FACULTY OF LAW AND CRIMINOLOGY

THE RIGHT TO FAMILY REUNIFICATION: THE INTERACTION BETWEEN EUROPEAN AND NATIONAL LAW

A COMPARATIVE STUDY OF BELGIUM AND THE NETHERLANDS

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Foreword

Since I could be called a ‘product’ of family reunification myself, a personal family history might seem an obvious reason to write a thesis on this subject. My initial idea to write this work came however more from the aha-experience I had when learning about European law and how much this level of legislation is reflected in our daily lives. To be fair, before I started studying law, I had little to no clue about how things exactly work in the big buildings in Brussels.

Even though I cannot say I am an expert by now, I do feel I have gained considerable insight into some parts of this tangled web and I have definitely learned to better read and understand European case law. It has therefore been very interesting to write on the subject of family reunification which is very topical and constantly evolving both at the EU and the national level.

Starting to study again after a period of working, was an exciting but not always easy challenge. Therefore, I would like to thank a few people who helped me through the process of writing this thesis, and by extension my whole second career as a law student.

First of all, I would like to thank professor Peter Van Elsuwege and Hester Kroeze for their guidance and support in writing this thesis.

I am also very grateful to AVS for letting me work as a journalist with them for the past four years and thereby giving me the economic freedom and flexibility to complete my studies.

Of course, although they will probably never read this work, I am also thankful to my friends for their support, providing a distraction and willingness to listen to my complaints. Both the usual crews in Ghent as well as the young kids in Leiden have been essential to me being able to write a thesis for the third time. A special mention goes to Alexander, Claire and Jolien, who actually did read parts of this work, and thankfully also corrected them.

Even with it being the third time, I still would not have been able to write this thesis without the help of my mom. Thank you, for being both the instigator and the final proof reader of this work, and for so much more.

Lastly, I am beyond grateful to my grandmother. Thank you for everything.

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Introduction

1. Research Objective

The subject of this dissertation is the right to family reunification and the interaction between European and national law. The implementation and interpretation of different instruments and case law of the European Union ('EU') with regard to family reunification will be analyzed in two EU Member States, Belgium and the Netherlands. Throughout this dissertation attention will be given to the legal uncertainties that exist in those Member States in the field of family reunification.

Given the current political climate and influence of populist parties within Europe, the future for immigrant families remains unclear in many Member States.[1] Member States have a wide discretion to determine if an immigrant has the right to reside in a state. This discretion is however limited by different European rules on the rights of family members of legally residing persons to reside in a certain Member State. In certain circumstances this right can be derived from Article 8 of the European Charter of Human Rights. In other cases, different instruments of EU-law apply. Directive 2003/86 on the right to family reunification ('Family Reunification Directive') establishes common rules for exercising the right to family reunification in 25 EU Member States (excluding the United Kingdom, Ireland and Denmark).[2] This Directive only applies to legally residing third country nationals who ask to be reunited with their third country national family members.[3] Other rules apply to family members of EU citizens. They derive the right to move and reside freely within the territory of the EU from Article 21 of the Treaty on the Functioning of the European Union ('TFEU'). As specified in Article 3 of Directive 2004/38 ('Citizenship Directive'), the family members of EU citizens have the right to accompany or join them in another EU country, subject to certain conditions.[4]

In principle, persons who want to use their right to family reunification can only request this from the state where they are residing. They are therefore dependent on the implementation of European rules and the national laws of that Member State. When a Member State adopts a new Directive, the Member State has to make sure that the national laws comply with the requirements of the Directive.

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[1] T. HUDDLESTON, "Right to family reunion: the dynamics between EU law and national policy change", Migration Policy Group briefings for Green Paper on Family Reunion, 2011, 3.

[2] Directive 2003/86/EC of 22 September 2003 on the right to family reunification. From now on referred to as 'Family Reunification

[3] A third country is defined as 'a non-EU citizen who does not enjoy the extensive free movement rights granted to Union Citizens, and to some categories of privileged non-EU citizens'. See: P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 128.

[4] 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.

For example, adopting the Family Reunification Directive has, on the one hand, obliged some states to adopt new rules in the field of family reunification since no specific legislation was previously applicable in this matter. On the other hand, some Member States have taken advantage of their duty to implement the Directive to modify existing rules, sometimes in a more restrictive way.[5]

Since the entry into force of the EEC Treaty ('Treaty of Rome'), the Union's own legal order[6] became an integral part of the legal systems of the Member States, which their courts are bound to apply[7]. There is no discretion left for national law as to the manner in which Union law affects national law.[8] However, it is not always clear how this has to be done in practice.

European case law plays a significant role in the development of the interpretation of the EU legislation on family reunification. This has two important reasons. Firstly, Directives contain provisions which leave a certain margin to a Member State to transpose this European legislation into their national laws. Often discussion arises as to whether this transposition has been done in accordance with EU law and whether the national interpretation by authorities and judges is done correctly. Secondly, the rights conferred by the TFEU on Union citizens and in a derived form on their family members, are subject to a constantly evolving interpretation by the European Court of Justice ('ECJ'). In the case of 'Ruiz Zambrano'[9] for example the ECJ discussed for the first time how EU law can still be triggered in situations that at first sight would fall under national law because of their internal nature.[10] The ECJ introduced the 'Ruiz Zambrano' criterion or the 'genuine enjoyment' test, which means that in certain situations a refusal to grant a residence right to a family member of a Union citizen would force this citizen to leave the territory of the Union. This would mean that he/she is unable to exercise 'the substance of the rights' conferred on them by virtue of their status as citizens of the Union.[11]

In several cases the ECJ gives a certain interpretation but then leaves the final decision for the national court to decide. In 'Dereçi', for instance, the ECJ left it to the national court to decide whether EU law was applicable or not.[12] Also in other cases, the ECJ refrained from giving a clear-cut answer

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[5] Y. PASCOUAU, "Conditions for Family Reunification under Strain: A comparative study in nine EU member states", in collaboration with Henri Labayle King Baudouin Foundation, European Policy Centre, Odysseus Network, 2011, 4.
[6] ECJ 5 February 1963, nr. C-26/62, ECLI:EU:C:1963:1, 'Van Gend & Loos'.
[7] ECJ 15 July 1964, nr. C-6/64, ECLI:EU:C:1964:66, 'Costa Enel'.
[8] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 23.
[9] ECJ 8 March 2011, nr. C-34/09, EU:C:2011:124, 'Ruiz Zambrano'.
[10] ECJ 8 March 2011, nr. C-34/09, EU:C:2011:124, 'Ruiz Zambrano'.
[11] 'Ruiz Zambrano', para. 44.
[12] ECJ 15 November 2011, nr. C-256/11, ECLI:EU:C:2011:734, 'Dereci', para. 74.

concerning the application of EU law and merely observed that it 'is to be determined by the referring court' whether or not the EU citizens' essential citizenship rights were at stake.[13]

The series of preliminary references concerning family reunification illustrates how difficult it can be for national judges to apply the criteria concerning application of EU law in specific situations. The use of generic references such as 'genuine enjoyment', 'the substance of EU citizenship rights' and 'hypothetical obstructions to the exercise of free movement rights' in the ECJ's case law contributes to legal uncertainty.[14] While the preliminary ruling procedure does indeed leave the adjudication of a case to the national court, its key objective to ensure the uniform interpretation and the application of EU law in the Member States warrants clear guidance for the national courts. This is particularly important in the context of family reunification, where largely comparable situations can lead to different outcomes in various Member States.[15] Whether this guidance is always clear-cut will hopefully become clear in this dissertation.

The relevance for this research comes from the growing disparities on the topic of migration in the EU. It will be interesting to understand how Member States use their discretion to make a national policy on family reunification and how this policy can be limited by a European framework. Although a lot of research has already been done on the topic of family reunification at EU-level, this research will still be relevant because it will give an overview of how the legal uncertainties caused by this EU-level are reflected in two Member States.

2. Research Method

In order to find an answer to which uncertainties exist in the field of family reunification and how these are reflected in the Member States, I will conduct a comprehensive literature review. First, I will try to give a clear overview of the different European instruments, phenomena and most important case law on the right to family reunification. This literature review will be followed by the comparative law part of this research. For this part, a micro legal analysis will be made of the national regulations on family reunification in Belgium and The Netherlands. This analysis will be conducted in a functional manner, in order to show how different legal regulations for the same problem function in practice.

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[13] ECJ 10 October 2013, nr. C-86/12, ECLI:EU:C:2013:645, 'Alokpa', para. 36.
[14] S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", in D. KOCHENOV, D. (ed.), *EU Citizenship and Federalism. The Role of Rights*, Cambridge University Press, 2017, 452 (hereafter: S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", 2017); D. KOCHENOV, "The Right to Have What Rights? EU Citizenship in Need of Clarification", 19 European Law Journal, 2013, 512-515.
[15] S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", reunification', 2017, 451.

As mentioned above, it would not be possible in the framework of this dissertation to cover the regulation of all 28 Member States. Therefore, it was necessary to target two Member States in order to reflect, as much as possible, different balances and trends.

In recent years several laws were adopted that have significantly modified the rules regarding family reunification in Belgium. The common thread through all these amendments is that the legislation became stricter and more complex with every amendment.[16] The second country is The Netherlands, a country that has received a lot of critique on its strict regulations on family reunification.

Belgium and The Netherlands are part of the same EU legal order but of course have a different national order. Both countries have for example implemented the Family Reunification Directive but made use of the optional provisions in a different manner. In the Netherlands, there is for instance a pre-entry integration requirement, which is not the case in Belgium. Both countries have also been involved in important judgments by the ECJ, which have influenced the interpretation of family reunification in the Member States.

3. Limitations

Due to reasons of feasibility, this research is limited in certain ways. A first limitation is the number of national frameworks, which will be discussed, as only two of the frameworks of a total of 28 Member States will be analyzed. Secondly, the focus of this dissertation lies on the entry conditions, thus the possibility to obtain a residence right on the basis of family reunification in a Member State, there will be no discussion on the preservation of this right.

Another limitation is that there will only be an analysis of five different regimes of family reunification at EU level. There will be no focus on family reunification and protection of settled migrants under Article 8 ECHR.[17] Concerning family reunification between third country nationals the possibility for certain of those third country nationals to benefit from less restrictive rules on family reunification on the basis of by the EU adopted international agreements will not be discussed in

[16] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 286.

[17] This concerns situations in which migrant family members wishing to reunite in a Member State cannot invoke EU-instruments, because their situation is outside the scope of Union law. In such situations, the European Convention of Human Rights may be an important instrument offering basic safeguards for the respect of family life and private life. As all Member States have ratified the ECHR, everyone within the jurisdiction of a Member State may issue a complaint with the European Court of Human Rights ('ECtHR') in Strasbourg against violation of the Convention. See P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014. 44.

detail.[18] Special attention will not be given to the case law concerning Union citizens with dual citizenship[19], nor to persons with subsidiary protection or refugees.

Next to the uncertainties in the application of family reunification Directives and the ECJ's case law, another important consequence of the interaction between European and national law in the field of family reunification is the phenomenon of 'reverse discrimination'. The introduction of EU citizenship with the Treaty of Maastricht extended the scope of application of family reunification rights to Member State nationals that are not involved in economic activities.[20] However, the ECJ immediately asserted that EU citizenship 'is not intended to extend the scope rationae materiae of the Treaty also to internal situations which have no link with Community [now Union] law'.[21] Therefore, EU citizens can only rely on their EU citizenship rights, including a right of residence for their third country family members, when they fall within the scope of application of EU law.[22] Purely internal situations that have no link with EU law, are governed by the national rules of the Member States. Often these national rules are more restrictive than EU-law. This leads to a situation of discrimination between 'static EU-citizens', that do not make use of their right to free movement, and are governed by national rules, and EU-citizens, that have made use of this right, and can rely on their EU citizenship rights. This is called 'reverse discrimination'. The choice has been made to narrow down the scope of this dissertation to the uncertainties only and not to discuss 'reverse discrimination' as well.[23]

4. Overview

PART I of this dissertation contains an extensive overview of the European framework on family reunification. This part contains the discussion of three different legal regimes, of which the last one can be subdivided again into three parts.

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[18] The EU has concluded a number of association and cooperation treaties with third countries that give preferential treatment in various spheres to nationals from these third countries. One of the most prominent examples is the Association Treaty concluded with Turkey.

[19] In this context there can be referred to the recent case of 'Lounes', which concerns the rights of third country nationals who are family members of people who hold dual nationality of the UK and another EU Member State. ECJ 14 November 2017, nr. C-165/16, ECLI:EU:C:2017:862.

[20] P. VAN ELSUWEGE, and D. KOCHENOV, "On the limits of judicial intervention: EU citizenship and family reunification rights", *European Journal of Migration and law*, 13(4), 2011, 444.

[21] Joint cases C-64/96 and C-65/96, Kari Uecker and Vera Jacquet v. Land Nordrhein Westfalen [1997] ECR I-3171, para. 23.

[22] P. VAN ELSUWEGE and D. KOCHENOV, "On the limits of judicial intervention: EU citizenship and family reunification rights", *European Journal of Migration and law*, 13(4), 2011, 444.

[23] See a recent Master dissertation written on this subject which discusses both the concept and the situation in Belgium. A. BYTTEBIER (supervisors: I. GOVAERE and L. GOOSSENS), "Omgekeerde Discriminatie en Gezinshereniging in de EU", Ugent, 2015, 1-114.

In the first chapter the right to family reunification between third country nationals and their third country national family members will be discussed. This includes a discussion of the Family Reunification Directive, which applies to this situation, and the interpretation of this right by the ECJ.

Secondly, the right to family reunification between a Union citizen and their third country national family member will be discussed. This discussion begins with a description of the Citizenship Directive, which applies to Union citizens who make use of their right to free movement and their family members. In addition, the ECJ's most relevant case law on this Directive will be discussed.

In the third chapter, the right conferred by the TFEU on a Union citizen will be analyzed. Three subdivisions will be made here. First, there will be a description on the ECJ's case law in 'Ruiz Zambrano' and subsequent cases which opens up the possibility for certain Union citizens who have not made use of their right to free movement to reside in the Member State of which they are national on the basis of Article 20 TFEU. Further, the situations in which Union citizens could rely on their rights conferred by Article 21 (1) TFEU and Article 45 TFEU will be discussed.

This discussion will lead to several insights on which uncertainties are created at EU-level under these different regimes, both through the European legislation and through the ECJ's case law.

In PART II of this dissertation, the legal framework of Belgium and the Netherlands will be discussed. This will happen by giving an overview of the applicable rules and case law for family reunification. This will include answering the question of whether the European rules and concepts are transposed and interpreted correctly. The conclusions drawn from the analysis of the European framework will lead to discussion on how these are interpreted in these national frameworks.

PART I: The European Framework for Family Reunification

1. Introduction

Pursuant to Article 5 of the Consolidated Version of the Treaty on European Union ('TEU'), 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.[24] These competences are divided into 3 main categories: exclusive competences; shared competences; and supporting competences.[25] For shared competences, the EU and the Member States are able to legislate and adopt legally binding acts. EU countries exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence.[26] One of the areas in which shared competence between the EU and EU countries applies is 'the internal market', which is described as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.[27] Articles 20 and 21 TFEU establish the legal basis for the free movement of persons. The possibility for a Union citizen to move freely and reside within the Union and to be accompanied by his/her family members falls within the scope of these provisions and is thus a shared competence. It is therefore in the first place up to the Union to set rules for family reunification within the Union.

Family reunification for citizens of the Union is 'a necessary corollary of free movement of persons, a central part of the internal market'.[28] But for third country nationals, family reunification is 'a power found in the part of the Treaty dedicated to developing the area of freedom, security and justice'. Although the area is linked to the completion of the internal market, it is not integral to it. Instead it is a power of the Union to extend to Europe's third country nationals or not as it chooses.[29] This means that whilst family reunification is a right for Union citizens, it is not for third country nationals.[30] Since the entry into force of the Treaty of Lisbon, the legal basis for a common European immigration policy can be found in Article 79 TFEU[31], which permits the adoption of measures regulating the

[24] Consolidated version of the Treaty on European Union, OJ.C. 326 of 26 October 2012.
[25] Article 2 TFEU
[26] Article 2 (2) TFEU
[27] Article 26 (2) TFEU.
[28] E. GUILD, "The Legal Elements of European Identity: EU Citizenship and Migration Law", Den Haag, Kluwer law international, 2004, 95.
[29] Ibid.
[30] Ibid.
[31] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 127.

conditions of entry and residence of third country nationals 'including for the purpose of family reunification'.[32]

On the basis of these competences, the EU has adopted the Citizenship Directive regulating the rights of migrating EU citizens[33], and the Family Reunification Directive in which the right of third country nationals to be accompanied by their family members in certain circumstances is regulated.[34] The Member States need to comply with these directives and are thus not able to control the full scope of family reunification within their national legislation. The interaction between the European and the national laws will determine the legal position of Union citizen, their family members and certain third country nationals.

Besides these Directives there are however other legal regimes which can apply to family members wishing to reunite. Under the influence of the ECJ's case law, a Union citizen can in certain circumstances be granted a right to family reunification directly by Articles 20 and 21 TFEU. EU workers can rely on the free movement of workers provided by Article 45 TFEU.

[32] S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", reunification', 2017, 4.
[33] 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.
[34] Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

2. Directive 2003/86: the 'Family Reunification Directive'

Scope

In contrast with Union citizens, third country nationals have no self-evident right, to enter or reside in EU Member States for purposes of economic activities.[35] For them, Union law provides no freedom of workers, no freedom of establishment or provision of services. A qualified right to family reunification for third country nationals is however laid down in the Family Reunification Directive.[36] This Directive determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.[37]

For the purposes of the Directive a 'third country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty (now Article 20 TFEU).[38] The Directive excludes persons who reside on the basis of subsidiary protection, but does apply to third country nationals who enjoy a refugee status.[39] The Directive is not applicable in Denmark, Ireland and the United Kingdom.[40]

The situation in which the Directive applies, can be described as follows: a sponsor[41], who is a third country national and who is holding a residence permit for at least one year with a reasonable prospect of obtaining the right of permanent residence, is looking to exercise his/her right to family reunification with another third country national.[42] The Directive then determines the conditions under which family reunification is granted, establishes procedural guarantees and provides rights for the family members concerned. The Directive is an instrument of minimum harmonisation.[43] Article 3 (5) provides that Member States may adopt or maintain more favourable provisions for family reunification. The Directive does not apply to family members of a Union citizen.[44] It is also important to notify that this Directive applies irrespective of any cross-border movement within the EU.[45] It will

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[35] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 39.
[36] Ibid.
[37] Art. 1 Directive 2003/86.
[38] Art. 2 (a) Directive 2003/86.
[39] Art. 3 (2) Directive 2003/86.
[40] Recital (17) and (18) Directive 2003/86.
[41] 'A person who already resides legally in a Member State and who wants to be joined by his/her family member(s).'
[42] Art. 3 Directive 2003/86.
[43] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 133.
[44] Art. 3 (3), Article 9 Directive 2003/86.
[45] S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", reunification', 2017, 4.

become clear later in later chapters, that this is an important difference with the other EU-instruments for family reunification.

Member States are obliged to authorise the entry and residence of the sponsor's spouse and the minor children of the sponsor and of his/her spouse, including adopted children.[46] This personal scope is more limited than in the Citizenship Directive by which Member States are obliged to also authorise the entry and residence of the sponsor's registered partner and his/her dependent direct relatives.[47] Concerning other family members there is no obligation but merely a possibility for the Member States to authorise family reunification under the same conditions. These family members are for instance, first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin, the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their health condition, or the unmarried partner, with whom the sponsor is in a duly attested stable long-term relationship.[48] With regard to the category of unmarried partners, the Preamble states that Member States should give effect to the provisions of this Directive without discrimination on the basis of sex (…) or sexual orientation.[49] This implies that when Member States authorise family reunification for unmarried partners, they must extend this authorisation to same-sex relationships.[50] In contrast with the conditions imposed on sponsors, the immigration status of the persons who are eligible for family reunification is of no relevance.[51]

In order to ensure better integration and to prevent forced marriages Member States are allowed under Article 4(5) of the Family Reunification Directive to require the sponsor to be of a minimum age, with a maximum threshold of 21 years, before the spouse is able to join him/her.[52] In 'Noorzia', the ECJ ruled that this provision does not preclude a rule of national law requiring that spouses and registered

[46] Article 4 (1) Directive 2003/86. According to Article 4 (4) Member States are not allowed to authorise the family reunification of a further spouse in the event of a polygamous marriage.
[47] Article 2 Directive 2004/38.
[48] Art. 4 (2) and (3) Directive 2003/86.
[49] Recital 5 Directive 2003/86.
[50] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 139.
[51] Ibid., 136.
[52] This limitation has been incorporated at the request of the Dutch delegation. The 2002 coalition agreement by the short-lived Dutch government and List Pim Fortuyn provided for an increase in the minimum age from 18 to 21. In order to allow for the realisation of that aim, the Netherlands actively lobbied for the inclusion of Article 4 (5) in the Directive. In the last phase of the negotiations, Belgium openly supported this Dutch proposal. See: K. GROENENDIJK, R. FERNHOUT, D. VAN DAM, R. VAN OERS, T. STRIK, "The Directive 2003/86 in EU Member States the First Year of Implementation", Centre for Migration Law Nijmegen, 2007, 20.

partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged.[53]

The rejection of an application is only possible on grounds of public policy, public security or public health.[54] Article 16 provides motives for rejecting an application, or withdrawing or refusing to renew a residence permit, other than the reason that the conditions of the Directive are not, or no longer, satisfied.

Interpretation

To analyse the interaction between EU and national law it is important to look at the ECJ's interpretation of the Member States' flexibility towards setting out the conditions for family reunification. In the following paragraphs the interpretation of the Directive will be discussed. After a discussion of the ECJ's general interpretation of the Directive, several specific provisions will be discussed. This discussion will be limited to those provisions which have caused most commotion during the negotiations of the directive, in literature and most importantly in the ECJ's case law. In the second part of this thesis it will then be interesting to analyse how the national authorities in Belgium and the Netherlands implement and interpret these provisions.

A certain margin and a strict interpretation

Soon after the entry into force of the Directive, the ECJ delivered an important judgement, explaining how the Directive should be interpreted and applied.[55] In 'Parliament v. Council' the ECJ found that the Directive imposes 'precise positive obligations on the Member States, with corresponding clearly defined individual rights', since it requires them, in the cases determined by the directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation'.[56] On the other hand, Member States do have a certain margin of appreciation. As mentioned above, they may decide to extend the right to family reunification to other family members than the spouse and minor children. The Directive also gives Member States the possibility to make the exercise of the right to family reunification subject to compliance with certain requirements. Member States thus retain a certain margin of appreciation to verify whether requirements determined

[53] ECJ 17 July 2014, nr. C-338/13, ECLI:EU:C:2014:2092, 'Noorzia', para. 14-18.
[54] Art. 6 Directive 2003/86.
[55] Ibid., 130.
[56] ECJ 27 June 2006, nr. C-540/03, ECLI:EU:C:2006:429, 'Parliament v Council', para. 60.

by the Directive are met and for weighing the competing interests of the individual and the community as a whole, in each factual situation.[57]

In 2014 the Commission released a note that provided guidance on how to apply the Family Reunification Directive. [58] It restated several of the ECJ's interpretations on the Directive that had been taken up till then such as the just discussed 'margin of appreciation' in 'Parliament v. Council'. The Commission also referred to the 'Chakroun' case in which the ECJ stated that Member States are invited to use their margin of appreciation in a manner that doesn't undermine the objective of the Directive, which is the promotion and the *effet utile* of family reunification.[59] This means that provisions which allow Member States to limit the right to family reunification need to be interpreted strictly.

This is reflected for example in the possibilities for Members States to set out the conditions for family reunification. Article 7 (1) for example contains a number of material conditions that Member States may impose on the sponsor, securing that family members will not become a burden on the social security system, and that they will enjoy a certain standard of living. These conditions concern having appropriate accommodation, sickness insurance and stable and regular resources. Article 8 of the Directive, allows Member States to require a waiting period for the sponsor to have stayed lawfully in the Member States, but this period has a maximum of two years.

The strict interpretation of the flexibility of the Directive's conditions is monitored by the ECJ of Justice but at the same time, the right to family reunification is not unlimited. The Commission is clear on the fact that beneficiaries are obliged to obey the laws of their host country, as set out in the Directive. In case of abuse and fraud, it is in the interests of both the community and of genuine applicants that Member States take firm action, as provided for by the Directive.[60]

Resources requirement: Article 7 (1) (c)

The first provision which will be discussed is Article 7 (1) (c) of the Family Reunification Directive. This provision requires a sponsor to have 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned'. The provision also states that 'Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum

[57] Ibid., paras. 54, 59, 61-62.
[58] COM (2014) 210: Communication from the Commission to the European Parliament and the Council on Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification.
[59] ECJ 4 March 2010, nr. C-578/08, EU:C:2010:117, 'Chakroun', para 43.
[60] COM (2014) 210, 3.

national wages and pensions as well as the number of family members'. This resources requirement consists of three components: the independent possession by the sponsor, the sufficiency and durability.

In 'Chakroun' the ECJ interpreted the component which concerns the level of sufficiency within the income requirement.[61] Mr. Chakroun had lived in the Netherlands for two years, holding a residence permit for an indefinite period, when he married in 1972. In 2005, he became unemployed and received unemployment benefits. In 2006, Ms. Chakroun applied for a Dutch residence permit in order to live with her husband. The application was denied, as her husband's unemployment benefits were below the required minimum income of 120 percent of the minimum wage in the Netherlands. This refusal was challenged on the basis that the Dutch law on minimum wage and minimum holiday allowance was incompatible with the Family Reunification Directive.

The ECJ found that, since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having, must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.' Therefore, the phrase 'recourse to the social assistance system' in Article 7(1)(c) must be interpreted as

> 'precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid')'[62]

When evaluating an applicant's financial resources, Member States are thus allowed to indicate a certain reference amount but this amount cannot be considered a fixed threshold below which all family reunifications can be refused irrespective of an actual examination of individual circumstances. This interpretation is supported by Article 17 of the Directive, which requires the individual examination of applications for family reunification.[63] Accordingly, the requirement to earn at least

[61] ECJ 4 March 2010, nr. C-578/08, EU:C:2010:117, 'Chakroun'.
[62] Ibid, para. 52.
[63] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 143.

120 % of the minimum wage in the Netherlands was deemed to be against the spirit and wording of the Family Reunification Directive.[64]

In the joined Cases 'O and S' the ECJ also specified that Member States must apply the provisions of the Family Reunification Directive in light of the Articles 7 and 24(2) and (3) of the Charter, making 'a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned' and 'avoiding any undermining of the objective and the effectiveness of that directive'. [65] The ECJ thus leaves it up to the national court to make this assessment consistent with European law as well as with fundamental rights protected by the legal order of the European Union.[66]

In its guidelines, the Commission later clarified that when an applicant provides evidence of a prognosis that his/her resources can reasonably be expected to be available in the foreseeable future, so that he/she will not need to seek recourse to the social assistance system, a permanent employment contract should be considered as sufficient proof.[67] However, concerning the durability of the income the Guidelines determine: 'Member States are encouraged to take the realities of the labour market into account as permanent employment contracts may be increasingly unusual, especially at the beginning of an employment relationship'.[68] This implies that if an applicant submits proof of another type of employment contract, for instance, a temporary contract that can be prolonged, Member States are encouraged not to automatically reject the application based solely on the nature of the contract. In such cases, an assessment of all the relevant circumstances in an individual case is necessary.

In the 'Kachab' case the ECJ confirmed the individual assessment determined by the 'Chakroun' case. It also clarified the durability component of the resources requirement.[69] The case concerned a Moroccan national, residing in Spain. The application for family reunification with his spouse was refused because even though he was working at the time of the application, he was unemployed when the refusal decision was made. According to the ECJ Member States are however entitled to assess prospectively whether the sponsor will retain stable and regular resources which are sufficient beyond the date of submission of the application for family reunification as long as the general principle of proportionality is observed.[70] The concerned national legislation, allowed Spanish authorities to assess

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[64] P. VAN ELSUWEGE, D. KOCHENOV, D., "On the limits of judicial intervention: EU citizenship and family reunification rights", European Journal of Migration and law, 13(4), 2011, 457.
[65] ECJ 6 December 2012, nrs. C-356/11 and C-357/11, ECLI:EU:C:2012:776, 'O and S.', paras. 81-82.
[66] Ibid., para 78.
[67] COM (2014) 210, 13.
[68] Ibid., 13.
[69] ECJ 21 April 2016, nr. C-558/14, ECLI:EU:C:2016:285, 'Kachab'.
[70] 'Kachab', para. 48; S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", reunification', 2017, 448.

this for a period of one year after the application. The ECJ considered this a proportionate, balanced, and reasonable time period. Similarly, the six-month period prior to the application for assessing the pattern of resources did not violate the objective of the Directive.

Integration measures: Article 7 (2)

Article 79(4) TFEU grants the EU the power to take measures to support national integration efforts. Harmonization of civic integration programs is explicitly ruled out. However, integration measures and conditions are mentioned in secondary EU law such as the Family Reunification Directive.[71] Under Article 7(2) of the Directive, Member States may require third country nationals to comply with integration measures, in accordance with national law. While in a number of Member States third country nationals are only subject to integration measures after a residence permit has been issued, it is also permissible to impose integration measures before family reunification has been granted.[72] In recent years, some EU Member States made passing a language test (Netherlands and Germany) or participating in a language course (France) a condition for a visa for family reunification for immigrants from certain third countries.[73]

The option to require applicants to comply with integration measures was one of the most controversial and debated requirements during the negotiations of the Family Reunification Directive.[74] Critics claim that the imposition of an obligation to pass an exam successfully is falling beyond the realm of the word 'measure'.[75] According to others, integration programs and tests are not, in themselves a violation of the Directive, since the discretion of Member States is limited by Articles 5 (5) and 17, which prescribe an individual assessment of all the interests in every individual application. In its guidelines, the Commission also stresses that the objective of such measures is to

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[71] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A", Common Market Law Review 53, Kluwer Law International, 2016, 1065.

[72] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 143. According to the author, this can be concluded from the second sentence of Article 7 (2), according to which integration measures with regard to the refugees and/or family members of refugees may only be applied once the persons concerned have been granted family reunification. A contrario, this sentence implies that family members of non-refugees may be required to comply with integration measures before entry. The Commission does not refute this interpretation in its guidelines but does mention that integration measures may often be more effective in the host country. (COM (2014) 210, 16)

[73] K. GROENENDIJK, "Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?", European Journal of Migration and Law, 2011, 1; Denmark and the UK have similar requirements but do not apply the Directive 2003/86.

[74] GREEN PAPER on the Right to Ramily Reunification of Third-Country Nationals Living in the European Union (Directive 2003/86/EC), COM (2011) 735 final, 4; C.A. GROENENDIJK, 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?', European Journal of Migration and Law, 2011, 7.

[75] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 145. Reference is made to K.M. DE VRIES, 'Intergration at the Border', Oxford, Hart Publishing, 2013.

facilitate the integration of family members. Their admissibility depends on whether they serve this purpose and whether they respect the principle of proportionality.[76]

For a long time, it was unclear what the notions integration 'measures' and 'conditions' meant in the sense of the Directive as the two terms were not defined in the Directive itself. It was unclear how far Member States could go in implementing integration measures and conditions in national law without undermining effectiveness, objective and purpose of the Directives.[77] Several preliminary questions regarding the admissibility of pre-entry were asked by a Dutch and a German ECJ but before these could be answered the cases were cancelled because the authorities decided to grant the required visa before the hearing.[78]

In 'Naime Dogan' it was the first time, the ECJ had the opportunity to rule on the implementation of an integration measure for family reunification.[79] The case concerned the application of Mrs. Dogan, a Turkish national living in Turkey, who wanted to join her husband in Germany. Her application was rejected on the grounds on the grounds of the German language test she had taken. She had actually passed the language test, but since she was illiterate her written German was not satisfactory.

The referring court asked whether the national provision on the language test violated the 'standstill clause' in Article 41 (1) of the Additional Protocol to the Association Agreement with Turkey. This clause prohibits new restrictions on establishment or the provision of services. It was applicable since Mrs. Dogan's husband ran a business in Germany. Secondly, the referring court asked whether the same provision of national law violated Article 7 (2).

The ECJ concluded that the 'standstill' clause, precludes a national measure which, introduced after the entry into force of that clause in the Member State concerned, requires the spouse of a Turkish national residing in that State to prove beforehand the acquisition of basic knowledge of the official language of the State in question to be able to enter the territory of the latter for the purpose of family reunification.[80] The ECJ found that the German language requirement 'goes beyond what is necessary to attain the objective pursued', such as the prevention of forced marriages and the promotion of integration, 'in so far as the absence of sufficient language knowledge automatically leads to the

[76] COM (2014) 210, 15.
[77] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A" Common Market Law Review 53, Kluwer Law International, 2016, 1066.
[78] ECJ Order 10 June 2011, nr. C-155/11 PPU, ECLI:EU:C:2011:387, 'Bibi Mohammad Imran v. the Netherlands'; ECJ Order 25 March 2013, nr. C-513/12, ECLI:EU:C:2013:210 'Ayallti v. Germany'.
79 ECJ 10 July 2014, nr. C-138/13, ECLI:EU:C:2014:2066, 'Naime Dogan'.
[80] Ibid. para. 39.

dismissal of the application for family reunification, without account being taken of the specific circumstances of each case'.[81]

In light of this answer, the ECJ did not consider it necessary to examine the second question concerning the possible violation of Article 7 (2). Unfortunately, this means that this judgement is only relevant to Turkish nationals, rather than to all third country nationals. However, the ECJ's judgment on this point applies to all Member States, including the UK, Ireland and Denmark.[82]

The ECJ had another opportunity to interpret the German pre-entry language requirements in the case of 'Ukamaka'.[83] The ECJ was supposed to ascertain whether Article 7 (2) enables a Member State to make the first entry of a third country family member conditional upon that person being able to communicate in that Member State's official language. Unfortunately, this order was removed from the register when the referring court informed the ECJ it did not intend to maintain its reference for a preliminary ruling.

In 'K and A' the ECJ examined the compatibility of the Dutch law which required third country nationals to pass exams testing their knowledge of Dutch language and society, with the Family Reunification Directive.[84] K and A's application for family reunification had been refused for failing to pass, although they had requested exemption from the exam on health grounds. The ECJ found that in principle, civic integration exams do not undermine the aim of the Directive, 'provided that the conditions of application of such a requirement do not make it impossible or excessively difficult to exercise the right to family reunification'.[85] The integration measures as mentioned in Article 7 (2) of the Directive should thus be aimed at facilitating integration rather than acting as an obstacle. Therefore, special circumstances such as age, level of education, health should be considered when an applicant is not able to take the exams. The Dutch law was considered incompatible with the Directive since it did not sufficiently take such factors into account. The hardship clause in the Dutch law only allowed for individual exemptions from the exam when a combination of 'very special' individual circumstances rendered a candidate permanently unable to pass the exam. Insufficient financial means, travel-related problems, illiteracy, or lack of proficiency of a language in which the official preparation pack is offered did not trigger the hardship clause.[86] In addition, the ECJ found that the

[81] Ibid. para. 38.
[82] S. PEERS, 'The CJEU transforms family reunion for Turkish citizens', EU Law Analysis, 2014.
[83] ECJ Order 21 November 2014, nr. C-527/14, ECLI:EU:C:2015:599, 'Ukamaka Mary Jecinta Oruche and Nzubechukwu Emmanuel Oruche v Bundesrepublik Deutschland'.
[84] ECJ 9 July 2015, nr. C-153/14, ECLI:EU:C:2015:453, 'K and A'.
[85] Ibid., para. 71.
[86] Ibid., para. 29.

fees relating to the examination were set too high, which made exercising the right to family reunification impossible or excessively difficult.[87]

Application Fees

There is no provision in the Directive on the charge of a fee for an application for family reunification. However, the ECJ considered that fees between €200 and €800 to acquire a long-term residence permit in the Netherlands were too high under Directive 2003/109.[88] The ECJ decided that the level at which fees are set, must not have either the object or the effect of creating an obstacle to the exercise of the right to family reunification. Third country nationals who satisfy the conditions laid down by the Directive could be prevented from exercising their right for family reunification if the application fees have a significant financial impact.[89] The fees levied on third country nationals and their family members under the Family Reunification Directive could be compared to those levied on their own nationals for the issue of similar documents, to evaluate whether the fees for third country nationals are proportionate, taking into account that these persons are not in identical situations.[90]

The Commission took over the ECJ's interpretation in this judgement in its guidelines. These now determine that Member States are allowed to charge reasonable, proportional administrative fees for an application for family reunification and they have a limited margin of discretion in setting these charges, 'as long as they do not jeopardise the achievement of the objectives and the effectiveness of the Directive'.[91]

In a more recent case the ECJ held that the Italian fees of €80 and €200 to obtain a similar permit as in the Dutch case, were disproportionate in the light of the Directive's objective and liable to create an obstacle to the exercise of the rights conferred by that Directive.[92]

[87] Ibid., para. 69.
[88] ECJ 26 April 2012, nr. C-508/10, ECLI:EU:C:2012:243, 'Commission v. Netherlands', paras. 56–77.
[89] Ibid., paras 69-70, 74 and 79.
[90] Ibid., para. 77.
[91] COM (2014) 210, 9.
[92] ECJ 2 September 2015, nr. C-309/14, ECLI:EU:C:2015:523, 'CGIL and INCA', para. 31.

Conclusion

Several conclusions can be drawn from this discussion on the Family Reunification Directive. Firstly, the Directive leaves broad discretion to the Member States by using many optional formulas.[93] However, the ECJ has confirmed on several occasions that the provisions in the Directive, which allow Member States to limit the right to family reunification need to be interpreted strictly. The question here remains to what extent the Member States actually comply with this determination.

Concerning the resources requirement, the 'Chakroun' judgement was particularly important. The mere fact that a sponsor does not meet a fixed threshold does not allow the Member States to refuse an application automatically. In every individual case, they should assess whether the sponsor would still be able to make a living from his/her income without having to rely on social assistance. The 'Kachab' judgement clarified that also concerning the durability element of the sufficient resources requirement, Member State are required to make this individual assessment.

Regarding integration measures the ECJ found that civic integration exams are allowed in principle when they are aimed at facilitating integration rather than acting as an obstacle. Since, the Dutch civic integration exam was however considered incompatible with the Directive in the sense that the 'hardship' clause was too strict and that the fees for the exam were too high, it will be discussed how the Netherlands reacted to the 'K and A' judgement.

Finally, the guidelines concerning the application fee are still vague in the context of family reunification. However, the fees which are required in the Member States could be compared with the height of the fees in the mentioned case law.

[93] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 153.

3. Directive 2004/38: the 'Citizenship Directive'

Scope

Another important group of family migrants for whom the EU guarantees the right of entry and residence in the Member States, are the non-EU or third country national family members of 'mobile' Union citizens. The Citizenship Directive is about the right of citizens of the Union and their family members to move and reside freely within the territory of the EU and EEA member states.[94] The Directive guarantees that third country national family members enjoy the same rights as the Union citizen they accompany. This means that those family members also have a residence right in all the other Member States of the Union, other than the one the Union citizen is a national of.[95]

There are three different rights of residence under the Directive: the right of residence for up to three months (Article 6), the right of residence for more than three months (Article 7), and the right of permanent residence (Articles 16-18). For the residence right up to three months, union citizens are only required to hold a valid identity card or passport.[96] The right of residence for a period longer than three months is subject to a more specific set of conditions. Three categories of Union citizens enjoy this right:[97]

- Union citizens who are economically active as workers or self-employed persons in the host Member State;
- Union citizens who have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover;
- Union citizens who are students and have comprehensive sickness insurance cover and who can give the assurance of sufficient resources not to become a burden on the social assistance system of the host Member State.

[94] Switzerland, which is a member of EFTA but not of the EEA, is not bound by the Directive but rather has a separate bilateral agreement (FMP Agreement) on free movement with the EU.
[95] Article 6 and 7 Directive 2004/38. Article 6 concerns the right of residence for up to three months, Article 7 the right of residence for more than three months.
[96] Article 6 (1) Directive 2004/38. Article 14 (1) and (4) do specify that persons enjoy this short-term right only as long as they do not become an unreasonable burden on the social assistance system of the host Member State, although workers and jobseekers are exempted from this requirement.
[97] Article 7 (1) Directive 2004/38.

After five continuous years of legal residence in the host Member State, Union citizens obtain a right of permanent residence that is no longer subject to any of the above-mentioned conditions.[98]

The Directive exclusively applies to Union citizens who reside or have resided for a certain time in another Member State than the one they are a national of. Only then, the Union citizen sponsor exercises his/her right to free movement and falls under the scope of EU law. As mentioned above, family reunification of Union citizens who reside in the Member State they are a national of (e.g. family reunification with a Belgian national in Belgium) is a strict national competence.

As mentioned, all the rights of the Directive also extend to the family members, irrespective of their nationality, provided that they are a family member as defined in Article 2 (2). The Member States are obliged to grant a residence right to the spouse and the registered partner[99] of the sponsor, to the direct descendants who are under the age of 21 or who are dependants and the dependent direct relatives in the ascending line of both the sponsor and his/her spouse or partner.

Additionally, non-registered partners with whom the Union citizen has a durable relationship, duly attested, and other family members, (such as grandchildren, grandparents or other relatives) who are dependants or members of the household of the Union citizen, or for whom serious health grounds strictly require the personal care of the Union citizen, may also be taken into account if the national legislation allows this on the basis of the optional clause in the Directive.[100] The group of family members recognised as a family member receptive for family reunification is thus wider than the group recognised in the Family Reunification Directive.

The following conditions have to be met for a non-EU family member of a mobile Union citizen to be granted a residence right in Member State:

- the Union citizen needs to be economically active and provide for his/her own living in the host Member State by working or being self-employed[101];
- or, if the Union citizen who is being joined is not economically active and/or a student or following vocational training, he/she needs to have sufficient resources and a comprehensive

[98] Article 16 Directive 2004/38. According to Article 7, a period of less than five years is sufficient for workers or self-employed persons, who become pensioners, who stop working due to permanent incapacity or who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day, or at least once a week.

[99] Art. 2 (2) (b) Directive 2004/38 defines this partner as 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State'.

[100] Art. 3 (2) Directive 2004/38.

[101] Article 7 (1) (a) Directive 2004/38.

sickness insurance to prevent the family from becoming a burden on the social assistance system of the host Member State[102]

In contrast with the Family Reunification Directive, integration conditions are not allowed for Union citizens and their family members under the Citizenship Directive.[103] Similarly to the Family Reunification Directive however, Member States are allowed to lay down or use more favourable national provisions.[104]

Interpretation

When interpreting the Citizenship Directive, the ECJ seeks to ensure that the right for a third country national to accompany his/her family member moving within the Union is effective.[105] In 'McCarthy II', for instance, the ECJ decided that Article 35 of the Citizenship Directive (which enables Member States to adopt measures to refuse, terminate or withdraw any right conferred under the Directive in the case of abuse of rights or fraud) does not permit a Member State to require the third country national family member of a Union citizen who has made use of his/her right to free movement to be in possession of an entry permit in order to be able to enter its territory.[106]

In the following paragraphs, several provisions of the Directive that have caused uncertainties both in the legal doctrine as well as in the ECJ's case law will be looked at in detail.

Sufficient Resources

It is important to notify that Article 8(4) of the Directive prohibits Member States from laying down a fixed amount to be regarded as 'sufficient resources', below which the right of residence can be automatically refused. The authorities of the Member States must take into account the personal situation of the individual concerned. However, the provision also determines that 'in all cases the amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State'. This provision is confusing since it first prohibits a fixed amount but then indicates that there is a certain threshold.

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[102] Article 7 (1) (b), (c) Directive 2004/38.
[103] The Citizenship directive does not mention any integration conditions.
[104] Recital (29), Article 37 Directive 2004/38.
[105] S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", reunification', 2017, 6.
[106] ECJ 18 December 2014, nr. C-202/13, ECLI:EU:C:2014:2450, 'McCarthy II', para. 58.

During the negotiations in 2002 and 2003 on the establishment of the Citizenship Directive, the wording of the provision regarding the determination of what 'sufficient resources' should mean was highly debated by some Member States and the Commission, which probably contributed to the ambivalence in the wording of the provision.[107] This ambivalence is also reflected in the practice of various Member States. The large number of definitions linked to the concept of 'sufficient resources' could give rise to confusion amongst Union citizens exercising their free movement rights. In particular, the evidence required to prove the possession of sufficient resources, the lack of transparency and the varying attitudes in different Member States result in 'a patchwork of uneven legislation'.[108]

Definition of family member Article 2(2)

The first problem that could arise concerning the eligibility of family members is the definition of 'spouse'. Since this definition is not the same in all Member States, this could lead to complications touching on fundamental differences between the Member States.[109] For instance, same-sex marriages are not considered valid in every country or Member State. It is not clear if those countries should just recognise same sex-marriages and confer a right of residence to the migrating partner or if they should rely on rules of private international law, which may enable a state to apply the private law of the host state to such unions and, accordingly, refuse to recognise same-sex marriages. [110] However, both Belgium and the Netherlands recognise same-sex marriages. Due to the limited scope of this thesis this issue will therefore not be further discussed.

A second problem concerns the fact that unmarried partners, who have not been registered as such, do not fall within the definition of family members in Article 2 (2). Therefore, their position is only partly secured by Article 3(2)(b) of the Directive, which only obliges Member States to 'facilitate' entry and residence of 'the partner with whom the Union citizen has a durable relationship, duly attested', the conditions of which must be laid down in national legislation.[111]

Dependancy

Member States are also obliged to 'facilitate' the entry and residence of 'any other family members, irrespective of their nationality, not falling under the definition of Article 2 (2) who, in the country

[107] P. MINDERHOUD, 'Sufficient resources and residence rights under Directive 2004/38', Nijmegen Migration Law Working Papers Series: 2015/03, 7.
[108] Ibid., 10.
[109] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 53.
[110] Ibid., 53.
[111] Ibid., 53.

from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'.

In the 'Lebon' case, the ECJ introduced the principle that there is no need to determine the reasons for the situation of dependency.[112] In 'Jia' it was underlined that the situation of dependency is established by referring to the need for material support in the State of origin of the applicant. [113]

In 'Reyes', the ECJ complemented its previous case law on the concept of dependency and gave more concrete guidance to the national authorities on how to apply this concept of 'dependence' within the meaning of the Directive.[114] The ECJ found that a Member State cannot require a direct descendant, who is 21 years old or older, to prove that he/she tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin.[115] No significance should be attached to the fact that a family member is deemed to be well placed to obtain employment in the host Member State, due to the personal circumstances such as age, education and health. [116] Referring to 'Lebon' and 'Jia' the ECJ also confirmed that there is no need to determine the reasons for the support of a family member. Therefore, the existence of a regular transfer of money is enough to show that dependence exists.[117]

The same interpretation of 'dependants' should logically be applied to the category of ascending direct relatives, because they are equally included in the definition of 'family members' in Article 2 (2) (d) of the Citizenship Directive.[118] A different treatment of this group of family members would amount to unjustified discrimination.[119]

Facilitate

In the 'Rahman' judgement, the ECJ analysed the impact of the word 'facilitate' in Article 3 (2).[120] According to this provision, Member States are obliged to ensure that their legislation contains criteria that enables these 'other family members' to obtain a decision on their application for entry and

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[112] ECJ 18 June 1987, nr. C-316/85, ECLI:EU:C:1987:302, 'Lebon', para. 22.
[113] ECJ 9 January 2007, nr. C-1/05, ECLI:EU:C:2007:1, 'Jia', para. 43.
[114] ECJ 16 January 2014, nr. C-423/12, ECLI:EU:C:2014:16, 'Reyes'.
[115] Ibid., paras. 28-31.
[116] Ibid., para. 34.
[117] Ibid., para. 23, 24.
[118] Article 2 (2) (d) Directive 2004/38.
[119] C. BERNERI, 'When is the family member of an EU citizen 'dependent' on that citizen?', EU Law Analysis, 2014.
[120] ECJ, 5 September 2012, nr. C-83/11, ECLI:EU:C:2012:519, 'Rahman'.

residence that is founded on an extensive examination of their personal circumstances, and, in the event of refusal, is justified by reasons.[121]

Prior residence in the Union not required

Article 3 (1) of the Citizenship Directive determines that the Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2 (2) who accompany or join them. In 'Metock' the ECJ held that this provision must be interpreted as meaning that a third country national who is the spouse of a Union citizen residing in a Member State whose nationality he/she does not possess and who accompanies or joins that Union citizen benefits from the provisions of that Directive, irrespective of when and where their marriage took place and of how the third country national entered the host Member State.[122] It is thus not required that the third country national family members of the Union citizen have resided in the EU before. Those family members are allowed to move immediately from outside the Union to a Member State where their sponsor is residing at that moment. Of course, under the condition that this is another Member State than the one the sponsor is a national of. In 'Singh' the ECJ had previously already stated that the residence right for the family member remains valid in case of a return to the home state of the sponsor.[123]

After the judgement, a small group of Member States unsuccessfully sought to reopen the negotiations in order to 'revise' the Directive to specifically address practices which they considered to be facilitated by this judgement: i.e. 'marriages of convenience' and 'illegal immigration'.[124] However, under Article 35 of the Directive,[125] Member States may already adopt measures to prevent abuses of rights such as 'marriages of convenience' in so far as they respect the principle of proportionality and provide for procedural safeguards.[126]

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[121] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 53-54.
[122] ECJ 25 July 2008, nr. C-127/08, ECLI:EU:C:2008:449, 'Metock', para. 99.
[123] ECJ 7 July 1992, nr. C-370/90, 'Singh', para. 25.
[124] S. CARRERA and A. FAURE ATGER, 'Implementation of Directive 2004/38 in the context of EU enlargement: A proliferation of different forms of citizenship?', CEPS Special Report, 2009, 16.
[125] Article 35 Directive 2004/38 reads that "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."
[126] Section 3.8.3. of COM(2008)840 final states that "where there are doubts that the marriage is not genuine, Member States can investigate to determine whether the rights granted by the Directive are being abused for example to circumvent national rules on immigration, and can refuse or withdraw the rights of entry or residence if abuse is proven. The Directive requires the respect of the principle of proportionality and of the procedural safeguards."

Conclusion

The most important conditions for the residence of third country national family members of Union citizens concern: demonstrating being related to or having a relationship with the Union citizen, the economical self-reliance of the family unit, or the official proof that the family members are dependant of the Union citizen or they need his/her care.

Concerning the economical requirement, the wording of Article 8 (4) of the Directive is confusing since it prohibits a fixed amount but also indicates that there is a certain threshold. In PART II it will be examined how this provision is implemented in Belgium and the Netherlands. More specifically whether they apply a threshold, how this threshold may be satisfied and whether there is transparency on this.

From the discussion, it has become clear that for the analysis of the implementation of Article 3(2)(b) of the Directive three elements will need to be considered. The first aspect is whether and how the conditions concerning the partner with whom the Union citizen has a durable relationship, duly attested, are laid down in the respective national legislations. Secondly, attention needs to be given to how the concept of dependency is implemented and assessed in the two Member States. According to the ECJ's case law there is no need to determine the reasons for the situation of dependency and the situation of dependency is assessed in the State of origin of the applicant. There should be no requirements concerning the family member being well placed to find a job in the host Member State, due to the personal circumstances such as age, education and health. The last element is the requirement to do an extensive examination of the personal circumstances of the other family members mentioned in Article 3 (2). It should be examined whether Belgium and the Netherlands actually perform this examination and if their criteria do not deprive Article 3 (2) of its effectiveness.

Lastly, it is not allowed for the Member States to require that family members of a Union citizen who has exercised his/her right to free movement to have resided in the Union prior to their application. It should be analysed whether Belgium and the Netherlands comply with this decision in 'Metock' and apply this to all family members and not only to for example spouses and children of those Union citizens.

4. EU primary law

Introduction

When Union citizens cannot rely on the Citizenship Directive because they fall outside its scope, it is possible for them under certain circumstances to rely on EU primary law. In several cases, Union citizens and their family members who were refused a residence right to family reunification on the basis of the Citizenship Directive, were able to rely on the rights as conferred in the Treaty on the Functioning of the European Union ('TFEU')[127].

In Article 20 (1) TFEU,[128] citizenship of the Union is established. This means that every person holding the nationality of a Member State shall be a citizen of the Union. This Union citizenship will shall be additional to and not replace national citizenship. In the second paragraph, it reads that citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. One of these rights is the[129] right to move and reside freely within the territory of the Member States. Article 21 (1) TFEU[130] stipulates that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The ECJ has argued in its case law that Union citizens would be deprived of their right to free movement and residence conferred by these articles if they were not allowed to be joined by their family members.

Article 45 TFEU stipulates that the freedom of movement for workers shall be secured within the Union. The same freedom is conferred by Article 56 TFEU concerning the freedom to provide services. These rights of Union citizens to enter and stay in other Member states extends to their family members. This extension of rights is laid down in Article 3, read together with Article 2 (2) of the Citizenship Directive. However, the Directive is only applicable when a Union citizen exercises his/her right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.[131] The ECJ has considered circumstances in which a residence right could be derived from Article 45 TFEU or 56 TFEU. When a Union citizen resides the Member State of which he is a national, but regularly travels to another Member State as a worker or provides services there, it is possible for the third country national family member of that Union citizen, to be

[127] Consolidated version of the Treaty on the Functioning of the European Union, 7 June 2016, "TFEU".
[128] Article 20 TFEU
[129] Article 20 (1) (a) TFEU.
[130] Article 21 TFEU.
[131] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 75.

granted a residence right in the home Member State of the Union citizen, provided that the refusal to grant such right of residence would discourage that citizen from exercising those freedoms.

Before going into the discussion of this important case law, it must be noted that the application of the Citizenship Directive is the general rule for family reunification between EU citizens and third country nationals. If the Union citizen falls outside the scope of the Directive, the applicant will have to rely on national legislation in the first place. It will be only be possible to rely on primary EU law in exceptional circumstances.

Directly granted on the basis of Article 20 TFEU

Ruiz Zambrano

The first case that will be analysed is the widely discussed judgement in 'Ruiz Zambrano'.[132] The case concerned a Colombian couple, living in Belgium. While living in Belgium they had become the parents of two children, who had acquired Belgian citizenship.[133] Both children were thus Union citizens on the basis of Article 20 TFEU. However, the children had always resided in Belgium and had not exercised their free movement rights as Union citizens. The Colombian parents had applied for a residence permit, as well as a work permit for Mr. Zambrano but both applications were refused. Before the ECJ, the question was raised whether a third country national ascendant should be granted a residence permit and a work permit on the basis of the Union citizenship of his/her young children who are dependent on him/her.

The ECJ considered that the Citizenship Directive was not applicable to the situation of the Zambrano's because the Directive does not regulate the stay of parents with minor children and because the Directive is only applicable to border crossing situations and not to Union citizens who have never used their right to free movement between Member States. Traditionally this would have been considered a 'purely internal situation, having no factor linking them with Union law. It has been standing case law of the ECJ, that it does not have jurisdiction in strictly internal situations.[134] In 2003,

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[132] CJEU 8 March 2011, nr. C-34/09, ECLI:EU:C:2011:124, 'Ruiz Zambrano'.

[133] Article 10 of the Belgian nationality legislation that was applicable at the time stipulated: 'A Belgian is the child born in Belgium, and that, at any time before the age of 18 years or before the emancipation before that age, would be stateless if it did not have that nationality. On 28 December 2006, the following was added to this provision: The first subsection will however not apply if this child could be granted another nationality, provided that his legal representative(s) carry out the administrative acts at the diplomatic or consular authorities of the country of the parents or one of them.

[134] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 91. See for example: ECJ 27 October 1982, nrs. 35 and 36/82, ECLI:EU:C:1982:368, 'Morson and Jhanjan'.

the ECJ also repeated that citizenship of the Union is not intended to also extend the scope ratione materiae of the Treaty to internal situations which have no link with EU law.[135]

However, the ECJ determined that EU law does apply to Zambrano's situation. The ECJ found that 'Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[136] According to the ECJ the refusal of a right of residence and a work permit to a person such as Ruiz Zambrano had exactly this consequence. This refusal would eventually give rise to the children being forced to leave the territory of the Union to accompany their parents and make it impossible for them to exercise their most important citizen's rights.[137] For the very first time, a third country national could receive derivative resident rights on the basis of the EU citizenship of his sponsors in the home Member State, *in casu* Belgium.[138]

The 'Ruiz Zambrano' judgement had two important consequences. Firstly, Union citizens could now invoke Article 20 TFEU against their Member State of nationality, even if they had never previously exercised their free movement rights. Secondly, Member States were precluded from denying a residence right to the third country national carer of a minor who had nationality of that Member State.[139] At first, the judgement was considered ground breaking in the context of family reunification. However, in the two subsequent cases of 'McCarthy'[140] and 'Dereci'[141], the ECJ clarified that the exception raised in 'Ruiz Zambrano' only applies to exceptional circumstances.[142]

Since the ruling, the case has been widely discussed and commented upon. Critics claimed that the freedom of the Member States to draft their own migration law concerning family reunification with their own citizens was infringed.[143] On the other hand, the judgement was praised since children were now recognised to have a natural right to live in their own countries together with their parents, regardless of the nationality of those parents.[144] For the purpose of this thesis it will be interesting to analyse in which degree it had impact on national legislation and case law.

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[135] Ibid, 91; Reference is made to: ECJ 2 October 2003, nr. C-148/02, ECLI:EU:C:2003:539, 'Garcia Avello', para. 26; ECJ 5 June 1997, nrs C-64/96 and C-65/96, ECLI:EU:C:1997:285, 'Uecker and Jacquet', para. 23
[136] 'Ruiz Zambrano', para. 42.
[137] 'Ruiz Zambrano', para. 45.
[138] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 91.
[139] Ibid., 92-93.
[140] ECJ 5 May 2011, nr. C-434/09, ECLI:EU:C:2011:277, 'McCarthy'.
[141] ECJ 15 November 2011, nr. C-256/11, ECLI:EU:C:2011:734, 'Dereci'.
[142] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 92-93.
[143] Ibid., 92-93.
[144] Ibid., 92-93.

McCarthy

In the case of 'McCarthy', the ECJ suggested that the impact of the Zambrano ruling may be limited.[145] The case concerned, Mrs. McCarthy, a woman with dual British – Irish citizenship, who had always resided in the United Kingdom. She had married a Jamaican national who was refused a residence right for family reunification in the United Kingdom under the British immigration legislation. On the basis of her Irish citizenship, Mrs. McCarthy tried to assert her EU citizenship rights to bring her spouse into the United Kingdom to live with her.

The ECJ first determined that the Citizenship Directive was not applicable, since Mrs. McCarthy had never exercised her right of free movement since she had always resided in the United Kingdom, the Member State of which she is a national. The fact that she also held Irish citizenship did not influence this finding.[146] Similarly to its 'Ruiz Zambrano' judgement, the ECJ then acknowledged that Mrs McCarthy enjoys the status of a Union citizen under Article 20 (1) TFEU and that she may therefore rely on the rights pertaining to that status, including in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.[147] However, the situation differs from the circumstances in 'Ruiz Zambrano' in that Mrs. McCarthy is not obliged to leave the territory of the Union would her spouse not be allowed to stay with her. As an adult, she was not considered to be dependent on her spouse to remain in the United Kingdom. According to the ECJ, the national measure does therefore not have the effect of depriving her of the genuine enjoyment of her rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.[148]

The reasoning of the ECJ in 'Ruiz Zambrano' and 'McCarthy' made clear that the boundaries between the scopes of application of EU and national law could no longer be reduced to a simple distinction between cross-border and purely internal situations.[149] Rather than, the formal existence of a cross-border element, even with it being artificially constructed, the implications of national measures for the effective reliance on EU citizenship rights are crucial when deciding whether or not EU law is applicable.[150]

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[145] CJEU 5 May 2011, nr. C-434/09, ECLI:EU:C:2011:277, 'McCarthy'.
[146] Ibid., para. 39 - 40.
[147] Ibid., para. 48.
[148] 'McCarthy', paras. 49 - 50.
[149] P. VAN ELSUWEGE, and D. KOCHENOV, "On the limits of judicial intervention: EU citizenship and family reunification rights", European Journal of Migration and law, 13(4), 2011, 450.
[150] Ibid.

Dereci

In 'Dereci' the ECJ further clarified that the 'Ruiz Zambrano' exception only refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.[151] While the parents in 'Ruiz Zambrano' were granted a residence right in Belgium, because their dependent children would otherwise have to leave the Union, 'Dereci' concerned the reverse situation. Dependent family members of Union citizens claimed a residence right on the basis of EU law. The involved Union citizens, however, had never exercised their free movement rights.

The joint case concerned five applicants, all third country nationals who wished to live in Austria with their respective Austrian family member, they claimed to be dependent on. None of those Austrian family members had ever exercised their right to free movement within the Union. The referring court was therefore unsure whether the 'Ruiz Zambrano' exception could be applied to one or more of the disputes following the applications.

The ECJ first determined that the Family Reunification Directive and the Citizenship Directive did not apply to the concerned applicants. Article 3(3) of the Family Reunification Directive states that the Directive does not apply to family members of a Union citizen,[152] whilst Article 3(1) of the Citizenship Directive stipulates that Union citizens who have not exercised their right of free movement do not fall within the scope of the Directive.[153]

The ECJ then examined the relevance of the Treaty provisions concerning citizenship of the Union and a possible deprivation of the genuine enjoyment of the rights conferred by that status.[154] According to the ECJ, the mere fact that it might appear more desirable to keep a family together in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if a right of residence is not granted to the Union citizen's family members.[155]

The ECJ leaves the issue of whether the current situation falls within the scope of Union law to be determined by the referring court. That court needs to evaluate whether or not the family members of the applicants were deprived of the genuine enjoyment of the substance of the rights by the decision of

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[151] CJEU 15 November 2011, nr. C-256/11, ECLI:EU:C:2011:734, 'Dereci'.; P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 93.
[152] 'Dereci', para. 47.
[153] Ibid., paras. 53-54.
[154] Ibid., para. 61, 64.
[155] Ibid., para. 68.

the referring court.[156] The ECJ also points out that if the referring court takes the view that the situation is not covered by Union law, there is still a possibility to derive rights from the right to respect for private and family life, laid down in Article 8 ECHR. However, the ECJ left also this issue to be determined by the national court.[157]

Two important conclusions can be drawn from these judgements. On the one hand, certain third country national family members of Union citizens can derive a residence right from Union law in case the refusal to be granted such a right, would deprive the Union citizen of his/her most important Union rights. This situation occurs when the refusal to grant a residence right to a family member, forces the Union citizen to leave the territory of the Union as a whole. As such, a residence right could be derived from Article 20 or 21 TFEU in situations to which, according to traditional case law, Union law did not apply. Secondly, this 'genuine enjoyment' criterion has a limited scope, it can only be applied to exceptional circumstances. There seems no doubt that it can be applied to the situation of a residence right refusal to the parents of minor children (as was the case in 'Ruiz Zambrano'), but that it cannot in case of the refusal to family members of an adult Union citizen ('McCarthy' and 'Dereci').

Since it has not proved to be easy to apply the 'genuine enjoyment' criterion there have been many more prejudicial questions on this matter. This has given the ECJ the opportunity to clarify its case law even further. In what follows the most important judgements relating to this criterion will be discussed.

'O and S'

In the 'O and S' judgement, the ECJ confirmed its adopted approach since 'McCarthy'. The strict approach to the application of the 'Ruiz Zambrano' criterion is upheld. Hereby, the ECJ addresses the Member States' concerns over the loss of their sovereignty on immigration due to a too liberal interpretation of Article 20 TFEU.[158] The case focussed in particular on the fact that it is the relationship of dependency between a minor Union citizen and his/her third country national family member that must be assessed.[159] According to the ECJ it is this dependency that could lead to the

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[156] Ibid., para. 74.
[157] Ibid, paras. 72.
[158] C. BERNERI, Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens, Oxford, Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2017, 111.
[159] ECJ 6 December 2012, nrs. C-356/11 and C-357/11, ECLI:EU:C:2012:776, 'O and S'. The case concerned two joined cases about women in a very similar situation. In this text only the specific circumstances of the case of 'O and S' are discussed. While that case (C-356/11) concerned a Ghanaian woman, the L. case (C-357/11) concerned a woman from Algeria.

Union citizen being obliged, to leave the territory of the Union as a whole, as a consequence of the refusal of a residence right to the third country national family member.[160]

The case concerned a woman originating from Ghana and living in Finland. She had been married to a Finish national before and had a child with him. This child was a Finish national and thus also a Union citizen. Later, she had remarried a man from Côte d'Ivoire, with whom she had another child. This child was however not a Union citizen. The question arose whether the new husband could derive a residence right in Finland from the Union citizenship of the oldest child.

Since the oldest child had never exercised his right to free movement, the Citizenship Directive did not apply. The ECJ then restated the rules set out in 'Ruiz Zambrano' and 'Dereci' and again, left it to the national court to decide whether the 'genuine enjoyment of the substance of rights' had been deprived.[161] In making that assessment the referring court should take into account the legal, financial or emotional dependency between the Union citizen child and the third country national seeking residence.[162] The ECJ does argue that since the mother has a permanent residence permit in Finland, since she has sole custody over her oldest child and since she is financially responsible over him, the refusal of a residence right to the new husband would not force the Union citizen child to leave the territory of the Union.[163] Even though it would be possible that the mother chooses to follow her new husband to a country outside the Union, the ECJ, citing 'Dereci' recalls that this mere possibility is not sufficient in itself to meet the 'genuine enjoyment' criterion. It would only apply in case the Union citizen would actually be forced to leave the Union's territory.[164] The ECJ thus concluded that Article 20 TFEU did not preclude a Member State from refusing the third country national step-parent of a Union citizen a residence permit, provided that the refusal did not entail the denial of the genuine enjoyment of the Union citizen's enjoyment of rights.

However, the ECJ states that in this case it could be possible to be granted a residence right on the basis of the Family Reunification Directive. The ECJ found that 'in view of the purpose of the Directive, which is to promote family reunification ('Chakroun', para. 43), and the protection it aims to give to third country nationals, in particular minors, the application of that Directive cannot be excluded solely because one of the parents of a minor third country national is also the parent of a Union citizen, born of a previous marriage'.[165] This means that in the case of 'mixed nationality' families, i.e. where a parent is a third country national and a child is a Union citizen, the parent can

[160] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 93-94.
[161] 'O and S', paras. 49, 53.
[162] Ibid., para. 56.
[163] Ibid., para. 51.
[164] Ibid., para. 52.
[165] Ibid., para. 69.

rely upon the Family Reunification Directive. The ECJ also emphasizes that family reunification is the general rule and that the Directive needs to be explained and applied in accordance with the provisions of the Charter, which includes the right to respect for private and family life and the obligation to take the child's best interests into regard.[166] Here, the ECJ also leaves it up to the national authorities to make this assessment.[167]

This case was important in the sense that for the first time since 'Ruiz Zambrano', the ECJ clarified the concept of dependency. The ECJ held that the relevant factors to assess the concept are: being legally, financially or emotionally dependent. The fact that the ECJ used 'or' could suggest that these conditions are not cumulative but alternative.[168] Unfortunately, this assessment is in itself, not covered by Union law. Thus, Member States have the discretion to restrict the scope of applicability of the dependency criterion to cases of extreme hardship.[169]

It is also worth noting that the 'O and S' case shows glimpses of the ECJ's resilience in not giving up its aim of enhancing Article 20 TFEU as a source of independent rights.[170] The ECJ considered that the 'genuine enjoyment test' could also apply when there is no blood relationship between the EU citizen and the third country national seeking a right of residence. In the next chapter the question whether the selected Member States are willing to follow this open approach by the ECJ towards dependency and the possibility of granting family residence rights to third country nationals not directly connected to EU citizens will be addressed.

Iida

In 'Iida', the ECJ decided that a third country national who resides legally in the Member State of origin of his daughter and his spouse, while they have moved to another Member State, cannot rely on their EU citizenship in order to be granted a right of residence in that Member State.[171] A Japanese man, living and working in Germany, was married to a German woman, with whom he had a daughter, with German citizenship. The couple was separated but not divorced. The wife and daughter

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[166] 'O and S', para. 74-76.
[167] 'O and S', para. 81.
[168] C. BERNERI, Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens, Oxford, Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2017,.112.
[169] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 94.
[170] C. BERNERI, Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens, Oxford, Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2017, 112.
[171] CJEU 8 November 2012, nr. C-40/11, ECLI:EU:C:2012:691, 'Iida'.

lived together in Austria. The question arose whether Mr. Iida, as a family member of a Union citizen, had a right of residence in Germany on the basis of the 'Ruiz Zambrano' judgement.

The ECJ considered whether the refusal of a residence right to Mr. Iida would deprive his wife and daughter of the 'genuine enjoyment' of their citizens' rights. The ECJ found that this was not the case.[172] Mr. Iida applied for a residence right in a Member State, where he did not live together with his wife and daughter.[173] In addition, it was clear that, despite the fact that he did not have a residence right based on Union law, his wife and daughter had exercised their right to free movement by moving to Austria. This means they were not prevented from exercising this right. Mr. Iida also had the option to rely on other provisions to be granted a residence right in Germany.[174] In those circumstances Mr. Iida's daughter and wife were not deprived of the 'genuine enjoyment' of their most important citizen's right and were not obstructed when exercising their right to free movement. The ECJ specified that the purely hypothetical prospect of the obstruction of this right is not sufficient to justify that the 'genuine enjoyment' criterion is fulfilled.[175]

Since Mr. Iida's situation did not fall within the implementation of European Union law, it was not possible either to rely on Articles 7 and 24 of the Charter, which include the right to respect for private and family life and the obligation to have regard to the child's best interests.[176]

Ymeraga

In the case of 'Ymeraga' the ECJ was confronted with an asylum seeker from Kosovo who had acquired Luxembourgian citizenship after several years of residence in Luxembourg.[177] The question arose whether the parents and brothers of the applicant could derive a residence right in Luxembourg from his Union citizenship.

First, the ECJ considered that the Family Reunification Directive was not applicable since the case concerned family members of a Union citizen.[178] Likewise, the Citizenship Directive did not apply since the applicant had never exercised his right to free movement and had always resided in a

[172] Ibid., para. 76.
[173] Ibid., para. 73.
[174] Ibid., paras. 45-48. Mr. Iida would in principle, be granted the status of long-term resident within the meaning of Directive 2003/109. But since he voluntarily withdrew his application for the status of long-term resident in accordance with Directive 2003/109, he cannot be granted a residence permit on the basis of the provisions of that directive.
[175] Ibid., para. 77.
[176] Ibid., para. 81.
[177] ECJ 8 May 2013, nr. C-87/12, ECLI:EU:C:2013:291, 'Ymeraga'.
[178] Ibid., paras. 25-27.

Member State of which he was a national.[179] Secondly, the ECJ examined if Mr. Ymeraga could derive a residence right based on the 'Ruiz Zambrano' judgement. The ECJ ruled that this was not the case since the mere fact that the Union citizen wishes to reunite with his/her family in the Member State, of which he is a national, is not sufficient in itself to rely on this case law.[180] Thirdly, the ECJ found that Mr. Ymeraga cannot rely on the fundamental rights laid down in the Charter either, since his situation falls outside the scope of European Union law.[181] However, the ECJ emphasizes that these findings do not prejudge the question whether the refusal to grant a residence permit is a violation of the right to respect for private and family life as laid down in Article 8 ECHR. The ECJ leaves it up to the national judges to decide on this matter.[182]

Alokpa

In 'Alokpa', the ECJ ruled that the 'Ruiz Zambrano' criterion was not fulfilled either. The case concerned the application for a residence permit of Mrs. Alokpa, a Togolese national, who had come to Luxembourg as a refugee and had given birth to twins there. [183] The father of the twins was a French national, who resided in France and who was not involved in the upbringing of the children. The question arose whether Mrs. Alokpa could derive a residence right in Luxembourg from the fact that she is an ascendant of her children, who since they have French citizenship, are Union citizens.

Firstly, the ECJ found that Mrs. Alokpa is the actual primary carer of the Union citizens who reside in the host state. This means that it could be possible to invoke a residence right on the basis of the 'Zhu and Chen' judgement.[184] If she were refused a residence right, her children would be deprived of the useful effect of their residence right. To rely on the 'Zhu and Chen' case, a sponsor is however required to have sufficient resources, on the basis of Article 7 (1) of the Citizenship Directive.[185] It is for the referring court to ascertain whether Mrs. Alokpa's children satisfy the conditions set out in Article 7 (1).[186]

Secondly, the ECJ therefore examined whether the 'genuine enjoyment' criterion could apply. For this, the ECJ needed to decide whether the refusal to grant a residence right to the applicant would actually force her children to leave the territory of the Union. The ECJ gave indications that this

[179] Ibid., paras. 28-32.
[180] Ibid., paras. 38.
[181] Ibid., paras. 40-43.
[182] Ibid., para. 44.
[183] ECJ 10 October 2013, nr. C-86/12, ECLI:EU:C:2013:645, 'Alokpa'.
[184] Ibid., para. 29.
[185] ECJ 19 October 2004, nr. C-200/02, ECLI:EU:C:2004:639, 'Zhu and Chen', paras. 46-47.
[186] 'Alokpa', para. 30.

criterion is not fulfilled by referring to the opinion of AG Mengozzi.[187] In case of refusal of a residence right in Luxembourg, the mother would be able to move to France with her French children and derive a residence right there as the primary carer of the children.[188] In France, the twins would then be in exactly the same situation as the children in 'Ruiz Zambrano'. However, the ECJ leaves it up to the referring court to determine whether in light of all of the facts, the refusal would oblige Mrs Alokpa's children to leave the territory of the Union as a whole.[189]

NA

In the 'NA' judgment, the ECJ held that it needs to be examined first whether a Union citizen's third country national caretaker has a right of residence under secondary EU law.[190] Only if there is no such right, Article 20 TFEU can apply. The case concerned a Pakistani national mother who lived in the UK with her German national children where she was refused a right of residence. The ECJ decided that because it had already held that both the children and their third country national mother had a right of residence in the host Member State under Article 12 of Regulation No. 1612/68,[191] which guarantees children of current and former workers the right to access to education in the host Member State, with corollary residence rights for those children and their parents, Article 20 TFEU did not confer a right of residence in the host Member State.[192] According to the ECJ, the protection under Article 20 TFEU is one of last resort.

CS and Rendon

The afore discussed subsequent cases, which came after 'Ruiz Zambrano', mostly concerned the significance of Article 20 TFEU in a host Member State. The cases of 'CS' and 'Rendón Marín' however, address the right under Article 20 TFEU in the home Member State. In these two decisions, the ECJ considered the effect of a criminal record of a third country national parent on his or her derived residence right under Article 20 TFEU and to what extent this right can be derogated on grounds of public policy or public security.[193] The ECJ's reasoning in 'Rendon Marin' and 'CS' can be read as an attempt to further clarify when the "effectiveness" of EU citizenship is undermined

[187] Opinion AG Mengozzi 21 March 2013, ECLI:EU:C:2013:197, paras. 55-56.
[188] 'Alokpa', para. 34.
[189] Ibid., para. 35.
[190] ECJ 30 June 2016, nr. C-115/15, ECLI:EU:C:2016:487, 'NA'.
[191] Ibid., 52-68.
[192] Ibid., 73-74.
[193] M. HAAG, "CS and Rendon Marin: Union Citizens and their Third-Country National Parents: A resurgence of the Ruiz Zambrano Ruling?", EU Law Analysis, 2016.

because the ‘genuine enjoyment of the substance of the rights conferred by virtue of Union citizenship’ is denied.[194]

In ‘CS’, a Moroccan national who resided in the UK, had sole care and custody of her British national son. Her application for asylum was denied because of her conviction to 12-months’ imprisonment.[195] The case of ‘Rendon Marin’ concerned a Colombian national who had sole care and custody over his two minor children. Both children were born and had always resided in Spain but only his son had Spanish nationality, his daughter had Polish nationality.[196] Mr. Marin’s application for a residence permit was rejected due to his criminal record. The most significant difference between the facts of the two cases is that Mr Rendon Marin has a Union citizen daughter who lives in a host Member State and a son who lives in his home Member State. A cross-border element existed in the situation of his daughter, but not in his son's.

According to the ECJ the mother in ‘CS’ had a derived right of residence under Article 20 TFEU on the basis of the ‘Ruiz Zambrano’ criterion. [197] There are possible derogations to this right for reasons of public policy or public security, which must be interpreted strictly.[198] However, a deportation decision cannot be made ‘automatically on the basis solely of the criminal record of the person concerned’.[199] The national courts must therefore assess ‘the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation’.[200] This individual assessment must take into account the principle of proportionality and the rights protected in the Charter of Fundamental Rights of the European Union ('CFREU'), ‘especially Article 7 on the right to respect of private and family life and Article 24(2) on the obligation of consideration of the child's best interests’.[201]

The ECJ’s decision concerning the son in ‘Rendon Marin’ was almost identical to the judgement in ‘CS’. The ECJ did mention the possibility of moving to Poland, as this is the Member State of nationality of the daughter but leaves it up to the referring court to assess this possibility.[202] As a Polish national and Union citizen, the daughter could rely on Article 21 TFEU and the Citizenship

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[194] P.J., NEUVONEN, “EU citizenship and its ‘very specific’ essence: Rendón Marin and CS”, Common Market Law Review 54, Issue 4, 2017, 1201.
[195] ECJ 13 September 2016, nr. C-304/14, ECLI:EU:C:2016:674, ‘CS’.
[196] ECJ 13 September 2016, C-165/14, ECLI:EU:C:2016:675, ‘Rendón Marín’.
[197] ‘CS’, para. 29.
[198] Ibid., para. 37, 40.
[199] Ibid., para. 41.
[200] Ibid., para. 42.
[201] Ibid., paras 48-49.
[202] ‘Rendon’, para. 79.

Directive to be granted a residence right in Spain.[203] The ECJ finds that if she fulfils the conditions laid down under Article 7(1) Citizenship Directive, the derived residence right of her father and sole caretaker, cannot be refused.[204] Even though, this derived right of residence can be limited for reasons of public policy or public security, EU law precludes such limitations on 'grounds of a general, preventive nature'.[205] As in 'CS', the national courts must make an individual assessment of the person concerned.[206] Derogations from derived rights of residence on the basis of Article 20 TFEU and Article 21 TFEU thus presumably have to withstand the same test.[207]

Chavez-Vilchez

As has become clear through the discussion above, the 'Ruiz Zambrano' exception seems restricted to the third country national parents of Union citizen children living in their home State. It will become clear in the second part of this thesis that cases with two third country national parents of a Union citizen child (as was the case in 'Ruiz Zambrano') are rare. Member States now rarely, if ever, confer nationality upon children simply because they are born on the territory.[208] However, there are more cases where a Union citizen marries a third country national in his/her home Member State and they have a child together which gets citizenship of the home state based on the citizenship of the Union citizen parent.

When the relationship of the parents ends, the question remains whether the third country national parent could derive a residence right from his/her Union citizen child.[209] It follows from the ECJ's earlier case law that when that third country national parent is the 'primary carer' for the Union citizen child, it is still possible that 'Ruiz Zambrano' applies if the refusal to grant this parent a residence right would force the Union citizen child to leave the territory of the Union. In 'Chavez-Vilchez' the ECJ clarified which conditions need to be fulfilled to be considered as the 'primary carer' of the Union citizen.[210]

The case concerned eight different cases. In all cases, a minor Dutch child had a third country national mother and a Dutch father. There were also a number of differences between the applicants. Five of

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[203] Ibid., para. 44.
[204] Ibid., para. 53.
[205] Ibid., paras. 57, 61.
[206] Ibid., paras. 59-66.
[207] M. HAAG, 'CS and Rendon Marin: Union Citizens and their Third-Country National Parents: A resurgence of the Ruiz Zambrano Ruling?', EU Law Analysis, 2016.
[208] S. PEERS, 'Think of the children: the ECJ clarifies the status of non-EU parents of EU citizen children living in their own Member State', EU Law Analysis, 2017; E.g. the Belgian nationality law was amended after the 'Ruiz Zambrano' ruling.
[209] Ibid.
[210] ECJ 10 May 2017, nr. C-133/15, ECLI:EU:C:2017:354, 'Chavez Vilchez'.

the families received no financial support from the father. The other three fathers contributed financially to the children's care, although the mothers were still the primary, day-to-day carers of the children. The relationships with the father varied slightly from case to case: from no contact with the father to almost daily contact. In one case (Chavez-Vílchez), the minor Union citizen had exercised her right to free movement.

The ECJ first addressed the case of Ms Chavez-Vílchez and her daughter, who had exercised her right to free movement by moving back to the Netherlands from Germany. It examined whether Article 21 TFEU and the Citizenship Directive applied. Whilst the Directive only applies to the Union citizen's stay in a host Member State, the ECJ confirmed its previous decision that when Union citizens return to their home state, the conditions for a derived residence right on the basis of Article 21 TFEU should not be stricter than those provided for in the Directive (see later: 'O and B', para. 50).[211] The mother could derive a residence right, if the referring court decided that she complied with the Directive's requirements for the lawful entry into a Member State. Only if this was not the case, it would be appropriate to examine the situation in the light of Article 20 TFEU.[212]

Concerning the other children, it needed to be ascertained whether they would actually be forced to leave the Union with their third country national carer. The ECJ considered that it is important to consider who has custody of the child and on whom the child is legally, financially, or emotionally dependent (see also 'O and S', para. 56).[213] This assessment must take into account the right to respect for family life of Article 7 of the Charter of EU Fundamental Rights in conjunction with the best interests of the child.[214] The ECJ considered that the fact that the Union citizen father is able and willing to take care of the child is a relevant element.[215] However, this, is not sufficient to conclude that there is no relationship of dependency between the child and the third country national mother. Even with a Union citizen father present, the child can still be forced to leave the Union if the third country national mother is refused a right to reside. When assessing whether this is the case, all the specific circumstances need to be taken into account in the best interests of the child. These circumstances include the age of the child, the child's physical and emotional development, the extent of its emotional ties both to the Union citizen parent and to the third country national parent, and the risks which separation from the latter might entail for that child's equilibrium.[216]

[211] Ibid., para. 54-55.
[212] Ibid., para. 56-57.
[213] Ibid., para. 68.
[214] Ibid., para. 70.
[215] Ibid., para. 71.
[216] Ibid., para. 71.

The ECJ also considered whether the third country national applicant has to show that the Union parent is unable or unwilling to look after the child. The ECJ held that a Member State may require the third country national parent to carry the burden of proof in providing such evidence. However, the ECJ stated that this burden of proof cannot undermine the 'effectiveness' of Article 20 TFEU. Thus, national authorities still have the obligation to undertake the necessary inquiries to accurately assess the child's potential deprivation of the 'genuine enjoyment'-right.[217]

Derived residence rights on grounds of Article 21 (1) TFEU

O and B

The case of 'O and B' concerned the applications of third country nationals who wanted to join their Dutch spouses to live together in the Netherlands. The sponsors in 'O and B' had lived in another Member State in the past. The case of O. concerned a Nigerian man who had obtained a residence card in Spain for residence with his Dutch spouse. However, the Dutch spouse had only lived with him for two months and further only made brief visits to him. In the case of B. a Moroccan man had left the Netherlands for Belgium together with his Dutch spouse. When they wanted to return to the Netherlands B was refused a residence right under the argument that his spouse had never lived with him in Belgium. The question arose whether their family members could derive a right of residence in the Netherlands from the Citizenship Directive and Article 21(1) TFEU.

Since the Citizenship Directive does not establish a residence right for third country family members of an EU citizen in his/her home Member Sate, the ECJ held that the Directive is not applicable.[218] However, the ECJ considered that it must be examined whether a derived right of residence may be based on Article 21(1) TFEU. According to the ECJ a Union citizen could be discouraged from moving to another Member State if he/she could not, on return to his home Member State, continue the family life he/she established in the host Member State. The ECJ referred to its judgments in 'Singh'[219] and 'Eind'[220], which concerned obstacles to the free movement of workers, and makes it clear that the same reasoning also holds in cases where the general free movement right of Article 21(1) TFEU is at stake.[221] Consequently, Article 21(1) TFEU does confer a residence right on family members even in the EU citizen's home Member State. Although the Citizenship Directive is not

[217] Ibid., para. 78.; S. PEERS, 'Think of the children: the ECJ clarifies the status of non-EU parents of EU citizen children living in their own Member State', EU Law Analysis, 2017.
[218] ECJ 12 March 2014, nr. C-456/12, ECLI:EU:C:2014:135, 'O and B', paras. 37-43.
[219] ECJ 7 July 1992, nr. C-370/90, ECLI:EU:C:1992:296, 'Singh'.
[220] ECJ 11 December 2007, nr. C-291/05, ECLI:EU:C:2007:771, 'Eind'.
[221] 'O and B', paras. 44-49.

applicable to such residence, the Directive should be applied by analogy and the conditions governing such residence should not be stricter than those provided for by the Directive.[222]

However, the possibility to rely on Article 21(1) TFEU to be granted a residence right is not unconditional. The ECJ established the criterion that one can only rely on that provision 'where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State'.[223] The ECJ considers that a Union citizen must have lawfully resided in the host Member State for more than three months (in accordance with Article 7 of the Citizenship Directive) or even have acquired a permanent residence right there (pursuant to Article 16 of the Citizenship Directive).[224] Shorter periods of residence by the Union citizen in the host Member State (in accordance with Article 6 of the Citizenship Directive) do not establish residence rights for his family members.[225] It is for the national court to determine whether the family settled and, therefore, genuinely resided in the host Member State.[226]

Article 45 TFEU

Article 45 TFEU stipulates that 'freedom of movement for workers shall be secured within the Union'. On the basis of Article 56 TFEU restrictions on freedom 'to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'. As mentioned before the rights of EU citizens to enter and stay in other Member states extends to their family members. In this respect, the ECJ has established that a third country national who is a family member of a Union citizen could be granted a residence right on the basis of Article 45 TFEU in the Member State of which the Union citizen is a national. This applies to situations in which the Union citizen resides in his home Member State but regularly travels to another Member State as a worker or where that citizen provides services in another Member State, provided the refusal to grant such right of residence would discourage that citizen from exercising those freedoms.[227]

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[222] Ibid., para. 61.
[223] Ibid., para. 51.
[224] Ibid., para. 56.
[225] Ibid., para. 59.
[226] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 82.
[227] ECJ 11 July 2002, nr. C-60/00, ECLI:EU:C:2002:434, 'Carpenter', ECJ 12 March 2014, nr. C-457/12, ECLI:EU:C:2014:136, 'S and G'.

Carpenter

The 'Carpenter' case concerned Mrs. Carpenter, a national of the Philippines, and her husband, a UK national. When her application for family reunification as the spouse of a UK national was refused she appealed the decision by arguing that she had a right to remain in the UK since her husband made use of his right to free movement by providing services in other Member States and she was looking after his children (from a previous marriage). The ECJ considered that Mrs. Carpenter should be granted a residence right because she takes care of her husband's children, and as such enables him to provide those cross-border services.[228] Using this approach the ECJ still leaves questions for the national courts that have to apply this judgement. The ECJ preserved national sovereignty 'confirming once again that when a relation of deterrence with EU law does not exist it is up to the national Member State to assess whether a third country national is entitled to reside within its territory'.[229] It is for example not clear, what factual evidence gives rise to a derived right of residence as a primary carer of an EU citizen's children. In the judgement the disturbance of family life for example, was only described in vague terms without really engaging with the importance of the child care provided by Mrs. Carpenter for the success of her husband's business.[230] Other question marks remain concerning which family members can derive a right of residence as 'a primary carer' of a Union citizen's children, or what conditions govern the carer's residence right.[231]

S and G

In the 'S and G' judgement, a more cautious approach than in the Carpenter judgement from 2002 is noticeable. Apparently, the ECJ does not wish to encourage an excessively easy applicability of Union law for the purpose of facilitating legal stay of third country family members who would otherwise not be allowed legal residence under applicable national law.[232]

The case concerned two Dutch sponsors living in the Netherlands, but working in Belgium for at least one day per week. The ECJ first made clear that the Citizenship Directive does not apply to this situation, since the Union citizens did not settle in the other Member State (Belgium). However, the ECJ found that the Union citizens in these situations did fall within the scope of Article 45 TFEU.

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[228] 'Carpenter', para. 39, 44.
[229] BERNERI, C., Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens, Oxford: Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2017, 50.
[230] Ibid., 51.
[231] N. CAMBIEN, "Cases C-456/12 O. and B. And C-457/12 S. and G.: Clarifying the Inter-State Requirement for EU Citizens?", European Law Blog, 11 April 2014, (Consulted on 18 April 2018)
[232] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 77.

According to the ECJ, Article 45 TFEU precludes refusing a residence right to a family member of an EU citizen where such would discourage the latter from exercising his free movement rights as a migrant worker. [233] However, it is not automatically assumed that this is always the case. It is for the national court to determine whether refusing a residence right to the family members would discourage the Union citizen from using his right to work.[234]

A relevant factor in this respect is whether the family member takes care of the EU citizen's child. In 'Carpenter', the ECJ had considered that a Union citizen's spouse should be granted a residence right if she takes care of the latter's children, and as such enables him to provide cross-border services. The same reasoning as in 'Carpenter' applies here where the Union citizen is employed in another Member State. However, the mere fact that it might be desirable that the child is cared for by a family member who is not the Union citizen's spouse, is not sufficient in itself for that person to be able to derive a residence right from Article 45 TFEU.[235]

After these judgements, some degree of uncertainty as to how much 'movement' is required, still remains.[236] On the one hand, national courts will have to determine whether a period of residence abroad was 'sufficiently genuine' and has enabled the Union citizen to 'create or strengthen' family life. It appears that periods of residence that give rise to a permanent residence right, in principle five years, are sufficient. The situation is less clear on periods of residence of less than five years and more than three months. On the other hand, national courts are asked to apply the Carpenter reasoning, which could lead to new questions. It is not clear, for instance, which family members can derive a right of residence as primary carer of an EU citizen's children, or what conditions govern the carer's residence right.[237]

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[233] 'S And G', paras. 36-40.
[234] P. BOELES, M. DEN HEIJER, G. LODDER, and K. WOUTERS, *European Migration law*, Intersentia, 2014, 77; S and G, para. 43.
[235] 'S And G', para. 43.
[236] N. CAMBIEN, "Cases C-456/12 O. and B. And C-457/12 S. and G.: Clarifying the Inter-State Requirement for EU Citizens?", European Law Blog, 11 April 2014, (Consulted on 18 April 2018)
[237] Ibid.

Conclusion

It is by now completely clear that third country national family members of a Union citizen who has never exercised his/her right to free movement cannot rely on the Citizenship Directive (not applicable to Union citizens who have not exercised their right to free movement), nor on the Family Reunification Directive (not applicable to family members of Union citizens). The ECJ has also clarified that not only biological parents can derive a residence right from this case law and that it is not decisive for the application of the 'genuine enjoyment' criterion that both parents live under the same roof.

In 'O and B' the ECJ gave more guidance on which kind of residence in another Member State brings a Union citizen within the scope of European Union law. The ECJ made clear that periods of residence, shorter than three months, even several shorter stays considered together, are not sufficient to establish a residence right for the family members of a Union citizen.[238] Longer periods of residence do establish such a right provided that it concerns a genuine residence which enabled the Union citizen to create or strengthen a family life in the host Member State.[239] The national judge has the difficult job to determine whether this is the case or not.

In abstracto the 'genuine enjoyment' criterion is clear: the criterion is fulfilled when the Union citizen is in fact forced to leave the territory of the Union as a whole. In practice, it is however not always easy to determine whether a Union citizen is forced to leave the territory of the Union. To answer this question, the Union citizen's dependency of the concerned family member needs to be determined.[240]

It seems clear that young children are dependent of their parents, in the sense that they cannot reside in a Member State by themselves. Adult Union citizens, however, are in principle supposed to be capable to live independently in a Member State, even if this means that they are separated from their close family members, such as a spouse. Much will however depend on the exact circumstances of the case and the assessment of the expected effect of a refusal to stay. In 'O and S' AG Bot suggested in his conclusion that adult children for example on whom a parent is dependent because of an illness or a disability should also fall under the 'Ruiz Zambrano' exception.[241]

The ECJ sometimes seems to accept quite easily that the refusal of a residence right to a family member will not lead to the Union citizen being forced to leave the territory. One could argue that the

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[238] 'O and B', para. 59.
[239] 'O and B', para. 51.
[240] 'O and S', para. 56.
[241] Opion AG Bot 27 September 2012, nrs. C-356/11 and C-357/11, ECLI:EU:C:2012:595, 'O and S', para. 44-45. See also the Opion of AG Mengozzi in 'Dereci', para. 48.

ECJ sometimes does not take enough notice of the actual impact the refusal will have in practice. In 'Alokpa' for example the applicant was looking for a job in Luxembourg, her children were receiving medical care there and it was unsure where she could stay in France.[242]

In 'Chavez Vilchez' the ECJ ruled that even with a Union citizen parent present, a Union citizen child can still be forced to leave the Union if the third country national parent is refused a right to reside. When assessing whether this is the case, all the specific circumstances need to be taken into account in the best interests of the child. It is important to consider who has custody over the child and on whom the child is legally, financially, or emotionally dependent.

Due to a very limited interpretation of the 'genuine enjoyment' criterion, Union citizens will sometimes have fewer rights than third country nationals. In for example in 'Ymeraga' the applicant had not been granted Luxembourgian nationality, at the expense of his Kosovar nationality, he would presumably have been able to invoke a right to family reunification with his parents on the basis of the Family Reunification Directive.[243]

In several cases the ECJ leaves the final decision on whether the 'genuine enjoyment' criterion is fulfilled up to the national judge. In some circumstances, this is understandable when the ECJ does not have enough information to make the very factual test herself.[244] Nevertheless, this means that there is still a lot of uncertainty for the national courts to decide whether the criterion is fulfilled or not. Moreover, it is quite likely that judges in different Member States will apply the test differently, which would undermine the uniform scope of the Union citizenship.[245] The responsibility of these national authorities will be discussed more thoroughly in the second part of this thesis.

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[242] 'Alokpa', para. 15. "Mrs Alokpa stated that she was unable to settle with her children in France, or reside with their father on the ground that she had no relations with the latter and that those children required follow-up medical treatment in Luxembourg as a result of their premature birth."

[243] S. ADAM and P. VAN ELSUWEGE, "EU Citizenship and the European Federal Challenge through the Prism of Family reunification", reunification', 2017, 10.; N. CAMBIEN, "Recente ontwikkelingen op het valk van gezinshereniging van Belgen en Unieburgers: A long and winding road?", in D. VANHEULE (ed.), *Migratie- en Migrantenrecht: recente ontwikkelingen, Deel 16, Ontwikkelingen inzake vrij verkeer, asiel, voogdij en nationaliteit*, Brugge, Die Keure, 2015, 16. (hereafter: N. CAMBIEN, "Recente ontwikkelingen op het valk van gezinshereniging van Belgen en Unieburgers: A long and winding road?", 2015)

[244] N. CAMBIEN, "Recente ontwikkelingen op het valk van gezinshereniging van Belgen en Unieburgers: A long and winding road?", 2015, 16.

[245] D. KOCHENOV, "The Right to Have What Rights? EU Citizenship in Need of Justification", 19 European Law Journal, 2013, 515.

PART II: The Domestic Framework for Family Reunification

1. Belgium

Introduction

The provisions concerning family reunification in Belgium are laid down in the Belgian Aliens Act of 15 December 1980 ('Aliens Act 1980').[246] The law is complemented with a Royal Decree.[247] This law has been amended several times over the years. The common thread through all these amendments is that legislation became stricter and more complex with every amendment.[248]

The first important amendment came in 2006 with the transposition of the Family Reunification Directive.[249] One of the most important changes was the removal of the cascade-rule for third country nationals. Before the amendment third country nationals who had arrived in Belgium on the basis of family reunification, could later not be joined by their spouse or minor children and thus re-do a family reunification.[250] This prohibition would be in violation of the Directive.

The next important amendment happened in 2007.[251] The Belgian legislator wanted to amend the Aliens Act 1980 in accordance with the Citizenship Directive. This was actually a year late since the transposition deadline was in 2006.

In 2011 the Aliens Act 1980 underwent a significant amendment which was widely debated and criticised.[252] The law introduced conditions for family reunification which were stricter for Belgian than for Union citizens.[253] The possibility for family reunification between minor static Belgian citizens and their third country national parents was explicitly added in Article 40ter to respond to the 'Ruiz Zambrano' judgement.

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[246] Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 31 December 1980.
[247] Koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen. BS 27 October 1981.
[248] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 286.
[249] Wet van 15 september 2006 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 6 October 2006.
[250] Old Art. 10 Aliens Act 1980.
[251] Wet van 25 april 2007 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 10 May 2007.
[252] Wet van 8 juli 2011 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen wat betreft de voorwaarden tot gezinshereniging, BS 12 September 2011.
[253] N. CAMBIEN, "Recente ontwikkelingen op het valk van gezinshereniging van Belgen en Unieburgers: A long and winding road?", 2015, 19.

A number of appeals for annulment of this new law were brought before the Belgian Constitutional Court. The Constitutional Court issued a ruling by means of two judgements on 26 September 2013.[254] Most provisions passed the test by the Constitutional Court. For example, the fact that the new law did not contain a transitional provision, which made it applicable with immediate effect, did not constitute a violation according to the Court.[255] However, the Court also found certain gaps in the law, which needed to be filled up by the legislator. For instance, the same conditions applied to all Belgian citizens under the new law, regardless of whether they had exercised their right to free movement or not.[256] Since, Union law however applies to those Belgian citizens who have made use of their right to free movement this distinction had to be adapted.

One of the most important objections made before the Constitutional Court was the less favourable treatment of Belgian citizens who had never exercised their right to free movement compared to Union citizens. Even though the subject of reverse discrimination lies outside the scope of this thesis a short summary of the Constitutional Court's decision on this matter will be provided. From the discussion on Union law given above, it has become clear that the ECJ allows this difference in treatment or 'reverse discrimination', except in those circumstances in which the conditions of the 'genuine enjoyment' criterion are fulfilled. The question at hand was thus whether this distinction did not violate the Belgian constitutional principle of equality, which opposes differences in treatment in the context of family life which are not reasonably justifiable.[257] According to the Constitutional Court there is no such violation since the difference in treatment is based on an objective criterion. This criterion is also relevant in light of the legislator's pursued objective to on the one hand, address migratory pressures and discourage certain abuses and on the other hand, to guarantee a residence right for family members under humane conditions.[258] The difference in treatment is justified since it pursues these objectives.

Secondly, the right of residence of a Belgian citizen cannot be withdrawn, while it can be for Union citizens. Therefore, it is also tenable that those (static) Belgian citizens are required to demonstrate that they have more financial and material resources than the Union citizen, in order to ensure the social assistance system.[259] Lastly, the Constitutional Court found that the stricter conditions for Belgian citizens were not disproportionate to the pursued objectives. For example, concerning the limited residence rights for parents of adult Belgian children, the Constitutional Court considers that

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[254] GwH 26 September 2013, nrs. 121/2013 and 123/2013.
[255] GwH 26 September 2013, nr. 121/2013, para. B.66.1-B.67; GwH 26 September 2013 nr. 123/2013, para. B.3.1-B.3.5.
[256] GwH 26 September 2013, nr. 121/2013, para. B.58.1-B.58.8.
[257] GwH 26 September 2013, nr. 121/2013, para. B.43-B.57; GwH 26 September 2013, nr 123/2013, B.4.1-B.7.3.
[258] GwH 26 September 2013, nr. 121/2013, para. B.52.2.
[259] Ibid. B.52.3.

the presence of parents of adult Belgian children is less necessary than for minor Belgian children.[260] Consequently, there was no unjustified discrimination according to the Constitutional Court.

Other issues with the 2011 amendment which were addressed by the Constitutional Court will be discussed throughout this analysis.

As a consequence of the Constitutional Court's judgements, a circular was adopted in 2013.[261] In the circular, the annulled provisions which would be amended were mentioned together with explanations on the Court's interpretations on several provisions. It gave an overview of the Constitutional Court's stances and determined the consequence thereof on the applications for family reunification.

In 2014 the Aliens Act 1980 underwent a new series of amendments.[262] The right to family reunification for parents of minor Union citizens was set in legislation, a clear transposition of the 'Zhu and Chen' judgement. A new chapter was also introduced regarding 'other family members of the Union citizen'. These changes will be discussed more thoroughly in the analysis of the consequences of 'Ruiz Zambrano' later in this chapter.[263] In 2016 two new laws introduced several changes in the field of family reunification, these changes will become apparent in the following discussion which concerns the legislation that is applied today.[264]

The legislation concerning family reunification, in which at least one third country national is involved, is differentiated according to the nationality of the 'sponsor', the person who is already residing in Belgium and who is looking to reunite with his/her family or wants to form a new family. Because of the different legislation on national and EU-level a differentiation needs to be made between:

- Family reunification with a third country national who is residing legally in Belgium

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[260] Ibid. B.54.2.
[261] Omzendbrief van 13 december 2013 betreffende de toepassing van de artikelen van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, wat betreft de voorwaarden tot gezinshereniging, die door het Grondwettelijk Hof in het arrest nr. 121/2013 van 26 september geïnterpreteerd werden, BS 20 December 2013.
[262] Wet van 19 maart 2014 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 5 May 2014.
[263] X., "Wijzigingen Verblijfswet voor EU burger en familie, langdurige ingezetene en varia", T.Vreemd. 2014, 364-366.
[264] Wet van 4 mei 2016 houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en de wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, BS 27 June 2016; Wet van 7 mei 2016 tot wijziging van de artikelen 10ter en 12bis van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 28 June 2016.

- Family reunification with a mobile Union citizen who exercised his/her right to free movement and resides in Belgium
- Family Reunification with a Belgian national in Belgium

Both the specific family members and the entry conditions, differ among these three categories. In all three situations, it concerns a third country national who comes to Belgium in the context of family reunification. A general rule for family reunification of third country nationals is that in principle family members are granted a residence right that does not have a longer validity period than the residence right of the sponsor.

The decisions concerning the applications for family reunification are taken by the Immigration Office or Dienst Vreemdelingenzaken ('DVZ'). The decisions taken by DVZ can be appealed before the Council for Alien Law Litigation. This council is an independent administrative court in Belgium that has sole competence to handle appeals against individual decisions taken in application of the Aliens Act.[265] If the Council rejects the appeal, it is exceptionally possible to lodge an appeal with the Council of State.[266] However, the Council of State cannot rule on the facts. It will only verify whether the judgment of the Council for Alien Law Litigation is lawful.

Family Reunification between Third Country Nationals

Introduction

In Belgium, family reunification between third country nationals is subdivided in family reunification with a sponsor who has a limited residence right (Article 10bis Aliens Act 1980) and family reunification with a sponsor who has an unlimited residence right (Article 10 Aliens Act 1980). In the following paragraphs the general conditions for family reunification with a third country national with limited and unlimited residence will be discussed together. There are several exceptions (usually more favourable) to these rules, for example for family members of third country national workers from countries with which Belgium has bilateral agreements (Morocco, Turkey, Tunisia, Algeria, etc.), or for family members of Blue Card-holders of long term residents, etc.[267] Since, the law of 2011 foresaw

[265] Art. 39/1 Aliens Act 1980.
[266] Art. 39/67 Aliens Act 1980.
[267] S. VAN DEN BROUCKE, "Toelatingsvoorwaarden voor derdelanders in België. Een beschrijving van het overkoepelende EU- rechtskader en vergelijking met andere EU-lidstaten", Steunpunt Inburgering en Integratie, 2015, 35.

in a restrictive interpretation of the bilateral agreements their application has become limited.[268] These exceptions will not be discussed any further.

Family members

If all conditions are being fulfilled the following family members are eligible for family reunification with a third country national as a sponsor:

- Spouses, equivalent partners[269] or registered partners[270], (only monogamous marriages or partnerships are recognised, including same-sex partnerships), [271]
- Minor children (below the age of 18) of the sponsor and/or of his/her spouse (adopted children included)[272],
- Dependent, unmarried children aged 18 or older with a disability,[273]
- The parents of an unaccompanied minor benefiting from protection status.[274]

To be recognised as a family member, one needs to submit proof of parentage, affinity, relationship (e.g. marriage certificate, adoption certificate, proof of a durable and stable relationship) and in case of applicability proof of 'dependency' (a medical certificate is required which states that the child is not capable of taking care of itself).

Concerning dependent family members, the legislator did not extend in a general way the right to family reunification to adult descendants, as authorized by Article 4, § 2, of the Family Reunification Directive. This means that other third country national dependent persons, receiving legal, financial, emotional or material support by the third country national sponsor, have no legally grounded right to family reunification in Belgium.

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[268] P. VAN ELSUWEGE, "De grenslijn tussen EU-recht en nationaal recht geïllustreerd aan de hand van recente rechtspraak inzake gezinshereniging", in I. GOVAERE (ed.), *Europees recht:moderne interne markt voor de praktijkjurist*, 2012, 124. This strict interpretation was confirmed in ruling nr 26.661 of 29 April 2009 in case 37.132 II of the Council of State.

[269] Equivalent partner: "In certain countries it is possible to be in a partnership through an alternative of a marriage. Belgium recognises these partnerships as equivalent to a marriage". (KMI, 2014 (p)).

[270] Article 10 §1 sub 1, 5° and sub 2 (a) Aliens Act 1980. The registered partner who applies for family reunification, needs to prove a durable, stable and exclusive relationship with his/her partner (e.g. lived together for 1 year, at least a relationship of 2 years, a common child, etc.) and being unmarried. (KMI, 2014 (b)). In a recent case of the Belgian Constitutional Court (7 February 2018, nr. 14/2018) it was decided that the difference in treatment between unmarried and married partners in that registered partners need to prove the stable and durable character of their relationship under Article 10 §1, sub 1, 5° and sub 2 (a) and spouses do not, is allowed.

[271] Art. 10 §1 4°, first hyphen and 5° Aliens Act 1980.

[272] Art. 10 §1 4°, second and third hyphen Aliens Act 1980 1980.

[273] Art. 10 §1 6° Aliens Act 1980.

[274] Art. 10 §1 7° Aliens Act 1980.

Reunited spouses, partners, children, stepchildren or parents are obliged to live together with their sponsor.[275]

Conditions

Before discussing the conditions that came forward in the discussion on the Family Reunification Directive as causing uncertainty, a brief overview of the other conditions concerning an application for family reunification will be given.

On the basis of Article 8 of the Family Reunification Directive, the Belgian legislator chose to install a minimal waiting period of 12 months, during which the sponsor has to have resided legally in Belgium. This waiting period is only required for family reunification with a third country national with an unlimited residence right. When the sponsor only has a limited residence right, there is no minimal waiting period. There is also no waiting period when the marriage/partnership already existed before the sponsor arrived in Belgium, the spouses/partners have a common minor child, or the migrant is an adult disabled child or a common minor child of the sponsor and the spouse/partner. [276]

For certain family members of third country nationals there are age criteria:

- Spouses and equivalent or registered partners should have a minimum age of 21, or a minimum age of 18 if the marriage or partnership already existed before the sponsor's arrival in Belgium;[277]
- Children and stepchildren should be minors (under the age of 18) and unmarried; or adult (18 years and older) unmarried and not capable of being self-sufficient due to a disability.[278]

An application for family reunification can be rejected on grounds of public order or national security.[279] Moreover, every applicant has to prove that he does not to suffer from any of the diseases that may endanger public health.[280]

The sponsor needs sufficient housing, health insurance and sufficient, stable and regular means of subsistence. More specifically this means that the sponsor needs to have a home (rental or property) which meets the minimum requirements for safety, health and habitability, and which is large enough

[275] Art. 10 Aliens Act 1980.
[276] Art. 10 §1 4° and 5° Aliens Act 1980.
[277] Art. 10 §1 4°, first hyphen Aliens Act 1980.
[278] Art. 10 §1 4°, second and third hyphen Aliens Act 1980.
[279] Art. 11 Aliens Act 1980; Art. 52 of Royal Decree.
[280] Art. 10 §2 sub. 7 Aliens Act 1980.

to house the family members, a health insurance policy that covers the risks of the whole family and own resources (not acquired from social assistance).[281]

Resources Requirement: Sufficient, stable and regular means of subsistence

One of the important modifications after the 2011 amendment of the Aliens Act 1980 was the introduction of the condition for sufficient resources.[282] This condition, which is the transposition of Article 7 (1) (c) of the Family Reunification Directive, was imposed on family members of third country nationals (with a limited or an unlimited residence right) and in an identical manner on the family members of a Belgian citizen.[283] (Some of the case law which will be discussed under this title, concerns family reunification with a Belgian sponsor. Since, the resources requirement for such a family reunification is identically formulated in the Aliens Act as for family reunification between third country nationals, the case law on this requirement for family reunification with a Belgian sponsor is also applicable to family reunification between third country nationals.)

In the parliamentary documents for the amendment the will of the legislator to conform with the 'Chakroun' judgement was mentioned.[284] This meant that, an individual assessment should be made considering both the sufficiency, stability and durability of the resources when the income is under a certain reference amount. The income requirement does not apply to a minor child coming alone. The condition is not applicable either when the sponsor is only joined by his/her own (or his/her spouse's or partner's) minor child. Other exceptions exist for beneficiaries of international protection (subjected to conditions) and EU Blue Card holders and long-term residents.[285]

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[281] Art. 10 § 2 sub. 2, §5 and 10bis Aliens Act 1980.
[282] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 300.
[283] Art. 10 §2; art. 10bis §1 first hyphen and art. 40ter §2, al 2, 1° Aliens Act 1980.
[284] G. PINTIAUX, S. FORTIN, S. MESKENS, A. MONSIEURS, A., J. GHEYLE, "Les moyens de substistance dans le cadre du regroupement familial – Bestaansmiddelen in het kader van gezinshereniging", in ADAM, C., *10 Jaar Raad Voor Vreemdelingenbetwistingen / 10 Ans Du Conseil Du Contentieux Des Étrangers. Daadwerkelijke Rechtsbescherming / La Protection Juridictionnelle Effective,* Brugge, Die Keure, 2017, 576. (hereafter: G. PINTIAUX, S. FORTIN, S. MESKENS, A. MONSIEURS, A., J. GHEYLE, "Les moyens de substistance dans le cadre du regroupement familial – Bestaansmiddelen in het kader van gezinshereniging".)
586; Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen voor wat betreft de voorwaarden tot gezinshereniging van staatsburgers van niet-EU-landen, amendementen, 2010-2011, 0443/014, 52.
[285] Art. 10 §2 sub. 3 Aliens Act 1980.

Who should have sufficient resources?

There has been some case law in Belgium concerning the concept of 'having' sufficient, stable and regular means of subsistence.[286] It was debated whether only the sponsor's resources should be taken into account or the resources of other family members to as well Since, April 2015, it has appeared from several judgements by the Council of State that it is the sponsor who needs to have sufficient resources and that matrimonial property regimes do not affect this finding.[287] After these judgements the Council for Alien Law Litigation has however taken a broader interpretation in cases dealt with by the Dutch speaking chamber of the Council. On the basis of a textual, analogue, teleological interpretation which is in accordance with Union law[288], it was decided that other resources than only those of the sponsor should be taken into account.[289] Both cases were appealed before the Council of State but due to procedural reasons these appeals were rejected.[290] On the other hand the French speaking chamber, considers that spouses, on the basis of their matrimonial property regime, should have access to each other's income, in contrast with the judgement of the Council of State.

In practice, DVZ only takes into account the resources of the sponsor and not those of the family remember requesting family reunification. [291] DVZ only takes into account the income of the family member as well when it is obliged to do so under the Aliens Act 1980.[292] In case of a possible termination of the residence right, DVZ always takes into account the income of the family member, as determined by the Family Reunification Directive.[293]

The Council of Alien Law Litigation has considered on several occasions that this approach was too strict when the family member had for example started working after the application and thus also has own resources, or when DVZ did not take into account the resources of third parties such as family members who also live together with the sponsor.[294]

In conclusion, it appears that there still is little consistency in Belgium on taking into account the income from family members or not. However, it should be pointed out that while there is an obligation for Member States to take into account the income of family members for the renewal of a

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[286] G. PINTIAUX, S. FORTIN, S. MESKENS, A. MONSIEURS, A., J. GHEYLE, "Les moyens de substistance dans le cadre du regroupement familial – Bestaansmiddelen in het kader van gezinshereniging", 576.
[287] Ibid, 585; RvS 23 April 2015, nr. 230.955; RvS 27 October 2015, nr. 232.708.
[288] The Council referred to the ECJ's case law on 'having' sufficient resources in 'Singh' para. 74.
[289] RvV 1 March 2016, nr. 163.344; RvV 1 March 2016, nr. 163.345.
[290] RvS 2 May 2016, nr 11.935; RvS 2 May 2016, nr 11.934.
[291] X, "De DVZ licht diverse praktijken toe in een overleg met het Agentschap Integratie en Inburgering", *T.Vreemd.* 2016, nr. 4, 524.
[292] For an application for family reunification by a family member of a third country national long-term resident (Article 10, § 3) or by a family member of a Blue Card holder (Article 10bis, § 4)
[293] Art. 16 (1) (a) of Directive 2003/86.
[294] RvV, 5 September 2017, nr. 191.456; RvV 28 September 2017, nr. 192.731.

residence permit under the Family Reunification Directive, there is no provision in the Directive prohibiting Member States from taking into account a family member's income at the time when the application is made.[295]

The reference amount

The sponsor is required to have own resources (not acquired from social assistance), with a threshold that is set at 120% of the social assistance level (or living wage). This amounts to 1.428,32 EUR net per month (updated on 12/09/2017).[296] Elements such as their nature and regularity are taken into account when assessing these resources.

In Belgium, one is not eligible for the living wage when one has an income that is at least equal to 100% of the living wage rate. Critics claim that it is difficult to justify that the threshold for the resources requirement is set at 120% of the living wage rate and not at 100%.[297] This would mean that a sponsor with an income lower than 120% of the living wage rate, but equal to or higher than 100% of that rate, would not be entitled to social assistance covering the necessary costs of living for him/herself and his/her family.[298] By definition this sponsor (and his/her family) would not become a burden on Belgium's social assistance system.

This argument was also raised by the appealing parties before the Constitutional Court who requested, as a subsidiary argument, that the Court would refer a preliminary question to the ECJ on this matter.[299] However, the Constitutional Court's judgement confined itself to the finding that the legislator's objective was to adopt a reference amount as meant by the ECJ in 'Chakroun'.[300] The provisions on the resource requirement do not prevent family reunification when the sponsor's resources are under the reference amount. In such a situation DVZ has to make an individual needs assessment to determine, on the basis of the specific needs of the sponsor and his/her family, which resources they would need to meet their needs without becoming a burden on the social assistance

[295] Art. 16 (1) (a) of Directive 2003/86.
[296] Art. 10 §5 and 10bis §1 first hyphen Aliens Act 1980; See: https://dofi.ibz.be/sites/dvzoe/NL/Gidsvandeprocedures/Pages/Gezinshereniging/Stabiele,%20regelmatige%20en%20voldoende%20bestaansmiddelen.aspx. (Consulted on 24/04/2018)
[297] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 300.
[298] Ibid.
[299] GwH 26 September 2013, nr. 121/12, paras. A.9.9.1-A.9.9.2.
[300] 'Chakroun', para. 46.

system.[301] The Constitutional Court did not refer a preliminary question to the ECJ and does not motivate this decision.[302]

The Constitutional Court also clarified that once the sponsor has demonstrated having an income equal to or higher than the legal reference amount, DVZ should not investigate the sufficiency of the resources any further. Before the Constitutional Court's judgement, this did happen since DVZ in practice referred to the poverty risk threshold which is sometimes higher than the reference amount in the Aliens Act.[303]

The individual assessment

However, an individual assessment should thus be made considering both the sufficiency, stability and durability of the resources when the income is under the reference amount. The minister or his delegate can require the submission of all documents and information needed to make this assessment.[304]

Despite the clear obligation for DVZ to make this individual assessment, it appears that in practice DVZ does not request information from the sponsor required for this assessment.[305] The Council for Alien Law Litigation has for instance annulled a decision by DVZ because it did not appear from the administrative file that DVZ had used the possibility to request information.[306] Therefore, DVZ had failed to carefully prepare its decision and base it on proper fact-finding. Moreover, the Council considers that it is not the applicant's duty to make an assessment of his/her own needs instead of DVZ to demonstrate that this could have led to another decision. The Council however also finds that, a citizen has the duty of care to submit all useful information on himself to the authorities and that an applicant cannot expect a needs assessment by DVZ if he does not come up with any elements to

[301] GwH 26 September 2013, nr. 121/12, paras. B.17.5.1-B.17.5.3, B.55.2.
[302] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 300.
[303] GwH 26 September 2013, nr. 121/12, para. B.55.2.
[304] Art. 10ter, § 2, al. 2. and art. 12bis, § 2, al. 4 Aliens Act 1980.
[305] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 301.
[306] RvV 23 June 2014, nr. 126.121. This case concerned a Belgian sponsor, but the duty of the minister or his delegate to request the required information to make this assessment on the basis of art. 42, § 1, al. 2 Aliens Act 1980 is the same as for third country national sponsors on the basis of art. 10ter, §2, al 2 and art. 12bis §2, al 4 Aliens Act 1980.

outline his current situation.[307] It is therefore advisable that an applicant pro-actively submits all useful information and evidence to DVZ with his/her application.[308]

According to the Council for Alien Law Litigation, DVZ violates its duty to state reasons when it does not appear from the contested decision that DVZ has made an individual needs assessment, or when it does not appear from the contested decision nor from the administrative file which analysis and elements DVZ has taken into account to conclude that the sponsor's resources are not sufficient to meet the needs of the family.[309] According to the Council, DVZ cannot confine itself to listing the various monthly costs and expenses, without giving any clarification on which amounts exactly, are concerned.[310]

DVZ very often refers to the so-called 'risk of poverty threshold' ('armoederisicogrens'). This consists of general, statistical data on the poverty risk in Belgium which are distributed yearly by the government.[311] This threshold is often higher than the legal reference amount. In 2016 for instance the poverty rate was €1792 for a household consisting of two adults (no children) that are both less than 65 years old.[312]

The Council of Alien Law Litigation considers that examining the resources on the basis of an amount that is even higher than the amount that is legally considered as being sufficient to permit family reunification, is manifestly in violation of the Aliens Act 1980. [313] According to the Council this also goes against the will of the legislator, as explained by the Constitutional Court.[314] The amount used to determine whether a person's resources are under the poverty line is significantly higher than the amount by which a person becomes eligible for social assistance. According to the Council it was the objective of the legislator to establish the resources required for a person not to become a burden on the government, and not to establish whether a person's resources are under the poverty threshold.[315] DVZ is thus not allowed to only consider that the average monthly income of a sponsor is under the poverty threshold, and conclude that the applicant and the sponsor risk becoming a burden on

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[307] RvS 28 April 2008, nr. 182.450, RvV 26 February 2014, nr. 119.542; RvV 27 October 2016 nr. 177 174; RvV 9 January 2017, nr. 180 402.
[308] S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", T. Vreemd. 2014, 301.
[309] Ibid.; RvV 23 June 2014, nr. 126.121; RvV 21 February 2014, nr. 119.324; RvV 30 March 2012, nr. 78.662; RvV 29 March 2012, nr. 78.310. Zie ook RvS 19 December 2013, nr. 225.915.
[310] RvV 26 September 2012, nr. 88.251.
[311] http://www.agii.be/nieuws/bestaansmiddelenvoorwaarde-bij-gezinshereniging-ontwikkelingen-in-rechtspraak (Consulted on 1 May 2018).
[312] https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.7%20Inkomen%20en%20levensomstandigheden/10.7.1%20Armoederisico/Plus/NL/BE-QualityReport%20SILC2016.pdf, (Consulted on 1 May 2018).
[313] RvV 7 August 2015, nr. 150.505; RvV 2 February 2015, 137.741.
[314] RvV 7 August 2015, nr. 150.505, para. 3, p. 7; GwH 26 September 2013, nr. 121/2013, para. B.55.2.
[315] RvV 2 February 2015, 137.741, para 2, p. 3.

Belgium's social assistance system.[316] In several cases, the Council also found that DVZ's reference to the poverty threshold was arbitrary. When DVZ is not familiar with the own and specific needs of the applicant and the sponsor, they should request the submission of all information necessary to become familiar with these needs.[317]

Integration measures

In contrast to the Netherlands, Belgium does not have any pre-arrival integration requirements. The reason for this could be that due to Belgium's federal structure, the decision to implement this requirement was influenced by the separation of powers.[318] In Belgium, the federal government is responsible for immigration and the regions or language communities are responsible for education, culture, and integration. Also, being a multilingual country, the issue of mandatory language tests abroad may be unattractive 'due to the potential risk of destabilizing the sensitive and fragile political compromise on the use of official regional languages'.[319]

Since the focus of this study is on the initial entry conditions, before a first residence right is granted, the conditions that need to be met during a period of conditional residence or after arrival, will only be discussed briefly in the context of integration measures.

In Belgium integration is a competence of the regional Communities. Flanders for example has a post arrival integration obligation with a sanction and appeal procedure for certain categories of persons.[320] In order to preserve their residence right these persons need to comply with these obligations.[321] Concerning the consequences of 'Dogan' this Flemish integration requirement could only be in violation with the Association Agreement with Turkey between the EU and Turkey if it would entail a restriction of the freedom of establishment and the freedom to provide services for Turkish persons, or a discrimination on the basis of nationality or regarding pay and employment conditions.[322]

Until recently, Belgian national law did not require any integration conditions to obtain or preserve a residence permit in the context of a family reunification procedure. Since, January 2017 there is

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[316] Ibid.
[317] RvV 14 October 2015, nr. 154.431; RvV 3 June 2016 nr. 169.047.
[318] K. GROENENDIJK, "Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?", European Journal of Migration and Law, 2011, 19.
[319] Ibid.
[320] S. DAWOUD and E. SOMERS, "Gezinshereniging en taal- of integratievereisten Analyse van het arrest-Dogan van het Hof van Justitie en van de gevolgen ervan voor België en Vlaanderen", T.Vreemd. 2014, nr. 4, 395-398.
[321] Het decreet van 7 juni 2013 betreffende het Vlaamse integratie- en inburgeringsbeleid, *BS* 26 juli 2013.
[322] S. DAWOUD and E. SOMERS, "Gezinshereniging en taal- of integratievereisten Analyse van het arrest-Dogan van het Hof van Justitie en van de gevolgen ervan voor België en Vlaanderen", T.Vreemd. 2014, nr. 4, 396.

however, similar to the obligations of the Regional Communities, a national requirement to make integration efforts to preserve the residence right.[323] After admission, the family member needs to provide evidence of his/her willingness to integrate into society. DVZ will verify this and if the person does not make a 'reasonable effort' to integrate, DVZ can put an end to his/her permit to stay.[324]

The possibility to end the residence right after admission only exists after executing a proportionality test and it only applies to certain categories of applications and persons. Persons who obtained a residence right as a family member of a Union citizen or a Belgian national who exercised his/her right to free movement are for example exempted from the integration requirement. Other exemptions include minors, seriously ill and protected persons.[325] Family members of Belgian nationals who do not make use of their right to free movement or of third country nationals (who do not have international protection and are not Turkish), are however obliged to make the federal integration efforts.[326] The national integration measures come on top of the obligations of the Communities. Certain persons that are already obliged to for example make integration efforts following the Flemish obligation, are now also obliged to meet the national integration requirements.

Concerning an integration requirement prior to arrival, in the future the applicant might need to sign a declaration indicating that he or she understands the fundamental values and norms of society and will act accordingly.[327]

Application Fees

In March 2017, the application fees for family reunification between third country nationals were raised from €160 to €200.[328] The application remains free for family reunification with dependent, unmarried children aged 18 or older with a disability and beneficiaries of the Association Agreement

[323] Wet van 18 december 2016 tot invoering van een algemene verblijfsvoorwaarde in de Verblijfswet van 15 december 1980 (BS 8 February 2017). The publication of this law determines that it annuls and replaces the earlier (wrongly) published text of the law of 24 November 2016, BS 16 January 2017.
[324] S. SAROLEA and J. HARDY, "Family Reunification with Third Country National Sponsors in Belgium", Study of The Belgian Contact Point of The European Migration Network (EMN), 2017, 7.
[325] Article 1/2 § 1 sub. 2, 5°, 6° and § 4 Aliens Act 1980.
[326] Article 1/2 § 1 sub. 1 Aliens Act 1980.
[327]This is legally foreseen, but not yet into force. The implementation of this obligation is delayed. http://www.knack.be/nieuws/belgie/nieuwkomersverklaring-loopt-opnieuw-vertraging-op/article-normal-983357.html; (28/03/2018; consulted on 10/04/2018)
[328] Koninklijk Besluit van 14 februari 2017 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 21 February 2017 ('KB 14 February 2017').

between the EU and Turkey. For family reunification with a long-term resident third country national in another Member State who requests a second residence in Belgium, the fee remains €60.[329]

The Council of State posed questions on the proportionality of this increase.[330] The Council referred to the ECJ's case law concerning the application fee for long term residents which stated that the application fee should not be disproportionate to the fees which the authorities require for the issuance of an identity card for their own citizens of Union citizens.[331] The government replied and stated:

> 'Concerning the applications for family reunification proof of sufficient resources needs to be submitted. As with economical migrates there is also a legal condition for family reunification that the persons who are joined by their family need to have sufficient economic strength. Consequently, demanding a fee of €200 is not disproportionate. The new amount still makes it possible to comply with the concern of guaranteeing the unity of the family, which is not an absolute right, and the best interest of the child. As there has been no impact on the amount of applications (…) for family reunification since the introduction of the initial fees, one can reasonably assume that raising this amount with €40 will not cause a reduction of the applications for residence and consequently, (…) not endanger the unity of the family. (…) The new amounts thus remain fair, in comparison with the amounts requested in neighbouring countries and given that the average amount for administrative costs per application is much higher than €268 (ed. the cost which was calculated in 2014).'[332]

The question here remains whether this increase would also be considered proportionate by the ECJ in light of its case law on similar application fees and the objective of the Family Reunification Directive.

Family Reunification between a Third Country National and a Union citizen

Article 40bis

Article 40bis of the Aliens Act 1980 regulates the conditions for family reunification between a third country national and a Union citizen from another Member State than Belgium. Family reunification between these family members falls under the scope of the Citizenship Directive. The provision

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[329] Art. 1/1/1, §1 Koninklijk Besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 27 October 1981.
[330] Advies 60.364/4 van 28 november 2016 van De Raad van State, Afdeling Wetgeving, over een Ontwerp van Koninklijk Besluit `tot wijziging van het Koninklijk Besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen'.
[331] 'Commission v. Netherlands', para. 77.
[332] KB 14 February 2017 (with accountability in the report to the King).

stipulates that it applies without prejudice to more favourable provisions laid down in laws or European regulations which the family members of the Union citizen might be entitled to.[333]

The eligible family members are listed in Article 40bis §2:[334]

1° the spouse or the alien with whom a registered partnership was contracted which is treated as equivalent to marriage in Belgium, who accompanies him or joins him;

2° the partner, who accompanies or joins him, with whom the Union citizen has contracted a registered partnership on the basis of a law. The partners need to comply with the following conditions:

a) Prove to have a durable partner relationship, duly attested
   The durable and stable character of this relationship is demonstrated:
   - when the partners prove to have continuously lived together in Belgium or another country for at least one year prior to the application;
   - or when the partners prove that they have known each other for at least two years, prior to the application, and that they submit evidence that they have had regular contact with each other by telephone, mail or email and that they during the two years prior to the application have met three times and that these meetings concern 45 or more days in total;
   - or when the partners have a child together;
b) Live together with each other
c) Both be older than the age of 21. The minimum age of the partners is brought back to 18 when they prove that they have lived together for at least one year before the alien who is joined, arrived in Belgium
d) Be unmarried and not have a durable and stable relationship with another person
e) Not be married under an incest prohibition
f) Towards neither the sponsor nor the applicant a definite refusal decision has been taken to officiate a marriage on the basis of the marriage being concerned a marriage of inconvenience

3° the relatives in the descending line and those of the spouse or partner as defined in 1° or 2°, under the age of 21 or are dependants, who accompany or join them, insofar that the sponsor, his spouse or the registered partner has custody and, when there is shared custody, on the condition that the other custody holder has given permission

[333] Art. 40bis §1 Aliens Act 1980.
[334] Article 40bis §2 Aliens Act 1980.

4° the relatives in the ascending line and those of the spouse or partner as defined in 1° or 2° who are dependants and accompany or join them.

5° the father or the mother of a minor Union citizen, as mentioned in article 40, §4, sub 1, 2°, insofar that the minor is dependent and under actual custody.

Even though this list is a mere transposition of what is prescribed by Article 2 of the Citizenship Directive, it is noticeable from the structure of the articles and the used language that the Aliens Act 1980 is very difficult to read.

Article 47/1

After the 2011 reform of the Aliens Act, the Belgian Constitutional Court ruled that Article 3 (2) (a) of the Citizenship Directive was not transposed correctly. As discussed above, the ECJ decided in 'Rahman' that this provision obliges Member States to ensure that their legislation contains criteria that enables the persons, who do not fall under the definition of a family Member in Article 2(2) of the Directive, to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances, and, in the event of refusal, is justified by reasons. This procedure was not included in the new law and therefore needed to be provided by the legislator.[335]

In 2014 the legislator inserted a new chapter Ibis in title II of the Aliens Act 1980 which permits family reunification for 'other family members of a Union citizen' with a Union citizen who has made use of his/her right to free movement.[336] Article 47/1 Aliens Act 1980 determines that the following family members can rely on this provision:

> 1° the partner with whom the Union citizen has a durable relationship, duly attested and not falling under the definition in Article 40bis, § 2, 2°;
>
> 2° the family members, not falling under the definition in Article 40bis, § 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen;
>
> 3° the family members, not falling under the definition in Article 40bis, § 2 for whom serious health grounds strictly require the personal care of the family member by the Union citizen.

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[335] GwH 26 September 2013, nr. 121/2013, para. B.30.4.
[336] Art. 24-27 Wet van 19 maart 2014 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 5 May 2014.

When assessing the application for family reunification by 'another family member' of the Union citizen the question is raised whether the Union citizen, discouraged from residing in Belgium because the applicant is refused a residence right.[337] Or, provided that the situation of dependency arose after the Union citizen established him/herself in Belgium, and the applicant does not obtain family reunification in Belgium, this would cause the Union citizen to refrain from exercising his right of free movement.[338]

In regard of the application of this provision, it appears that a large number of the decisions that are appealed before the Council for Alien Law Litigation, concern third country national family members who claim to be dependent on or to be a member of the same household as the Union citizen.[339] The refusal to grant a residence right of more than three months on the basis of a factual partnership is also repeatedly disputed. A minority of the judgements concern third country nationals who require the personal care of the family member by the Union citizen due to health reasons. Especially in the first two situations it appears that the application for family reunification is often not sufficiently motivated.[340]

The Council for Alien Law Litigation recently ruled that a Union citizen's relatives in the ascending line cannot in a general sense be excluded from the category of 'other family member' under Article 47/1, 2° of the Aliens Act 1980. An ascendant who was not dependent on the Union citizen in the country of origin, but was a member of the same household, is able to request family reunification as 'other family member'.[341]

In casu, the third country national mother of a Dutch citizen had requested family reunification as a family member who was part of the same household as a Union citizen in the country of origin. DVZ refused to grant a residence right on the basis that the mother is excluded from the scope of Article 47/1, 2° as an ascendant. According to DVZ she is eligible for a 'classical' application for family reunification on the basis of Article 40bis §2, 4°. The mother denies this. Since she left the country of origin when her daughter was only 7 years old. In addition, she had previously requested family reunification as an ascendant on the basis of Article 40bis §2, 4° but DZV had refused this application because she had not submitted proof that she was dependent on her daughter. The mother stated that she was not dependent on her daughter but had however always lived together with her. The Council held that even though ascendants are mentioned as family members under Article 40bis §2, 4°, this

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[337] M. VANDENBERGHE, "Gezinshereniging voor 'andere familieleden van een burger van de Unie': een versoepeling van de wetgeving, maar wat in de praktijk?", T.Vreemd. 2017, nr. 4, 403.
[338] Ibid.
[339] Ibid., 422.
[340] Ibid.
[341] RvV 27 April 2017, nr.186.142.

does not imply that they can never be eligible under the category of 'other family members' in Article 47/1.

Even though The Council only considered 'ascendants' in this case, the judgement is also relevant for other categories of family members who were previously excluded by DVZ from the scope of Article 47/1 because they are mentioned in Article 40bis §2, 4°.

Sufficient Resources

On the basis of Article 7 (1) of the Citizenship Directive Member States are allowed to require a Union citizen sponsor to have sufficient resources when he/she is not a worker or a self-employed person. In the Aliens Act 1980 this condition is laid down in Article 40bis §4, al. 2 which determines that the Union citizen who has sufficient means of subsistence must also provide prove that he has sufficient means of subsistence to prevent that the family members accompanying him would become a burden of the Belgian social assistance system. For the evaluation of this condition, account shall be taken of the personal situation of the Union citizen, including the nature and regularity of his/her income and the number of family members dependent on him. Similar to the resources requirement for third country national sponsors the Aliens Act 1980 stipulates that when the resources are not deemed sufficient, the minister or his delegates need to determine on the basis of the needs of the sponsor and his family members which resources they would need to provide for themselves without becoming dependent on the public authorities. The minister or his delegates can require the applicant and every Belgian authority to submit all documents and information which could be useful to determine this amount.[342]

As discussed in PART I the wording of Article 8 (4) of the Citizenship Directive is confusing since it prohibits a fixed amount but also indicates that there is a certain threshold. Member States must thus always take into account the personal circumstances of the applicant. In practice, DVZ does apply a fixed amount, which is higher than the living wage rates.[343]

The 2014 amendment of the Aliens Act 1980 introduced the residence right for the parent of a minor Union citizen. Since then, Article 40bis §2, 5° grants a residence right to the father or the mother of a minor Union citizen as meant in Article 40, 40, §4, al.1 , 2°, insofar as this minor Union citizen is dependent on him/her and he/she has actual custody over the child.

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[342] Article 42, §1, al. 2 Aliens Act 1980.
[343] See the unpublished guidelines by DVZ of 23 May 2008, "Citizens of the Union and their family members", 5. These guidelines stipulate an amount of € 698 increased by € 232 per dependant person. http://www.agii.be/thema/gezinshereniging/je-bent-familielid-van-een-unieburger/de-unieburger-is-economisch-niet-actief-in-belgie/je-bent-derdelander (Consulted on 1 May 2018).

In addition, Article 40bis §4, al.4 stipulates that the parent should:

- demonstrate that he/she has sufficient resources to provide for his/her own needs and those of the child, in order to not become a burden on Belgium's social assistance system, and
- have a health insurance which covers all the medical risks in Belgium.

However, when the parent of a minor Union citizen requests family reunification with his/her child, the child is not required to have obtained a residence right as a person who has 'sufficient resources'. The Council of Alien Law Litigation has confirmed this in several judgements.

In two cases the applicants/parents complied with all the conditions mentioned in Article 40bis.[344] They had sufficient resources for themselves and their minor Union citizen child, whether through own income from employment, or through income from the other Union citizen parent; they had a health insurance for themselves and their child; the Union citizen was dependent on the parent and the parent had custody over the child. Still, DVZ refused to acknowledge the parent's residence right because the Union citizen had not requested and obtained a residence right on the basis of Article 40 § 4, al 1, 2° of the Aliens Act 1980 as a non-economically active Union citizen who has sufficient resources. The children had obtained there residence right on the basis of family reunification with the other, Union citizen, parent. According to the Council for Alien Law Litigation, DVZ's stance is based on an incorrect interpretation of the Aliens Act 1980. It does follow from the Aliens Act the minor Union citizen should have sufficient resources and a health insurance, however, the child should not have obtained a residence right for itself on that ground. The minor child is thus allowed to have obtained a residence right based on another ground such as for instance, family reunification with the other parent. The Council based itself on the Alien's Act preparatory works from which it appears that the goal of the legislator was particularly to prevent that the parent and the minor Union citizen would become a burden on the social assistance system. *In casu*, the Council considered that this goal was met and annulled the decisions that was insufficiently motivated. In addition, the Council considered that there are no requirements in regard to the origin of the resources.

In another case a third country national mother was refused a residence right for family reunification with her Dutch minor daughter on the basis of Article 40bis, § 2, 5° Aliens Act 1980.[345] The mother had only submitted pay slips from the child's father, with whom she was living together, and had not demonstrated that she also had own resources to provide for the child. According to DVZ it was

[344] RvV 18 June 2015, nr. 148.088, para. 2.5-2.6; RvV 7 May 2015, nr. 145.025, para. 2.2, p. 4-7.
[345] RvV 22 December 2016, nr. 180 019, para. 3.3, p. 11-12.

therefore not established that there existed a relationship of dependency between the applicant and her daughter. The Council annulled the refusal because it did not consider this to be a correct interpretation of the concept of 'dependency' as established by the ECJ's settled case law since it was narrowed down to a merely financial dependency. It follows from 'Zhu and Chen', 'Iida' and Alokpa' that it is the minor Union citizen who has to own sufficient resources for him/herself and his/her family members in order not to become a burden on the social assistance system of the host Member State during their residence (cf. Article 7 (1) (b) Citizenship Directive), that there should be no requirements concerning the origin of these resources and that the parent who actually takes care of this Union citizen who also complies with the other requirements imposed by Article 7 (1) (b) (having sickness insurance) can reside in the host Member State on the basis of these provisions. [346] The Council concluded that DVZ did not properly motivate nor carefully examined the applicant's application since they did not assess her argumentation concerning her daughter being dependent on her and whether the income of the father is sufficiently high to maintain the whole family.

Family Reunification between a Third Country National and a 'mobile' Belgian citizen

Following the entry into force of the new law of 4 May 2016[347], aimed in particular at making the law in conformity with the judgement of the Constitutional Court,[348] the Aliens Act 1980 explicitly foresees that the family members of a Belgian citizen who has exercised his/her right to free movement is placed under the same provisions, more favourable, as those for family members of a Union citizen (new article 40ter, §1 Aliens Act 1980).

After the judgement by the Constitutional Court a new separate provision to regulate family reunification for a Belgian who had exercised his/her right to free movement had to be implemented.[349] The old article 40ter of the Aliens Act 1980 did not make a distinction between a Belgian who had and a Belgian who had not exercised his/her right to free movement. When returning to Belgium the conditions for family reunification should not be stricter than those applicable in the host Member State. The new provision now explicitly mentions that family members of a Belgian who has exercised his/her right to free movement falls under the same provisions that are applicable to family members of a Union citizen. The amendment went further than the judgement of the

[346] 'Zhu and Chen', paras. 28-30, 45-47; 'Iida', 55, 69; 'Alokpa', paras. 25-29.
[347] Wet van 4 mei 2016 houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en de wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, BS 27 June 2016.
[348] GwH 26 September 2013, nr. 121/2013.
[349] GwH 26 September, nr. 121/2013, para. B.58.8.

Constitutional Court in that the new provision does not require the family member to have resided in the host Member State with the Union citizen sponsor, which is in line with the ECJ's case law.[350] Therefore it cannot be ruled out that even a family member of a Belgian, who did not accompany the Belgian to another Member State and resided there together with him/her, can request family reunification with a 'mobile' Belgian. Also in this situation, the same provisions, that apply to family members of a Union citizen, will be applicable.

Article 40ter §1 of the Aliens Act 1980 concerns the situation where a third country national derives a residence right as a family member of a Belgian citizen who has exercised his/her right to free movement. Together with the family members of Union citizens of another Member State than Belgium, these family members also fall under the scope of the Citizenship Directive. In line with the ECJ's case law this residence right can only be derived when the Union citizen has exercised his/her right to free movement for more than three months [351]

The Belgian Council for Alien Law Litigation has confirmed that it is not required that the family member has resided in the other Member State together with the Belgian sponsor.[352] *In casu*, the applicant's Belgian daughter had lived in Switzerland between 2003 and 2009. It was not contested that she had made exercised her right to free movement. However, the mother's application was refused by DVZ because the mother had not lived together with her mother in Switzerland.[353] The Council ruled that this is not required on the basis of Article 40ter, § 1 and that by imposing this additional condition, DVZ had added a condition to the law.

The Council is however critical when the right to free movement has only be exercised for a short period of time.[354] The Belgian son of a third country woman national returned to Belgium after three months and two days. According to the applicant, her son had however intended to reside in the Netherlands for a longer time, as a person with sufficient resources. The Council considered that this either meant that there were problems concerning meeting the residence conditions in the Netherlands, or that it was actually never the son's intention to exercise his right to reside for more than three months. It seems that the 'temporary stay' in the Netherlands had to open up the possibility for the mother to derive a residence right as a family member of her Union citizen son who had made use of his right to free movement.[355] That the son had not taken recourse to social assistance in the

[350] Art. 18 Wet van 4 mei 2016, BS 27 June 2016.
[351] 'O and B', para. 53.
[352] RvV 14 September 2017, nr. 191.976, para. 3.2.
[353] Article 7 of the Agreement on the Free Movement of Persons (AFMP) signed on 21 June 1999 between the European Union EU and Switzerland its Annex I.
[354] M. VANDENBERGHE, "Gezinshereniging voor 'andere familieleden van een burger van de Unie': een versoepeling van de wetgeving, maar wat in de praktijk?", T.Vreemd. 2017, nr. 4, 404.
[355] RvV 7 March 2017, nr. 183.504, para. 2.2.2, p. 9-10.

Netherlands, was not considered a valid argument since the host country is not obliged to permit access to social assistance during the first three months of a residence.[356]

The same consideration was made by the Council when it appeared from a combination of elements that a sponsor 'intentionally momentary' (three months and three days) had made a moving declaration[357] to Germany, only with the intention that the applicant could derive a residence right as the family member of her Belgian brother who had made use of is right to free movement.[358]

Concerning the application of Article 45 TFEU and the case of 'S and G', the Council has made clear that the mere fact that a Belgian citizen who resides in Belgium and often travels to the Netherlands to make purchases for a business purpose does not lead to the citizen falling under the scope of Article 3 of the Citizenship Directive. *In casu* there was no employment on the basis of an employment contract.[359]

Family Reunification between a Third Country National ascendant and a 'static' minor Belgian citizen

Family reunification between a minor Belgian citizen who has not exercised his/her right to free movement and his/her parents is currently established by Article 40ter §2 2° of the Aliens Act 1980. In what follows the evolution leading up to this provision and other consequences of the 'Ruiz Zambrano' judgement will be discussed.

Nationality Legislation

Following the 'Ruiz Zambrano' judgement, the Belgian legislation concerning 'nationality' was amended.[360] One of the purposes of the new legislation was to objectify the acquisition of nationality and make it 'migration neutral'. The acquisition should not be a resort to be granted a residence right.[361]

The children in 'Ruiz Zambrano' would nowadays no longer be Belgian citizens based on their birth. The current legislation requires that at least one of the parents is a Belgian citizen who was born in

[356] Article 24 (2) of Directive 2004/38.
[357] In Dutch this is called: 'afschrijving buitenland'.
[358] RvV 7 March 2017, nr. 183.514.-, par. 2.2.2, p. 5.
[359] RvV 23 February 2017, nr. 182.794, para. 2.1.3., p. 5.
[360] Wet van 4 december 2012 tot wijziging van het Wetboek van de Belgische nationaliteit, BS 14 December 2012.
[361] M. VAN DE PUTTE and J. CLEMENT, "De metamorfose van het wetboek van de Belgische nationaliteit na de 'betere Belg'-wet", in D. VANHEULE (ed.), *Migratie- en Migrantenrecht: recente ontwikkelingen, Deel 16, Ontwikkelingen inzake vrij verkeer, asiel, voogdij en nationaliteit*, Brugge, Die Keure, 2015, 220.

Belgium and has had his/her main place of residence in Belgium for at least five years during the ten years prior to the birth of the child. [362] Other categories of children who automatically become Belgian by birth are: children who would otherwise be stateless[363], children who have been adopted by a third country national who was born in Belgium and had his/her main place of residence in Belgium for at least five years during the ten years prior to the adoption of the child[364], children whose parents or adoptive parents make a statement before the child reaches the age of 12 and who have had their main place of residence in Belgium during 10 years prior to making the statement and of which at least one of the parents has an unlimited residence right in Belgium at the moment of making the statement[365].

The 2011 amendment and the Constitutional Court's judgements

Before 'Ruiz Zambrano' the ascendants of Belgian children could, at best hope to be granted a residence right on the basis of the old Article 9 §3 of the Aliens Act 1980, under the discretionary power of the administration or to be granted a right of establishment on the basis of Article 40 §6 of the Aliens Act 1980.[366] In the context of the reformation of the Belgian legislation on family reunification, the law of 11 July 2011 integrated the right of family reunification for the parents of Belgian minor children in Article 40ter, §1, second hyphen of the Aliens Act 1980.[367] However, in the challenge before the Belgian Constitutional Court the appealing parties argued that the new law violated the 'Ruiz Zambrano' judgement because the provision does not sufficiently take into account the rights for family reunification derived from Union citizenship.[368]

The Constitutional Court responded that the possibility for family reunification between minor Belgian citizens and their third country national parents was explicitly added in Article 40ter of the new law to respond to 'Ruiz Zambrano'.[369] The Court does add that there could be other circumstances, besides the situation of minor children and their parents, in which the 'genuine enjoyment' criterion could be fulfilled. However, when these 'abstract norms' are created, it is not possible for the legislator to anticipate on all those circumstances in a general manner. When such circumstances occur, the provision which refuses those persons a right to family reunification, should

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[362] Art. 11, §1, 1° Wetboek van de Belgische nationaliteit van 28 juni 1984 (BS 12 July 1984).
[363] Art. 10 Wetboek van de Belgische nationaliteit van 28 juni 1984 (BS 12 July 1984).
[364] Art. 11, §1, 2° Wetboek van de Belgische nationaliteit van 28 juni 1984 (BS 12 July 1984).
[365] Art. 11, §2 Wetboek van de Belgische nationaliteit van 28 juni 1984 (BS 12 July 1984).
[366] WOOG, S., "Le regroupement familial en qualité d'ascendant d'un enfant mineur belge 'sédentaire': aperçu des principes et de la jurisprudence récente", in ADAM, C., 10 Jaar Raad Voor Vreemdelingenbetwistingen / 10 Ans Du Conseil Du Contentieux Des Étrangers. Daadwerkelijke Rechtsbescherming / La Protection Juridictionnelle Effective, Brugge, Die Keure, 2017, 530.
[367] Ibid., 532.
[368] GwH 26 September 2013, nr. 121/2013, para. B.59.1, See N. CAMBIEN, "Recente ontwikkelingen op het valk van gezinshereniging van Belgen en Unieburgers: A long and winding road?", 2015, 24.
[369] GwH 26 September 2013, nr. 121/2013, paras. B.59.2-B.59.8.

not be applied.[370] This means that DVZ should not apply article 40ter when it appears from the specific individual circumstances in a case that a decision to refuse family reunification would deprive a Belgian of his/her most important rights as a Union citizen because he/she would *de facto* be forced to leave the territory of the Union. The Court hereby anticipates cases other than those of third country national parents of minor Belgians.

However, the fact that other family members could possibly also be granted a residence right based on family reunification in certain circumstances caused uncertainties. It was not clear which elements should be taken into account to identify these circumstances and who bears the burden of proof. These uncertainties probably explain why this aspect was not addressed in the circular of 13 December 2013 on the judgement by the Constitutional Court.[371] Therefore, the question whether this situation occurs, can only be answered on the basis of the guidance given by the ECJ. The Constitutional Court had in its judgement for instance referred to 'O and S' in which it was decided that an assessment of all factual circumstances of every specific case should be taken into account.[372] From 'McCarthy', 'Dereci', and 'O and S' it had become clear that it is the criterion of dependency which needs to be assessed to determine if the exception applies.[373] This means that it is the duty of the administration or the judge to verify, in every specific case, whether the refusal to grant a residence right to a family member of a Union citizen would force that citizen to leave the territory of the Union.

A new Article 40ter in 2016

After the amendment in 2016 which was a response to the judgements by the Constitutional Court, the provision that addresses the 'Ruiz Zambrano' exception can be found in Article 40ter § 2, al 1, 2° Aliens Act 1980. The content has however not been modified since the introduction in 2011. On the basis of this provision the father and the mother of a minor Belgian who prove their identity by means of a valid identity document and accompany the Belgian who opens the right to family reunification or join him could have a derived right of residence in Belgium. In contrast to family members of other Belgians who have not exercised their right to free movement, they do not need to prove that their sponsor (their minor child), has sufficient resources, housing and health insurance.

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[370] Ibid., B.59.5.- B.59.7.
[371] S. WOOG, "Le regroupement familial en qualité d'ascendant d'un enfant mineur belge 'sédentaire': aperçu des principes et de la jurisprudence récente", 532; Omzendbrief van 13 december 2013 betreffende de toepassing van de artikelen van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, wat betreft de voorwaarden tot gezinshereniging, die door het Grondwettelijk Hof in het arrest nr. 121/2013 van 26 september 2013 geïnterpreteerd werden (BS 20 december 2013).
[372] GwH 26 September 2013, nr. 121/2013, para. B.59.5.; Reference to 'O and S', paras. 47-56.
[373] Opion AG Bot 27 September 2012, nrs. C-356/11 and C-357/11, ECLI:EU:C:2012:595, 'O and S', para. 44-45.

Interpretation by the Council for Alien Law Litigation

On several occasions, the Council for Alien Law Litigation has dealt with the question whether the 'genuine enjoyment' exception could be applied to a certain situation.

Other family members of Union citizens than parents

The following cases concern situations that are not very similar to 'Ruiz Zambrano' in the sense that they do not revolve around third country national parents and Union citizen children.

The Council for example ruled that the exception does not apply to an adult third country national and his Belgian grandparents. From the circumstances, it was insufficiently clear how the refusal of a residence right to the third country national would deprive the grandparents from their rights as Union citizens.[374] In another case the Council found that the third country national son of a Belgian mother cannot derive a residence right based on the 'Ruiz Zambrano' exception. According to the Council the situation was not comparable to 'Ruiz Zambrano', in which a residence right was granted to the parents of minor EU citizens.[375] The proof of the applicant's material dependence on his mother was insufficient.[376]

The Council also considered the case of the third country national adult daughter of a Spanish father who had applied for family reunification in Belgium.[377] The Council first stated that the 'Ruiz Zambrano' judgement was not even relevant in this case, since it does not concern the granting of a work and a right of residence to the ascendants of minor Union citizens who have not exercised their right to free movement.[378] The Council notes that it is not disputed that the applicant has lived with her father since his arrival on the territory. However, no particular dependency is conclusively demonstrated since the applicant has failed to prove any financial dependency on her father.[379]

In another case the applicant herself was a Union citizen from Bulgaria without dependant minor children.[380] She did not comply with the income requirements for Union citizens. According to the Council she could not derive a residence right in Belgium from the 'Ruiz Zambrano' judgement. The Council considered that the factual circumstances which gave rise to that judgement, were by no means similar to this case. The Council also found that there was no violation of Article 20 TFEU

[374] RvV 14 December 2012, nr. 93.631, para. 2.7.
[375] RvV 3 August 2012, nr. 85.586, para. 3.2.
[376] RvV 3 August 2012, nr. 85.586, para. 3.3.
[377] RvV 29 November 2011, nr. 70.909.
[378] Ibid., para. 3.3.
[379] Ibid., para. 3.5.6.
[380] RvV 20 July 2012, nr. 84.970.

since the applicant was not deprived of her citizen's rights by the refusal. The mere fact that she is a Union citizen, does not imply that she is allowed to reside in Belgium for more than three months without complying to the prescribed conditions.[381]

The Council also decided that no derived residence right could be granted to the applicant who had a dependant minor child with Portuguese citizenship.[382] A similar decision was made in a case with a Dutch minor child.[383]

The Council's arguments in all those judgements seem to vary from no similarity to 'Ruiz Zambrano' in the sense that other family members than the parents of minor children were the applicants or in the sense that the Union citizen sponsor had made use of his/her right to free movement, to no proven relationship of dependency between the third country national family member and the sponsor.

Parents of Union citizens

However, there have also been judgements on situations more similar to 'Ruiz Zambrano' in which one third country national parent and one Union citizen parent were involved.

The Council ruled for instance that there was no violation of Article 20 VWEU in a case in which the applicant did not show how his removal of the territory would force his 'possible'[384] child of Belgian nationality to leave the territory of the Union, given the fact that his partner, who also had Belgian nationality could take care of the child in Belgium.[385]

The fact that Article 40ter, §2, al1, 2° of the Aliens Act 1980 stipulates that the parent 'accompanies or joins' the child, could imply that there should be a certain kind of shared establishment with the child.[386] Both the Council of State and the Council of Alien Law Litigation have consistently held that if this notion does not correspond to an actual and durable cohabitation, it should appear from the circumstances that there is at least a minimum of communal life with the child.[387]

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[381] Ibid., para. 3.4.
[382] RvV 21 November 2011, nr. 70.223, para. 4.2.5.
[383] RvV 14 March 2014, nr. 120.669, para. 2.4.
[384] The child was born two years after the application was made. According to the Council it was thus impossible for the authorities who made the appealed decision, to take the factor of the child into account.
[385] RvV 14 February 2013, nr. 97.187, para. 3.16.
[386] S. WOOG, "Le regroupement familial en qualité d'ascendant d'un enfant mineur belge 'sédentaire': aperçu des principes et de la jurisprudence récente", 536.
[387] Ibid, reference is made to: RvS 24 April 1995, nr. 53.030; RvS 5 March 2004, nr. 128.878; RvS 4 October 2005, nr. 149.807; RvS 8 May 2006, nr. 158.407; RvV 27 February 2014, nr. 119.746, RvV 9 October 2014, nr. 131.090; RvV 6 October 2015, nr. 153.985; RvV 13 November 2015, nr. 156.442; RvV 16 December 2015, nr. 158. 687; RvV 30 March 2016, nr. 164 929; RvV 25 May 2016, nr. 168.293; RvV 11 April 2014, nr. 122 370.

In a case of 2014, the Council of Alien Law litigation referred to the interpretation by the Constitutional Court on this condition [388] According to the Constitutional Court the family members of a Union citizen mentioned in Article 13 (1) sub 2 of the Citizenship Directive should comply with the conditions of Article 7 (1) (d) of the Directive that require that the family member 'accompanies or joins the Union citizen', which in principle implies that they have a shared establishment.[389] In this case DVZ had refused the request for family reunification because it found that the applicant had not submitted proof of him being interested in his child. However, DVZ had not disputed that the applicant lived together with his child. Therefore, the Council for Alien Law Litigation considers that DVZ could not have concluded, that there was no family relationship between the applicant and his child, on the sole finding that there was no evidence that the applicant was interested in his child, because the parentage and the cohabitation were established.[390]

For some time now, DVZ has been facing requests for family reunification introduced by the fathers of Belgian minors, who are separated from the mother of their child and who, therefore, no longer live together with the Belgian child. The motivation by which DVZ has refused a right of residence to these fathers has evolved.[391]

Initially, DVZ concluded that the applicant had no interest in his child nor had the intention to establish a family life with it, when it appeared from State records that the applicant did not live together with his child. DVZ considered that the applicant merely used his child as an instrument to be granted a residence right. When DVZ made this kind of hypotheses, the Council of Alien Law Litigation fairly consistently held that the finding that the applicant and his child do not live together cannot be sufficient in itself to exclude the applicant from family reunification.[392] This finding cannot lead to the conclusion either that the applicant does not want to establish a communal life with his child and is therefore not accompanying or joining the child as required by Article 40ter of the Aliens Act 1980.[393]

Following the annulation of these decisions, DVZ continued to make the same conclusion when an applicant and his child were not living together.[394] Numerous decisions have been annulled by the Council for Alien Law Litigation because DVZ inadequately motivated its decision by stating that an

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[388] RvV 27 February 2014, nr. 119.746.
[389] GwH 26 September 2013, nr. 121/2013, paras. B.36.5.
[390] RvV 27 February 2014, nr. 119.746, para. 2.2.2.
[391] S. WOOG, "Le regroupement familial en qualité d'ascendant d'un enfant mineur belge 'sédentaire': aperçu des principes et de la jurisprudence récente", 537.
[392] Ibid.; RvV 30 January 2014, nr. 118.004; RvV 24 February 2014, nr. 119.409; RvV 24 February 2015, nr. 139.199.
[393] RvV 24 February 2015, nr. 139.199.
[394] S. WOOG, "Le regroupement familial en qualité d'ascendant d'un enfant mineur belge 'sédentaire': aperçu des principes et de la jurisprudence récente", 538.

applicant had not submitted sufficient proof of family life, while this is not required on the basis of Article 40ter of the Aliens Act 1980 and while it is established in administrative case law that the condition to establish communal life does not refer to an actual and durable cohabitation but implies that it should appear from the circumstances that there is at least a minimum of communal life between the applicant and his child.[395]

More recently the Council considered the case of an applicant who had submitted an application for a residence card as a family member of his Belgian daughter. Since the applicant did not live on the same address as his daughter it needed to be verified whether the applicant joined or accompanied his child in a figurative way for which a financial and affective relationship between the applicant and his daughter needed to be established. The Council decided that there was no such relationship since the applicant had only twice transferred a minimal amount of money during the lifetime of the 4- year old child and there was sufficient proof that there had hardly been any contact between the applicant and his daughter.[396]

Concerning the assessment of an affective relationship between the applicant and his/her child the Council considered the value of witness reports as evidence. *In casu,* the Council found that there was an affective relationship between the Togolese father of Belgian minor children. The refusal to grant the father a residence right was annulled since the witness reports proved that this relationship was not sufficiently taken into account by DVZ. Even though the Council acknowledges that the probative value of a declaration of honour is usually limited, since it is generally difficult to check the veracity, it considers that *in casu* these declarations did not originate from random third parties who made vague statements. For example, the applicant's ex-partner and mother of the children stated that the applicant visits the children as often as possible and takes care of them. The other declarations were made by the principal of the school of one of the children, the secretary of the rehabilitation centre of another child and the doctor. The verification of these declarations was perfectly possible since DVZ had contact details of all of these persons. Moreover, the statements should not have been separated from the money transfers made by the applicant, which were considered to be insufficient by DVZ. The Council therefore concludes that in the present case DVZ did not correctly assess the evidence submitted by the applicant and made its decision in a manifestly unreasonable manner. [397]

It appears from these cases that DVZ takes a very restrictive approach to the granting of a residence right to the third country national parent of a minor Union citizen when there is another parent present.

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[395] RvV 16 December 2015, nr. 158.687; RvV 6 October 2015, nr. 153.985; RvV 30 March 2016, nr. 164.929; RvV 25 May 2016, nr. 168.293.
[396] RvV 20 April 2017, nr. 185.649, para. 3.11 – 3.13.
[397] RvV 19 September 2016, nr. 174.800, para. 2.1.3.

When looking into the database of the Council for Alien Law Litigation for references to the 'Chavez Vilchez' judgement, only one case appeared. The reference was made by the Council but only to conclude that it did not apply to the underlying situation which concerned the application of the third country national mother seeking to derive a residence right in Belgium from the citizenship of her adult Dutch daughter.[398]

Conclusion

The first element which has become very clear after this analysis, is that the Belgian legislation on family reunification is very complex and lacks transparency. One of the reasons for this is the fact that the Aliens Act 1980 has been amended several times over the course of the past decade. This has been done both in the context of national considerations on family reunification but also mainly with regard to the development of a European policy on family reunification, the adoption of two Directives and continuously evolving case law. Every time new amendments were made, little attention was given to the structure and comprehensibility of the law. Another reason is that for instance, the 2011 amendment was appealed before the Constitutional Court. This has led to even more adaptations in later years.

Even though these amendments could have been an opportunity to clarify in legislation what was decided by the ECJ, the Aliens Act 1980 and its Royal Decree lack definitions and guidelines on concepts such as 'the durability of resources' and 'dependency'. Even though, there is still uncertainty on several concepts introduced by the ECJ, no attempt has been made to list the considerations that were made. This lack of transparency is also reflected in the decisions by DVZ.

Concerning family reunification between third country nationals the interaction with European law is most noticeable in the context of the resources requirement. Different discussions have arisen on this condition in Belgium's case law. For instance, the Council of State has decided that the income of the applicant should not be taken account for the assessment of this requirement. However, the Council's decision is not followed in practice by the Council for Alien Law Litigation. This leads to a situation where DVZ in general only takes into account the income of the sponsor, and the Council for Alien Law Litigation overrules DVZ's decisions. However, it should be pointed out that with regard to provisions in the Family Reunification Directive, which do not prohibit this, and the 'Chakroun' requirement to make an individual assessment, Member States should take the applicant's income into account. Therefore, this point of discussion is an interesting example of the division that exists in Belgium between parties such as the Council for Alien Law Litigation, who tend to follow what is

[398] RvV 13 October 2017, nr. 193.648, para. 2.10.

decided at the European level and parties such as DVZ, and sometimes the Council of State, who follow their own interpretation.

Other issues which occur concerning the sufficient resource requirement are the application by DVZ of a higher threshold than the one indicated in legislation, the discussion on who should submit information and whether an individual assessment in line with 'Chakroun' is actually performed. The Council for Alien Law Litigation has consistently held that DVZ violates the law when they apply a higher threshold such as the poverty risk threshold. Concerning the discussion on who should submit information, the Council considers that DVZ should request information but that the applicant also has a duty of care to submit useful information for his/her case. This means that the applicant should submit information but it is DVZ's duty to make the assessment of the resources. When DVZ finds that certain elements of the applicant's case are unclear, they should request additional information. However, it appears that in practice DVZ does not always seem to do this.

Regarding the resources requirement for third country nationals it can be concluded that even though the will of the legislator to comply with the 'Chakroun' judgement was expressed, an individual assessment of every specific case is not always made by DVZ. However, when an applicant brings DVZ's refusal decision before the Council for Alien Law Litigation, changes are high that the Council will rule that DVZ has insufficiently motivated its decision.

Next to the resources requirement, there is little discussion on the conditions for third country nationals to be granted a residence right on the basis of family reunification. There are no pre-entry integration measures in place at the moment. Belgium's complex state structure and diversity of languages could be a reason for this. In the future, a 'light' version of a pre-entry integration measure might be adopted when an applicant becomes obliged to sign a declaration indicating that he or she understands the fundamental values and norms of society and will act accordingly. The fees that should be paid for an application might be disproportionate in light of the ECJ's case law. If not, the reasons which are given by the government to increase these fees are not a reflection of the objective of the Family Reunification Directive but are rather a consideration of actual costs based on a comparison with neighbouring countries.

Concerning family reunification between a third country national and Union citizen there do not seem to be that many uncertainties. With regard to the ECJ's case law, the Council for Alien Law Litigation has confirmed that a family member should not have resided together with the sponsor in the other Member State prior to the application. However, regarding 'other family members' the Belgian legislator has failed to clearly identify the conditions for family reunification. The 2014 amendment which introduced this ground in the Aliens Act has for instance no implementing decree. Most appeals before the Council for Alien Law Litigation concern applicants who claim to be dependants or

members of the same household and unmarried/unregistered partners. Due to the lack of legal definitions of the relevant concepts for this category of family members, these are filled in by the ECJ's case law. However, DVZ takes a broad and non-transparent approach towards these family members. The Council for Alien Law Litigation has for instance ruled that DVZ is not allowed to refuse a residence right to the family member who applies for family reunification on the basis of the 'other family members' provision but is also a family member as defined by the general provision on eligible family members.

With regard to sufficient resources for Union citizen sponsors, it appears that DVZ does apply a threshold even though this is not allowed by the Citizenship Directive. The Council for Alien Law Litigation has confirmed, in light of the ECJ's case law that DVZ is not allowed to require the minor Union citizen sponsor to have obtained its own residence right by having sufficient resources.

Concerning 'mobile' Belgian sponsors, the Council for Alien Law Litigation also confirms that a family member should not have lived together in another Member State than Belgium with the sponsor. With regard to the specific aspects of what can be considered as 'having exercised the right to free movement' the Council does not accept periods that are under nor only slightly over three months. When assessing a derived residence right on the basis of Article 45 TFEU the submission of an employment contract will be decisive.

The 'Ruiz Zambrano' case and the introduction of the 'genuine enjoyment' criterion has led to several legislative changes in Belgium. For instance, the legislation on nationality was adapted, to 'prevent' situations such as in 'Ruiz Zambrano', with two third country national parents and Union citizen children, from occurring again. The legislation on family reunification was amended as well, albeit in different phases. Only the right for family reunification between the minor Belgian child and its third country national parents is laid down in legislation. It appears both from the fact that it is not laid down in legislation and from the interpretation given by the Council for Alien Law Litigation that other family members are not likely to be granted a derived residence right on the basis of the 'genuine enjoyment' criterion in Belgium.

In situations more similar to 'Ruiz Zambrano', it is more likely to be granted a derived residence right for family reunification. For instance, when there is one Union citizen parent and one third country national parent. When assessing the 'Ruiz Zambrano' exception, DVZ seems to concentrate on the consideration whether the third country national parent and the child reside together at the same address. When they live together, the Council for Alien Law Litigation considers that family life is established, even though DVZ for example claims that the applicant has no interest in his/her child. The Council has also consistently held that when the applicant and the child do not live together, DVZ cannot automatically exclude the applicant from family reunification. Other elements which are taken

into account to assess whether the exception applies are: money transfers, these alone are not considered as sufficient evidence that there is family life; and witness reports, these should be taken into account by DVZ to assess whether there is an affective relationship between the applicant and the child, when these are sufficiently genuine.

2. The Netherlands

Introduction

In the Netherlands, the legal provisions on family reunification are available in the Aliens Act 2000,[399] the Aliens Decree 2000[400] and the Aliens Regulation 2000[401]. In addition, a number of policy rules with regard to family reunification in the Netherlands are further elaborated upon in the Aliens Act Implementation Guidelines 2000.[402] Furthermore, the Immigration and Naturalisation Service[403] ('IND') has drawn up a number of working instructions on various subjects which provide decision makers with terms of reference in the implementation of policy.[404]

Applicants can object to a refusal decision with the state secretary of Justice. Appeal against the decision of the state secretary is open with the District Court of The Hague (Aliens Chamber). Higher appeal against a judgement of this court, or of one of its ten sub courts, is possible before the Administrative Jurisdiction Division of the Council of State[405] ('the Dutch Council of State').[406]

In the Netherlands, residence can be allowed both for family reunification as well as for family formation. The two terms are defined as follows:[407]

- Family reunification: The family relationship between the family member and the sponsor staying in the Netherlands already existed before the sponsor received a residence permit in the Netherlands.
- Family formation: The family relationship between the family member and the sponsor staying in the Netherlands arose after the sponsor received a residence permit in the Netherlands.

Conditions for admission for family reunification and family formation are however the same. In order to be granted a temporary regular residence permit[408] certain general conditions need to be met.[409] In

[399] Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet ('Vreemdelingenwet 2000'), Stb. 1 April 2001, 144.
[400] Besluit van 23 november 2000 tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000), Stb. 1 April 2001, 144.
[401] Voorschrift Vreemdelingen 2000, Stb. 1 April 2001, 144.
[402] Vreemdelingencirculaire 2000, Supplement-Stcrt. 1 April 2001, 64.
[403] The Dutch name for this service is 'Immigratie- en Naturalisatiedienst'.
[404] See L. CLETON, L. SEIFFERT, H. WÖRMANN, H., "Family Reunification of Third-Country Nationals", (EMN) 2017, 18; Example: Work Instruction 2018/4 On the law of the European Union. Publication date: 20-03-2018, https://ind.nl/Documents/WI_2018-4.pdf.
[405] 'Afdeling Bestuursrechtspraak van de Raad van State'.
[406] Chapter 7 'Legal Remedies' Aliens Act 2000.
[407] Article 1.1 Aliens Decree 2000.

addition, specific conditions apply for the residence with the purpose of residence as a family member.[410]

In the context of family reunification, the Dutch legislation underwent amendments with the implementation of the Family Reunification Directive in 2004[411], and the Citizenship Directive in 2006.[412]

Family Reunification between Third Country Nationals

For family reunification with a third country national as a sponsor, the following family members are eligible if all conditions are being fulfilled:

- spouses, equivalent partners or registered partners (only monogamous marriages or partnerships are recognised,[413] including same-sex partnerships),[414]
- minor children (below age 18) of the sponsor and/or of his/her partner (adopted children included[415]), who factually belong to the sponsor's family and are in the sponsor's custody.[416]

No policy has been laid down in Dutch laws and regulations with respect to other family members, such as grandparents, uncles and aunts. However, all family members of holders of residence permits in the Netherlands may submit an application for family reunification by relying on the right to family life, as described in Article 8 ECHR.[417]

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[408] In Dutch this is called: verblijfsvergunning regulier voor bepaalde tijd ('vvr bep').
[409] Article 16 Aliens Act 2000.
[410] Article 3.14 to 3.22a Aliens Decree 2000.
[411] Besluit van 29 september 2004 tot wijziging van het Vreemdelingenbesluit 2000 in verband met de implementatie van de Richtlijn 2003/86/EG van de Raad van 22 september 2003 inzake het recht op gezinshereniging (PbEG L 251) en enkele andere onderwerpen betreffende gezinshereniging, gezinsvorming en openbare orde, Stb. 12 October 2004, 496.
[412] Besluit van 24 april 2006, houdende wijziging van het Vreemdelingenbesluit 2000 in verband met de implementatie van Richtlijn 2004/38/EG van het Europees Parlement en de Raad van 29 april 2004 betreffende het recht van vrij verkeer en verblijf op het grondgebied van de lidstaten voor de burgers van de Unie en hun familieleden (PbEU L 158 en L 229), Stb. 27 April 2006, 215.
[413] Article 3.16 Aliens Decree. Polygamy is not allowed in the Netherlands. If the sponsor has simultaneously joined with more than one other person in matrimony or partnership, the IND only grants a residence permit for family reunification to one partner and the children born from the relationship with this partner.
[414]Article 3.14 Aliens Decree. Both registered partners as well as non-married/non- registered partners who have a lasting and exclusive relationship with the sponsor qualify as a partner.
[415] Article B7/3.6.4 Aliens Act Implementation Guidelines 2000: an adopted child is a legally accepted child.
[416]Article 3.14 (c) Aliens Decree 2000.
[417] L. CLETON, L. SEIFFERT, H. WÖRMANN, H., "Family Reunification of Third-Country Nationals", (EMN) 2017, 25; See also Annex V "How does the IND assess the right to family life (8 ECHR)?" in the same report.

Similar to Belgian legislation, documentation is required to be recognized as a family member. If that is not possible, the IND can offer DNA testing or an identification interview with certain indications, the IND may assume that a child actually does not belong to the sponsor's family.[418] For example, when the child lives independently or provides for its own subsistence. Other conditions apply for adoptive and foster children.[419]

In principle, adult children do not qualify for family reunification. As mentioned, they may however, rely on the right to conduct family life based on an Article 8 ECHR assessment. In contrast to the Belgian legislation dependent, unmarried children aged 18 or older are not automatically considered a family member eligible for family reunification. The IND however does assume that there is family life if there is a 'more than usual relationship of dependence' between the adult child and his/her parents, for example, if the child is seriously ill and has to be taken care of by the parents.[420] Another example are parents of minor children who have a residence permit in the Netherlands. They may also rely on the Article 8 ECHR assessment.

Similar to Belgium, there is a waiting period, during which the sponsor must have stayed in the Netherlands for a period of at least one year on the basis of a residence permit prior to applying for family reunification.[421] Concerning age requirements, the sponsor must be 21 years of age or older. The reason for this age requirement is the fact that the sponsor needs to have sufficient resources.[422] However, family reunification of spouses is also possible if, at the time of application, the sponsor and the spouse were both 18 years and the marriage already existed.[423] The sponsor and his/her family member must live together in the Netherlands.[424] The family member may not constitute a danger to public order or national security.[425]

Sufficient Resources

The sponsor must also have sufficient financial resources to support him/her- self and his/her family members. Those cannot be acquired from public funds such as social assistance. In line with the

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[418] Article B7/3.2.1 Aliens Act Implementation Guidelines 2000; Article C2/4.1 Aliens Act Implementation Guidelines.
[419] Article 3.26-3.28 Aliens Decree 2000; Par. B7/3.6.1- B7/3.6.3, B7/3.7.1-B7/3.7.2 Aliens Act Implementation Guidelines 2000.
[420] Article B7/3.8.1 Aliens Act Implementation Guidelines 2000.
[421] Article 3.15 Aliens Decree. Beneficiaries of international protection have a non-temporary purpose of residence, but are excluded from this condition.
[422] Article 3.22 (1) and Article 3.74 (1) (a) Aliens Decree 2000.
[423] Par. B7 3.1.2 Aliens Act Implementation Guidelines 2000.
[424] Article 3.17 Aliens Decree 2000.
[425] Article 3.20 Aliens Decree 2000.

optional provision in the Family Reunification Directive,[426] the income requirement means that the sponsor must prove that he or she has a sufficient independent, stable and regular income.[427] In the Netherlands, an income is considered as being sufficient if it is equal to or higher than the applicable statutory minimum wage.[428] Since 1 January 2018, this is €1.578,00 gross per month excluding holiday allowance for married couples and unmarried cohabitants and €1.104,60 gross for single parents.[429] It is not relevant how many family members are joining the sponsor, to calculate this amount.[430]

The income can be generated from: legally permitted work in employment, legally permitted work as a self-employed person, income replacement benefits or own capital. An income is identified as being stable and regular, when the income is available for at least one year after the application for family reunification.[431] If the sponsor has no income for at least one year, the income is also regarded as stable and regular if the applicant has met the income requirement in the year preceding the application and at the time of submission. In addition, the income must be available for at least six months in the future.[432]

There are however some exceptions to the income requirement, such as for example for pensioners.[433] As a consequence of the 'Chakroun' judgement, failing to meet the income requirement does not automatically mean that the application will be rejected. According to the IND, they always check whether individual circumstances provide cause to deviate from this condition and to grant the application anyway if the sponsor fails to meet the income requirement.[434]

The required individual assessment

The 'Chakroun' judgement had important consequences for the Dutch policy on family reunification. The measures taken after the judgement also applied to situations that did not fall under the personal scope of the Family Reunification Directive.[435] A week after the judgement the requirement that the Dutch sponsor should earn at least 120% of the net minimum wage was removed. The required amount is currently linked to the gross statutory minimum wage. After two months, Article 3.74 of the

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[426] Art. 7 (1) (c) of Directive 2003/86.
[427] Art. 3.22 Aliens Decree 2000.
[428] Art. 3.74 Aliens Decree 2000.
[429] For more information see: https://ind.nl/paginas/inkomen.aspx. (Consulted on 24/042018).
[430] L. CLETON, L. SEIFFERT, H. WÖRMANN, H., "Family Reunification of Third-Country Nationals", (EMN) 2017, 31.
[431] Article 3.75 (1) Aliens Decree 2000.
[432] Art. 3.75 (3) Aliens Decree 2000.
[433] Art. 3.22 (2) Aliens Decree 2000.
[434] L. CLETON, L. SEIFFERT, H. WÖRMANN, H., "Family Reunification of Third-Country Nationals", (EMN) 2017, 31; Reference is made to Kamerstukken II, 2014-2015, 30573, nr. 127.
[435] M. WIERSMA, "Het middelenvereiste bij gezinshereniging onder de Wet Momi", A&MR 2014/3, 139.

Aliens Decree was adapted by adding that the level of income is 'in any event' (i.e. not exclusively) sufficient if the sponsor's income is at least the gross statutory minimum wage.[436] The purpose of this addition was to establish that the amounts mentioned in Article 3.74 should be considered as reference amounts. With regard to durability, it was added to Article 3.75 of the Aliens Decree that the sponsor's income 'in any event' is durable if it remains disposable for one year at the time the application was received or the decision is made.[437]

However, the IND did not seem to make the required individual assessment even after these amendments.[438] The strict manner in which the resources requirement kept being assessed in family reunification cases in the Netherlands was criticized for a long time.[439] Critics claimed that the 'Chakroun' judgement was only observed in words but not in deeds.[440] It appeared that too little attention was given to the individual balance of interest when addressing the question whether the income was sufficient and durable.[441]

After this critique however, several judgements by the Dutch Council of State seemed to make greater demands for an individual examination.[442] The Council for instance considered that the assessing authority gave too little attention to the specific situation of the application as required by the Family Reunification Directive and confirmed by the ECJ in 'Chakroun'.[443] The Council confirmed this approach in a later judgement by concluding that the manner in which the application was refused by only referring to general policy rules does not meet the required individual examination under 'Chakroun'.[444] *In casu*, the authorities had failed to take into account the applicant's compensation for voluntary work when assessing the situation of the applicant and the sponsor. [445] It could be called remarkable that it took five years before this element of the 'Chakroun' judgement was taken into account by Dutch case law.[446]

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[436] Besluit van 24 juli 2010 tot wijziging van het Vreemdelingenbesluit 2000 in verband met Richtlijn 2003/86/EG van de Raad van 22 september 2003 inzake het recht op gezinshereniging (PbEU L 251), Stb. 30 July 2010, 306.
[437] Art. 3.75, §1 Aliens Decree 2000.
[438] M. WIERSMA, "Het middelenvereiste bij gezinshereniging onder de Wet Momi", A&MR 2014/3, 139.
[439] M.A.K. KLAASSEN AND G.G. LODDER, "Kroniek Gezinshereniging. Januari 2014 – december 2015", A&MR 2016, nr. 1, 36.
[440] M. WIERSMA, "Het middelenvereiste bij gezinshereniging onder de Wet Momi", A&MR 2014/3, 132.
[441] College voor de Rechten van de Mens, "Gezinnen gezien? Onderzoek naar Nederlandse regelgeving en uitvoeringspraktijk in het licht van de Europese Gezinsherenigingsrichtlijn", Utrecht, 2014, 50.
[442] M.A.K. KLAASSEN AND G.G. LODDER, "Kroniek Gezinshereniging. Januari 2014 – december 2015", A&MR 2016, nr. 1, 36.
[443] ABRvS 10 March 2015, ECLI:NL:RVS:2015:839, para. 5.4, reference is made to para. 48 of 'Chakroun'.
[444] ABRvS 22 June 2015, ECLI:NL:RVS:2015:2086, para. 4.
[445] ABRvS 22 June 2015, ECLI:NL:RVS:2015:2086, para. 4.1.
[446] M.A.K. KLAASSEN AND G.G. LODDER, "Kroniek Gezinshereniging. Januari 2014 – december 2015", A&MR 2016, nr. 1, 36.

The durability of the resources

Since 'Chakroun' Article 3.75 (1) of the Aliens Decree stipulates that the sponsor's income 'in any event' is durable if it stays disposable for one year at the time the application was received or the decision is made.[447] By derogation from paragraph (1), Article 3.75 (3) determines that if there is no guaranteed income for at least one year, a working history of at least 3 years could possibly offer relief.[448]

As a consequence of the 'Khachab' judgement an important significance is attributed to the individual assessment of the durability of the sponsor's income. The Netherlands are allowed in principle to require a guaranteed income of the sponsor of minimum one year. An application may however not be automatically refused if this is not the case. The wording in Article 3.75 (1) of the Aliens Decree that the sponsor's income 'in any event' is durable if it stays disposable for one year, allows for this. The requirement of Article 3.75 (3), that the income from labour in other circumstances can only be durable if there is a work history of three years could however not be in accordance with the Family Reunification Directive since it does not allow this individual assessment. In this respect it must be remembered that the European Guidelines determine that Member States are encouraged to take the realities of the labour market into account and not to refuse an application of a sponsor with a temporary employment contract automatically, when they decide on the durability of an income.[449]

In response to 'Khachab' the Dutch Council of State has considered the durability of the income requirement in several judgements.[450] The Council has for instance considered the refusal for family reunification with a sponsor who had recently graduated as a teacher. She did not have a tenured position yet and did not comply with the requirement to have had sufficient income during the past three years.[451] According to the Council the IND had not sufficiently considered the recent graduation of the sponsor and the realistic prospective that she would be offered a permanent position in the near future. Therefore, the IND had failed to demonstrate that an assessment of the specific circumstances of the sponsor had been performed.

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[447] Art. 3.75, (1) Aliens Decree 2000.
[448] Art. 3.75, (3) 2000 Aliens Decree 2000.
[449] COM (2014) 210: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for application of Directive 2003/86/EC on the right to family reunification, 13.
[450] M.A.K. KLAASSEN AND G.G. LODDER, "Kroniek Gezinshereniging 2016-2017", A&MR 2017, nr. 10, 487.
[451] ABRvS 6 July 2016, ECLI:NL:RVS:2016:1998, JV 2016/226, para. 2.9.

In another judgement, the Council considered whether paragraphs (1) and (3) of Article 3.75 Aliens Decree 2000 are in violation with the Family Reunification Directive.[452] The judgement concerned a sponsor who had an employment contract that remained valid for six months after the application. Since this is shorter than the year, as required by Article 3.75 (1), he had to demonstrate that he had complied with the resources requirement for the past three years on the basis of Article 3.75 (3). According to the Council the requirement to demonstrate the availability of the income up to a year after the application is in line with the Directive since Article 3.75 (3) offers an alternative when this requirement is not met. Concerning the compatibility of paragraph 3 with the Directive, the Council considers both the moment at which the reference amount is measured and the required period of three years. The Council finds that the elements of this provision are only compatible with the Directive when they are duly motivated by the IND.

To reassure the compatibility of the durability requirement of the income with the Directive, the legislator has adopted a new evaluation framework in the Aliens Regulation 2000.[453] Article 3.24b of the Regulation stipulates: 'In addition to Article 3.75 (1) of the Decree, the income from employment is also durable in the context of family reunification, if at the time when the application is received or the decision is made, it is demonstrated that for a continuous period of one year sufficient resources have been acquired from employment and that these resources will continue to exist for another six months.'

It should be noted that in addition to the assessment of the resources one year prior to the application, it should also be demonstrated that these resources continue to be available for six months after the application.[454] This is in contrast with Article 3.75 (3) that only requires that the resources are 'still available'. Since this provision concerns sponsors who do not comply with the requirement of an employment contract of one year on the basis of Article 3.75 (1), it is very likely that in practice these applicants have a flexible employment contract which will neither meet the requirements of Article 3.34b of the Aliens Regulation 2000.[455] In this light the individual assessment, as required by Article 17 of the Family Reunification Directive, remains highly relevant for the application of the durability requirement in the Netherlands.

[452] ABRvS 21 September 2016, ECI:NL:RVS:2016:2584, JV 2016/289 with annotation of M. WIERSMA.
[453] Kamerstukken II 2016-17, 32 175 nr. 63.
[454] M.A.K. KLAASSEN AND G.G. LODDER, "Kroniek Gezinshereniging 2016-2017", A&MR 2017, nr. 10, 487.
[455] Ibid.

Whose income should be taken into account?

With regard to the independency of the resources the District Court of The Hague has considered the question whether, in addition to the income of the sponsor, the income of the applicant should also be taken into account when assessing the resources requirement. According to the court not taking into account this income undermines the objective and the 'effet utile' of the Family Reunification Directive.[456]

Integration Measures

One of the most significant differences with the Belgian conditions for family reunification between third country nationals, is the pre-entry civic integration examination which is required under Dutch law. In March 2006, the Law on integration abroad entered into force ('Wib').[457] This condition entails that the family member who wants to reunite with the sponsor in the Netherlands, must have passed the civic integration examination abroad. The test examines basic knowledge of the Dutch language and of Dutch society.[458] There are a number of exceptions to the obligation to participate in the civic integration programme abroad. Family members under the age of 18, family members from certain countries with which the Netherlands has an agreement, and EU long-term residents, are for example exempted from the obligation.[459] In addition, family members who cannot participate in the civic integration examination abroad can be absolved from the obligation, on the basis of special individual circumstances.[460]

From the 'Dogan' judgement it could have been concluded that the Dutch civic integration exam would probably not pass a test by the ECJ. The exam did not leave enough room for an individual assessment.[461] The same conclusion could have been drawn from an analogous interpretation of 'Chakroun', in which the ECJ considered that Article 7 (1) (c) of the Family Reunification Directive needs to be interpreted strictly.[462]

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[456] Rb. Den Haag (seat Middelburg) 25 November 2016, ECLI:NL:RBDHA:2016:14395, JV 2017/57 with annotation of M. WIERSMA, para. 10.
[457] Wet van 22 december 2005 tot wijziging van de Vreemdelingenwet 2000 in verband met het stellen van een inburgeringsvereiste bij het toelaten van bepaalde categorieën vreemdelingen (Wet inburgering in het buitenland), Stb. 31 January 2006, 28.
[458] Art. 16 (1) (h) Aliens Act and art. 3.98a Aliens Decree 2000; The test consists of three parts: Knowledge of Dutch society, speaking skills and reading skills at level A1. See: https://www.naarnederland.nl/en/the-exam (Consulted on 25/04/2018)
[459] For a complete list of exemptions see: https://ind.nl/Paginas/Basisexamen-inburgering-in-het-buitenland.aspx (Consulted on 25/04/2018)
[460] Art. 3.71a (2) (c) Aliens Decree 2000; Par. B1/4.1 Aliens Act Implementation Guidelines 2000.
[461] 'Dogan', para. 38.
[462] 'Chakroun', para. 43.

The 'K and A' judgement provided an answer to this uncertainty on the Dutch civic integration exam. The ECJ decided that the obligation of a civic integration exam as a pre-entry requirement to the Netherlands was in line with the Family Reunification Directive. However, the costs of the test were too high and the hardship provision was too strict. The first reaction to the judgement which was ruled on 9 July 2015 came in December 2015 with a letter from the Minister of Social Affairs and Employment.[463] The Minister introduced the amendments which would be taken following the 'K and A' judgement. The prognosis was made to publish these amendments at the latest on 1 July 2016. The new rules would however already be applied in practice.

Hardship clause

The new hardship clause was eventually implemented in Article 3.71a (2) (c) and Article 3.98a of the Aliens Decree and Paragraph B1/4.1 Aliens Act Implementation Guidelines 2000.[464] The new provisions determine that the application for a limited residence right is not refused when the applicant has not passed the civic integration exam due to special individual circumstances which make it impossible or very difficult to exercise his/her right for family reunification. The assessment of these circumstances will be made by the Minister of Social Affairs and Employment. The elements which have to be taken into account for this assessment are included in the Aliens Act Implementation Guidelines. In the guidelines, the words of the Court were almost literally inserted.[465] All aspects of the individual situation must be taken into account together with the efforts to pass the examination when assessing whether the duty to pass the exam must be upheld, so as to prevent family reunification from becoming impossible or excessively difficult.[466] A non-exhaustive list of aspects which could be considered as specific individual circumstances is also included.[467] It is no longer required that only a combination of circumstances could lead to exemption.[468]

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[463] See Minister of Social Affairs and Employment, "Evaluatie Wet inburgering in het buitenland; Brief regering; Basisexamen inburgering buitenland", Kamerstukken II, 2015-2016, 32005, nr. 8.
[464] Besluit van 13 oktober 2016 tot wijziging van het Vreemdelingenbesluit 2000, Stb. 2016, 408; See *Staatssecretaris van Veiligheid en Justitie,* "Regeling van 19 Februari 2016, nr. 736437, houdende wijziging van het Voorschrift Vreemdelingen 2000 (honderdtweeenveertigste wijziging)", Stc. Nr. 9932 of 24 Feb. 2016; Besluit van de Staatssecretaris van Veiligheid en Justitie van 7 december 2015, nummer WBV 2015/22, houdende wijziging van de Vreemdelingencirculaire 2000, Stc, Nr.45363, 23 December 2015.
[465] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A", Common Market Law Review 53, Kluwer Law International, 2016,
[466] Par. B.1/4.7 Aliens Act Implementation Guidelines 2000.
[467] Examples: having a mental or physical impediment; an unsafe situation in the country of origin; the unavailability of course material suitable for the foreigner,…
[468] K. DE VRIES and L. MEIJER, "Inburgering in het buitenland en gezinshereniging", *Verblijfblog*, 2016, (Consulted on 5 May 2018). (hereafter: K. DE VRIES and L. MEIJER, "Inburgering in het buitenland en gezinshereniging".

After this adaptation, there could however still be a problem because it is the applicant's responsibility to argue that he/she does not need to pass or sit the integration exam.[469] There is no *ex officio* test by the Dutch authorities.[470] Future cases will have to tell whether this standard is sufficient to ensure that the Dutch rules are appropriate to guarantee the right to family life under the Family Reunification Directive. The Court's insistence on taking into account the individual circumstances of cases in the field of family migration suggests that the Dutch lack of an *ex officio* examination of the individual circumstances make the adapted rules still insufficient under the standard required by the Court. [471] Germany, for instance, as one of the other Member States which applies pre-departure integration conditions, has such a general rule connecting the civic integration requirement to an individualised examination of whether it can be required, as part of a system with three alternative avenues for an exception based on hardship.[472]

Concerning the consequences of the new hardship clause it is interesting to take a look at the evolution of the number of applicants who resorted to this exception.[473] It appears from these numbers that approximately half of the requests on the basis of the old hardship clause failed. The expansion of the grounds for which third country nationals can receive exemption led to a significant increase in the number of requests for exemption after the adaptions to the hardship clause were made in 2016. Again, about half of the requests were successful, which means that in total there is a clear increase of successful exemptions.

Period	Exemption	No exemption	Not substantively dismissed	Total received
2011-1	10	10	-	20
2012-1	30	30	-	60
2013-1	40	40	-	80
2014-1	70	50	-	110
2015-1	70	90	-	160
2016-1	150	110	20	270
2017-1	110	120	10	240
Total	**480**	**450**	**30**	**930**

[469] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A", 1084.
[470] K. DE VRIES and L. MEIJER, "Inburgering in het buitenland en gezinshereniging".
[471] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A", 1084.
[472] D. THYM, "Towards a contextual conception of social integration in EU immigration law: Comments on P & S and K & A", 18 European Journal of Migration and Law, 2016, 92–93, reference is made to D. THYM, 'Sprachkenntnisse und Ehegattennachzug', 34 Zeitschrift für Ausländerrecht und Ausländerpolitik, 2014, 304–305.
[473] Monitor basisexamen inburgering buitenland 2017-1, onderzoeks- en adviesbureau Significant in opdracht van het ministerie van Sociale Zaken en Werkgelegenheid, 2017, 26. Table 1: Overview request for granting exemption Wib starting from the first half of 2011

Another question which can be raised in light of the 'K and A' judgement, is whether the new policy provides adequate scope to exempt illiterate and very low-educated third country nationals, for whom the civic integration examination abroad is an important barrier to family reunification.[474] This barrier was already further increased in 2011 with the introduction of the 'GBL test'.[475] Since then, the exam includes not only an oral proficiency part, but also a literacy and reading comprehension test. Simultaneously with the introduction of this test, a literacy course was included in the self-study package.[476]

When introducing the GBL test, the government took the stance that with help of the self-study package, the test should also be feasible for illiterate and low-educated persons. [477] Therefore, neither illiteracy nor a low level of education were considered an autonomous ground for exemption. In the new policy, this has not changed. Level of education and illiteracy are mentioned as specific individual circumstances, which, whether or not in combination with other grounds, could lead to exemption.[478] However, to be exempted it is ultimately decisive whether the foreigner has made demonstrable efforts to pass the exam.[479] In that context, the provision also mentions that the freely available (online) self-study package contains a literacy course and that being literate is not necessary to pass the oral proficiency test and the test on Dutch society.[480]

Even illiterate or very low educated persons will in principle have to take the exam (several times) before it is assumed that they cannot pass it. In 'K and A' the Court did not consider this possible ground for exemption. However, the judgement does leave room to determine, in a possible future judgement, that family reunification in such circumstances becomes 'impossible or excessively difficult'.[481]

The court of Utrecht has considered the new hardship clause in the case of a Moroccan applicant who claimed that she had to be exempted from the civic integration exam requirement because she is illiterate and suffers from psychological distress.[482] The court agreed with the decision of the IND that stipulated that on the basis of medical circumstances it was not demonstrated that the applicant is permanently incapable to comply with the civic integration requirement. *In casu* the applicant had never taken the exam, nor prepared for it.

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[474] K. DE VRIES and L. MEIJER, "Inburgering in het buitenland en gezinshereniging".
[475] 'Toets Geletterdheid en Begrijpend Lezen'.
[476] K. DE VRIES, "VREEMDE VERWANTEN: Inburgering in het buitenland en het recht op gezinsleven", NJCM-bulletin: Nederlands tijdschrift voor de mensenrechten, 2014, 39(4), 421-422.
[477] K. DE VRIES and L. MEIJER, "Inburgering in het buitenland en gezinshereniging".
[478] Par. B.1/4.7 Aliens Act Implementation Guidelines 2000.
[479] Ibid.
[480] 'KNS' test: Kennis Nederlandse Samenleving.
[481] K. DE VRIES and L. MEIJER, "Inburgering in het buitenland en gezinshereniging".
[482] Rb. Den Haag (seat Utrecht), 28 December 2016, ECLI:NL:RBDHA:2016:16838.

Fees

Since the exam needs to be accessible for everyone, both financially as content wise, the costs for the exam were reduced.[483] The fees for the integration exam and the self-study package were reduced from €350 to €150 and from €110 to €25 respectively.[484] The digital version of the self-study package can be downloaded for free. [485] It is possible that these reduced costs for the exam alone, which are in addition to the application fees for family reunification, are still too high and continue to undermine the effectiveness of the Family Reunification and the right to family reunification.[486]

This is especially possible, in light of the ECJ's case law on application fees. Since fees between €200 and €800 to acquire a long-term residence permit were considered too high under Directive 2003/109[487], and the Italian fees of €80 and €200 to obtain a similar permit were disproportionate[488], it can be concluded that the costs for family reunification in the Netherlands are per definition higher than these fees. It will be a question for the Court to address whether it allows significantly higher fees in the context of family reunification. The strict line of upholding the *effet utile* of the Family Reunification Directive and the strict stance on financial requirements could suggest that the new fees for family reunification in the Netherlands are still too high.[489]

Application Fees

Since January 2018 the application fees for family reunification are: €240 (€237 in 2017) for married or unmarried partners, €51 (same in 2017) for the residence with a family member as a minor child.[490] As previously discussed these fees could be deemed disproportionate to the objective of the Family Reunification Directive, since they have to be considered in combination with the fee for the civic integration exam.

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[483] *Staatssecretaris van Veiligheid en Justitie*, "Regeling van 19 februari 2016, nr. 736437, houdende wijziging van het Voorschrift Vreemdelingen 2000 (honderdtweeenveertigste wijziging)", Stc. No. 9932 of 24 February 2016.
[484] Art. 3.11, sub. 2 and Art. 3.12 Aliens Regulation 2000.
[485] See *Staatssecretaris van Veiligheid en Justitie*, "Regeling van 19 februari 2016, nr. 736437, houdende wijziging van het Voorschrift Vreemdelingen 2000 (honderdtweeenveertigste wijziging)", Stc. No. 9932 of 24 February 2016.
[486] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A", 1083; M.A.K. KLAASSEN AND G.G. LODDER, "Kroniek Gezinshereniging. Januari 2014 – december 2015", A&MR 2016, nr. 1, 38.
[487] ECJ 26 April 2012, nr. C-508/10, ECLI:EU:C:2012:243, 'Commission v. Netherlands', paras. 56–77.
[488] ECJ 2 September 2015, nr. C-309/14, ECLI:EU:C:2015:523, 'CGIL and INCA', para. 31.
[489] M. JESSE, "Integration measures, integration exams, and immigration control: P and S and K and A", 1083.
[490] Art. 3.34, art. 3.34jb Aliens Regulation 2000.

Family Reunification between a Third Country National and a Union citizen

The Citizenship Directive is implemented in Articles 8.7 to Article 8.25 of the Aliens Decree 2000. The policy rules can be found in paragraph B10/2 of the Aliens Act Implementation Guidelines 2000.

The eligible family members can be found in Article 8.7 (2) of the Aliens Decree 2000. The list follows what is prescribed by Article 2 of the Citizenship Directive:

a. the spouse
b. the partner, with whom the Union citizen has a registered partnership which is valid according to Dutch international private law
c. the direct relative in the descending line, of the Union citizen, or those of his/her the spouse or registered partner, who are under the age of 21 or are dependent on that spouse or registered partner
d. the direct relative in the ascending line who is dependent on the Union citizen or on the family member as meant in a or b.

Other family members are also eligible when they accompany or join the Union citizen in the Netherlands:

a. if they are dependants or members of the household of the Union citizen in the state of origin; or
b. where serious health grounds strictly require the personal care of the Union citizen.[491]

The unmarried partner who accompanies or joins the Union citizen to the Netherlands is also eligible when he/she has a duly attested durable relationship, with the Union citizen. The direct relative in the ascending line of this partner, who is under the age of 18 and accompanies or joins this partner is also eligible.

The specific content of concepts such as ‘dependency’ and ‘durable relationship’ is implemented in B10/2 of the Aliens Act Implementation Guidelines 2000.[492] The Netherlands hereby complies with Article 3 (2) of the Citizenship Directive and the ‘Rahman’ judgement by ensuring that the Dutch legislation contains criteria that enables ‘other family members’ to obtain a decision on their

[491] Art. 8.7 (3) Aliens Decree 2000.
[492] Art. 8.7 (4) Aliens Decree 2000.

application for entry and residence that is founded on an extensive examination of their personal circumstances, and, in the event of refusal, is justified by reasons.[493]

Dependency

Concerning dependency B10/2 of the Aliens Act Implementation Guidelines 2000 stipulates that the IND assesses whether a family member, on the moment when the family remember requests family reunification with the Union citizen, in the country of origin of the family member or the country from which the family member came (i.e. not in the Netherlands), is materially supported by the Union citizen. This material support should be necessary and genuine.

For the direct relative in the descending line under the age of 21 and the direct relative in the ascending line the IND accepts in any case that material support is required when the family member is not (fully) providing for his/her own basic needs due to his/her economic or social situation. The reason why the family member relies on the material support is irrelevant. The IND also accepts in any case that the material support for these family members is genuine when the Union citizen has for at least one year continuously, regularly paid the family member a certain amount of money which is required for the family member to be able to provide for his/her own needs in the country of origin.

For the other family members meant in Article 8.7 (3) the IND only accepts that material support is required when the family member is not (fully) providing for his/her own basis needs and only accepts that the material support is genuine when the Union citizen has for at least one year continuously, regularly paid the family member a certain amount of money which is required for the family member to be able to provide for his/her own needs in the country of origin.

These clarifications on the concept of dependency are a clear transposition of the ECJ's case law in 'Lebon' (no need to determine the reasons for the support), 'Jia' (the need is assessed in the state of origin) and 'Reyes' (transfer of money is sufficient to demonstrate dependency).

Durable Relationship

In addition to Article 8.7 (4) of the Aliens Decree, the IND accepts that a durable relationship exists when the Union citizen and the unmarried partner prior to the application for scrutiny to EU-law or at the time of the decision, for a period of six months have had a communal household and lived together

[493] P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law in Ius Communitatis*, Antwerpen, Intersentia, 2014, 53-54.

during that time; or when they have a child together. In every case it should concern an existing durable relationship.

Sufficient resources requirement

The sufficient resources requirement is laid down in Article 8.12 of the Aliens Decree 2000. The Union citizen should have sufficient resources and a health insurance which covers medical expenses in the Netherlands for him/her-self and his/her family. The sponsor has in any case sufficient resources if he/she has an income that is higher than the reference amount mentioned in Article 3.74 of the Aliens Decree.

There is not much case law available on the issue of sufficient resources and its consequences in the Member States.[494] In the Netherlands, only a few court cases on this issue could be detected.[495] An interesting judgement in the context of family reunification was given by the Dutch Council of State on the issue of the granting of a residence permit.[496]

This case concerned a Dutch-Jordanian couple who had to stay in a Belgian hospital for a period of five months, due to an emergency medical treatment for the Dutch husband. The Jordanian wife had travelled to the Netherlands on a short-term visa just the day before the unexpected hospitalization of her husband. When they returned to the Netherlands the couple applied for a residence permit for the Jordanian wife. The application was rejected because due to a lack of sufficient resources during their stay in Belgium. The Council however annulled the refusal decision by referring to Article 8 (4) of the Citizenship Directive, arguing that the applicant's individual circumstances were not sufficiently taken into account. *In casu*, all the hospital costs had been paid by the husband's health insurance and the couple had not applied for any social assistance during their stay in Belgium.

In another case the District Court of The Hague considered the decision of the IND concerning a Moroccan woman who wanted to stay with her Spanish children in the Netherlands. [497] The IND had decided that her bank declaration of €8000 was insufficient to meet the resources requirement. The court ruled that the IND had wrongly not taken into account the fact that the woman received financial help of her sisters as well as the alimony for the children, paid by her Spanish former husband.

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[494] J. SHAW and N. SHUIBHNE, "General Report: Union Citizenship: Development, Impact and Challenges" in U. NEERGAARD, C. JACQUESON and N. HOLST-CHRISTENSEN (eds), *Union Citizenship: Development, Impact and Challenges*, The XXVI FIDE Congress in Copenhagen, Copenhagen: DJØF Publishing, 2014, 91. This is based on the information of the national reports written for the 2014 FIDE conference on Union Citizenship.

[495] P. MINDERHOUD, "Sufficient resources and residence rights under Directive 2004/38", Nijmegen Migration Law Working Papers Series: 2015/03, 11.

[496] ABRvS 12 November 2009, ECLI:NL:RVS:2009:BK3910.

[497] Rb. Den Haag (Middelburg) 18 September 2014, ECLI:NL:RBDHA:2014:11638.

According to the court, the 2009 Commission's guidelines clearly forbid the requirement of a fixed standard.[498]

Concerning the origin of the resources the Dutch Council of State considered the case of a German minor.[499] His financial means were supported by his Turkish father, who did not have a regular income himself, but received a monthly donation of €800 from an Islamic foundation. The IND had rejected the application for a residence permit because the child did not have sufficient resources of his own. In line with the ECJ's case law in 'Zhu and Chen' the Council found that the origin of the resources is not relevant for the decision on the right of residence in the Netherlands. *In casu*, the Council considered that the monthly donation, even with the amount being below the threshold of the Dutch social assistance benefit, should be seen as sufficient resources.

From these cases it can be concluded that the IND tend to apply a fixed amount at the level of a social assistance benefit to assess the sufficient resources requirement. Hereby, the IND does not take into account the personal situation of the individual concerned as required by Article 8 (4) of the Citizenship Directive. However, the courts do take into account these circumstances and tend to accept a lower amount of money to fulfil the condition of sufficient resources.[500]

Family Reunification between a Third Country National and a 'mobile' Dutch citizen

Concerning the family reunification between a third country national and a Dutch citizen who has exercised his/her right to free movement it is interesting to look at the developments after the 'O and B' and the 'S and G' cases. In both cases the ECJ had left the final decision on granting a residence right to the applicants for the Dutch authorities to decide.

In the cases of 'O and B' the Dutch Council of State followed the ECJ's finding that a Union citizen who has exercised his/her right on the basis of Article 6 (1) of the Citizenship Directive did not have the intention to create or strengthen family life in the host Member State.[501] In the case of O. the Council considered that for a residence of less than three months in the host Member State there is under no circumstances a derived residence right on the basis of Article 21 (1) TFEU for the third country national family members on return in the Netherlands.[502] The same was considered in the case

[498] COM/2009/0313 final, para. 2.3.1.
[499] ABRvS 3 September 2013, ECLI:NL:RVS:2013:1068.
[500] P. MINDERHOUD, "Sufficient resources and residence rights under Directive 2004/38", Nijmegen Migration Law Working Papers Series: 2015/03, 11.
[501] 'O and B', para. 52.
[502] ABRvS 20 August 2014, ECLI:NL:RVS:2014:3179, para. 4.3.

of B where there had never been a continuous period of residence of longer than three months, *in casu* the sponsor had visited B in Belgium only during the weekends, therefore there could not be a derived residence right for B in the Netherlands.[503]

After the decision in 'O and B', the Dutch Council of State made some other judgements in the same context. For instance, the Council considered that the authorities may require that there has been residence in another Member State for more than three months, and that next to administrative proof such as a residence card there should be required factual evidence proving that there has been a residence of more than three months in another Member State.[504]

The question which remained for the national court to decide after 'S and G' was whether it is necessary for the Dutch sponsor to be able to exercise his/her right to free movement that a residence right is granted to his/her third country national family member. Hereby the mere fact that it might be desirable that the third country national family member takes care of the children, is not sufficient in itself to accept that the residence is necessary to exercise the right to free movement by the sponsor.[505]

The Dutch Council of State did not consider it necessary for the Dutch sponsor in S. to exercise his right to free movement that the mother-in-law stays with the family.[506] The residence of the mother-in-law is not required since the children could also stay in day care while their parents are working. In the case of G. the state secretary revoked the appeal before the Dutch Council of State after the judgement by the ECJ. It is possible that after examining the judgement the State Secretary is of the opinion that the residence of the spouse is necessary for the sponsor to be able to continue to work in Belgium.[507]

The relationship between a residence of less or more than three months (see Article 6 and 7 of the Citizenship Directive) and creating or strengthening family life is however nog completely clear yet.[508] It is not unthinkable that even during a residence of less than three months family life has been created or strengthened. No judgements on this matter were found.

In B10/2 of the Aliens Act Implementation Guidelines 2000 the residence right for the family member upon return of a Dutch citizen who has exercised his/her right to free movement, is now included

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[503] ABRvS 20 August 2014, ECLI:NL:RVS:2014:3184, para. 5.3, 5.4.
[504] ABRvS 19 February 2015, ECLI:NL:RVS:2015:526, para. 3.5; ABRvS 12 August 2015 ECLI:NL:RVS:2015:2669, para. 3.2.
[505] 'S and G', para. 43.
[506] ABRvS 20 August 2014, ECLI:NL:RVS:2014:3172, para. 6.4.
[507] M.A.K. KLAASSEN AND G.G. LODDER, 'Kroniek Gezinshereniging. Januari 2014 – december 2015', A&MR 2016, nr. 1, 38.
[508] Ibid.

under a separate paragraph. The paragraph stipulates the conditions to derive a residence right from Article 21 (1) TFEU. The Dutch sponsor and the family member need to have:

- effectively resided in another Member State of the EU;
- during the whole period of this residence they should have complied with the conditions mentioned in Article 7 (1) or (2) or in Article 16 of the Citizenship Directive; and
- during the residence have created or strengthened family life.

The IND only assumes that family life has been created or strengthened when there was an effective, continuous residence in another Member State of at least three months.

Family Reunification between a Third Country National ascendant and a 'static' minor Dutch citizen

The Aliens Decree 2000 has a strict interpretation of the notion 'family member'. The possibility to grant a residence permit to family members other than the spouse, partner or minor children was deleted from the Decree in 2012.[509] Consequently, the third country national parent who wants to reside in the Netherlands with his/her Dutch child is not considered a family member under Article 3.14 of the Aliens Decree. The minor child is not eligible as a sponsor due to the minimum age requirement of 21.[510] A third country national parent can therefore not be granted a temporary regular residence permit on the basis of Article 3.13 (1) Aliens Decree 2000. The only possibility for that parent would then be to rely on the discretionary competence of the Minister and argue the violation of the right to family life of Article 8 ECHR.[511] In practice however, it has proved to be difficult for the third country national parent to be granted a residence right based on Article 8 ECHR since the State has a wide discretion to make this decision and there is often a possibility for family life in the state of origin.[512] This means that the only possibility left would be to derive a residence right from the Union citizenship of the minor child.

Following the 'Ruiz Zambrano' judgement a EU policy concerning the derived residence right of a third country national parent from his/her Union citizen minor child was developed. In the

[509] Stb., nr. 148, 27 March 2012.
[510] Article 3.15 Aliens Decree 2000.
[511] Article 3.13 (2) Aliens Decree 2000 stipulates that the Minister has the possibility to grant a regular residence permit even if the conditions of Article 3.16 to 3.22 (a) Aliens Decree 2000 are not met and the refusal would contravene the right to family life of Article 8 ECHR. See: M.A.K. KLAASSEN AND G.G. LODDER, 'Kroniek Gezinshereniging. Januari 2014 – december 2015', A&MR 2016, nr. 1, 34-35.
[512] Report: College voor de rechten van de mens, 'Gezinnen gezien? Onderzoek naar Nederlandse regelgeving en uitvoeringspraktijk in het licht van de Europese Gezinsherenigingsrichtlijn', Utrecht, College voor de rechten van de mens, 2014, 50.

Netherlands, this right is currently included in paragraph B10/2.2 of the Aliens Act Implementation Guidelines 2000.[513]

In the following section the possibility for third country national parents to derive a residence right from the Union citizenship of their child in the Netherlands, will be analysed. The analysis is divided into two parts. In the first part the Dutch legislation and interpretation after 'Ruiz Zambrano' and subsequent cases will be discussed. The second part concerns the changes that had to be made after the 'Chavez Vilchez' judgement.

Ruiz Zambrano and subsequent cases

The day after the 'Ruiz Zambrano' five political parties already posed questions in the parliament on the impact of the judgement for the Netherlands.[514] Not much later the stance of the Minister of Immigration and Asylum at the time was published. He addressed the question whether the situation in 'Ruiz Zambrano' also occurs or could occur in the Netherlands.[515] The Minister considered that, due to the Dutch legislation on nationality[516], a situation such as in 'Ruiz Zambrano', with two third country national parents and a Dutch citizen child, could only occur in exceptional circumstances. These parents would however, be granted a residence right in line with the judgement.

Even though it appears from 'Dereci' that the residence rights under Article 20 TFEU are limited, the application of the 'genuine enjoyment' criterion does not seem limited to situations with young children since the ECJ mentions 'the Union citizen' in a general sense. However, one of the characteristics of the Dutch case law on derived residence rights based on the 'genuine enjoyment' criterion is, that they almost always concern a family that consists of a third country national parent, a Dutch citizen parent and a Dutch child (or children). The question then arises whether both parents have to be present, so that the Union citizen child can reside in the territory of the Union.

Immediately after the judgement there were also cases concerning family situations without minor children.[517] For instance, the derived residence right was refused to a third country national who had a

[513] These policy rules are a supplement to or an elaboration of Articles 8.7 to 8.25 Aliens Decree 2000.
[514] H. VAN EIJKEN, "Ruiz Zambrano the aftermath: de impact van artikel 20 VWEU op de Nederlandse rechtspraak", NtEr, 2012, nr. 2, 41.
[515] Kamerstukken II 2010/11, 19 637, nr. 1408, Brief van de minister voor Immigratie en Asiel van 31 maart 2011.
[516] In view of Article 6, §1, introductory wording and under b of the Law on Dutch citizenship at the time, it was not possible for children in the situation such as in the judgement to acquire Dutch citizenship.
[517] H. VAN EIJKEN, "Ruiz Zambrano the aftermath: de impact van artikel 20 VWEU op de Nederlandse rechtspraak", NtEr, 2012, nr. 2, 42.

relationship with a Dutch citizen.[518] In another case, the 'Ruiz Zambrano' exception was unsucesfully invoked in a case concerning the difference in fees for family reunification.[519]

Interpretation by the Dutch Council of State

In four judgements on 7 March 2012, the Dutch Council of State, set the tone on how the 'Zambrano-criterion' should be applied in cases with a minor Dutch citizen.[520] The cases concerned both situations with only a third country national parent, as well as families with one third country national parent and one Union citizen parent. The cases also differed in the relationship between the parents. In two cases the parents were married.[521] In one case the husband was deceased and the mother and the children lived together in Indonesia.[522] In another case the place of residence of the Dutch father, who was not involved in the upbringing and care of the minor, was unknown.[523]

The conclusion that can be drawn from these rulings is that when it is possible to identify the location of a parent, the Dutch Council of State would only accept that there is a relationship of dependency between the third country national parent and the minor Union citizen in very exceptional circumstances. According to the Dutch Council of State it needs to be assessed whether the minor has no other option than to leave the territory of the Union with the third country parent.[524] This interpretation seems stricter than the criterion used in 'Dereci', which referred to the Union citizen being 'in fact' forced to leave the territory of the Union. It could be better to use the 'Dereci' criterion since the minor child is not in the position to make a choice.[525]

In addition, the Dutch Council of State considers it not sufficient that a parent is not able to care for the child due to a reduced fitness for work and psychological problems. According to the Council it has to be demonstrated that a parent is not able to take care of a child without the help and support of third parties, such as social institutions. The members of such a family are expected to make use of the

[518] Ibid., Rb. 's-Gravenhage, (Haarlem), 26 April 2011 (voorlopige voorziening) LJN BQ5774.
[519] Ibid., Rb. 's-Gravenhage, 24 June 2011, LJN BR0696.
[520] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV9924; ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8623; ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8619 with annotation of T. DE LANGE and P.R. RODRIGUES; ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8631.
[521] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV9924, para. 2.2; ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8619 with annotation of T. DE LANGE and P.R. RODRIGUES, para. 2.5.4.
[522] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8631, para. 2.1.
[523] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8623, para. 2.3.1.
[524] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8619 with annotation of T. DE LANGE and P.R. RODRIGUES, para. 2.5.3.
[525] Ibid., annotation para. 5, reference is made to 'Dereci' para. 66.

possibility to claim benefits and receive help if this could prevent a Union citizen from, in fact, being forced to leave the territory of the Union.[526]

In subsequent cases, the Dutch Council of State confirmed that families with a Union citizen parent, a third country citizen parent and a minor Union citizen child, should make use of the possibility to receive social assistance and help if this could prevent a Union citizen from being forced to leave, not only the Netherlands, but the territory of the Union as a whole. According to the interpretation of the Council, a Union citizen will only be deprived of his/her right to reside in the Union, if the third country national parent demonstrates that the other parent is factually not able to take care of the child. This means that even when that parent relied on social assistance and help, it would cause the residence of the child with that parent in the Netherlands or in the Union, without the third country national parent to be essentially impossible. In that situation, the child would be forced to follow the third country national parent, outside the territory of the Union.[527]

Even the situation in which the third country national parent argues that he/she takes care of the minor Union citizen child since he/she provides for the child's livelihood, is not specific enough to prove that the Union citizen parent, with or without receiving social assistance and help, is not able to take care of the minor Union citizen child.[528]

However, in certain circumstances the Dutch Council of State does consider a Union citizen parent to be unable to take care of his/her minor Union citizen. For instance, when that parent is deceased[529] or in prison,[530] or when it is not possible to locate that parent[531]. The Council also accepts that a Union citizen parent is, even with the help of third parties, not able to take care of a minor Union citizen if chances are high that the minor would be placed into care due to the parent's psychological or physical

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[526] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV9924, para 2.3.4 en ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8619, para 2.5.4.
[527] ABRvS 24 April 2012, ECLI:NL:RVS:2012:BW4298, para. 2.5.4; ABRvS 15 November 2012, ECLI:NL:RVS:2012:BY4039, para 2.3, ABRvS 10 July 2012, ECLI:NL:RVS:2012:BX1345, para 2.4.2, ABRvS 8 August 2013, ECLI:NL:RVS:2013:131, para. 4.1; ABRvS 1 October 2013, ECLI:NL:RVS:2013:1417, para. 5.4.
[528] ABRvS 24 April 2012. ECLI:NL:RVS:2012:BW4298, para. 2.3.4; ABRvS 19 February 2013, ECLI:NL:RVS:2013:BZ2060, para. 4.6.
[529] ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8631, para. 2.7.9.
[530] ABRvS 10 July 2012, ECLI:NL:RVS:2012:BX1345, para. 2.4.5; ABRvS 31 December 2013, ECLI:NL:RBDHA:2013:19094, para. 5.6.
[531] ABRvS 7 Maart 2012, ECLI:NL:RVS:2012:BV8623, para. 2.3.8.

problems.[532] In case of domestic violence, a Union citizen parent is not deemed to be able to take care of his/her child.[533]

The Council also considered the role of custody in families which consists of a third country national parent and a Union citizen parent. In several cases the Council has ruled that the mere fact that the Union citizen parent does not have custody over the children is insufficient in itself, if the third country national parent has not demonstrated that the Union citizen parent could have that joint custody.[534] It follows from these cases that the Council only considers the potential joint custody over the child(ren), the actual custody is not considered relevant.

Paragraph B2/10 Aliens Act Implementation Guidelines 2000

The 'Ruiz Zambrano' and 'Dereci' judgements and the early case law by the Dutch Council of State were included in the Dutch policy by December 2012.[535] A new paragraph was added to the Aliens Act Implementation Guidelines 2000 in which the conditions for the residence right of a third country with a minor Dutch child were taken up.[536] The conditions to be granted a residence right were that the third country national had a Dutch child, that he/she had or would take up the care over the child and that the child would be forced to follow the third country national if he/she was refused a residence permit.[537] The minor is not forced to follow the third country national parent when there is a Dutch parent who is factually able to take care of the child, possibly with government support. Later, the legislator added that the Dutch parent can factually take care of the child if that parent does not have custody ('gezag') over the child and the third country national parent has not demonstrated that this custody could be granted to the Dutch parent.[538] It was also added that the Dutch parent cannot take care of the child when he/she is in prison. In 2014, the residence right for the third country national parent with a Union citizen minor was included in B10/2.2 Aliens Act Implementation Guidelines 2000.[539]

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[532] ABRvS 26 April 2013, ECLI:NL:RVS:2013:BZ9025, paras. 3.3, 6.4; ABRvS 2 September 2013, ECLI:NL:RVS:2013:1147, para. 3.6.
[533] ABRvS 20 April 2015, ECLI:NL:RVS:2015:1349, para. 1.3.
[534] ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4921, para. 2.3.4; ABRvS 17 October 2012, ECLI:NL:RVS:2012:BY0833, para. 5.6; ABRvS 3 April 2013, ECLI:NL:RVS:2013:BZ8706, para. 3.3; ABRvS 13 June 2013, ECLI:NL:RVS:2013:CA3615, para. 4.4.
[535] B2/10 Aliens Act Implementation Guidelines 2000; Stc, nr. 26248, 17 December 2012, 16.
[536] Par. B2/10 was added to the Aliens Act Implementation Guidelines 2000 with the title: 'Gezinshereniging van verzorgende ouder met Nederlands minderjarig kind' or 'Family reunification of a custodial parent with Dutch minor child'.
[537] Par. B2/10.1 Aliens Act Implementation Guidelines 2000; Stc,, nr. 26248, 17 December 2012, 16.
[538] Par. B7/3.9 Aliens Act Implementation Guidelines 2000; Stc., nr. 8389, 28 March 2013, 61
[539] Stc, nr. 8761, 25 March 2014.

Strict interpretation

After this implementation, the Dutch Council of State upheld its strict approach towards the application of the 'genuine enjoyment' criterion.

In another judgement by the Council the third country national mother had sole custody over her Dutch child for whom she had been taking care all her life.[540] The father had met his child for the first time in 2010. The child had by that time already reached the age of 12. Because these circumstances were not taken into account by IND, the Council found that they had unduly motivated their decision. It can thus be concluded that at the time that the third country national parent has already been taking care of the child for a long time, the child is no longer very young and there has been no contact between the Dutch parent and the child when the child was still young, a derived residence right for the third country national parent of the child exists.

In the case of a third country national mother who took care of her Dutch child by herself without any involvement of the Dutch father, the Council considered that there was no derived residence right.[541] *In casu* the mother had stated that she was no longer in contact with the father and that she did not know where he resided. The Council considers that the statement by the father of the child, which was submitted by the mother and which stated that he confirms that he cannot and is not willing to take care of the child because of his duties towards his current fiancé, does not imply that he is not factually able to take care of the child. Therefore, there should be no derived residence right for the mother.

When the Dutch child is a ward of the state (Stichting NIDOS[542]) but is factually taken care of by the Serbian mother and her partner, the Council considers that it is not the third country national and the partner of the other parent who can decide where the child should live, but the organisation which is the legal guardian. [543] For this reason, the argument by the authorities that the child could stay with the Dutch parent when the mother is deported failed.

This discussion leads to the conclusion that after 'Ruiz Zambrano' and its subsequent cases, the Council consistently held that when a child has one parent who is a Dutch national, that child can be expected to stay with that parent in order to prevent the situation of the child being forced to leave the territory of the Union. The given interpretation is that if there is a Dutch national parent, he or she, can be expected to take care of the child. It is up to the third country national parent to demonstrate that

[540] ABRvS 21 March 2014, ECLI:NL:RVS:2014:1197.
[541] ABRvS 6 June 2014, ECLI:NL:RVS:2014:2135, JV 2014/287 with annotation of CARDOL.
[542] An organisation for minor asylum seekers and aliens who arrive in the Netherlands without parents.
[543] ABRvS 4 December 2015, ECLI:NL:RVS:2015:3807.

the Dutch national parent is not able to take care of the child. The fact that the Dutch national parent may be unwilling to take care of the child is deemed to be of little relevance. According to the Council of State, the situation is different if the Dutch national parent is not able to take care of his or her child, for example because the parent concerned is in prison

Chavez Vilchez

As described, in the previous section, the Dutch Council of State interpreted the 'Ruiz Zambrano' case in a very restrictive manner. The factual presence of another Union citizen parent who, with or without the help and assistance of others, could in theory take care of the minor, is decisive. However, after the 'Chavez-Vilchez' case the Council's strict approach to determine whether a minor is forced to leave the territory of the Union, could no longer be maintained.

In a letter of 14 July 2017, the Dutch State Secretary set forth the consequences of the judgement on Dutch policy.[544] He confirmed that the current policy had to be adapted.

The State Secretary first commented on the 'burden of proof' requirement laid out in 'Chavez Vilchez'.[545] Since, the ECJ imposes the condition that even when the Dutch parent is able to and willing to care of the child, further examination needs to be executed to what can be summarized as the best interest of the child. Hereby, the burden of proof has, more than before, been shifted to the authorities.

He continued by confirming that even when a Dutch parent shows willingness to take care of the child, it needs to be determined whether the separation with the third country national parent will not have negative consequences on the child. According to the State Secretary this assessment will, more than before, lead to the granting of a residence right to a third country national parent.

Lastly, the State Secretary stated that in every case, the IND will have to keep making this examination. The third country national parent is required to provide all information necessary to determine whether the refusal of a residence right would force the child to leave the Union.

The announced policy change, entered into force on 1 October 2017.[546] Provision B10/2.2 of the Aliens Act Implementation Guidelines 2000 was adapted and new paragraphs were added. The provision now states that a third country national parent will be granted a derived residence right from his/her minor Dutch child, if there is a relation of dependency between the minor and the third country

[544] Kamerstukken II, 2016/17, 19 637, nr. 2338: 'Letter of the State Secretary of Security and Justice'.
[545] 'Chavez-Vilchez', paras. 74-75.
[546] Stc, nr. 53847, 15 September 2017.

national which would lead to the minor being forced to leave the territory of the Union if the third country national parents was refused a residence right. When assessing this relationship of dependency, the IND will consider all relevant circumstances and take into account the best interest of the child. These circumstances include in particular, the age of the child, its physical and emotional development, and the degree of its affective relationship with both the Dutch parent as the third country national parent, as well as the possible risks for the child if it would be separated from the third country national parent. It is assumed that such a relationship of dependency exists when the third country national parent actually performs care and/or educational tasks (irrespective of its extent and frequency).[547] Especially this last sentence shows that the scope of the policy has significantly broadened, which will presumably increase the success rate of applications by families with a Dutch parent, a Dutch child and a third country national parent.

In light of the recent developments after 'Chavez Vilchez' one relevant case has been found which considered the required presence of the applicant and the Dutch minor.[548] In this case the IND had ruled that, even though there were indications that the applicant could possibly derive a residence right on the basis of 'Chavez Vilchez', this should not be considered since the applicant was not present in the Netherlands. The IND held that the applicant should request a visa for the Netherlands and upon arrival make an application for this residence right.[549]

However, the court does not follow the IDN and considers that, as confirmed by the ECJ in 'Chavez Vilchez', the derived residence right is dependent on (in this case) the EU rights of the Dutch daughter of the applicant.[550] The question is thus whether the relationship of dependency between the applicant and his daughter would force the daughter to leave the territory of the Union if the applicant is refused a residence right. The court finds that the answer to this question does not depend on the presence of the applicant in the Netherlands. It is hereby relevant that this concerns a fundamental right, which would deprive the daughter of the effectiveness of her Union citizenship if it were violated.[551]

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[547] Par. B10/2.2, ad b., Aliens Act Implementation Guidelines 2000
[548] Rb. Den Haag, 6 November 2017, ECLI:NL:RBDHA:2017:12769, para. 7.1-7.4.
[549] This consideration could at the moment of writing still be found on the website of the IND: https://ind.nl/eu-eer/Paginas/Familieleden-met-een-andere-nationaliteit.aspx (Consulted on 11 May 2018).
[550] 'Chavez Vilchez', para 62.
[551] The court refers to its judgement of 7 March 2012, ECLI:NL:RVS:2012:BV863, para. 2.7.9. in which the Council considered that the 'Ruiz Zambrano' judgement also applies when both the minor Union citizens as the third country national parent are located outside the territory of the Union.

Conclusion

The Dutch legislation on family reunification consists of several legislative instruments but still remains comprehensive. On the one hand, the complementary instruments to the Aliens Act 2000 provide a clear, structured overview of the different regimes for family reunification, and on the other hand these clarify important concepts as established by the ECJ.

Concerning the family reunification between third country nationals it is especially the resources requirement that has been under debate in the Netherlands. After the 'Chakroun' judgement the Dutch legislator was obliged to make some changes in order to make the requirement in compliance with the Family Reunification Directive. However, it appeared from the case law just after the judgement that the required individual assessment was not consistently performed by the IND. The Dutch Council of State however summoned the IND to make this assessment in order to comply with the ECJ's case law. An interesting aspect of the Dutch resources requirement is the assessment of the 'durability' of these resources. In light of the 'Khachab' judgement, the Dutch Council of State has determined that even here an extensive individual examination is required. Article 3.75 (3) which determines that if there is no guaranteed income for at least one year, a working history of at least 3 years could possibly offer relief, could violate the Family Reunification Directive when the IND fails to duly motivate the specific circumstances on the basis of which it took its decision. Lastly, not much attention is given in the Netherlands to the question whether the applicant's income should also be taken into account when assessing whether the resources are sufficient. It seems clear from the case law that in light of the required individual assessment, these resources should be taken into account as well.

With regard to integration measures, the Netherlands had to make amendments to its legislation on the civic integration exam. A new hardship clause is now in place which no longer requires a combination of elements to be exempted from the obligation to take the exam. The new clause has led to an increase of requests for exemption. Even after the introduction of this new clause, questions could still be raised concerning the fact that there is no *ex officio* test by the authorities and whether the new clause provides adequate scope for illiterate persons. The new fees could still be considered too high, especially since these come on top of the application fee for family reunification.

Concerning family reunification with a Union citizen, Dutch legislation stands out with a comprehensive implementation of the ECJ's case law in its legislative instruments. Concepts such as 'a durable relationship' and 'dependency' are defined and the elements which the IND will take into account are mentioned. From the case law on the sufficient resources requirement it appears that the IND tends to apply a fixed threshold and does not always take into account the personal situation of the individuals concerned. The IND's decisions are however revised when these are brought before a court.

After the ‘O and B’ and the ‘S and G’ cases, the Dutch legislator implemented the elements which need to be considered when assessing ‘the exercise of free movement’. It is stated that the IND will only assume that family life has been created or strengthened when there was a continuous residence of at least three months in another Member State.

Following the ‘Ruiz Zambrano’ judgement the Dutch legislator and jurisprudence took a strict approach towards the application of the ‘genuine enjoyment’ criterion. Firstly, this appears from the fact that only situations with a third country national parent and a Union citizen child are considered. It is highly unlikely that situations with other family members would fall under the exception. Secondly, it is even for those third country national parents highly unlikely to be granted a residence right when there is another Union citizen parent present. The Dutch Council of State did not consider it relevant for instance that the Union citizen parent is not willing to take care of the child. The Council also held that help of third parties could prevent a Union citizen child from being forced to leave the territory of the Union, even when the third country national parent is refused a residence right. Only, when the Union citizen parent was deceased, in prison or untraceable, the Council considered that a residence right should be granted to the third country national parent. However, after ‘Chavez Vilchez’ this strict approach could no longer be hold on to. The Dutch legislator, was again quick to respond to this judgement and amendments were made. The burden of proof has now shifted even more to the authorities who need to demonstrate whether specific circumstances will force the child to leave the territory of the Union. Special consideration should be given to the level of dependency, and the affective relationship between the applicant and the child. It will have to appear from the development of the Dutch case law after this judgement whether the ECJ’s judgement is followed in practice.

Conclusion

It follows from the analysis that the interaction between European and national law is highly reflected in the uncertainties that exist on the interpretation of the right to family reunification. These uncertainties follow from the ECJ's case law on the requirements which may be imposed on the basis of the Directives but also from the ECJ's case law on derived residence rights. These uncertainties are reflected in the Member States' legislation, policy and case law.

With regard to legislation it follows from the comparison between the two Member States that in general the Dutch legislation on family reunification is more comprehensive and transparent than the Belgian legislation. Clear guidance is given on how the IND will make assessments. It is much less clear how DVZ operates in family reunification cases. Numbers are available but the guidelines they apply are not available. In light of the concepts introduced by the ECJ it is clear that the Dutch legislator has attempted to lay these down in legislation. In Belgium such an attempt is less apparent.

In light of the Member States' policy on family reunification a clear difference is apparent in that the Netherlands has a pre-entry integration requirement and Belgium does not. Even though the ECJ has considered that the Dutch civic integration exam does not violate the Family Reunification Directive, certain uncertainties remain. However, Member States are in this context given quite a significant freedom to impose integration measures for family reunification applicants. Another policy rule concerns the application fees for family reunification. Compared to Belgium, these fees are significantly higher in the Netherlands, since these need to be paid in combination with the fees for the civic integration exam.

With regard to the resources requirement for third country nationals it is clear that an individual assessment of the specific circumstances is required on the basis of 'Chakroun'. Even though there is not much uncertainty on the fact that this needs to be done, both IND and DVZ do not always seem to make this assessment. In light of the high amount of applications for family reunification it could be considered easier to apply a threshold, irrespective of other elements. Specific differences between the Member States are that in Belgium more attention is given to the fact whether or not the applicant's income should also be taken into account, DVZ seems to apply a higher threshold than the one which is laid down in legislation and there is discussion on who has the duty to submit information. In the Netherlands there has been a recent focus on the consequences of the 'Khachab' judgement.

Concerning the sufficient resources requirement for Union citizens the uncertainty to apply a certain threshold followed from the discussion prior to the adoption of the Citizenship Directive. Even though the Commission has made clear its interpretation on this requirement by now, the Member States seem to hold on to their initial will to be able to apply a threshold, against the guidance at the EU level.

From the discussion on the application of the 'genuine enjoyment' it can be concluded that the outcome in the Member States is similar but the path to this outcome differs. In both Member States is very unlikely that the exception will apply to other situations than the one where a third country national parent wants to derive a residence right from his/her minor Union citizen child. In Belgium the approach seems less strict when there is a Union citizen parent around as well than in the Netherlands. However, this strict approach might be taken down in the Netherlands as well, after the 'Chavez Vilchez' judgement. Before this judgement, the Netherlands put more focus on the help of third parties, custody and the will of a parent to take care of child. In Belgium on the other hand, elements such as a different address and a shared communal are given a lot of attention.

In conclusion it can be stated that Member States are confronted with a lot of uncertainties in the context of family reunification but the approach they take towards these uncertainties is often very different. However, the outcome might still be quite similar.

For further research it would be interesting to give attention to the consequences of the case law on Article 8 ECHR. Another interesting aspect which could not be discussed within the scope of this work is the element of measures taken in the context of family reunification with regard to public policy or public security.[552]

[552] See for example the following recent judgement: ECJ 2 May 2018, Joined Cases C-331/16 and C-366/16, ECLI:EU:C:2018:296.

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Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC

Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

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Belgium

Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 31 December 1980.

Koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen. BS 27 October 1981.

Wet van 15 september 2006 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 6 October 2006.

Wet van 25 april 2007 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 10 May 2007.

Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen voor wat betreft de

voorwaarden tot gezinshereniging van staatsburgers van niet-EU-landen, amendementen, 2010-2011, 0443/014.

Wet van 8 juli 2011 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen wat betreft de voorwaarden tot gezinshereniging, BS 12 September 2011.

Wet van 4 december 2012 tot wijziging van het Wetboek van de Belgische nationaliteit, BS 14 December 2012

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