seems to have retained, in the case of the family member of the third-country national, the exclusive situation of domestic violence. Domestic violence is stated and described differently depending on the family members concerned.

1) Art. 11§ 2 of the Law of 15 December 1980

Art. 11 of the law concerns the family members of the foreign sponsor and transposes Art. 15.3 of Directive 2003/86. It refers to the possibility for a Member State to grant an autonomous residence permit in the event of a "particularly difficult situation".[65] Under the terms of article 11, the law provides for an exception to the termination of residence if the foreign national "proves that during the marriage or partnership he has been the victim of an act referred to in articles 375, 398 to 400, 402, 403 or 405 of the Criminal Code.[66] In other cases, the minister or his delegate takes particular account of the situation of people who are victims of domestic violence, who no longer form a family unit with the person they have joined and require protection." These are people who are victims of domestic violence or who have suffered violence covered by the Criminal Code. It should be noted that particularly difficult situations are no longer mentioned in the law following transposition of the directive, and that the legislator intends to restrict them solely to domestic violence.[67]

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[64] ALC, no. 194 262 of 26 October 2017; ALC, no. 153 706 of 30 September 2015; Doc. Parl. 2008–2009, no. 2845/001, p. 116.

[65] Article 15.3 of Directive 2003/86, *op. cit*.

[66] There is no reference to art. 410 of the Penal Code, inserted into the Penal Code by a subsequent law.

[67] Article 11 does not therefore refer to particularly difficult situations that are not linked to domestic violence, such as the widowhood of the person being reunited. The Belgian legislator has decided to reduce the scope of directive 2003/86 and to consider only cases of violence punishable under the Criminal Code in the context of marriage or registered partnership or domestic violence, for family members of a third-country national.

This provision covers several forms of violence and does not require to prove violence of a definite seriousness. This is reflected in the case law: the concept of victims of domestic violence is not limited to situations of physical violence.[68] **Psychological or verbal** violence **is sufficient to fall within the** scope of this article.[69] Thus, a ruling by the ALC indicates that even if the administration has broad discretionary powers with regard to whether or not to take into consideration situations of domestic violence, "the law does not limit these situations of violence to physical violence alone, so (that) by taking the view in the contested decision that the violence complained of by the person concerned was more of a verbal nature and that no physical violence supported by a medical certificate had been recorded, the defendant misinterpreted the *last sentence of* Article 11(2) and therefore infringed that article".[70] Requiring physical violence exceeds the legal statute of limitations. Moreover, criminal proceedings are distinct from the implementation of the protection clause. It is not necessary that the partner has been convicted, for the facts to be taken into consideration[71] "Serious indications of domestic violence do not necessarily have to be supported by evidence or criminal proceedings, as the violence is not necessarily physical but can also be psychological, economic and sexual".[72] However, the difficulty of proving such violence, especially psychological violence, remains (see below).

Case law emphasises the administration's obligation to consider the information received and to carry out, and to invite the foreign national to be heard before withdrawing a residence permit.[73]

2) Art. *42quater* of the Law of 15 December 1980

Directive 2004/38 refers to the exception to the end of legal stay when particularly difficult situations require so, for example having been a victim of domestic violence when the marriage or registered partnership was still in existence, without any further details.[74] Article *42quater* transposes this exception to the end of residence for third-country family members of Belgians or EU citizens, in the event of particularly difficult situations such as "for example" "domestic violence", OR having been the victim of rape, attempted homicide or bodily harm. To maintain residence, the law also requires proof of financial resources despite the violence suffered.[75] Case law considers that the acts must be more serious than verbal/psychological

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[68] ALC, 10 July 2019, n° 223 839.

[69] ALC, 1er February 2016, n° 161 145.

[70] ALC, 28 December 2009, no. 36,610.

[71] In this respect, the situation differs from that in France, see chapter 4.

[72] ALC, 10 July 2019, n° 223 839.

[73] ALC, 22 November 2018, n° 212 690

[74] Directive 2004/38, art. 13.2 c).

[75] Article 42quater stipulates that the end of the stay will not be considered ***when particularly difficult situations so require, for*** *example, when the family member demonstrates that he or she has been the victim of domestic violence* ***as well as*** *acts of violence covered by articles 375, 398 to 400, 402, 403 or 405 of the Criminal Code, within the context of the marriage or registered partnership.* One reading of this article might suggest that these acts of violence should be interpreted cumulatively (victim of domestic violence as well as acts of violence covered by the Criminal Code). However, this does not seem to be the intention of the legislator and the case

violence. The judge points out that "the legislator necessarily intended the acts committed to reach a certain degree of seriousness, otherwise the very notion of domestic or conjugal violence would be trivialised".[76] On the other hand, a one-off act is sufficient: the ALC has already ruled that "having been a victim of violence is sufficient, even if the violence is not repeated or frequent".[77] Thus, the judge considered that the administration had misinterpreted the provision (art. 42 quarter) when it "considers that it requires systematicity in the event of acts of physical violence such as those denounced by the applicant". By setting out as an example the acts of violence punishable under Article 398 of the Criminal Code, the legislator had in fact clearly demonstrated its intention to protect the victims and could not have intended that such acts should be repeated "systematically". In another case, the judge considered that by noting a one-off event and requiring *a contrario a* repetition of the acts of violence, the administration was unduly restricting the scope of application of article *42quater* of the law of 15 December 1980, by imposing stricter conditions. This provision does not exclude the possibility that a single incident of domestic violence may constitute a particularly difficult situation.[78]

The judge considers that while it is up to the foreign national to demonstrate that he or she is in a situation that allows him or her to retain the right of residence, the administrative authority, informed of the existence of acts of domestic violence, must allow him/her to provide the necessary evidence in good time.[79] However, the authorities do not specify what evidence is required. It has no guidelines in this respect, and for women it is complex to be able to prove all the elements. What's more, in the absence of any designation of the means of proof to be provided, the assessment of the evidence is left to the practice of the Aliens Office, which creates legal uncertainty and a state of anxiety for the victims. Their uncertain situation, coupled with a lack of knowledge of the procedure, makes them doubly vulnerable at the administrative level (see below).

c) Obligation to Produce Financial Means for Family Members of Union Citizens Who Have Suffered Domestic Violence

Article 11 does not require proof of income in order to maintain the right of residence, the protection clause paradoxically allowing them to compensate for the lack of sufficient resources (article 11 of the law). Only the existence and proof of violence need to be demonstrated. Article *42quater, on the other hand,* lays down a means test for the continued residence of a Union citizen's foreign family member. The aim is to ensure that this person does not become a burden on the public funds. In addition to the particularly difficult situation

law does not seem to follow this path. In addition, it should be noted that these acts of violence are cited by way of example.

[76] ALC, 72 639 of 23 December 2011: *the legislator necessarily intended the acts committed to reach a certain degree of seriousness, failing which the very notion of domestic or conjugal violence would be trivialised*. ALC, n° 114 792 of 29 November 2013; ALC, n° 126 985 of 14 July 2014; ALC, n° 114 792 of 29 November 2013 ALC, n° 141 862 of 26 March 2015.

[77] ALC, 16 May 2019, no. 221 290

[78] ALC, n° 273 958 of 13 June 2022

[79] CE, n° 219 425 of 22 May 2012.

of the victims of violence, the latter must prove that they have an income and that they are covered by health insurance that covers all risks in Belgium. This is therefore also the case, by assimilation, for the Belgian's foreign family member.

The Council of State referred a question to the Constitutional Court for a preliminary ruling on the obligation to produce proof of sufficient resources for the family member of a Belgian, in addition to proof of the violence suffered, in order to determine whether there was reverse discrimination in this case. If the victim was a family member of a Belgian, she would have to prove the existence of an income, whereas if she was married to a foreigner residing in Belgium, there was no such requirement. The Court held that the two provisions in question "give rise to a difference in treatment between third-country nationals who are divorced and who have been victims of domestic violence in the course of their marriage, depending on whether they were married to a third-country national or to a Belgian".[80] As to whether this difference in treatment was based on an objective criterion, the Court held that "neither the objectives pursued by the legislature through the Law of 8 July 2011, nor the reasons given by the Council of Ministers can justify treating the two categories of foreign nationals compared differently, who find themselves in the same particularly difficult situations and for that reason require special protection".[81] The Court therefore annulled this obligation to produce financial means for Belgian family members.

However, the Court of Justice, answering a question referred by the ALC[82] on the possibility of unequal treatment if the victim is a member of the family of a Union citizen compared with other cases, upheld the income requirement, finding that the situations were not comparable.[83]

In conclusion, while Leila, married to Ahmed, who is Afghan and has unlimited residence in Belgium, and Maria, ex-wife of Bob, a Belgian, do not have to show proof of income to obtain autonomous residence, the same does not for Fatoumata, mother of two children and wife of Giorgio, an Italian. Fatoumata will have to prove that she has income so that she and her children do not become a burden on the Belgian state. So, after the violence she has suffered,

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[80] C.C., 7 February 2019, n°17/2019.

[81] *Ibidem*, point B.11.1-5.

[82] ECJ, 13 December 2019, No 230 182. The question referred for a preliminary ruling is worded as follows: "Does Article 13(2) of Directive 2004/38/EC [… infringe Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in that it provides that divorce, annulment of marriage or termination of a registered partnership does not entail the loss of the right of residence of members of the family of a Union citizen who are not nationals of a Member State – in particular, where particularly difficult situations so require, for example the fact of having been a victim of domestic violence when the marriage or registered partnership was still subsisting – but only on condition that the persons concerned do not lose their right of residence, but only on condition that the persons concerned demonstrate that they are employed or self-employed or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State for the duration of their stay, and that they are fully covered by sickness insurance in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person meeting these requirements, whereas article 15.3 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, which provides for the same possibility of maintaining a right of residence, does not make this maintenance subject to the latter condition".

[83] CJEU (Grand Ch.), 2 September 2021, C-930/19.

the proof of the violence and the steps taken to obtain custody of the children, if Fatoumata does not work or is not helped by a third party, she will not meet the conditions for this autonomous residence and the authorities will be able to terminate her residence. On the other hand, if she is working, there is every chance that her stay will be extended.

What solutions are therefore possible to avoid this situation (section 2)? We will see in section 3 what limits there are to the possibility of the authorities terminating the stay.

Section 2: Possible Solutions?

To try to harmonise these different conceptions of violence, but above all the conditions for their continued residence, one solution might be to refer to domestic violence as defined in the Istanbul Convention.[84] This seems all the more justified given that the EU has just ratified this Convention end of June 2023 and that family reunification is part of European law.[85] As a result, Member States will have to comply with the Istanbul Convention as part of the European acquis from October 2023. This will undoubtedly require adjustments to the various directives relating to family reunification.

Article 59 is one of the only provisions of the Convention concerning migrant women.[86] It stipulates the obligation to provide independent and **unconditional** residence for all victims of domestic violence and the suspension of expulsion procedures to enable them to apply for independent residence. Moreover, this provision applies to all women regardless of their residency status in the country where the violence occurred. The principle of non-discrimination, set out in article 4.3, obliges States to invest the same level of effort in preventing, prosecuting, investigating and punishing acts of violence against women in the same way as other forms of violence, in respect of all women, regardless of their status.[87]

With the implementation of the Istanbul Convention as part of the European acquis, this provision should be applied consistently and harmoniously in the States that have ratified the

[84] Council of Europe Convention on preventing and combating violence against women and domestic violence (known as the "Istanbul Convention"), which entered into force in Belgium on 1 July 2016. The aim of the Istanbul Convention is to prevent and combat violence against women and domestic violence, protect the rights of victims and strengthen national and international cooperation against violence against women and domestic violence.

[85] The Istanbul Convention has been ratified by 37 countries and the EU (since 28 June 2023). The Istanbul Convention will enter into force for the EU on 1er October 2023. This convention has been implemented after the directives on family reunification

[86] Art. 59 reads as follows; "Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.

2 Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.

[87] S. Forrez, "La Convention d'Istanbul: Un nouvel instrument de la lutte contre la violence à l'égard des femmes - impact sur le droit belge, impact sur le terrain", asbl INTACT, 2016, p. 7. Available online only; https://www.intact-association.org/images/analyses/Studie-Sophie-FR-CvI.pdf.

Convention. The Convention also provides a definition of domestic violence, which will help to harmonise this interpretation in law.

Section 3: Pitfalls for Victims of Violence

We will examine the difficulties in applying this clause in practice for victims of domestic violence. These are linked to the practical implementation of the protection clause, in particular its scope (a), the question of proof (b), sufficient information for people (c) and their access to rights or the definition of violence (d). In addition, the authorities are sometimes suspicious when examining these requests (e).

Before addressing these various points, it should be emphasised that migrant women who are victims of domestic violence are faced with a difficult choice between leaving an abusive and violent relationship or tolerating the abuse in order to preserve their rights of residence in the host country. Similarly, these restrictive standards and regulations make victims hesitate to report their abuser or to find shelter and protection, whether institutional or not, in the country.[88] As highlighted in a field study conducted in 2014, these women have to fight a battle at various levels, even though they are not equipped to deal with the many challenges: trying to protect themselves from violence, making a separation decision that may have an impact on their stay, demonstrating the reality of the violence, dealing with family pressure in the country and facing the gaze of social workers if they find help. What's more, they live in a country where they are often unaware of the administrative maze, the legislation, the social services or even the language.[89]

a) Scope of Application

The proposed protection clause applies to women undergoing family reunification proceedings who are victims of domestic violence. However, it does not apply to all applicants for family reunification.[90] In fact, this exception to the withdrawal of residency via "protection clauses" does not apply if the violence occurs after the application has been submitted, when the victim has not yet obtained the right to one year's residency in Belgium, or while her case is being examined. In other words, if the person is under a registration certificate and has not yet obtained a one-year residence permit, they cannot benefit from this exception. Yet domestic violence can occur during this period. The GREVIO expert report on Belgium criticised this situation, pointing out the lack of protection for women holding a registration

[88] G. Orsini, *op.cit.*

[89] B. Banza, N. Uwera, Violence conjugale et regroupement familial : des femmes se mobilisent pour une sensibilisation préventive, CPVF, 2014.

[90] It should also be remembered that this protection clause only applies in the strict context of family reunification and cannot therefore be applied to other foreign women who are victims of violence. For the latter, only a residence permit for exceptional reasons can be introduced (procedure 9bis, see below).

certificate[91] under the family reunification procedure.[92] The law offers them no specific protection (even if the violence they report is proven).

In addition, the clause does not apply to all types of family reunification. For example, if the sponsor's stay is limited on the basis of work or study,[93] this exception does not apply. Nor are there any exceptions if violence occurs in the context of family reunification between two EU citizens. This too is highlighted in the expert report.[94]

Lastly, this clause does not apply *a fortiori* to migrant women residing on a basis other than family reunification but who are victims of domestic violence. There is no legal provision for specific protection against violence against women, even though their situation is extremely precarious. This is a gap highlighted by the GREVIO report.[95] For all these people excluded from the scope of this clause, the only possible approach is to apply for a residence permit on the basis of article *9bis* of the law of 15 December 1980 for exceptional reasons (see below, chapter 3, section 4).

b) Lack of Information

Victims of violence often have to cope with a number of problems relating to administration, housing, equipment, work and so on. For them, lack of knowledge and command of the language is both the cause and consequence of a large number of social problems. In the event of separation, which might be necessary in view of the circumstances, the question arises of access to a shelter that could take them in. It seems that the reception facilities do not have enough space to accommodate the victims, who are sometimes accompanied by children.[96] Without socio-legal support, access to information about their right to stay is inadequate.

These people will be informed that their stay is being withdrawn when they receive the letter asking for further information. This letter will be written in either French or Dutch. The importance of following up the matter will therefore not be perceived quickly if the person cannot read the letter or understand it without translation. This additional information should be sent to the Aliens Office within 15 days. Apart from the fact that victims have sometimes left their family home – which creates practical difficulties in recovering this mail – this 15-day period is particularly short for understanding what is at stake in the mail, gathering evidence so that the authorities can make an informed decision and forwarding it. Assistance is essential if you are to know your rights and respond appropriately to the questions asked. Indeed, the stakes are high, as it is the withdrawal of the residence permit that is being considered. What's more, the person concerned may not be aware of the regulations relating to the exception to the end of the stay linked to domestic violence or, worse still, may not realise that they are subject to them.

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[91] Attestation d'immatriculation (in French)

[92] GREVIO, Baseline Evaluation Report Belgium, published on 21 September 2020, Strasbourg, pt.207.

[93] Law of 15 December 1980, art. 10 bis.

[94] GREVIO, *op. cit.*, pt. 208.

[95] *Ibidem*

[96] *Ibidem*

Furthermore, it is not uncommon for the spouse or partner who has perpetrated the violence to take the initiative in informing the woman that she has "abandoned" her home.

Finally, a migrant woman who leaves home and seeks accommodation in an emergency reception centre cannot be domiciled there, which adds to the administrative difficulties if the protection clause is rejected and she wishes to apply for regularisation on exceptional grounds.[97]

c) Complaints Procedure and Evidence Gathering

Although the exception for domestic violence does exist, it is extremely difficult for victims of domestic violence to report the violence they have suffered and to corroborate it sufficiently. The burden of proof lies entirely with the victim. It is vital that the victim receives support when filing a complaint, in order to reassure her about her administrative situation and help her to take this step. This is to avoid a refusal to register the complaint or to prosecute if the facts are difficult to prove. In fact, some police areas still regularly refuse to register complaints from victims of domestic violence, because they believe that a victim can only be a victim if she has been beaten (often severely and/or certified by a doctor).[98] Victims are therefore very reluctant to go to the police station to lodge a complaint. What's more, police officers are not informed or trained about the existence of this exception clause for migrants.

Furthermore, while the complaint is undoubtedly a form of evidence, the authorities do not specify what other useful evidence should be presented. It has no guidelines in this respect. These are often complex situations of psychological violence that are difficult to prove. Lack of knowledge of the evidence to be provided is an obstacle and creates legal uncertainty, which adds to the administrative vulnerability of migrant women. The burden of proof should be eased or at least lightened for the victim. And shared with the authorities, given her vulnerability.

The lack of transparency in the procedure was highlighted in the GREVIO report, indicating the lack of information from those involved about the nature of the evidence that could be submitted. For example, GREVIO observed that many of them were unaware that the Aliens Office accepts the accommodation certificate as irrefutable proof of domestic violence. With regard to the evidence that can usefully be submitted, the same report indicates police reports, a court conviction, a restraining order or protection order, medical evidence, a divorce order, reports from social services or even NGO reports on women.[99]

The lack of guidelines encourages a certain inconsistency in decision-making, also between the Dutch and French sections of the Aliens Office, which remains a matter of concern for the GREVIO expert group.[100]

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[97] Law of 15 December 1980, art. 9bis.

[98] AVEVI, 2022 activity report, ADDE.

[99] GREVIO, *op. cit.,* pt. 303.

[100] *Ibidem*, pt. 209

Furthermore, the exception does not seem to apply to forms of violence such as the situation of women who are deceived or inconsiderate and who, at the risk of losing their residence permit if they separate from their spouse, have to continue living together for five years against all odds.

What's more, the individual has no control over the situation and no room to manoeuvre to influence the authorities. Their situation is suspended in time. Their case is subject to the discretionary power of the authorities, even if this is limited by respect for fundamental rights (see below). All they can do is add to the administrative file and wait for the outcome, possibly preparing for an appeal, but they have no control over the time needed for the administration to take a decision. This lack of a timeframe within which the person will be given a decision is another factor that makes them feel insecure.

d) Situation of Children

The precariousness of a stay due to separation also has implications for children, who sometimes witness the violence but also the administrative difficulties with which their parent struggles. Children are sometimes the only means of communicating with the authorities through their knowledge of the language or the education they have received in the country of residence. This integration must necessarily be included in the factors to be considered by the authorities when considering the best interests of the child.

e) Suspicious Approach by the Administration

The Aliens Office approaches this issue with some suspicion, believing that the person is trying to circumvent the rules by invoking the protective clause to obtain an independent stay before the five years formally provided for by the law.[101]

In conclusion, in addition to the limited scope of the exception clause, there are many difficulties on the ground in implementing it. The victim, a migrant, is at the intersection of several personal and administrative vulnerabilities and does not always have the means to react adequately to the request for information. Moreover, the procedure concerning them lacks transparency, as highlighted in the GREVIO report on Belgium in 2020. The complexity and fragmentation of the applicable legislation is also criticised.[102]

Chapter 3: Limits at the End of the Stay

In this chapter, we examine the precautions that must be taken by the competent authorities when deciding to terminate the stay. If the victim has not been able to convince the Aliens Office of the reality of the violence suffered, she will not be granted an autonomous stay and the authorities may put en end to her legal stay. However, certain procedural guarantees must be respected (section 1).

The person concerned may appeal to the ALC against the decision to withdraw their residence permit, but the question of the effectiveness of this appeal may be raised (section 2). The decision must respect fundamental rights (section 3). If the appeal is rejected and the

[101] C. Mascia*, op. cit.*, p. 120

[102] GREVIO, *op. cit.*, pt. 210.

domestic violence is not recognised, the only remaining option is to apply for regularisation (section 4).

Section 1: Procedural Guarantees in the Context of the Withdrawal of Residence Permits

Few procedural guarantees are provided for foreign nationals when the administrative authority is considering terminating their residence. When the authorities become aware that the foreign national is no longer living together and wish to terminate his or her residence, they must first notify the person concerned and gather additional information. A letter will be sent to the person concerned, giving them the opportunity to put forward their arguments. The administration has a **duty to inform in** order to "inform the requesting party that a withdrawal measure is considered and to enable him/her to put forward useful *observations*".[103] As mentioned above, the person concerned has 15 days to respond to this letter (see p. 20). The letter is written in one of the national languages used by the authorities and does not contain any information about associations that might be able to help them.

Provided it is understood, this letter should enable the victim to respond appropriately to the request for further information and to invoke any exceptions provided for by law. This is therefore the crucial time to report the violence suffered and to provide evidence to substantiate what has been declared, if necessary by lodging a complaint. This enables the authorities to make an informed decision.

If the administration wants to withdraw the legal stay, the person concerned must be heard. A prerequisite for the **right to be heard** is to be able to communicate the facts and to be invited to do so by the administration.[104] This is a matter of respecting the principle of equality of arms, which is one of the migrant's rights of defence.[105] This principle was shaped by case law before it was translated into hard law. Indeed, if the administration was considering terminating the stay, it was obliged "to notify the applicant of its intention and to give him the opportunity to put forward the arguments it considers useful".[106] In order to be useful and effective, this invitation to be heard must be accompanied by certain guarantees, such as full information about the issues at stake and the decision that the administration proposes to take, the right to speak with counsel, targeted questions, etc.[107]

These are essential guarantees for migrants whose residency has been undermined because they no longer meet the conditions required for their stay. They have the opportunity to put forward their point of view and arguments, and have the assurance that these will be examined carefully and cautiously by the authorities, within the scope of their discretionary powers.[108]

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[103] ALC, no. 194,877 of 10 November 2017; 195,639 of 27 November 2017.

[104] Law of 15 December 1980, art. 62 in force since 29 April 2017.

[105] C.E. (11e ch.), 29 October 2015, n° 232.758, X.; C.E. (11e ch.), 19 January 2016, n° 233.512, X.

[106] CE, no. 220 320 of 13 July 2012; CE, no. 203 711 of 5 May 2010.

[107] ALC, n° 188 517 of 16 June 2017.

[108] ALC, 28 May 2015, no. 146 616.

While the administrative judge therefore considers that it is up to the foreign national to demonstrate that he or she is in a situation that allows him or her to retain the right of residence, the administrative authority, informed of the existence of acts of domestic violence, must allow the foreign national to provide the necessary evidence in good time.[109]

Case law insists on a duty of precaution and the obligation for the authorities to take account of the information received and the investigations to be carried out before withdrawing a residence permit.[110]

Although the person has the right to be heard after reacting to the letter, the law does not stipulate a time limit for this. Nor is the administration bound by any deadline for communicating a final decision. The procedure lacks transparency. In the meantime, the reunited family member whose stay is called into question is left in a state of uncertainty as to his or her future or that of his or her family.

In reaching a final decision, the authorities have a discretionary power of appreciation*, in the exercise of which they are required to take account of all the factors brought to their attention.*[111] On several occasions, the ALC has ruled that the exceptional provision relating to domestic violence must be examined before the right of residence can be ended, and that a failure to observe the duty of care has been demonstrated on several occasions in the context of these provisions (principle of precaution).[112]

The Aliens Office's decision is subject to an obligation of formal motivation. In order to satisfy this obligation, the decision must enable the person to whom it is addressed to *know the reasons on which it is based, without the authority being obliged to explain the reasons for these reasons*. It is sufficient for the decision to make clear and unequivocal the reasoning of its author and to enable the addressee to understand the justifications for the decision, so that he or she can challenge them in the appeal and the court can exercise its review in this regard.[113]

The Council of State, for its part, has specified that it is up to the Aliens Office "to seek information enabling it to make a decision in full knowledge of the facts" and "to investigate the case and therefore to invite the foreign national to be heard on the reasons why the opposing party should not terminate his or her stay", since "only such an invitation offers the foreign national an effective and useful opportunity to put forward his or her point of view".[114]

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[109] ALC, n° 219.425 of 22 May 2012.

[110] ALC, n° 162 185 of 16 February 2015; n° 151890 of 7.09.2015

[111] C. Const, judgment no. 121/2015 of 17 September 2015, *op. cit*.

[112] ALC, n° 151890 of 7 September 2015; ALC, n° 151399 of 31 August 2015.

[113] ALC, n° 160697 of 25 January 2016; ALC, n° 157 132 of 26 November 2015; the judge considers that this possibility offered to the defendant by the aforementioned Article 42 is not a simple option, but is intended to enable it to carry out the needs assessment to which the same provision obliges it. Consequently, the defendant cannot criticise the applicant for failing to provide a complete file on his own initiative concerning the household's own needs, nor can it rely on the fact that this lack of information means that it is "unable to carry out the analysis *in concreto* provided for by Article 42, § 1, subparagraph 2 [of the Law]".

[114] CE, no. 230.293 of 24 February 2015; CE, no. 230.257 of 19 February 2015.

This is a form of procedural cooperation, which is all the more important in the context of the decision to terminate the stay.[115]

The person is in a very uncomfortable situation, as they know that a withdrawal procedure is underway but do not know when the decision will be taken. In addition, they are in an ambiguous position, since it is in their interest for the authorities to take time to examine the information submitted and the fact that this will extend their legal stay, but on the other hand, they would like the uncertainty surrounding their administrative situation to end, so that they can get on with their lives.

The integration elements, the person's paid or unpaid activities and the ties developed since arriving in Belgium are all elements that enable the Aliens Office to make an informed decision. Unfortunately, once this information has been submitted, there is no other possibility for the person to react, and this could possibly lead to anxiety. This, in turn can have an impact on the person's family life and their ability to continue the integration process they have begun or maintain their usual activities. Depending on the information submitted, the authorities will either decide to withdraw the residence permit or grant an autonomous residence permit. In this case, the person will be able to look forward to a new life, but will often have to face many challenges related to socio-economic integration. It should be noted that autonomous residence is a one-year stay.

Section 2: End of the Stay and Respect for Fundamental Rights

When considering withdrawing the residence permit of a family member of a third-country national or an EU citizen, the authorities must take account of the individual circumstances of the person concerned and duly justify their decision, such as the length of the person's stay in the Kingdom, their family and economic situation, their social and cultural integration in the Kingdom and the intensity of their links with their country of origin.[116] This requires the authorities to balance the interests at stake and take account of fundamental rights.

The provisions on family reunification must be applied with due respect for fundamental rights, in particular the right to family life[117] and the principle of the best interests of the child.[118] Any decision by an administrative authority to terminate a residence acquired through family reunification must therefore scrupulously respect these principles, given the potentially negative consequences for family life.

It is interesting to note the different approaches of the two European courts to this issue.[119]

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[115] ALC, no. 121846 of 31 March 2014. See also J. Hardy; "Les lignes directrices pour l'application de la directive 2003/86 relative au regroupement familial à l'aune de la jurisprudence récente", RDE, pp. 339–349.

[116] Art. 11, §2 al. 5 of the law of 15 December 1980.

[117] European Convention on Human Rights, art. 8 and Charter of Fundamental Rights of the European Union of 18 December 2000, J.O.C.E, C 364/1, art. 7 and 24

[118] Communication from the Commission to the Council and the European Parliament on guidelines for the application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014
COM (2014) 210 final, pp. 3 and 13.

[119] European Court of Human Rights and Court of Justice of the European Union.

a) European Court of Human Rights

Article 8 of the ECHR[120] stipulates that everyone has the right to respect for his private and family life, his home and his correspondence. This is not an absolute right, but a relative one: any interference with these freedoms by the authorities must be assessed in the light of the principles of proportionality and reasonable justification. This presupposes that family life is protected from any unjustified interference by the authorities. The ECHR's interpretation of family life in the context of migration is a little hesitant.

The Court held that this right to private life does not imply a subjective right to family reunification or an obligation on the part of the Member State to respect the choice of families who decide to live in another State. However, it may imply a positive obligation inherent in effective "respect" for family life.[121]

These principles are binding on the administration when examining any decision relating to residency, insofar as they are a guarantee and take precedence over the provisions of the law of 15 December 1980.[122] This means *that it is up to the administrative authority to examine the case as rigorously as possible before making its decision, based on the circumstances of which it is or should be aware.*[123]

It is up to the authority to demonstrate that it was concerned to strike a fair balance between the aim pursued and the seriousness of the infringement.[124] When withdrawing a residence permit, the authorities may not therefore disproportionately infringe the right to private and family life of the persons concerned. The European Court of Human Rights has also specified that the "necessity" of interference with the right to family and private life implies that the interference is based on a pressing social need and is proportionate to the legitimate aim pursued. This means that the interference must be examined not only from the point of view of immigration and residence, but also in relation to the *applicants' mutual interest in continuing their relationship, and that the legitimate aim pursued must be weighed against the seriousness of the interference with the applicants' right to respect for their family life.*[125] In a subsequent Grand Chamber case, the Court reiterated that where minors are concerned, the best interests of the child must be the **primary consideration in the** proportionality analysis.[126]

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[120] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

[121] ECtHR, 21 December 2001, *Sen v Netherlands* (no 31465/96), pt 31. *Account must be taken of the fair balance to be struck between the competing interests of the individual and of society as a whole. By leaving the first two applicants only the choice of giving up the position they had acquired in the Netherlands or giving up the company of their eldest daughter, the respondent State failed to strike a fair balance between the applicants' interests, on the one hand, and its own interest in controlling immigration, on the other.*

[122] European Court of Human Rights, 5 February 2002, *Conka v Belgium*, § 83; CJEU, C-540/03 of 26 June 2006; ALC, n° 192 842 of 29 September 2017.

[123] ALC, n°142 062 of 27 March 2015.

[124] ALC, n° 151 478 of 31 August 2015.

[125] European Court of Human Rights, 21 June 1988, Berrehab v. Netherlands, application no. 10730/84 § 28.

[126] Eur. D.H. (gde ch.), *Jeunesse v. Netherlands*, 3 October 2014.

These rulings have consequences in terms of obligations of rigour and caution in the examination of individual situations by the administration. This allows for in-depth judicial review where fundamental rights are at stake.

The case law of the ALC examines the balance between the various interests at stake and checks whether the authorities have considered the impact of their decision on family life, especially when children are present.[127] The judge has already found a violation of Article 8 of the ECHR, criticising the authorities for failing to carry out a careful and rigorous examination of the private life of which they were aware when they issued the order to leave the country.[128]

b) Court of Justice of the EU

The Court of Justice considers that there is a subjective right to family reunification and that it is a fundamental right, enshrined in the Charter of Fundamental Rights.[129] The directives on family reunification define the concept of family and set out the conditions for implementing this right. The Commission regularly reiterates that the objective of family reunification is to foster the family unit.[130] It considers that family life cannot be restricted by migration, which is the very objective of the right to free movement of Union citizens. According to recital 4 of the directive, family reunification is a necessary means of enabling family life. It contributes to the creation of sociocultural stability facilitating the integration of third-country nationals in the Member States, which also helps to promote economic and social cohesion, a fundamental objective of the Community set out in the Treaty. This teleological and pragmatic interpretation of the directives on family reunification by the Court runs through all its case law on the subject.[131]

As regards taking account of the interests of the child, the Court of Justice considers the Convention on the Rights of the Child to be an integral part of Union law as a general principle of Community law. It recalls the obligation of the Member States to consider, when assessing each particular situation, the best interests of the child, family life, the state of health of the person concerned and the principle of non-refoulement.[132]

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[127] ALC, 59 982 of 19 April 2011.

[128] Similar situation where withdrawal of residence is considered due to lack of sufficient resources: ALC, no. 194 012 of 20 October 2017. The situation of the common minor child was not considered when the administration made its decision. The Council considers that the defendant did not, in the present case, carry out as rigorous an examination of the case as possible, in the light of the circumstances of which it was or should have been aware at the time of making the order to leave and the territory complained of, and that the alleged breach of article 8 of the ECHR must, therefore, be considered to be well-founded in this respect.

[129] Charter of Fundamental Rights, *op.cit*, art. 7

[130] CJEU, Chakroun, 2010; and K and A, 2018

[131] CJEU, 16 July 2020, B. M. M. ea v Belgian State, joined cases C-133/19, C-136/19 and C-137/19. This case highlights the extremely long time taken by the ALC to examine family reunification applications (3 years and 9 months in the case in question). The Court was surprised that the ALC did not give priority to cases involving children (pt. 43). Ch. Flamand, "Regroupement familial : Effectivité des recours et garanties procédurales au nom de l'intérêt supérieur de l'enfant", *Cahiers de l'EDEM*, August 2020.

[132] CJEU, C-249/13, 11 December 2014.

Section 3: Appeal to the ALC: An Effective Remedy?

Any negative decision by the Aliens Office may be challenged before the ALC, an administrative court, as part of the annulment procedure.[133] To be admissible, this appeal must be lodged with the ALC within 30 days of notification of the decision. It has automatic suspensive effect.[134] The ALC exercises a marginal power to review the legality of administrative decisions. This review is limited to "verifying whether the authority has taken as established facts that are not apparent from the administrative file and whether it has given an interpretation of the said facts, in both the substantive and formal grounds of its decision, that does not result from a manifest error of assessment".[135] The administrative court's review therefore relates solely to the formal reasoning of the decision or to any manifest error of interpretation by the administration.

The appeal is therefore examined in part by the ALC. Its jurisdiction is limited to verifying the legality of the decision (for example, compliance with the principles of formal motivation), but the court cannot go back over the facts or the assessment of them, in the absence of full jurisdiction (as is the case in asylum matters).

Because of this limited jurisdiction, the ALC cannot substitute its assessment power for that of the administration. In addition, the legality of an administrative act is assessed on the basis of the factors known to the authority at the time it takes its decision[136] or with reference to the legislation in force at the time it was adopted.[137]

Consequently, all the circumstances must be known to the administration at the time it takes its decision.[138] Conversely, the authorities must take account of the information submitted and may not disregard it on the sole grounds *that it is declaratory and unsubstantiated, even though its content corroborates and is supported by the other information on "family" life or, at the very least, on private life and integration submitted.*[139]

In view of the ALC's limited powers in the context of its review of the legality of the decision taken by the administration, the procedural collaboration referred to above is all the more important.[140]

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[133] Law of 15 December 1980, art. 39/2.

[134] Law of 15 December 1980, art. 39/79. It does not have suspensive effect in the case of a visa refusal or a refusal to submit the application in Belgium on exceptional grounds.

[135] ALC, 16 March 2023, n° 286 219; C.E. (11e ch), 6 July 2005, n° 147.344, X.

[136] ALC, no. 1940444 of 27 October 2017; CE, no. 110.548 of 23 September 2002.

[137] CE, n° 234 615 of 2 May 2016; ALC, n° 196 945 of 21 December 2017.

[138] ALC, n° 185 593 of 20 April 2017.

[139] ALC, no. 184 573 of 28 March 2017.

[140] CE, no. 235,582 of 4 August 2016. This ruling reiterates that the ALC's judgment must state the reasons on which it is based and requires it to respond, explicitly or implicitly, to any request, any exception, any defence and any plea or argument put forward by the parties. The purpose of this rule is to enable the parties to the proceedings and the Council of State to ensure or check that the court has fully examined the elements of the case and has effectively responded to the arguments presented to it.

This limited jurisdiction raises the question of the effectiveness of the appeal. Indeed, if the court cannot go back over the facts or consider information provided by the claimant after the appeal has been lodged, the issue merits consideration. As the GREVIO report points out, the legal deadline of fifteen days prescribed by law[141] to provide evidence of the violence is considered "very short and although an extension of this deadline is possible in principle, it is left to the discretion of the officer in charge of the case within the Aliens Office. If an application is rejected for lack of evidence, it is not possible for the victim to produce new evidence (however convincing) as part of the appeal to the ALC, since the jurisdiction of this appeal court is limited to reviewing the legality of the Aliens Office's decision and does not extend to the merits of the case."[142] The ALC considers that it cannot question the Aliens Office's assessment of the facts of a given situation.[143]

Can the remedy be considered effective if the court cannot remedy the situation but can only annul the measure? An effective remedy is an essential right to guarantee the exercise of migrants' rights. This principle has its source in European Union law, more specifically in the Charter of Fundamental Rights (art. 47), and in the general principles of law.[144] Directive 2003/86 on the right to family reunification does not provide any information on the effectiveness of appeals. It requires Member States to ensure "that the sponsor and/or his/her family members have the right to challenge in court decisions rejecting applications for family reunification, decisions not to renew or withdraw residence permits, or decisions to issue expulsion orders". A wide margin of manoeuvre is reserved for the Member States: "the procedure and powers for exercising the right referred to in the first paragraph shall be determined by the Member States concerned."

It should be pointed out that the absence of an opportunity review seems to be at odds with the European Commission's guidelines, which recommend that appeals against refusals of residence for family reunification purposes should comply with the principle of an effective remedy.[145] This review is defined by the Commission as an "exhaustive judicial review which must be available as to the substance and legality of decisions" and requires that "decisions may be challenged not only on points of law, but also on the facts of a particular case".

Finally, if the ALC annuls a decision taken by the Aliens Office, a new decision must be taken by this same Office. This decision may not disregard the grounds of the judgment annulling the first decision. Once annulled, the contested act is deemed not to have existed.[146]

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[141] Law of 15 December 1980, art. 62.

[142] GREVIO, *op.cit*, pt. 210.

[143] ALC, 13 December 2018, no. 213 813. "In the context of its review of legality, it is not for the Council to call into question the assessment made by the Aliens Office of the elements at issue."

[144] J.-Y. CARLIER and S. SAROLEA, *op. cit.* p. 118.

[145] Communication from the Commission to the Council and the European Parliament on guidelines for the application of Directive 2003/86/EC on family reunification, Brussels, 3 April 2014, COM (2014) 210 final and J. HARDY, *op. cit.* pp. 339–349.

[146] C.C., 27 May 2008. n° 81/2008, B.16.3.

This is followed by a "carrousel" that can take several months, extending the uncertainty surrounding the final decision.

Chapter 4: Women Victims of Domestic Violence Outside the Legal Framework

The previous chapters dealt with the issue of women victims of violence who were legally in Belgium as part of the family reunification process. However, women who are not in the relationships described or who are staying illegally cannot benefit from this protection clause. This is problematic. While they have the right to lodge a complaint against the perpetrator, there is currently no mechanism to protect them in terms of removal (Section 1). In terms of residence, they only have the possibility of applying for regularisation (Section 2). This is despite the fact that the Istanbul Convention requires States to suspend all expulsions in cases of domestic violence. There is therefore a legal vacuum that needs to be filled since the EU ratified the Istanbul Convention on 28 June 2023[147].

Section 1: Illegal Immigrants

Anyone who has been the victim of violence can lodge a complaint against the perpetrator. Apart from the difficulty of making such a complaint (such as shame etc.), there is the whole issue of how the complaint is received by the police authorities. While great efforts are being made to train these people to receive complaints, the reality is that it is more the residence status of the migrant that is considered. However, as already noted, the Istanbul Convention states that the right of women to be protected and to obtain independent residence in the event of domestic violence applies to all women *regardless of their residence status*.[148] This means that States have an obligation to invest the same level of effort in preventing, prosecuting, investigating and punishing acts of violence against women in the same way as other forms of violence against all women, regardless of their status. Given the current lack of precision in the law regarding the granting of a residence permit (or at least a suspension of expulsion), there is a legal vacuum concerning all migrant women who are victims of violence and who fall outside the scope of the law or women who are not in a marital relationship or recognized partnership. To fill this legal vacuum and consolidate this right, this obligation should be specified in the law of 15 December 1980, in order to make it effective.

Section 2: Application for Regularisation

If the person cannot invoke the protection clause, either because it has not been recognised or because the situation falls outside the scope of the law, the only possibility is to submit regularisation request on exceptional grounds[149]. In all these situations, only this type of application for regularisation can be submitted to obtain residence in Belgium. It should be remembered that the victim can of course lodge a complaint against the perpetrator of the violence, but will not be protected in terms of residence.

The request is made to the mayor of the municipality of residence. In this case, the victim has no rights during the procedure, which makes his or her situation particularly delicate. The

[147] It will enter into force on 1 October 2023 in the EU.

[148] Istanbul Convention, *op. cit.* art. 4.3 and 59.

[149] Law of 15 December 1980, art. 9 *bis*.

application is left to the discretion of the Aliens Office and is not subject to any time limit. However, the State is obliged to take account of fundamental rights, as mentioned above.[150]

As the GREVIO expert committee report on Belgium points out, article *9bis* of the law of 15 December 1980 is formulated in a generic way for any person residing illegally, without referring to the specific situation of migrant victims of domestic violence.[151] In addition to the obligation to pay a fee of 385 euros to apply for regularisation, the victim must present an identity document and provide the address of a fixed abode (which cannot be the address of a refuge). According to the report, "these conditions do not take into account the specific situation of victims of violence, such as financial exploitation preventing payment of the fee, the retention of official identity documents by the aggressor or the impossibility for victims to provide an address after fleeing violence". The report also sets out, on the basis of ALC case law, the threshold for admissibility of an application under Article *9bis*, which is particularly high: an applicant must establish that it is "impossible or particularly difficult" to return to his or her country of origin. Furthermore, pending consideration of an application for regularisation, there is no guarantee that a victim is protected from the risk of being arrested or placed in detention.

In view of this description, the Law of 15 December 1980 should include a mechanism enabling a victim of violence to apply for a residence permit on the basis of domestic violence using a specific procedure that is distinct from the procedure provided for in art. 9*bis*.

Chapter 5: The Situation in Other EU Countries

Section 1: France

In France, the renewal of a residence permit issued on the basis of family reunification is subject to continued cohabitation unless this is the result of the death of the French spouse.[152] However, where cohabitation has ceased as a result of domestic violence suffered by the spouse, the administrative authority may not withdraw the residence permit and may renew it. In the event of violence committed after the foreign spouse's arrival in France but before the temporary residence permit was issued for the first time, the foreign spouse will be issued with a temporary residence permit marked "vie privée et familiale" (private and family life)[153] unless his or her presence constitutes a threat to public order. They must live together for five years if they are married to a French national, or four years if they have benefited from family reunification, before acquiring an independent and unlimited right to residence.

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[150] CE, 11 March 2022, no. 14782, point 3.1.1.2 and ALC, 11 August 2022, no. 275 870. The existence of a discretionary power of assessment on the part of the defendant, when it applies Articles 9 and 9*bis* of the Aliens Law, does not per se imply an arbitrary exercise of that power of assessment, provided that it is exercised under the control vested in the ALC and that the defendant is under an obligation to state the reasons for its decision.

[151] GREVIO, *op. cit.* pt. 211.

[152] Code de l'entrée et du séjour des étrangers et du droit d'asile, art. 313-12. This article was amended by the Law of 9 July 2010 on violence against women, domestic violence and its impact on children.

[153] Carayon, Lisa, "Derrière le masque du droit : la femme parfaite du droit des étrangers", in Femmes et droit. Des discriminations invisibles, dir. J. Houssier and M. Saulier, coll. Thèmes et commentaires, Dalloz, forthcoming.

In France, protection for foreign women who are victims of violence has improved significantly over the years.[154] For a long time, such women were not protected against refusal to renew their residence permit if they broke up their relationship,[155] even if this was due to violence. Subsequently, this protection began to be granted to married victims who had obtained residence through the family reunification procedure. Henceforth, a breakdown in cohabitation linked to domestic or family violence entitles the holder to a renewed residence permit.[156] However, for women in civil partnerships or cohabiting couples, this protection against withdrawal only applies if a **protection order** has been issued.

Whereas in Belgium, there is a legal vacuum for women who have arrived in Belgium and are victims of violence before they have obtained a one-year residence permit (under IA), French law provides that in cases of domestic violence, the foreign spouse can be issued with a temporary residence permit bearing the words "vie privée et familiale" ("private and family life"), unless his or her presence constitutes a threat to public order.

As in Belgium, this residence permit is temporary and women who are victims of domestic violence are limited to one-year residence permits. However, in France, if they have succeeded in becoming "**real victims**" (i.e. following a complaint against the perpetrator of the violence, the perpetrator is convicted), they are entitled to a ten-year residence permit. This rule does not seem to take into account the many obstacles, both social and legal, that can lead to a lack of conviction in cases of domestic violence: fear of lodging a complaint, refusal to register the complaint or to prosecute if the facts are difficult to prove and, also, referral of the case to one of the many alternative measures to prosecution that are not considered as "convictions" under the Aliens law. In addition, the right to work is automatically included in the granting of the right of residence.

Finally, unlike the situation in Belgium, the death of a spouse is considered as a particularly difficult situation.

Section 2: Spain

Family reunification is governed by Organic Law 4/2000 of 11 January on the rights and freedoms of foreign nationals in Spain[157] and its implementing regulations, approved by Royal Decree 557/2011 of 20 April 2000.

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[154] *Ibidem*

[155] Residence permits for family reasons, whether within or outside marriage, are conditional on the existence of cohabitation. As a matter of principle, renewal of a permit acquired on this basis therefore requires proof of the continuity of this cohabitation. See art. not. art. L. 423-3 et - 17 CESEDA.

[156] Art. L. 423-5 and -6 for spouses of French women and -18 for people benefiting from family reunification. Note that, on the basis of the same texts, if the break-up due to violence occurs *before the* issue of the first residence permit as the spouse of a French national or as the "reunited" spouse, the permit is issued despite the break-up.

[157] Organic Law 4/2000 of 11 January on the rights and freedoms of foreign nationals in Spain, Art. 19 and Regulation of the law on foreigners, Art. 59.2

In Spain, a spouse or partner who arrives as part of a family reunification process can obtain an independent residence permit. To do so, they must demonstrate that they have sufficient financial resources or a work contract.

The regulation also adds the possibility of an independent residence and work permit in case of domestic violence. To obtain this authorization, the applicant must have reported being a victim of gender-based violence, provide a **protection order** issued by the competent judicial authority within the framework of the criminal proceedings, or a **report from the Public Prosecutor's Office** indicating the existence of indications of gender-based violence, which would result in a provisional authorization. Just like in other countries described before, migrant women face difficulties to lodge a complaint based on domestic violence[158]. The provisional authorization for temporary residence and work, granted to a woman involved in a gender-based violence procedure as a victim, will have a one-year duration and will have to be extended if it expires before the end of the criminal proceeding that supports it.

In order for the authorization to be definitively granted, it will be required that the criminal proceeding in which gender violence is denounced concludes with a condemnatory sentence or with a judicial resolution from which it is deduced that the woman has been a victim of gender-based violence, including the closing of the case due to the accused being at an unknown location or the provisional dismissal due to the expulsion of the denounced person. This residence permit will also be granted in the event of the death of the sponsor, which, unlike in Belgium, is recognised as a particularly difficult situation.

In the event of a non-conviction, the authorization will be denied and will imply the loss of the effectiveness of the provisional authorization in case it was granted. An administrative sanctioning proceeding will also be initiated for being irregularly in Spanish territory without a residence authorization[159]. Which would probably end with the removal from Spanish territory.

The definitive residence and work authorization, on the other hand, will have a duration of 5 years. Unlike in Belgium, but more like the situation in France, the right to stay is closely linked to the judicial proceedings and a criminal conviction. This is also in breach with the Istanbul Convention, that recommends an autonomous residence and a suspension of removal in case of domestic violence.

Conclusion

As we can see, the situation of migrant women is particularly complex and at the intersection of different realities: vulnerability as a woman, as a migrant, as a victim of violence and subject to numerous administrative requirements because of her residency status. As Lisa Carayon points out, “resilience is ultimately one of the great qualities of the perfect woman in

[158] “Gender Violence against Migrant Women living in Spain” 2021. https://asociacionportimujer.org/wp-content/uploads/2022/03/Informe-final-PICUM-Violencia-de-Genero-2021.pdf and “Migrant women face the hostility of an administrative and legal system that perpetuates racist attitudes when they file a complaint and initiate legal proceedings for gender-based violence” https://www.pikaramagazine.com/2023/06/al-denunciar-no-sabes-que-ese-sistema-va-a-ser-devastador/

[159] Organic Law 4/2000 of 11 January, *op.cit.*, art. 53.1 a.

immigration law". Resilience in the face of violence and the administrative and socio-economic obstacles that come with a possible separation.

In Maria's case, presented at the beginning of the study, if she can prove that she has been subjected to violence, she will be able to obtain a one-year stay after the Aliens Office has examined her case. If she fails to do so, her residence permit will be withdrawn and she will have to appeal against this decision. If the ALC confirms that her residence permit has been withdrawn, she will find herself without a legal residence permit and will have no option but to apply for regularisation, which will not give her any rights pending the decision.

This contribution showed that family or domestic violence sometimes occurs because of the legal framework and the administrative dependence created by the law between the person being reunited and the person reuniting them. In addition, the technicality and complexity of the law of 15 December 1980, and the successive amendments it has undergone over the years, seem to reflect the undesirability of foreign nationals coming to join their families in Europe. Foreign nationals will only "deserve" their right of residence if they have "held out" during the five-year period following the granting of the right to family reunification. As we have seen, the pressure that the law puts on family life can have perverse effects and create tensions within the couple. This considerably weakens any autonomy that the person being reunited may have wanted.

However, the purpose of the directives in question is to encourage family reunification and to ensure that it remains effective. The Court of Justice points out that the right to family reunification is a subjective right which requires the administration to issue a residence permit when the conditions are met.[160]

As a first recommendation and in order to comply with the Istanbul Convention, **protection** should **be extended to all migrant women** and, if they arrive through family reunification, to all the women concerned. If the migrant victim is an illegal resident, a similar procedure specific to her situation should be provided for. As mentioned above, the general procedure for applying for regularisation on the basis of article 9 bis of the law is not adapted to the situation of victims of violence. A specific and adjusted procedure must be put in place to guarantee the rights of these people during the procedure. In addition, any removal or expulsion of a victim complaining of domestic violence should be suspended or prohibited, in accordance with art. 59 of the Istanbul Convention.

At the end of this study, it is clear that the legal context of family reunification produces vulnerabilities that are likely to generate tension in the couple and *ultimately* lead to domestic violence. Although the law attempts to alleviate this situation by providing for an exception to the end of the stay, it has been shown that the requirements for applying the exception are high and do not always make it possible to respond adequately to the situation. In fact, even if the stay is maintained, the person is faced with numerous challenges related to their socio-economic situation (finding accommodation, work) or their own personal reconstruction.

[160] CJEU, C-578/08 of 10 March 2008, § 41 and 43.

It is also important to avoid secondary victimisation of the victim by not taking this violence into account or by issuing a decision to end the stay because the victim has not been able to substantiate the violence suffered.

Additional protection against the administration would be to **strengthen the ALC's control** over the Aliens Office's decisions by envisaging full jurisdiction in matters relating to family life or residence in general. This would extend the review to the appropriateness of the decision in the light of the facts of the case.

In the context of the procedure for withdrawing residence permits, the protection of persons claiming to be victims of domestic violence should be strengthened, in particular by extending the time limits for responding to a request for information and by providing for a more transparent procedure in this context. Evidence should be made more flexible **and the burden of proof should be shared, as** should the elements of integration in the broadest sense. For example, the fact that a person lives in a centre should be one element among others proving that the woman is a victim of violence.

Migrant women who do not have a residence permit in the host country should be entitled to a moratorium on removal, as provided for in the Istanbul Convention.

With the passing of the law criminalising femicide in Belgium[161] and the EU's ratification of the Istanbul Convention,[162] the perspectives are promising. This ratification should result in the "operationalisation" or concrete implementation of the Convention's somewhat abstract provisions, such as the right to independent residence in the event of domestic violence. In addition, the Court of Justice will be able to monitor compliance with the provisions of the Istanbul Convention, if only by answering questions referred for a preliminary ruling. It should also make it possible to harmonise practices in the various States with a view to providing effective protection for foreign victims of violence, in terms of access to independent residence, methods of proof and access to reception facilities. In any case, it seems essential to grant unconditional rights to victims of domestic violence in order to protect them from violence.

Only under these conditions will women victims of violence be adequately protected and reassured about their administrative situation.

LIST OF REFERENCES

Legislation

Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, approved by the law of 13 May 1955, *M.B.*, 19 August 1955, err., 29 June 1951

Charter of Fundamental Rights of the European Union of 18 December 2000, OJ EC, C 364/1

[161] On 29 June 2023, Belgium adopted a law penalising femicide.

[162] The EU ratified the Istanbul Convention on 28 June 2023

Law of 15 December 1980 on access to the territory, residence and expulsion of foreign nationals, *M.B.*, 31 December 1980

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* EU, L 158 of 30.04.2004

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ* L 251, 3.10.2003, p. 12-18

Case-Law

CJEU, 18 April 2023, C-1/23

CJEU (Grand Ch.), 2 September 2021, C-930/19

CJEU, 16 July 2020, C-133/19, C-136/19 and C-137/19

CJEU, 20 November 2019, C-706/18

CJEU, (gde. ch.) 5 June 2018, C-673/16

CJEU, 27 June 2018, C-246/17

CJEU, 8 May 2018, C-82/16

CJEU, 11 December 2014, C-249/13

CJEU, 4 March 2010, C-578/08

CJEU, 26 June 2006, C-540/03

ECtHR (Grand Ch.), 3 October 2014, *Jeunesse v. Netherlands*

ECtHR, 5 February 2002, *Conka v. Belgium*,

ECtHR, 21 December 2001, *Sen v. The Netherlands*

ECtHR, 21 June 1988, *Berrehab v. the Netherlands*

C. Const. 4 October 2018, 126/2018

C. Const. 7 February 2019, n°17/2019

C. Const, 17 September 2015, n°121/2015

C. Const, 27 May 2008, n° 81/2008

CE, 5 May 2010, no. 203 711

CE, 6 July 2005, no. 147 344

CE, 23 September 2002, no. 110 548

ALC, 16 March 2023, no. 286 219

ALC, 11 August 2022, no. 275,870

ALC, 13 June 2022, no. 273,958

ALC, 16 May 2019, no. 221 290

ALC, 10 July 2019, no. 223 839

ALC, 13 December 2019, no. 230 182

ALC, 13 December 2018, no. 213 813

ALC, 22 November 2018, no. 212 690

ALC, 27 November 2017, no. 195 63

ALC, 10 November 2017, n° 194 877

ALC, 29 September 2017, no. 192 842

ALC, 27 October 2017, no. 1940 444

ALC, 21 December 2017, no. 196 945

ALC, 16 June 2017, no. 188,517

ALC, 20 April 2017, no. 185,593

ALC, 28 March 2017, no. 184,573

ALC, 25 January 2016, no. 160 697

ALC, 26 November 2015, no. 157 132

ALC, 7 September 2015, no. 151 890

ALC, 31 August 2015, no. 151 478

ALC, 31 August 2015, no. 151 399

ALC, 26 March 2015, no. 141 862

ALC, 16 February 2015, no. 162 185

ALC, 28 May 2015, no. 146 616.

ALC, 27 March 2015, n° 142 062

ALC, 24 October 2013, no 112,748

ALC, 22 May 2012, no 219 425

ALC, 19 April 2011, no 59 982

Doctrine

Bossu, Guillaume. « La parentalité transnationale due au parcours migratoire du demandeur d'asile renforce ou éloigne-t-elle les liens familiaux pré-établis? », Faculté de psychologie et des sciences de l'éducation, Université catholique de Louvain, 2017. Prom. : Merla, Laura.

Carlier, J.-Y. et Sarolea, S., Droit des étrangers, 2016, Bruxelles, Larcier.

Carayon, Lisa, "Derrière le masque du droit : la femme parfaite du droit des étrangers », *in* Femmes et droit. Des discriminations invisibles, dir. J. Houssier et M. Saulier, coll. Thèmes et commentaires, Dalloz, à paraître.

Carpentier, S. , « Lost in transition – Essays on the socio-economic trajectoires of the social assistance beneficiaries », www.mi-is.be/sites/default/files/documents/lost_in_transition_-_essays_on_the_socio-economic_trajectories_of_the_social_assistance_beneficiaries_-_sarah_carpentier_-_final_version.pdf

Fallon, M. Observations sous CJUE, 5 juin 2018, gr. ch., Coman, C-673/16, EU:C:2018:385, *Cahiers de l'EDEM*, juin 2018.

Flamand, Ch., « La famille migrante et la loi : reconnaissance sous contrainte. » *in* Composer avec les normes, Trajectoires de vie et agentivité des migrants face au cadre légal, L. Merla, S. Sarolea, B. Schoumaker (coord.), Academia, 2021.

Flamand, Ch., Sarolea, S., « Trajet migratoire et regroupement familial », *in* Sarolea S. (coord.) Immigrations et droits, Questions d'actualités, S. Sarolea (dir.), Bruxelles, Larcier, novembre 2018, p. 45-97.

J. Freedman, N. Sahraoui et E. Tastsoglou *Gender-Based Violence in Migration, Interdisciplinary, Feminist and Intersectional Approaches*, SPRINGER, 2022.

Freedman, J. Domestic violences through a human right lens, Routledge, 2021

Freedman, J. « Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis" », 2016, *Reproductive Health Matters*, Published by Elsevier BV.

Forrez, S., "La Convention d'Istanbul: un nouvel instrument de la lutte contre la violence à l'égard des femmes - impact sur le droit belge, impact sur le terrain", asbl INTACT, 2016, uniquement en ligne ; https://www.intact-association.org/images/analyses/Studie-Sophie-FR-CvI.pdf.

Leboeuf, L., Decabooter, N., Vandenberghe, I., « Les États membres ne peuvent exiger, sans exceptions, une comparution personnelle au sein d'un consulat à l'étranger aux fins d'introduire une demande de regroupement familial », *Cahiers de l'EDEM*, mai 2023

Mascia, C. How bureaucracies shape access to rights: the implementation of family reunification in Belgium, *Journal of Ethnic and Migration Studies*, 2020.

Mascia, C. « Administrer le regroupement familial, Construire l'indésirable, justifier l'indésirabilité », Editions de l'Université de Bruxelles, 2022, p 64-68.

Melis, K., « Les méandres des délais en matière de regroupement familial », *RDE* 2018, n°199, pp 347-363.

Merla, L., Sarolea, S. « Migrantes ou sédentaires : des familles ontologiquement différentes? », *In* Faire et défaire les liens familiaux, Fillod-Chabaud A., Odassoin, L., Presses Universitaires de Rennes, 2019, pp. 23-46.

Orsini, G., Smit Sarah, Farcy J.-B. and Merla, L., Institutional racism within the securitization of migration. The case of family reunification in Belgium, *Ethnic and racial studies*, Vol. 45, No. 1, 02.01.2022, pp. 153-172.

Sarolea, S. Crine, Z., Raimondo, F. « Through the Eyes of the Vulnerable": Research Report on the experiences of migrants seeking protection in Belgium. VULNER Research Report 2. https://www.vulner.eu/117714/Research-Report-2-Belgium

Other

AVEVI, Rapport d'activité, ADDE, 2022, https://www.adde.be/images/ADDE_Rapport_dactivit%C3%A9_2022_Public.pdf

Banza, B.,Uwera B., Violence conjugale et regroupement familial : des femmes se mobilisent pour une sensibilisation préventive, CPVF, 2014 uniquement en ligne : https://www.cvfe.be/publications/etudes/294-violence-conjugale-et-regroupement-familial-des-femmes-se-mobilisent-pour-une-sensibilisation-preventive

MYRIA, La migration en chiffres et en droit, Les Cahiers du rapport annuel, 2021, https://www.myria.be/fr/publications/le-rapport-migration-2021-sous-forme-de-cahiers