igc intergovernmental consultations on migration, asylum and refugees

Access to Family Reunification

Request for Information

July 2020

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REQUEST

Requesting State: Denmark

Responses received from: Belgium, Denmark, Finland, Germany, Ireland, Norway, Poland, Switzerland, and the United Kingdom.

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Background
The Danish Ministry of Immigration and Integration wishes to obtain information from other countries participating in the European Convention on Human Rights regarding the possible legality in differentiating between own citizens and foreigners in the access to family reunification.

Referring to the principle of the European Court of Human Rights' (ECHR) judgment in the case of Gaygusuz v. Austria (appl. no. 17371/90), the Ministry requests information on any developments in the field of family reunification where such differentiating is considered compatible with the Convention.

Questions

1. In terms of applications for family reunification, do your laws and practices differentiate between hosts holding your country's citizenship and hosts holding a foreign citizenship including stateless persons?

2. If "yes" to Q1, are some or all conditions for family reunification waived or more relaxed if the host holds your country's citizenship?

3. If "yes" to Q1, please describe any less stringent conditions/waiver in any conditions for family reunification when the host holds your country's citizenship.

4. Can you share any analysis or the like on weather more relaxed conditions for the access to family reunification when the host holds your country's citizenship is compatible with the European Convention on Human Rights, especially Article 14 taken in conjunction with Article 8?

Use of Information
Collected information will fall into the public domain or be shared with Parliament.

Question 1

In terms of applications for family reunification, do your laws and practices differentiate between hosts holding your country's citizenship and hosts holding a foreign citizenship including stateless persons?

BELGIUM

Yes. The Belgian legislation in terms of family reunification differentiates between 3 large categories:

- family reunification with a Belgian host who has not made use of his right to free movement;
- family reunification with a Union citizen (based on directive 2004/38);
- family reunification with a third country national (TCN).

DENMARK

In general, hosts with Danish citizenship are not given a favorable access to family reunification.

In terms of eligibility for spousal reunification, it is however a prerequisite when the host is an immigrant, i.e. not a Danish or Nordic citizen or an international protected person, that the host has had permanent residence for at least three years.

A ruleset similar to the current conditions for obtaining permanent residence must also be fulfilled by this group. Overall, this means that the host must fulfill the conditions for obtaining permanent residence in force at the time of application if the host obtained permanent residence on the basis of former less stringent conditions.

Also, hosts with temporary protection status must have had this status for more than three years before being eligible for family reunification.

All but a few fundamental conditions will be derogated from if a refusal would otherwise violate international obligations, not least Article 8 of the European Convention on Human Rights.

FINLAND

Yes.

GERMANY

It depends.

In terms of the actual application for a title at the competent authority there is no differentiation. The application is based on a scheduled process within the sphere of responsibility of the competent authority.

When it comes to the conditions for the issuance of a permit, there is a differentiation. Whereas in general any permit is subject to the general criteria stipulated in Section 5(1) RA, Sections 27 to 36a of the German Residence Act (RA) lay down the additional conditions for granting a residence permit to dependants for the purpose of family reunification. While Section 28 RA only refers to family members of German nationals, Sections 29 to 36a RA apply to family members of hosts holding a foreign citizenship (third

country nationals). Moreover, the German Federal Administrative Court has endorsed the different treatment of family reunification with German nationals compared to the reunification with third country nationals.

General statement:
The ECHR's judgment in the case of Gaygusuz v. Austria (appl. no. 17371/90) concerns the discriminatory exclusion of a Turkish national from benefitting from his retirement pension in the form of emergency assistance in Austria. It does not contain any considerations on the subject of family reunification.
The German Residence Act provisions on family reunification with third country nationals were enacted pursuant to the provisions of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

IRELAND

Ireland (like the UK) does not participate in the EU Directive on Family Reunification. Therefore, family reunification is solely a matter of national immigration policy and subject to the jurisdiction of the Irish Courts. The Policy Document on Non EEA Family Reunification is available here.
http://www.inis.gov.ie/en/INIS/Family%20Reunification%20Policy%20Document.pdf/Files/Family%20Reunification%20Policy%20Document.pdf

Unlike the position in the UK or in the Schengen zone, the rules for visa requirements in Ireland do not distinguish between short- and long-term stays. A foreign national is either visa required or visa exempt, irrespective of the length of stay or its purpose. As a result, family reunification applications from non-visa required persons are made only when the person is already in Ireland, with the exception of a couple of Pre-clearance schemes which apply to certain cohorts of De-Facto Partners.

Under the International Protection Act 2015 refugees, subsidiary protection holders and programme refugees can apply for Family Reunification. Family Reunification under the 2015 Act is a right. Once identity and relationship are established to the satisfaction of the Minister, then the application is granted. Irish Citizens are not entitled to apply for Family Reunification under the 2015 Act.

NORWAY

Yes.

SWITZERLAND

Yes.

UNITED KINGDOM

Under the UK's family reunification laws, we do differentiate between a person holding British citizenship and those holding foreign citizenship including a stateless person. The family reunification policy ends when a refugee becomes a citizen in the UK. This is because the policy is designed to be more generous to refugees and not British citizens, in recognition that families can become fragmented because of the speed

and manner in which those seeking asylum are often forced to flee their country of origin. Given it takes a refugee a minimum of 6 years to become a British citizen it is deemed a reasonable length of time to enable them to benefit from the family reunification policy. Any person who wishes to bring their family members to the UK on the basis of their relationship after they have obtained British citizenship must apply under the UK family Immigration Rules.

The UK family Immigration Rules apply in exactly the same way to a person who is a British citizen, a person who is settled in the UK of any nationality and a person who is in the UK with limited leave as a refugee or with Humanitarian Protection. In July 2012, the UK Immigration Rules were changed to introduce requirements for family members wishing to come to or remain in the UK on the basis of their relationship with a family member who is a British citizen or settled in the UK. The UK family Rules now include a financial and an English language requirement to prevent burdens on the taxpayer and encourage integration. The requirements which need to be satisfied are set out in Appendix FM of the Immigration Rules.

Question 2

If "yes" to Q1, are some or all conditions for family reunification waived or more relaxed if the host holds your country's citizenship?

BELGIUM

The most favourable requirements can be found within the category 'family reunification with a Union citizen' (directive 2004/38).

As for the other 2 categories, some requirements are waived when the host has the Belgian nationality, in comparison to a third country national host.

FINLAND

Yes, some are but not all.

GERMANY

Yes. But not all conditions are waived or more relaxed, such as the general prerequisite in Section 5(1) RA like established identity or fulfilling passport obligations. For details see answer to Q3.

IRELAND

No – however where the sponsor, is an Irish citizen the economic assessment would be less onerous than for non-EEA sponsors.

NORWAY

There are two conditions that are more relaxed if the host holds our country's citizenship.

POLAND

A spouse and a minor child-in-law of a Polish citizen

Temporary residence permit for the family member of Polish citizen

Legal basis: Act of 12 December 2013 on foreigners, Article 158 along with executive acts

To whom and for how long may be granted
A foreigner who is a spouse of a Polish citizen, and minor children of a spouse of a Polish citizen who holds temporary residence permit for a Polish citizen's family member or a permanent residence permit granted in connection with remaining married to a Polish citizen.

Temporary residence permits shall be granted if circumstances which are the basis to apply for this permit justify the residence on the territory of the Republic of Poland for a longer period than 3 months.

Temporary residence permit is granted for a period which is necessary to complete the object of this residence on the territory of Poland longer than 3 months to 3 years, with the possibility to apply for subsequent permits.

Where and when submit the application
The foreigner makes the application personally, no later than on the last day of the lawful residence on the territory of the Republic of Poland to the voivode competent with regard to the foreigner's place of residence.

During making the application the foreigner is under obligation to give his/her fingerprints.

In the case of the foreigner who is a minor, application for temporary residence permit is made by parents or appointed court guardians or one of parents or one of the appointed court guardians.

During making the application for temporary residence permit in the case of the foreigner who is a minor, and is under the age of 6, his/her presence is not required.

Fees related to residence permit:
Stamp duty PLN 340
Fee for residence card PLN 50
A minor foreigner who, by the date of applying for a temporary residence permit, is under the age of 16, is entitled to a discount in the fee for issuing a residence card in the amount of PLN 25.

Necessary documents:
1. Completed application
2. 4 up-to-date photographs
3. Photocopy of a valid travel document (original available for inspection); in particularly justified cases, if the foreigner does not have a valid travel document and it is not possible to obtain such document, they may present another document which confirms his/her identity**.**

Note: Lack of any of the aforementioned documents will result in margin call within 7 days from its delivery, under pain of leaving the application without examination.

Standard documents necessary for examination of the application:
Note: Documents listed below attached to the application may reduce the quantity of official correspondence and shorten the time which is necessary to handle the case.
1. Current copy of marital status;
2. Copy of the identity card of a Polish citizen (original available for inspection)

Note: In the procedure for granting a temporary residence permit the authority that conducts the proceedings is obliged to determine whether the marriage was concluded in order to circumvent the rules and conditions for entering foreigners into the territory of the Republic of Poland, their passage through that territory, residing in it, and leaving it.

In the case of explanations or particularization of evidences during proceedings the foreigner may be called to deliver other documents or to submit testimonies which confirm circumstances referred to in the application and circumstances concerning the purpose of marriage.

Residential status following the application
If the application for temporary residence permit was made during the foreigner's lawful residence and this application did not contain formal defects or these defects were supplemented within the time limit, the voivode stamps the travel document which confirms registration of the application. Residence of the foreigner is deemed to be legal from the date of submission the application until the date when the decision on temporary residence permit becomes final.

Note: Stamp in the travel document does not entitle the foreigner to travel through territories of other countries of Schengen area, while the foreigner may travel to the country of origin, however, in order to return to Poland he/she must obtain a visa, if he/she comes from the country which is subject to the visa obligation.

Time to handle the case
The residence permit decision takes place no earlier than after 1 month prior to initiation of the procedure.

The document issued after granting this permit
The foreigner who obtains temporary residence permit on the territory of Poland will be issued with the residence card. This document is issued ex officio by the voivode who granted the residence permit.

Residence card in the period of its validity confirms the foreigner's identity during his/her residence on the territory of the Republic of Poland and entitles him/her, along with the travel document, to multiple crossing of the border without the need to obtain the visa.

This document should be collected personally. In the case when the residence card was issued to the foreigner aged less than 13 this card is issued to his/her statutory representative or guardian.

Information obligations related to the residence permit
A foreigner who has been granted a temporary residence permit is obliged to notify within 15 working days the voivode who granted the permit on the cessation of the reason for granting the permit. If the temporary residence permit was granted by the Head of the Office for Foreigners in the second instance the aforementioned notification is addressed to the voivode who ruled on the granting of this permit in the first instance. Failure to comply with this obligation may result in the refusal to grant subsequent temporary residence permit if the application for another temporary residence permit has been submitted within one year of the expiry of the previous permit or from the day when the decision to withdraw the temporary residence permit has become final.

Entitlement to work
This permit entitles to perform work without additional document which authorizes the foreigner to perform work in the form of the work permit. The residence card granted in connection with this permit includes a note "access to the labour market".

Obligation to leave Poland after refusal or withdrawal of the permit
The foreigner is obliged to leave the territory of the Republic of Poland within 30 days from the day when the decision on refusal to grant the temporary residence permit or the decision to withdraw the permit became final and in the case the decision was issued by a superior body, from the day when the final decision was delivered to the foreigner, unless he/she is authorized to reside on the territory of Poland on a different basis.

A spouse, a minor child or child-in-law of the foreigner and parents or caretakers a minor beneficiary of international protection staying in Poland unattended

Temporary residence permit – for the purpose of family reunification

Legal grounds – Act of 12 December2013, on Foreigners – Article 159 of the Act – along with implementing acts

To whom and for what period of time it may be granted
Family members of foreigners living in Poland on the basis of one of the following residence titles, staying within the territory of Poland for the purpose of family reunification:

1. on the basis of the permanent residence permit,
2. on the basis of a residence permit for EU long-term resident,
3. in relation with granting refugee status,
4. in relation with granting subsidiary protection,
5. at least for the period of 2 years on the basis of the consecutive temporary residence permits, including directly prior to making the application for granting temporary residence permit for a family member – on the basis of a permit granted thereto for the period of stay not shorter than 1 year,
6. on the basis of a temporary residence permit for the purpose of conducting scientific research,
7. on the basis of a temporary residence permit for the purpose of long-term mobility of a scientist,
8. on the basis of a temporary residence permit for the purpose of highly qualified employment,
9. on the basis of a temporary residence permit for the purpose of work under the Intra-corporate transfer,
10. on the basis of a temporary residence permit for the purpose of exercising long-term mobility of a management employee, specialist or an employee under training under the Intra-corporate transfer.
11. on the basis of a temporary residence permit granted to a foreigner, who has finished scientific research or development works and seeks employment within the territory of Poland or plans to set up economic activity within the territory,
12. in relation with granting permit to stay for humanitarian reasons.

Family member of the aforementioned foreigner is:

1. a person who is married to that person and the marriage is recognized under the law of the Republic of Poland;
2. a minor child of the foreigner and the person married thereto by marriage recognized under the law of the Republic of Poland, including also an adopted child;
3. a minor child of the foreigner, including also an adopted child, dependant on the foreigner, over whom the foreigner effectively exercises parental custody;
4. a minor child of the person referred to in letter a, including also an adopted child, dependant on the foreigner, over whom the person effectively exercises parental custody;
5. a direct ascendant or an adult responsible for a minor foreigner, who was granted refugee status or subsidiary protection, staying within the territory of the Republic of Poland unattended.

Temporary residence permit shall be granted if the circumstances, which constitute the basis for application for the permit, justify the foreigner's stay within the territory of the Republic of Poland for a period longer than 3 months.

Temporary residence permit shall be granted for the period necessary for implementation of the purpose of the foreigner's stay within the territory of Poland, exceeding 3 months up to 3 years, with the possibility to apply for the subsequent permits.

Manner of making the application
Foreigner shall make an application in person, not later than on the last day of legal stay within the territory of the Republic of Poland to the voivode competent for the place of residence of the foreigner. When making the application the foreigner shall be obliged to provide fingerprints.

In the case of a foreigner being a minor, application for granting temporary residence permit shall be made by parents or guardians appointed by court, or one of the parents or guardians appointed by court.

In the case of making an application for temporary residence permit for a foreigner being a minor, who has reached the age of 6 years old by the day of making the appointment, presence thereof is required.

Note: If the foreigner resides outside the territory of the Republic of Poland**,** the application for granting temporary residence permit for the purpose of family reunification shall be made by a foreigner residing in Poland, who will receive the family member. Making the application by a family member of the foreigner requires a written consent thereof or their legal representative consent, unless the applicant is legal representative thereof. Expression of the consent is equal with granting the foreigner residing within the territory of Poland power of attorney for acting on behalf of the family member in the given proceedings.

Presence of the aforementioned family members shall be obligatory after issuance of the decision on granting temporary residence permit, at making the application for issuance of a residence card, for the purpose of provision of fingerprints thereby.

Fees related to granting the permit
Stamp duty PLN 340
Fee for issuing a residence card PLN 50

Minor foreigner, who until the day of making the application for temporary residence permit has not reached the age of 16 years old shall be entitled for PLN 25 reduction in the fee for issuance of a residence card.

Necessary documents
1. Completed form in accordance with the instructions
2. Four photographs:
3. Xerox copy of a valid travel document (original for inspection), in a particularly justified case, when the person has no valid travel document and it is impossible to obtain it, he/she may present other identity confirming document.

Note: Absence of any of the aforementioned documents shall result in a call upon the foreigner for supplementing thereof within the period of 7 days from service of the call under pain of leaving the application unprocessed.

Typical documents needed for processing the application
Note: Attaching the filled documents to the application before its submission may reduce the number of official correspondence and shorten the time of settling the case.
1. **Documents confirming the level of kinship** (civil-status extracts: certified copy of Marriage Certificate, certified copy of Birth Certificate);

2. documents constituting evidence of the foreigner, who intends to reside within the territory of Poland, holding the required residence title;
3. documents constituting evidence of the foreigner, applying for the permit, having a stable and regular source of income sufficient to cover the living costs of the foreigner and any dependant family members (for a person in a family – in the amount higher than net PLN 528 per month), e.g. PIT tax return on the amount of the income, for the last tax year, earned by the foreigner making the application or a family member for the last year or a relevant ZUS statement;
   Note: The requirement of having a stable and regular source of income shall be deemed fulfilled also when the costs of living of the foreigner will be covered by a family member responsible for supporting the foreigner and residing on the territory of the Republic of Poland.
4. documents certifying that the foreigner applying for the permit holds a **health insurance** as defined by the Act of 27 August 2004 on health care services financed from public funds or confirmation of insurer's coverage of medical treatment costs within the territory of the Republic of Poland;
5. document confirming a **place of residence provided**, e.g. confirmation of registration, apartment rent contract, other contract enabling possession of a dwelling, or statement of a person authorised for possession of a dwelling on provision of a place of residence to the foreigner).

Note: In the case proceeding for granting temporary residence permit, the body which conducts the proceedings shall be obligated to determine whether the marriage between the foreigner was concluded to circumvent the Act on Foreigners. In the case of a need for explaining and clarification of the evidence held by the authority in the case, during the proceedings the foreigner may be called upon to provide additional documents or to provide testimonies confirming the conditions mentioned in the application or the circumstances concerning purpose of the marriage.

Residence status after submitting the application
If the application was made during legal stay of the relevant foreigner and the application is free of any formal defects or the formal defects have been corrected within the deadline, voivode shall include the travel document of the foreigner with a stamp imprint, confirming making the application. The foreigners stay is deemed legal from the day of submitting the application until the day when the decision in the case of granting temporary residence permit would become final.

NOTE: Including an imprint of a stamp in the foreigner's travel document does not entitle the foreigner to travel within the territory of other Schengen States, but the foreigner may leave for the country of origin, however, in order to return to Poland, it is necessary to obtain a visa if that person originates from a country subject to the visa obligation..

Case settlement period
Issuance of the decision on granting the permit shall occur not earlier than after 1 month from the day of initiation of the proceedings.

Document issued after obtaining the permit
The foreigner who has obtained the temporary residence permit within the territory of Poland is issued with a residence card.

If the foreigner has independently made the application for granting temporary residence permit while staying within the territory of Poland, the document is issued ex-officio by the voivode who has granted this permit to the foreigner.

If the application for granting temporary residence permit was made on behalf of a foreigner residing abroad by a family member thereof. Residence card shall be issued at an application of the foreigner, for whom the permit was granted. The body competent for issuance of residence cards is the voivode who granted the temporary residence permit to the foreigner. Presence of the foreigner shall be required at making the application for a residence card, for the purpose of providing fingerprints.

In its validity period the residence card confirms the identity of the foreigner during that persons stay within the territory of the Republic of Poland and, together with the travel document, provides the right for multiple crossing the border without the need to obtain a visa.

The document should be received in person. In the case when the residence card was issued to a foreigner who by the day of receipt thereof has not reached the age of 13, the card shall be received by a statutory representative or a curator thereof.

Information obligations related with obtaining the permit
Within 15 working days the foreigner who was granted temporary residence permit shall notify the voivode who has granted the permit that the reason for granting thereof no longer applies. If the temporary residence permit was granted by the Head of the Office in the second instance, the aforementioned notification shall be addressed to the voivode, who made the decision in the case of granting the permit in the first instance. Failure to fulfil this obligation may result in refusal to grant subsequent temporary residence permit, if the application for granting the subsequent temporary residence permit was made before the end of a year before the expiry date of the previous permit or by the day in which the decision on withdrawal of the temporary residence permit has become final.

The right for performance of work
The permit provides entitlement to work without the need to hold additional document allowing the foreigner to perform work in the form of work permit. The residence card issued in relation with granting the foreigner the temporary residence permit shall be annotated with “access to labour market”.

The obligation to leave Poland upon refusal, discontinuation or revocation of the permit
The foreigner is obliged to leave the territory of the Republic of Poland within 30 days following the day, when the decision on refusal to grant the temporary residence permit, the decision on discontinuing the aforementioned case or the decision on revocation of the permit has become final, in the case of issuing the decision by the higher degree authority, following the day of servicing the decision to the foreigner, unless that person is entitled to stay within the territory of Poland on another basis.

SWITZERLAND

The foreign spouse and unmarried children under the age of 18 of a Swiss national who live with the Swiss national are entitled to be granted a residence permit and to have their residence permit extended (Art. 42 Federal Act on Foreign Nationals and Integration (FNIA) Foreign Nationals and Integration Act, (FNIA) Art. 42 - 45 FNIA. https://www.admin.ch/opc/en/classified-compilation/20020232/index.html). That means there is just one condition: living together. The other four conditions that apply to a foreign national with a permanent residence permit or residence permit are waived.

Question 3

If "yes" to Q1, please describe any less stringent conditions/waiver in any conditions for family reunification when the host holds your country's citizenship.

BELGIUM

A family member of a third country national must submit a proof of good conduct (criminal record) and a medical certificate, whereas this is not required for a family member of a Belgian citizen.

As for the categories of the eligible family members, a further distinction is made between a Belgian or third country national host:

- Descendants up to 21 years or dependant (Belgian) <-> Children up to 18 years or handicapped (TCN)
- Parent of a minor child (Belgian) <-> /// (TCN)

Differences concerning the procedure itself:

- Application can be submitted at the Belgian municipality (Belgian) <-> application must be submitted in the country of origin (TCN)
- Legal processing time = 6 months (Belgian) <-> legal processing time = 9 months + 2x3 months (TCN)

FINLAND

Regularly receiving residence permit requires a third country national to have secure means of support. If the third country national is a family member of a Finnish citizen, he does not need to have secure means of support.

According Aliens Act section 39 paragraph 1, "issuing a residence permit requires that the alien has sufficient financial resources unless otherwise provided in this Act. In individual cases, a derogation may be made from the requirement if there are exceptionally serious grounds for such a derogation or if the derogation is in the best interest of the child."

According Aliens Act section 50 paragraph 1," if a third country national is a family member of a Finnish citizen issuing a residence permit referred to in this section is not conditional on the alien having sufficient financial resources."

GERMANY

Section 28 RA grants the right to family reunification to a German national's adult spouse, his or her minor, unmarried child or his or her parents for the purpose of care and custody if the habitual residence is in the federal territory.

Here, the general condition of showing sufficient means of subsistence pursuant to Section 5(1) RA can be waived in the case of a German's spouse and is generally waived in the case of a minor children willing to reunite or the parent of a minor unmarried German for the purpose of care and custody.

However, Section 28 (1) Sentence 5 also stipulates some additional requirements, for instance, the general age requirement of 18 years for each spouse and the spouse's obligation to generally be able to communicate in the German language on a basic level (see Section 30 (1) Nr. 1 and 2).

Reunification with a third country national's adult spouse, minor, unmarried child or parents is not only subject to the general criteria stipulated in Section 5(1) RA, but also to the additional requirements outlined in Sections 29 to 36a RA. According to Section 29(1) RA, the foreigner generally needs to hold a residence permit and sufficient living space must be available.

Both spouses have to meet the age requirement of 18 years as well and the spouse willing to reunite must generally be able to communicate in the German language on a basic level (see Section 30 (1) RA). Moreover children over 16 when they do not relocate the main ordinary residence to Germany with their parents need to prove higher skills of the German language (Section 32(2)) and the parents reunification with their minor child in Germany is in general only temporarily possible for minors without any parent present in the federal territory (Section 36(1) RA).

Family members of persons with a protection status, as outlined in Section 29 (2) RA can or have to be exempted from showing suffient means or having sufficient living space available. Family members of persons with a subsidiary protection status are generally exempt from these requirements pursuant to Section 36a RA.

IRELAND

Visa applications for Join Family usually fall into one of two categories A and B as follows, with Irish citizen sponsors falling into Category A:

Category A (Eligible to sponsor applications for immediate family reunification, including being accompanied by family members on arrival)

- Critical Skills Employment Permit Holders
- Investors
- Entrepreneurs
- Business Permission Holders
- Researchers
- INIS Approved Scholarship programme students (e.g. KASP)
- Intra Corporate Transferees
- PhD Students (subject to conditions including no recourse to social welfare payments)
- Full time non-locum doctors in employment

Category B (Eligible to sponsor applications for family reunification after 12 months)

- Non Critical Skills Employment Permit Holders
- All Stamp 4 holders not covered by other more favourable arrangements
- Ministers of Religion (there is a case for putting these in Category A provided they are maintained by the church)

Applications (assuming all required information has been submitted) for family reunification for immediate family members in Category A above and for Irish Citizens should be dealt with within 6 months of application. A 12-month target will apply in other cases.

Immediate family members of Irish citizens granted immigration status through the family reunification process will have the right to work without employment permits and to establish or manage/operate a business in the State. They should receive a Stamp 4 immigration permission.

Immediate family members of non-EEA sponsors Category A or non-immediate family of Irish Citizens will, if granted immigration permission, continue to be subject to the employment permit requirements as

operated by the Department of Business, Enterprise and Innovation. They will be entitled to apply for immigration status in their own right under the various channels available.

Where Sponsor is Irish Citizen
An Irish citizen, in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of 2 years immediately prior to the application and must over the three year period prior to application have earned a cumulative gross income over and above any State benefits of not less than €40k.

Where Sponsor is non-EEA National
In the case of a non-EEA sponsor in Category A, family reunification may take place prior to any earnings being accrued and the immigration status granted to the sponsor is such as to assume certain levels of income (e.g. Critical Skills Employment Permit holder or researcher) either immediately or in the future or on the basis that the sponsor falls into a category whose migration to Ireland is promoted as part of Government policy. However, a sponsor must continue to meet the terms of the permission in order to maintain their own and the family's entitlement to reside here and evidence of this must be provided by the sponsor at the time of the renewal of permission. In the case of Critical Skills Employment Permit holders and researchers this will include achieving the levels of earnings projected. For PhD students there are time limits applied to the study and academic progress must be demonstrated. This is in addition to the requirement that there be no recourse to social welfare payments. For immigration purposes it is assumed that any additional costs to the State such as those which may accrue from the education of the sponsor's minor(s) are accepted.

Category B sponsors must have a gross income in each of the previous 2 years in excess of that applied by the Department of Social Protection in assessing eligibility for Family Income Supplement (FIS) and the expectation must be that this level of income will be maintained.

NORWAY

1) According to section 40a of the Immigration Act it is a condition for a residence permit under section 40 that the host has worked or studied in Norway for four years, when the host has:

(a) asylum; see section 28,

(b) a residence permit following permission to enter as a resettlement refugee; see section 35, third paragraph,

(c) collective protection in a mass flight situation; see section 34,

(d) a residence permit on the grounds of strong humanitarian considerations or a particular connection with the realm; see section 38,

(e) a residence permit as a family member; see sections 40 to 53, or

(f) a permanent residence permit based on the permits mentioned in (a) to (e); see section 62.

<u>This condition does not apply when the host is or has become a Norwegian Citizen.</u>

2) Exemption from the subsistence requirement can be made because of particularly strong humanitarian considerations in a family immigration case, cf. the Immigration Regulations § 10-11.

This provision is further described in Circular G-2012-008; *"Circular on exemption from the subsistence requirement, cf. the Immigration Regulations § 10-11".* The Ministry of Justice and Emergency Preparedness provides guidelines for eight different types of cases where the UDI can make exemptions from the subsistence requirement pursuant to § 10-11. Two of the cases concern exemptions partly due to the host's and the joint children's Norwegian citizenship:

1. In cases where the applicant is a foreign citizen who has lived a long and established family life with a Norwegian or Nordic citizen and the parties have joint children who are Norwegian or Nordic citizens, an exemption may be made from the subsistence requirement after a specific assessment. However, this does not apply to cases where the relevant family life has been exercised in Norway during illegal residence.

2. Exemptions may be made from the subsistence requirement if the applicant and the reference person have joint children who are Norwegian or Nordic citizens born in Norway, and the applicant had legal residence in Norway at the time of birth.

SWITZERLAND

For a foreign citizen with a permanent residence permit or residence permit, the following additional conditions apply to family reunification:

- suitable accommodation is available;
- they are not dependent on social assistance benefits;
- they are able to communicate in the national language spoken at their place of residence (in order to obtain a residence permit, it is sufficient to register for a language support programme as an alternative to meeting the requirement);
- the family member they are joining is not claiming supplementary benefits under the Federal Act of 6 October 2006 on Benefits supplementary to the Old Age, Survivors' and Invalidity Insurance or would not be entitled to claim such benefits due to family reunification.

Different arrangements apply to persons who have rights under one of the agreement on the free movement of persons (with the EU or the EFTA):

Citizens of EU/EFTA member states benefit from the Agreement on the Free Movement of Persons (AFMP), which gives them rights of residence in our country. The FNIA only applies to them if it provides them with a more advantageous legal position (Art. 2 FNIA). Specific SEM directives clarify the rules applicable to EU/EFTA citizens, particularly with regard to family reunification (https://www.sem.admin.ch/sem/fr/home/publiservice/weisungen-kreisschreiben/fza.html and Factsheet on Family Reunification https://www.sem.admin.ch/sem/en/home/themen/fza_schweiz-eu-efta/eu-efta_buerger_schweiz/factsheets.html).

If the person concerned is a member of the same family as a citizen of an EU/EFTA member state who is working in Switzerland, he or she is entitled to a residence permit provided suitable accommodation is available for the family to live together. If the EU/EFTA citizen is not working, he or she must have the financial means to support the family. Family members are defined as spouses, children under the age of 21 or who are dependent and dependent ascendant relatives (parents, grandparents, etc.). Family members of EU/EFTA citizens are not required to have lived beforehand in an EU/EFTA member state, in

contrast to family members of Swiss citizens, who are (reverse discrimination; see Federal Supreme Court decision 2C_354/2011 of 13 July 2012).

Foreign members of a Swiss citizen's family must fulfil different conditions depending on whether they are citizens of an EU/EFTA member state or not (i.e. whether they are third country citizens) and whether they hold a permanent residence permit issued by an EU/EFTA member state or not. The spouse of a Swiss citizen and his or her unmarried children under the age of 18 who do not hold a permanent residence permit issued by a EU/EFTA member state are entitled to a residence permit and to have that permit extended provided they live in the same household as the Swiss citizen concerned (Art. 42 para.1 FNIA; Clause 6.2 Directive on Foreign Nationals (see above)). On the other hand, the family members of a Swiss citizen holding a permanent residence permit issued by an EU or EFTA member state with which Switzerland has concluded an agreement on free movement are entitled to a residence permit and to have it extended. Family members are defined not only as spouses and children under the age of 21 or who are dependent, but also the ascendants (parents, grandparents) of the Swiss citizen or of a dependent spouse (see Directive on Foreign Nationals, Clause 6.2).

Swiss citizens have a right to reunification with members of their family provided they all live in the same household thereafter (Art. 42 para.1 FNIA). If the family members are citizens of an EU/EFTA member state, they are entitled to a residence permit. Family members are defined as spouses, children under the age of 21 or who are dependent, and dependent ascendants. The family members of a Swiss citizen who are non-EU/EFTA citizens (third country citizens) may also benefit from family reunification but are subject to different conditions set out in the FNIA. Family members are defined as spouses and unmarried children under the age of 18. The entire family must live in the same household (Art. 42 para.1 FNIA).

Question 4

Can you share any analysis or the like on weather more relaxed conditions for the access to family reunification when the host holds your country's citizenship is compatible with the European Convention on Human Rights, especially Article 14 taken in conjunction with Article 8?

BELGIUM

As far as known, the difference in regulation between a Belgian host and a third country national host has never led to a legal debate in our country (contrary to the distinction between a Belgian host vs. a host who is a citizen of the Union).

In case the family reunification conditions are not fulfilled, the family member is free to apply for a residence permit based on humanitarian reasons, in which the right of a family life with respect to art. 8 of the European Convention of Human Rights will be assessed.

DENMARK

Referring to the principle of the European Court of Human Rights' judgment in the case of Gaygusuz v. Austria (appl. no. 17371/90), it is the interpretation that very weighty reasons would have to be put forward before the Court would regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.

FINLAND

With regard to more relaxed conditions, we don't see them as discriminative because a foreigner can always seek for unification of the family in his country of origin or in some other state.

A foreigner doesn't have an absolute right to reside in Finland. It is dependent whether the foreigner fulfils the requirements stipulated in law or not.

For example, it has been necessary to regulate that the foreigner needs to have secure means of support so that Finnish society doesn't have to be liable for the expenses which the foreigner cause.

GERMANY

According to Article 14 ECHR, the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination on, inter alia, national origin. An analysis of the ECHR's case-law shows that family reunification falls within the ambit of Article 8 ECHR. However, a difference of treatment is only discriminatory for the purpose of Article 14 ECHR if it has no objective and reasonable justification, i.e. if it does not pursue a legitimate aim or if is disproportionate to the aim sought to be realised. The legitimate aim pursued by Sections 29 to 36a RA is both to control and manage immigration and to allow for the reunification of family members of third country nationals with a view to facilitating their integration into Germany society. With regard to the proportionality assessment, the ECHR has repeatedly held that the "[t]he Convention does not guarantee the right of an alien to enter or to reside in a particular country" (Darren Omoregie and others v. Norway (appl. no. 265/07 § 54) and that Article 8 ECHR "does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to

authorise family reunion in its territory“ (Rodrigues da Silva and Hoogkamer v. The Netherlands (appl. no. 50435/99 § 39)). Instead, the ECHR requires the Contracting States to conduct a proportionality assessment, bearing in mind the general interest and the individual circumstances of the case. Consequently, differentiating between German and third country nationals cannot not, by default, amount to a discrimination within the meaning of Article 14 ECHR. Instead, the German RA provides for several “hardship provisions“ that enable immigration authorities to accommodate irregular cases of hardship and, thus, complies with the individual proportionality assessment envisaged by the ECtHR.

IRELAND

Irrespective of the status of the sponsor, family reunification in all cases must be subject to proper checks and balances against immigration abuse, such as marriage of convenience, and each case must be looked at on its merits, taking into account the immigration history of the parties and also the general issues of social and economic policy. The onus of proof as to the genuineness of the family relationship rests squarely with the applicant and sponsor whether that person is an Irish national or non-EEA national. This policy will not affect the visa requirement for those coming from countries where such applies.

NORWAY

The purpose of the condition that the host has worked or studied in Norway for four years is to reduce the arrival of asylum seekers to Norway who do not meet the conditions for protection, and to act as an incentive to take work and education. The purpose of the circular opening up for exemption from the subsistence requirement is to ensure the rights of children with Norwegian citizenship to live in the realm. Hence these more relaxed conditions for the access to family reunification when the host holds Norwegian citizenship are considered compatible with the European Convention on Human Rights.

SWITZERLAND

Switzerland regards paragraph 2 of Article 8 ECHR as the basis for its statutory provisions.

In Switzerland, there is discrimination among residents in Switzerland, or to be precise, reverse discrimination against Swiss citizens compared with EU and EFTA citizens in relation to family reunification in accordance with Article 8 of the Federal Constitution and Article 14 ECHR. In contrast to citizens of EU/EFTA states, Swiss citizens may only claim extended family reunification for foreign children up to the age of 21 and for relatives in ascending line whose maintenance is guaranteed if the person applying for reunification already holds a permanent residence permit for an EU/EFTA state (Art. 42 para. 2 FNIA). In the case of extended family reunification, there is discrimination against Swiss citizens when compared with citizens of EU/EFTA states, as family reunification under the Agreement on Free Movement of Persons (AFMP) does not require the person applying for reunification to hold a permanent residence permit for an EU/EFTA state.

The Federal Supreme Court has held that in view of the existing bilateral agreements and the related legal precedent, nationality can be used as a decision-making criterion in order to control immigration. There are therefore sufficient grounds that are non-discriminatory under Article 14 ECHR for treating Swiss citizens differently with regard to family reunification from citizens of the European Union (Federal Supreme Court decision 2C_438/2015 of 29 October 2015, Consideration 3.2). For more details see also background information (Annex A).

ANNEX A: BACKGROUND INFORMATION PROVIDED BY SWITZERLAND

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Département fédéral de justice et police DFJP
Secrétariat d'Etat aux migrations SEM
Domaine de direction Immigration et intégration
Division Admission Séjour

Background informations on family reunification

Foreign citizens from non-EU/ETA countries (third countries) who hold a permanent residence permit (C permit) are entitled to be reunified with their spouses and their children under the age of 18. Several conditions have to be fulfilled cumulatively: they must live in the same household, have suitable accommodation, must not be dependent on social assistance benefits, must meet the language requirements for family members and must not be in receipt of supplementary benefits (Art. 43 FNIA). The Act also specifies deadlines for requesting family reunification (Art. 47 FNIA). The same conditions apply to family reunification for foreign nationals from third countries who hold a residence permit (B permit), the difference being that their family members do not have an automatic right to a residence permit (Art. 44 FNIA). Foreign nationals from third countries who hold a short-stay permit (L permit) have no automatic right to family reunification but can request and obtain reunification subject to the same conditions as holders of a residence permit (B permit; Art. 45 FNIA).

The regulations on the family reunification of third country citizens are explained in detail in the SEM directives (not available in English): (https://www.sem.admin.ch/sem/fr/home/publiservice/weisungen-kreisschreiben/auslaenderbereich/familiennachzug.html). The regulations have been the subject of numerous court decisions, which are cited in the directives.

In addition, the FNIA lays down specific rules for the admission for the foreign descendants (regardless of nationality) of a Swiss citizen with a view to their naturalisation as Swiss citizens. If they have close ties with Switzerland but do not fulfil the conditions for obtaining a residence permit in the context of family reunification, they can obtain a residence permit if they are eligible for the reinstatement of their Swiss citizenship or for simplified naturalisation under the Swiss Citizenship Act[1] (Art. 29 Ordinance of 24 October 2007 on Admission, Period of Stay and Employment[2]).

Stateless persons who are recognised as such under the Convention of 28 September 1954 relating to the Status of the Stateless Persons are entitled to have their residence status in Switzerland regularised. They are granted a residence permit for one year at a time (B permit). As far as their personal and residence status are concerned, recognised stateless persons have the same rights as recognised refugees who have been granted asylum under the 1951 UN Refugee Convention. However, family reunification for recognised stateless persons is not governed by the law on asylum, as is the case for refugees who have been granted asylum; the provisions of the FNIA apply as the *lex generali*, i.e. stateless persons have the same family reunification rights as foreign nationals who have rights of residence in Switzerland[3].

[1] RS 141.0
[2] RS 142.201
[3] See *Manuel Asile et retour*, Article F4