The right to family unification

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Between migration control and human rights

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Table of Contents

Abbreviations

A-G	Advocate-General
A&MR	Asiel & Migrantenrecht
BVerfG	Bundesverfassungsgericht; Federal Constitutional Court
BVerwG	Bundesverwaltungsgericht; Federal Administrative Court
CD	Citizenship Directive
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Charter	Charter of Fundamental Rights of the European Union
CRC	Convention on the Rights of the Child
CJEU	Court of Justice of the European Union
CMLRev	Common Market Law Review
CRC	UN Convention on the Rights of the Child
ECHR	European Convention of Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECLRev	European Constitutional Law Review
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJML	European Journal of Migration and Law
ELRev	European Law Review
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDI	Immigration Directorate Instructions
FRD	Family Reunification Directive
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court

1 Introduction and methodology

1.1 Motivation for this study

The right to respect for family life is a recognised human right.[1] In many international and regional instruments, as well as in the constitutional traditions of most states, the right to respect for family life has a prominent position.[2] In the Universal Declaration of Human Rights, which is not a binding instrument of international law, the family is positioned as the natural and fundamental group unit of society. From this wide range of obligations, it can be derived that states may not arbitrarily interfere in family life.[3] There is, however, no single instrument or even provision in international (and regional) human rights law that protects the right to family unification: the right of family members to live together in one state. In this age of globalisation, in which more persons than ever have direct family members holding a different citizenship,[4] the question of whether there is a human right to family unification has become topical.[5] The right to family unification is closely linked to the right to respect for family life.[6] It is in fact an example of the right to respect for family life, like the right to marry for example. The right to family unification is the branch of the right to respect for family life that deals with families who seek to reside together in one state but who are limited in doing

1 In Art 16(3) UDHR and in Art 23(1) ICCPR the family is positioned as the natural and fundamental group unit of society that is entitled to protection by society and state.

2 See for instance Art 12 UDHR, Art 17 ICCPR and Art 8 ECHR.

3 See Art 17(1) ICCPR, which states that "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*" Similar, although not exactly the same, protection is provided for in Art 8 ECHR.

4 In this dissertation, the notion of citizenship is used to refer to a person holding the passport of a certain state. In this context, often also the term nationality is used. If, in this dissertation, a different meaning is ascribed to the notion of citizenship, this is mentioned in the text of the footnotes.

5 The terms 'human right to family unification' and 'right to family unification' are used interchangeably in this dissertation. Both terms are meant to refer to the 'human right to family unification'. Whenever this is not the case, this is specifically mentioned, or should be inferred from the context.

6 Cholewinski reported that "it is not such a significant step to take" from the protection of family life to the recognition of the right to family unification. Cholewinski R, 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right' (2002) 4 EJML p 275.

so by immigration law. Boeles reported in 2001 that a right to family unification has generally not been acknowledged, but nuanced this by referring to the constitutional traditions of several member states of the EU.[7]

In this dissertation, the existence of a human right to family unification is the object of inquiry. Based on an analysis of international and European human rights law, EU law and the domestic law of selected states, it is argued that a right to family unification exists as a branch of the right to respect for family life. There is ample scholarship on the issue of family unification.[8] Important research has been conducted on specific issues related to family unification, such as integration measures.[9] Others have focussed on the negotiation of EU legislation in the field of family unification.[10] From a historical perspective, policy making in the field of family unification in the Netherlands has been reported on extensively.[11] In a comprehensive country study, recent developments in the field of family unification in the United Kingdom were analysed.[12] On a more specific level relating to specific instruments, the case law of the European Court of Human Rights (ECtHR) has been analysed thoroughly on different aspects.[13] In the field of EU law, the interpretation of the Family Reunification Directive (FRD),[14] the impact of the Citizenship Directive on family unification law[15] and in general the fragmentation of EU family unification law have been examined.[16] From a philosophical perspective, the

7 Boeles P, 'Directive on Family Reunification: Are the dilemmas resolved?' (2001) 3 EJML.

8 Walter A, *Familienzusammenführung in Europa: Völkerrecht, Gemeinschaftsrecht, Nationales Recht* (Nomos 2009).

9 De Vries K, Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law (Hart 2013); Wehner M, *Der Sprachnachweis beim Ehegattennachzug von Drittstaatsangehörigen* (Verlag Dr. Kovaè 2013); Leuschner, J, *Das Spracherfordernis bei der Familienzusammenführung. Zur Vereinbarkeit des § 30 I 1 Nr. 2 AufenthG mit dem Schutz von Ehe und Familie im Verfassungs-, Europa- und Völkerrecht* (Wissenschaftlicher Verlag Berlin 2014).

10 Strik T, *Besluitvorming over asiel- en migratierichtlijnen: de wisselwerking tussen nationaal en Europees niveau* (Boom Juridische Uitgevers 2011); Guèvremont S, *Vers un traitement équitable des étrangers extracommunautaires en séjour régulier* (E.M. Meijers Institute for Legal Research 2009).

11 Van Walsum S, *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms* (Cambridge Scholars Publishing 2008); Bonjour S, *Grens en Gezin: Besluitvorming inzake Gezingsmigratie in Nederland, 1955-2005* (Aksant 2009).

12 Wray H, *Regulating Marriage Migration into the UK: A Stranger in the Home* (Ashgate 2011).

13 Spijkerboer T, 'Structural Instability. Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML; Smyth C, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 EJML.

14 See for instance Groenendijk K et al (eds), *The Family Reunification Directive in EU Member States: the first year of implementation* (Wolf Legal Publishers 2007) .

15 See for instance Costello C, 'Metock: Free movement and "normal family life" in the Union' (2009) 46 CMLRev.

16 Groenendijk K, Family Reunification as a Right under Community Law (2006) 8 EJML; Staver A, 'Free Movement and the Fragmentation of Family Reunification Rights' (2013) 15 EJML.

justification for the right to family unification as a channel for migration has been discussed at length.[17] None of these contributions have solely focussed on the question of whether there is a (human) right to family unification and how states may derogate from this right.

A distinction must be made between whether a human right exists and whether it is realised in an individual case. Even though there is no generally accepted definition of what a human right is, it can be categorized as

> "*a legally enforceable claim or entitlement that is held by an individual human being vis-à-vis the state government, for the protection of the inherent human dignity of a human being.*"[18]

A human right is a right that is believed to belong to every person. Human rights regulate the relationship between a state and the individuals under its jurisdiction.[19] A human rights norm is a minimum standard which must be respected. States may offer a higher level of protection, but may not fall below the minimum threshold. Concluding that a right to family unification exists in particular circumstances does not necessarily imply that a human right to family unification exists. It could also be that a state exercises discretion when it comes to which persons it grants residence. In this regard it is important to determine whether states are under an obligation to grant family unification in particular circumstances or whether it is merely a discretionary competence to do so. In this context it is important to remark that whatever conception of the human right to family unification is developed, this right is not absolute. Like the right to respect for family life, states may make derogations from the right to family unification. This makes the right to family unification a qualified right.[20] Interferences in the right to family unification are allowed if the legal grounds for interference are adhered to and may be subject to derogations.[21]

The individual human right to family unification stands in opposition to the sovereign right of states to control immigration.[22] Traditionally, it has been a sovereign right of states to determine which foreign nationals are allowed to enter and reside in its territory. However, like the human right to respect for family life, the right of states to control immigration is not

17 Carens J, *The Ethics of Immigration* (OUP 2013); for a different perspective see Honohan I, 'Reconsidering the Claim to Family Reunification in Migration' (2009) 57 Political Studies.

18 Victor Condé, H, *A Handbook of International Human Rights Terminology* (2nd ed University of Nebrasca Press) p 111.

19 De Schutter O, *International Human Rights Law: Cases, Materials, Commentary* (2nd ed Cambridge University Press 2014) p 11.

20 Bantekas I & Oette L, *International Human Rights: Law and Practice* (Cambridge University Press, 2013) p 75.

21 Ibid.

22 Goodwin-Gill G, *International Law and the Movement of Persons Between States* (Clarendon Press 1978) p 3.

absolute. States are limited in exercising this right in various ways.[23] Firstly, international human rights law sets limits on states in exercising their sovereign right to control immigration. The proliferation of human rights in the twentieth century has led to a system of human rights obligations on states which vastly restrict state competence in controlling immigration. International tribunals still recognise the sovereign right of states to control immigration, but nevertheless make it subject to adherence to human rights standards.[24] Secondly, states have limited the competence to regulate immigration matters by concluding bilateral and multilateral agreements with other states. An example of this is the harmonisation of laws in the context of the EU, which has led to the foundation of a right to family unification under EU law in a number of situations.[25]

The sovereign right of states to control immigration, including the limitations as outlined above, form the main source of derogations from the right to family unification as a branch of the right to respect for family life. It makes it possible for states to set requirements for family unification in order to achieve public policy goals. In the context of human rights, this is not an unusual ploy. Take for example the freedom of assembly. As the freedom of assembly is not absolute, states may interfere with the freedom of assembly, if legal grounds for interference are adhered to. The fact that there are derogations from a right does not make it less of a human right. It only means that the right is not absolute but qualified. This makes the realisation of the right to family unification a balancing exercise in which the human right to family unification of the applicant must be weighed against the interests of the state holding the sovereign right to control immigration.

Three important assumptions or premises are made in this dissertation. The existence of the right to respect for family life as the foundation of the right to family unification is the first of these assumptions. In its most minimalistic form, the right to respect for family life also applies in the context of families who seek to live together but are limited in doing so through immigration law. This is what is meant by the right to family unification in this dissertation. The second premise is that the right to family unification is not absolute; grounded in the sovereign right of states to control immigration is the assumption that states have legitimate interests in doing so. The fact that states have legitimate reasons to control immigration – even if this means that this interferes with and derogations are made from the right to family unifica-

23 Ibid p 21.

24 See for example the restrictive stand of the Human Rights Committee, which only opened the door for human rights implications for immigration policy slightly (see section 2.4). On the other hand, the European Court of Human Rights, while in each and every judgment recognising the right of states to control immigration, has ruled a number of times that the state is under the positive obligation to allow for the residence of an immigrant on its territory on the grounds of Art 8 ECHR (see chapter 3).

25 See chapter 4.

tion – is not disputed. That does not mean that any ground used by a state to legitimise derogations from the right to family unification is appropriate and justifiable. This should be determined on an individual basis using the legal grounds that are applicable in the situation at hand. The third assumption is that different types of obligations arising from different legal systems together shape the right to family unification. As there is no single human rights instrument protecting the right to family unification, in this dissertation a number of different sources of the right to family unification are investigated.

The focus of the analysis partly lies on the law of the European Union (EU). The reason for this being that the right to family unification is only acknowledged in a multinational context in EU law.[26] In the past twenty years, the EU has gained competence in the field of immigration policy and has developed various legal instruments to implement this competence.[27] Member states were motivated to harmonise their immigration policy because of the removal of border controls between the member states to which the Schengen framework applies. Within the context of the EU, there are two main trends with regard to policy on family unification. Firstly, almost since the beginning of the European project, the free movement of persons has been one of the fundamental freedoms of the EU. This initially only applied to economically active persons and EU citizens, but nowadays this fundamental freedom implies that in principle all EU citizens and their family members irrespective of their citizenship are free to move and reside within the territory of the EU.[28] The requirements for exercising this right are marginal. The free movement of persons within the EU also applies to non-EU citizens who are family members of an EU citizen who makes use of the free movement of persons. In this way, the free movement of persons includes a right to family unification for those EU citizens who do make use of their right to the free movement of persons. Secondly, non-EU nationals who lawfully reside in one of the member states of the EU have a right to family unification based on Directive 2003/86/EC on the right to family reunification (FRD) subject to the requirements set forth in this Directive.[29] This Directive however does not apply to EU citizens.

This very brief overview of EU family unification law already demonstrates the fragmented nature of the right to family unification in the EU. What furthermore contributes to this fragmentation is the role international (human rights) law plays in family unification law. Most notably, Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) plays an important role in European family unification law. It serves as a source of inspiration for EU and domestic law, but also in itself contains obligations for

26 Cholewinski (n 6) p 276.
27 A. Wiesbrock, *Legal Migration to the European Union: Immigration law and policy in Europe* (Martinus Nijhoff Publishers 2010).
28 Barnard, C, The Substantive Law of the EU: The Four Freedoms (4th ed OUP 2013) p 229.
29 See section 4.3.

states in the field of family unification. The European Court of Human Rights (ECtHR) has derived both the obligation of contracting states not to expel a person as well as the obligation to admit a person in the territory based on the right to respect for family life. Although from the outset, it must be emphasised that generally the ECtHR grants a wide margin of appreciation to states in controlling immigration.

Increasingly, both the legal and policy developments at the EU level as well as the case law of the ECtHR are being influenced by children's rights. Although the UN Convention on the Rights of the Child (CRC), which is signed and ratified by all member states of the EU, does not contain a right to family unification,[30] it is an important source of inspiration in both EU law and the case law of the ECtHR. Article 3(1) CRC, which states that the signatory states must make the best interests of the child a primary consideration in all actions concerning children, is repeated both in Article 24(3) of the Charter of Fundamental Rights of the EU (ChFR) and in Article 5(5) FRD. Even though the case law of the ECtHR lacks consistency,[31] it can be held that the importance of the best interests of the child concept is increasing in this case law. It is rather straightforward that for the discipline of family unification law, children's rights are of utmost importance. This clearly follows from the fact that most cases discussed in this dissertation involve children in one way or another. That is why it has been selected as a central element of the human right to family unification.[32]

1.2 Objectives and main research question

The object of this study is to construe a human right to family unification from the various national, constitutional and international obligations arising from international and European human rights law and the law of the EU. The first aim of the study is to determine to what extent a right to family unification exists in international and European human rights law and EU law. The second aim of the study is to find out to what extent a right to family unification exists at the domestic level of selected member states. Part of the analysis in this context is to study to what extent the obligations arising from international and European human rights law and EU law have been implemented by the selected member states. The object is not to make a full study on the compliance with international and European law of the selected member states. Rather, the study aims at discovering how the different international obliga-

30 Art 10 CRC does contain an obligation for states to examine applications for family unification in a positive, humane and expeditious manner.

31 See Spijkerboer (n 13) and the analysis in chapter 3 of this dissertation.

32 See section 1.4. below.

tions have been implemented. The main research question of this dissertation is:

> *Does a human right to family unification exist in international and European law and the domestic law of selected member states and what elements does this right consist of considering that the different legal systems involved affect each other?*

The different jurisdictions investigated in this research affect each other, which influences the character and content of the right to family unification.[33] The aim is not to offer a full study on the compliance of the international norms analysed, as this would go beyond the objectives of the research. This does not mean that failures of compliance are not identified, but the context in which this is done is limited to the question of whether a right to family unification exists. For example, in Chapter 7 the competence of the member states to impose pre-entry integration conditions on applicants for family unification is discussed. It is widely debated whether such pre-entry integration requirements are compatible with the FRD. Concerning this topic, this alleged incompliance is identified to the extent that such requirements may form an illegitimate restriction to the right to family unification. The significance of the non-compliance solely within the context of EU law falls outside the scope of this research.

1.3 STRUCTURE AND SUB-QUESTIONS

Answering the main research question requires an analysis of international and European law on family unification. However, an analysis of the various sources of international and European law is not sufficient to answer the question whether a right to family unification exists. As immigration law is structured around states who hold the sovereign right to control immigration but find themselves restricted by different forms of international obligations, applications for entry and residence must be made at the level of the state. Therefore, an analysis of the question whether a right to family unification exists must include an assessment of how international and European law affect the domestic law of the member states. If international and European law do provide for a right to family unification, but this does not materialise in domestic law, the internationally acknowledged right to family unification would be illusory.

33 The use of the word 'affect' to describe the relationship between different legal systems was previously used in Battjes H, *European Asylum Law and International Law* (Nijhoff 2006).

In Part I of this dissertation, the right to family unification in international and European law is analysed. This section is structured around the various (international) jurisdictions.

In *Chapter 2*, different sources of international (human rights) law are investigated. The research question addressed in this chapter is which sources of international (human rights) law are relevant for the right to family unification and whether a right to family unification can be derived from these sources. In this chapter various sources of international law are analysed. Even where a particular source does not contain an explicit right to family unification, it is investigated whether the source is indirectly relevant to family unification law.

In *Chapter 3*, the focus of the analysis lies on the European Convention of Human Rights (ECHR). The research question addressed in this chapter is what the role of Article 8 ECHR and Article 14 ECHR in family unification law is and whether a right to family unification can be derived from the ECHR. The chapter includes an analysis of the case law of the ECtHR in family unification cases. Besides the abovementioned provisions relating to the right to respect for family life and the prohibition of discrimination, the relevance of the right to an effective remedy for family unification law, as enshrined in Article 13 ECHR, is evaluated.

Chapter 4 is devoted to an analysis of the EU law on family unification. It is observed from the outset that EU family unification law has a highly fragmented character.[34] The relevant sources of law include the Citizenship Directive and the Family Reunification Directive, from which a right to family unification, subject to the restrictions mentioned in the directives, can be derived. The research question investigated in this chapter is under which circumstances can a right to family unification be derived from EU law. An analysis of the relevant case law of the Court of Justice of the European Union (CJEU) is included in this chapter.

Part II of this dissertation analyses the implementation of the norms derived from international and European law in the domestic law of selected member states. The structure of the comparison is not based on jurisdictions, but on different themes within family unification law. The themes investigated are the definition of the family, substantive and procedural requirements and the domestic implementation of Article 8 ECHR and the *Ruiz Zambrano* ruling of the CJEU.

In *Chapter 5* the focus of the analysis shifts from international and European law to domestic law. This first chapter relating to domestic law is devoted to the research question whether structural and systematic characteristics exist in the investigated member states which shape their domestic family unification

34 See in this context Staver (n 16).

law. These different characteristics may stem from different legal traditions in the member states and from the fact that some member states have negotiated opt-outs from certain instruments of secondary EU law.

In *Chapter 6*, the definitions of the family as used in domestic family unification law are analysed. The research question addressed in this chapter is how the selected member states define the family in their domestic family unification law. As there is a difference between the family within the context of the Citizenship Directive and the Family Reunification Directive, the domestic transposition of both directives is investigated.

None of the investigated sources of international and European law grants an absolute right to family unification. Instead, the right to family unification is qualified. The member states are allowed to impose requirements on applicants for family unification and their sponsors. Therefore, *Chapter 7* is devoted to an analysis of the substantive requirements that the member states impose on applicants for family unification and their sponsors. The research question addressed in this chapter is which substantive requirements do the member states impose on applicants for family unification.

Besides substantive requirements, there are also procedural issues which may result in limitations on the right to family unification. As the imposition of procedural requirements may limit the right to family unification, for the purpose of answering the question whether a right to family unification exists it is relevant to assess these procedural requirements. In *Chapter 8*, these procedural requirements are the topic of analysis. The research question addressed in this chapter is which procedural requirements do the member states impose on applicants for family unification and their sponsor. It is assessed whether these procedural requirements can pose an obstacle to the exercise of the right to family unification.

In *Chapter 9*, the domestic implementation of the obligations arising under Article 8 ECHR is analysed. The ECtHR plays a subsidiary role in the protection of the rights laid down in the ECHR. The primary role for the protection of these rights lies with the contracting parties themselves. In this chapter, the manner in which the member states implement the obligations arising from Article 8 ECHR is investigated. The research question addressed is how the selected member states implement the obligations derived from Art 8 ECHR.

In *Chapter 10*, the domestic implementation of the *Ruiz Zambrano* ruling of the CJEU is the topic of analysis. In the *Ruiz Zambrano* ruling, the Court for the first time derived a right to family unification for sponsors who are an EU national but reside in their home member state and have never made use of their rights under the Citizenship Directive from the EU citizenship of the sponsor. This ruling, which stems from 2011, has implications for domestic family unification law which are completely new. The research question addressed in this chapter is how the member states implement the right to family unification that was attached to the status of EU citizenship in the *Ruiz Zambrano* ruling of the CJEU in their domestic family unification law.

Part III of this dissertation offers a synthesis of the findings in Part I and Part II. As was stated in the previous section, the objective of this dissertation is to analyse the extent to which a right to family unification exists and to find out of which elements it consists of considering that the different legal systems involved affect each other. The objective is not to offer a compliance study on whether the member states act in accordance with their international obligations. *Chapter 11* of the dissertation offers an overview of the findings in the substantive chapters of this dissertation. Various research questions are posed in this chapter. The first research question relates to the manner in which the different legal systems involved affect each other. The focus is specifically not on the underlying dynamics of the different actors involved at the different levels, but on how the interconnectedness of the different legal systems involved shape the right to family unification.

1.4 Elements of the right to family unification

One finding in this research is that even though there is no instrument in international human rights law that is solely devoted to the right to family unification and that the legal framework is highly fragmented, certain elements are relevant for the right to family unification in all of the selected legal systems. These elements are identified as central elements of the right to family unification. The identified elements are the principle of proportionality, the prohibition of discrimination and the rights of children. It must be noted that not all these elements are relevant to the same extent in each application for family unification. The rights of the child do not play a role in applications for family unification in cases where no children are involved. The extent to which the prohibition of discrimination is relevant in a particular case can also differ depending on the circumstances of the case. But it is true that states must have regard for these elements when deciding on an application for family unification. The degree of relevance of these elements and the weight that should be attributed to each element can vary depending on the circumstances of the case.

The first of the identified elements is the principle of proportionality. The right to family unification as part of the general right to respect for family life is not an absolute right, but is subject to interferences and derogations. It is precisely in the non-absoluteness of this right that the sovereign right of states to control migration comes into play. What follows is that a balance must be found between the individual right to family unification on the one hand and the sovereign right of states to control migration on the other. Within the context of the principle of proportionality, the state must motivate its desire to interfere with or derogate from the right to family unification. The principle of proportionality is used in each of the investigated legal systems to a certain

extent and in a certain manner. This makes the principle of proportionality one of the defining elements of the right to family unification.

The second element that has been identified as a central element in the right to family unification is the prohibition of discrimination. In all the investigated legal systems, the prohibition of discrimination plays a certain role. Some of the sources of international law in the second chapter are solely devoted to the prohibition of discrimination.[35] Within the context of the ECHR, the prohibition of discrimination plays an important role in the sense that states may not discriminate on certain grounds in the enjoyment of the rights protected by the Convention. Within EU law, the prohibition of discrimination plays a role in various contexts. Within the internal market, the abolition of discrimination based on nationality is central to achieving the aim of creating one internal market. Within the context of the role of fundamental rights within EU law, the Charter of Fundamental Rights of the EU contains a more general prohibition of discrimination. Besides these international sources, the prohibition of discrimination is also visible in the constitutional traditions of the selected member states. Even though unequal treatment on the grounds of citizenship lies at the core of immigration law, which is all about the inclusion and exclusion of people, this does not mean that states can freely restrict the right to family unification without regard to the prohibition of discrimination. Throughout this dissertation it is established that the role of the prohibition of discrimination has more potential than it currently plays in family unification law.

The third central element of the right to family unification that is identified in this dissertation is the role of the rights of the child. By nature, many applications for family unification involve children in one way or another.[36] This can be because the application concerns the migration of the child itself or the migration of (one of) the parents of the child. Implicitly or explicitly the rights of the child always play a role in such applications. For example in Section 2.4 in which the case law of the Human Rights Committee is analysed, children's rights are not explicitly mentioned. However, the only cases where a violation is found concern children. The same is true for the case law of the ECtHR as analysed in Chapter 3. Within EU law children's rights also play an important role, even though this is sometimes not acknowledged. For example, in Section 4.5.4. where the forced-to-leave-the-territory-of-the-EU-criterion is analysed, it is assumed that children's rights are not relevant because only the ability of the child to reside in the EU is the topic of inquiry, for which the residence of the parents is required. However, even here the normative belief that a child belongs with its parents and not in some kind

35 CERD, CEDAW.

36 In applications that do not involve children, this element of the right to family unification may be irrelevant for that particular case.

of state-run institution is a central normative assumption which directly, though implicitly, relates to the rights of the child.

In the absence of a concrete right to family unification laid down in a legal instrument that is solely related to this issue and applies to all categories of family unification imaginable, these three elements form the core of the right to family unification that is relevant in all applications for family unification. In all applications, the principle of proportionality should be respected. In all applications, attention must be paid to potential forms of discrimination and the question should be addressed whether discrimination is justified. Lastly, in all applications concerning children in one way or another, the rights of the child must be taken into account in the balancing of interests exercise that is inherent in the right to family unification.

1.5 Scope and demarcation

In this dissertation, the right to family unification is the topic of analysis. The choice has been made to limit the analysis to issues relating to the admission of immigrants within the context of family unification. All issues which are not related to admission fall outside the scope of this dissertation. This means that questions relating to expulsion fall outside the scope of this research. However, cases which at first sight seem like expulsion cases but which are also relevant in the context of admission are included in the analysis. These cases are referred to throughout this dissertation as 'quasi-admission' cases. A quasi-admission case is a case which formally concerns the termination of residence, but which in fact concerns issues related to admission. A few examples of such cases are:

- A person's lawful residence is terminated because the admission requirements are no longer complied with. An example of such a case is the ECtHR case *Berrehab v. Netherlands*.[37] In this case the residence permit of the applicant was withdrawn because his relationship with his wife had ended following the couple's divorce. The sole reason for the termination of lawful residence was that he no longer fulfilled the requirement of belonging to the family of the sponsor. As this was the sole reason for the termination of lawful residence, the case is identified as a quasi-admission case.
- A person's lawful residence is withdrawn with retroactive effect. An example of such a case is the ECtHR case *Nunez v. Norway*.[38] Here, the applicant had a residence permit which was withdrawn with retroactive effect after the Norwegian authorities discovered the applicant's immigration fraud. At first sight the case seems to be an expulsion case as the applicant held a residence permit, but because her residence permit was

37 *Berrehab v Netherlands* (1988) 11 EHRR 322.
38 *Nunez v Norway* (2011) 58 EHRR 17.

revoked with retroactive effect, the Norwegian authorities dealt with the case as if it concerned an admission case.

- A person already resided in a country illegally, and sought to regularise his illegal stay. An example of such case is the CJEU case *Ruiz Zambrano*.[39] In this case the Columbian parents of two Belgian citizen minor children stayed in Belgium illegally and regularised their stay based on the EU citizenship of their children. The case does not concern the entry of the applicants, as they were already present in Belgium, but did concern the first time they obtained lawful residence and for that reason it is identified as a quasi-admission case.

Explicitly excluded from the scope of this dissertation are cases which concern the expulsion of a settled immigrant after a criminal conviction or in the case of other public order considerations which do not relate to no longer meeting the admission requirements. The reason that such cases are excluded is two-fold. Firstly, admission in itself is already such a wide topic for analysis that the inclusion of expulsion would make the study unfeasible. Secondly, expulsion for public order reasons raises fundamentally different legal questions than in admission cases. The requirement that an applicant may not pose a threat to public order is investigated in Chapter 7 on substantive requirements to the right to family unification within the context of admission policy.

The present study is limited to a study of legislation and case law. The underlying practice is not studied. The research for the study was completed on 1 December 2014.

1.6 METHODOLOGY

The object of the present dissertation has previously been identified as finding out to what extent a human right to family unification exists and what the elements of this right are considering that the different legal systems involved affect each other to a large extent. This objective makes this study comparative to its very core: it is an inventarisation of different jurisdictions which deal with the right to family unification.

In this research, a functional comparative method is used.[40] This means that the functions of the sources of law which are discussed are at the core of the analysis. As there is no international convention or treaty on the right to family unification, the analysis necessarily focusses on instruments which either do not solely concern family unification but are only partly relevant or sources which have a limited personal and material scope. For all of the investigated

39 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

40 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (3rd edition edn, OUP 1998).

sources of law, the function of the instrument is investigated and what effect this has on the right to family unification.

As family unification is a widely dispersed field in which numerous sources of law play a role, the different instruments can have fundamentally different functions. For example, the fundamental freedom of the free movement of persons in EU law does not have the explicit objective of creating a right to family unification. Instead, the inclusion of third-country national family members in this context aims to facilitate the free movement of persons or EU citizens. This influences the manner in which family unification within free movement law is shaped. In the domestic context, the explicit function attributed to a specific admission required by the legislator may be different than the implicit objective the legislator has by imposing the requirement. A possible example of this is the requirement that applicants for family unification should pass an integration exam in the country of origin. The official objective given for this requirement, which is imposed by Germany and the Netherlands, is to facilitate the integration of the migrating family member in the host member state.[41] It can be argued, however, that the intended effect of the measure is to limit the number of applicants for family unification and to select applicants based on their level of intelligence.

The comparison in this research has different dimensions. Firstly, various sources of international and European human rights law and EU law are investigated and compared with each other in Part I of the dissertation.

The different supranational jurisdictions do not exist in a vacuum. They cannot be studied in isolation as they are often interdependent. For example, the UN Convention on the Rights of the Child is applied in the case law of the ECtHR on Article 8 ECHR and plays an important role in EU family unification law. In turn, EU family unification law is heavily influenced by Article 8 ECHR. Many examples are provided of how the different international legal systems affect each other and fail to affect each other. An example of the latter that is identified in this dissertation is the prohibition of discrimination that is laid down in multiple supranational instruments but which does not prevent discrimination based on citizenship that lies at the core of EU family unification policy. In the comparison, the function of the different instruments and their specific characteristics is investigated. This means that for each of the legal sources, the question is asked what the function of the source is and whether this is realized when the source is applied in conjunction with other sources. For example, Article 3(1) CRC lays down that the best interests of the child should be the primary consideration in all actions concerning children. In the application of Article 8 ECHR, the ECtHR makes reference to this provision. In the analysis in this dissertation the question is addressed whether the approach

41 See for analysis K. De Vries, *Integration at the Border: The Dutch Act on Integration Abroad and Internation aland Immigration Law* (Hart Publishing 2013).

of the ECtHR in implementing the obligations under Article 3(1) CRC corresponds to the function of this provision.

Secondly, the manner in which legal norms from international and European human rights law and EU law are implemented in the domestic law of the selected member states is investigated and the domestic legal systems are compared to each other.

The analysis of the national jurisdictions is aimed at discovering to what extent international and European human rights law and EU law affect domestic law in shaping the human right to family unification. The aim of this comparison is not to offer a comprehensive compliance study on how the supranational provisions are implemented in the domestic legal systems. Rather, the analysis focuses on the different ways in which the member states implement the obligations arising from international and European human rights law and EU law. For example, in Germany the domestic constitutional protection of the right to respect for family life is relatively strong. Therefore, Article 8 ECHR plays a limited role in the domestic German context. In the United Kingdom on the other hand, Article 8 ECHR plays an important and active role in family unification law. Also, as the analysis focuses on both member states where the FRD is applicable and on member states where this is not the case, the influence of the Directive on the domestic law is assessed. These examples illustrate that the emphasis of the analysis lies with finding similarities and differences across the selected member states, and not on the comparison between supranational law and domestic law in the sense that a compliance study is conducted. This, however, does not mean that problematic issues in the implementation of supranational norms are not identified. The various domestic legal systems that are investigated in this dissertation are also interdependent, albeit arguably to a lesser extent than international and European human rights law and EU law. The member states are not formally bound by each other to formulate their family unification policy. However, especially considering the many similarities between the selected member states, they are inspired by policy developments in other member states. For example in section 7.3.5. on integration measures, it is shown how the various domestic legal systems were influenced by each other when formulating their own pre-entry integration requirements.

Finally, in Part III of the dissertation the outcomes of the comparisons in Part I and Part II are brought together. The central question relating to the existence of a right to family unification is answered and the three central elements that are crucial for this right are presented.

Four member states have been selected as national jurisdictions to be included in this research. As the aim of the legal comparison of national jurisdictions is not to offer a comprehensive compliance study, four member states are sufficient to draw conclusions on how the international and European human rights law and EU law affect domestic law. The number of selected national

jurisdictions is restricted to four to guarantee the feasibility of the research. The selected national jurisdictions are: Denmark, Germany, the Netherlands and the United Kingdom. The selection of these member states is based on a number of factors. Firstly, in the selected national jurisdictions, family unification is an active and dynamic field in which there are many developments in policy and case law. In this sense the selected national jurisdictions can be considered similar. Secondly, in order to assess the role of the FRD, two member states were chosen where this Directive is applicable (Germany and the Netherlands) and two where the Directive is not applicable (Denmark and the United Kingdom). The objective of selecting the member states based on the applicability of the FRD is to find out how this Directive in fact influences the right to family unification. This means that on the one hand the most similar systems were selected in order to explain the similarities. The right to family unification is positioned as a human right derived from the more general right to respect for family life. As family unification is presented as a human right, it is not surprising that in four legal systems which are very active in changing family unification policies, the existence of a claim to family unification for individuals is not doubted at the core. On the other hand, the most different legal systems were selected in the sense that one of the core instruments protecting the right to family unification in EU law, the FRD, is not applicable in two of the four selected member states. This choice has been made to show to what extent the applicability of the FRD is relevant for the existence of the right to family unification in the selected jurisdictions.

1.7 Terminology and translation

Throughout this dissertation the term 'family unification' is used instead of 'family reunification'. The term 'family reunification' implies that the family has lived together as a unit before the application for family unification was made. This, however, is by no means a prerequisite for family unification. It is very possible that the family relationship started at a moment during which the family did not reside together. This is the case, for example, when two spouses only start cohabiting after family unification has been realized. Family unification is identified as the unification of a family which previously resided in different states and encompasses all forms of families which come together after previously having resided in different states.

Another issue concerns the translation of foreign terms. Throughout the analysis of the domestic law of the selected member states, non-English terminology is used to describe and to identify sources of law, names of tribunals and specific formulations of legal concepts. In order to improve the accessibility of this research, the choice has been made to translate all foreign terms. The first time the translation of a foreign term is used, the original language version will be provided in brackets.

A similar issue concerns the manner in which domestic legislation is referenced. In each of the selected member states, a different system of referring to domestic provisions is used. For example, provisions in German legislation are referred to as '§§', while provisions in the UK Immigration Rules are referred to as 'p'. In order to improve the accessibility of this dissertation, for all legal systems the term 'Article' ('Art' in the footnotes) is used when referring to a provision of domestic law.

PART I

International and European law

2 International law on family unification

2.1 INTRODUCTION

There is no single treaty or convention in international law that regulates the right to family unification. Instead, there are a number of instruments which deal with family unification, be it directly and explicitly or indirectly and implicitly. The research question addressed in this chapter is which sources of international (human rights) law are relevant for the right to family unification and how can these sources contribute in constructing a right to family unification.

After the experiences in the first half of the twentieth century, the protection of the rights of individuals against arbitrary state interference was high on the political agenda. This caused a proliferation of international agreements on the protection of different groups. The first result of this was the Charter of the United Nations, which was signed before World War II officially ended. In this document, the founders agreed that one of the purposes of the United Nations is *"to promote and encourage the respect for human rights."*[42] This goal inspired the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on 10 December 1948.[43] The Declaration was the first document in which the rights to which all humans are entitled were laid down. However, as it was proclaimed by the General Assembly and not negotiated and ratified by the members of the UN, the Declaration is not legally binding. It is believed, however, that the Declaration is a source of customary international law.[44] The Declaration inspired two binding international agreements: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The proliferation of human rights, which started with the Declaration, resulted in many more agreements, including the Convention on the Rights of the Child (CRC), the Convention on the Elimination of

42 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (Charter) art 1(3).

43 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

44 See for example H. Hannum, 'The status of the Universal Declaration of Human Rights in national and international law' (1995) 25 Georgia Journal of International and Comparative Law .

All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW) which are relevant for this research. The abovementioned instruments will be discussed in the order of the date they came into force.

2.2 Universal Declaration of Human Rights

The UDHR does not contain any provision on the right to family unification as such. However, it does position the family as the cornerstone of society and as such it can be seen as the basis and inspiration for more specific provisions in subsequent treaties. Article 16(3) UDHR states that "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*"[45] Next to this provision, the UDHR also prohibits arbitrary interference in the private and family life of individuals. To this end, Article 12 UDHR states that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*[46] The applicability of the UDHR is not limited to nationals of a particular state. Everyone is entitled to the protection of the rights put forward in the UDHR, irrespective of nationality or place of residence.[47] As mentioned above, the UDHR is not legally binding, and can therefore not be invoked as such before a court or tribunal. However, the provisions included in the UDHR on the family form the basis for provisions in subsequent treaties on the right to respect for family life.

2.3 International Convention on the Elimination of All forms of Racial Discrimination

The International Convention on the Elimination of All forms of Racial Discrimination was adopted by the UN General Assembly in 1965 and came into force in 1969.[48] The Committee on the Elimination of Racial Discrimination monitors compliance with the Convention. State parties are obliged to submit reports on the implementation of the Convention every two years.[49] The

45 Art 16(3) UDHR.
46 Art 12 UDHR.
47 Art 2 UDHR.
48 The selected member states for this research (Denmark, Germany, the Netherlands and the United Kingdom) have all ratified the ICERD.
49 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 9.

Committee examines these reports and formulates its conclusions in the form of Concluding Observations. The Committee can also issue early-warning measures and urgent procedures to try to prevent serious violations of the Convention. Besides this, a petition mechanism exists through which state parties and individuals can bring a complaint before the Committee.[50] Although the findings of the Committee are not legally binding, they are considered to be of high authority.

As the aim of the Convention is to combat racial discrimination, it does not include any explicit reference to the right to family unification. Article 5(d)(iv) ICERD prescribes that states must take action to prohibit and eliminate all discrimination based on race in the context of the right to marriage and choice of spouse. Article 5 ICERD in general contains a list of substantive rights for which states must take measures to prohibit and eliminate all forms of racial discrimination. Lerner reports that the list in Article 5 should not be considered as exhaustive.[51] It can therefore not be held that the obligation of states to prohibit and eliminate all forms of racial discrimination does not apply in the context of family unification. The Committee has referred to family unification on a few occasions, though always with regard to the discriminatory effect of family unification legislation. When Israel decided to adopt a law which suspended the possibility of family unification in cases of marriage between an Israeli citizen and a person residing in the West Bank or Gaza, the Committee observed that the suspension order raised serious issues under the Convention and therefore requested an urgent report from the Israeli government.[52] In its Concluding Observations, the Committee urges member states to respect the right to family unification. For example as a reaction to the tenth and eleventh period report of Portugal, the Committee observed new legislation governing the entry, stay, departure and removal of aliens from the territory and recommended that Portugal took measures to facilitate family unification.[53] More specifically, the Committee expressed its concerns on the Dutch policy which requires that applicants for family unification complete a civic integration examination which should be passed in the country of origin and recommended that the Dutch government abolish the discriminatory

50 Art 14 ICERD.

51 Lerner N, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Brill Nijhoff 2015) p 59.

52 UN Committee on the Elimination of Racial Discrimination, *'Prevention of Racial Discrimination, including early warning measures and urgent action procedures, Decision 2 (65) Israel' (10 December 2004)* (UN Doc CERD/C/65/Dec2, 2004) Despite the concerns of the Committee, Israel maintains the contested policy.

53 UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Portugal 12/10/2004' (10 December 2004)* (UN Doc CERD/C/65/CO/6, 2004) para 14.

application of this criterion.[54] Shadow reports by Dutch NGOs call for attention to the discriminatory effects of Dutch integration and income requirements.[55] The Danish requirement that both spouses must have attained the age of 24 before they are eligible for family unification and the requirement that the aggregate ties of both spouses with Denmark must be stronger than their ties with any other country are under scrutiny by the Committee. The Committee has urged Denmark to adopt concrete measures to assess the racial impact of this legislation on the right to family life and to assess the discriminatory effect of the legislation.[56]

2.4 International Covenant on Civil and Political Rights

It took more than twenty years after the adoption of the UDHR before the General Assembly adopted the ICCPR in 1966.[57] Subsequently, it took another decade before a sufficient number of signatory states ratified the Covenant in 1976.[58] The ICCPR is an international treaty which is legally binding on the state parties. All the member states of the EU have ratified the ICCPR. The Committee on Human Rights (HRC) is responsible for monitoring the ICCPR. The HRC was established under Article 28 ICCPR and consists of eighteen independent experts. States are obliged to submit reports to the HRC on the domestic implementation of the provisions of the ICCPR.[59] Generally, the HRC requires states to submit a report every five years. The HRC examines these submissions and issues comments when deemed necessary.[60] The HRC is also authorised to receive and consider individual complaints against states which ratified the optional first protocol of the ICCPR.[61] The various documents of the HRC are not legally binding, but are considered to be of high authority.

54 UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: The Netherlands' (25 March 2010)* (UN Doc CERD/C/NLD/CO/17-18, 2010) para 5.

55 Nederlands Juristen Committee voor de Mensenrechten, *Commentary on the Seven teenth and Eighteenth Periodic Reports of the Netherlands on the International Convention on the Elimination of all Forms of Racial Discrimination* (2009).

56 UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark (20 September 2010)* (UN Doc CERD/C/DNK/CO/18-19 2010) para 14.

57 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

58 The selected member states for this research (Denmark, Germany, the Netherlands and the United Kingdom) have all ratified the ICCPR.

59 Art 40(1) ICCPR.

60 Art 40(4) ICCPR.

61 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302 art 2. The United Kingdom is the only member state which did not ratify the First Protocol. This means that the HRC.

The ICCPR does not contain an explicit reference to the right to family unification as such. However, it does contain several provisions which are relevant to the right to respect for family life in migration cases. The HRC has referred to the right to respect for family life in migration cases numerous times, both in comments on state reports and in individual complaint procedures. In the documents of the HRC, attention is paid to the admission of foreign nationals as family migrants and to the expulsion of foreign nationals who have family ties in the host state.

In Article 23(1) ICCPR the importance of the family is highlighted: "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*"[62] This Article carries a positive obligation, in the sense that it urges member states to take action to protect the unity of the family. Article 17(1) ICCPR prohibits arbitrary and unreasonable interference with the right to family life: *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."*[63] With this structure of treaty obligations, the protection of the family is twofold. In individual complaint procedures it is commonplace to claim an interference with the rights guaranteed by both Articles 17(1) and 23(1). These provisions can be read in conjunction with each other. The state parties to the ICCPR are required to adopt legislative, administrative or other measures to ensure the protection provided for in Article 23.[64]

There is no absolute prohibition of interferences with family life under Article 17(1). However, interferences can only be justified when they are on the basis of law and when they are not arbitrary and reasonable in the particular circumstances of the case. The legal basis for interference in family life should in turn be in line with the provisions, aims and objectives of the ICCPR itself.[65] The definition of family should be broadly interpreted to include all those comprising a family.[66] When a group of persons is regarded as a family in a particular state, that state should offer that group the protection referred to in Article 23.[67] For the purpose of the implementation of the rights pro-

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does not have jurisdiction over individual complaints against the United Kingdom. The United Kingdom is however fully bound by the provisions of the ICCPR.

62 Art 23(1) ICCPR.

63 Art 17(1) ICCPR.

64 UN Human Rights Committee, *General Comment No 19 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2004)* (UN Doc HRI/GEN/1/Rev7 2004) (General Comment No 19) para 3.

65 UN Human Rights Committee, *General Comment No 16 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2004)* (UN Doc HRI/GEN/1/Rev7 2004) para 3.

66 Ibid para 5.

67 General Comment No 19 para 4.

tected by the ICCPR, a state cannot prescribe a narrower definition of family than adopted within that society.[68]

Explicit references to the right to family unification were made by the HRC in several cases. The HRC commented that states must cooperate to ensure unity and reunification of families.[69] Family unification was highlighted as an important principle under Article 23.[70] With these observations the HRC did not intend to abandon the sovereign right to determine access and residence rights by states. Generally, restrictions to the access of migrants to the territory and authority to expel them for security reasons may be justifiable.[71] However, these restrictions should be lawful, reasonable and not arbitrary.

In the case of admission of foreign nationals as family migrants, the HRC has refrained from formulating positive obligations. However, the legal basis for restrictions on admission should be in line with the provisions, aims and objectives of the ICCPR. For example, the Mauritian policy, which only required residence permits from male foreigners married to Mauritanian women and not from female foreigners married to Mauritanian men was not in line with the ICCPR. According to the HRC, the Mauritian legal basis for interferences with the right to family unification does not comply with Articles 2(1) and 3 ICCPR, the non-discrimination provisions of the ICCPR, and is therefore in violation of these provisions in conjunction with Article 17(1).[72] Similar reasoning was adopted in the comments on the Israeli policy to only permit the family unification of Jewish foreign nationals.[73] Also an automatic ban on the family unification of all spouses is contrary to the provisions, aims and objectives of the ICCPR.[74] The reasoning of the HRC in admission cases focuses on the legal basis of restrictions, and not on individual circumstances requiring positive state action. This is in line with the idea that the state has the sovereign authority to determine the admission of migrants in its territory.
The case law of the HRC on the expulsion of settled foreign nationals with family ties in the host state is more elaborate than the case law on the admission of foreign nationals for the purpose of family unification. In numerous individual cases as well as in many concluding comments, the HRC has repri-

68 *Francis Hopu and Tepoaitu Bessert v. France* (1997) 6 Selected Decisions of the Human Rights Committee 68.
69 General Comment No 19 para 5.
70 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Switzerland 11/08/1996 (8 November 1996)* (UN Doc CCPR/C/79/Add 70, 1996).
71 *Aumeeruddy-Cziffra et al v Mauritius* (1981) 1Selected Decisions of the Human Rights Committee 67.
72 Ibid 9.2(b)2(i)8 .
73 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel 08/18/1998 (18 Augustus 1998)* (UN Doc CCPR/C/79/Add 93, 1998) and UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel 08/21/2003 (21 Augustus 2003)* (UN Doc CCPR/CO/78/ASR, 2003).
74 UN Human Rights Committee, *'Concluding Observations of the Human Rights Committee: Zimbabwe 04/06/1998' (6 April 1998)* (UN Doc CCPR/C/79/Add89, 1998)i.

manded states on their lack of compliance with the ICCPR in expulsion cases. The reasoning of the HRC in expulsion cases is not always consistent. For example, in two cases against Canada, the HRC held that the expulsion of long-term residents who have committed criminal offences is in accordance with domestic law and not arbitrary.[75] However, in a later concluding comment the HRC condemns the Canadian policy on the expulsion of long-term residents.[76]

In *Winata v Australia* the HRC seemed to expand the scope of Articles 17(1) and 23(1).[77] In this particular case the Indonesian parents of a thirteen-year-old Australian national were facing expulsion from Australia. In view of the duration of the residence of the child in Australia and the fact that he had established social ties with Australian society, the HRC ruled that the expulsion of Winata and his wife would constitute a violation of the provisions mentioned in the ICCPR. It should be noted that it was the exceptional circumstances of the case which influenced the decision to find a violation, but there were no clear indications of what constitutes exceptional family considerations.[78] In a similar case in which a grandfather who faced expulsion because he had lived in the host state illegally for eleven years to take care of his grandchildren, the HRC did not find a violation as the exceptional family considerations were not present.[79] Similarly, the fact that two parents have a child who is a national of the host state does not automatically grant those parents residence rights.[80] When there are no objections to family life being enjoyed elsewhere, the HRC has also adopted a hesitant approach to condemn expulsion.[81] Despite this reluctant attitude, the HRC will look at the particular circumstances of the case. For example, in a case in which the expulsion was only motivated by the 'bad character' of the applicant, demonstrated only by previous criminal convictions in the country of origin, the HRC found that the expulsion would constitute an arbitrary interference.[82]

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75 *Charles Stewart v Canada* (1996) 6 Selected Decisions of the Human Rights Committee 49 and *Giosue Canepa v Canada* (1997) Unreported Communication of the Human Rights Committee (Com No 558/93).

76 UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada 04/07/1999' (7 April 1999)* (UN Doc CCPR/C/79/Add105 1999) para 15.

77 *Hendrick Winata, So Lan Li and Barry Winata v Australia* (2001) 7 Selected Decisions of the Human Rights Committee 147.

78 A. Comte and R. Burchill, *Defining civil and political rights: the jurisprudence of the United Nations Human Rights Committee* (Ashgate 2009) p 232.

79 *Mohammed Sahid v New Zealand* (2003) Unreported Communication of the Human Rights Committee (Com No 839/99).

80 *Keshva Rajan and Sashi Kantra Rajan v New Zealand* (2003) Unreported Communication of the Human Rights Committee (Com No 820/99).

81 *Ngoc Si Truong v Canada* (2003) Unreported Communication of the Human Rights Committee (Com No 706/96).

82 *Madaferri v Australia* (1996) 8 Selected Decisions of the Human Rights Committee 259 para 9.8.

The decisions of the HRC in individual cases seems to illustrate that the HRC is granting a wider margin of appreciation to the domestic courts when the domestic legal procedures seem to have been respected. Only when there are exceptional individual circumstances, like in *Winata v Australia*, does the HRC seem to reduce the margin of appreciation of the state. The factors which the HRC seems to consider in the determination of whether an interference is arbitrary, are the criminal record of the person to be deported,[83] whether the domestic procedures were followed,[84] the impact of the expulsion on the family life in the host state,[85] the ability to enjoy family life in the country of origin[86] and the impact on the children involved in the expulsion.[87] Although the criteria seem to be clear, it is inherent in expulsion cases that a balance needs to be struck between the family rights of the individual and the interests of the state to regulate in the public interest. Observers have commented that the HRC often makes this balance in an inconsistent and sometimes even insensitive manner.[88]

As mentioned before, all member states of the EU have ratified the ICCPR and, with the exception of the United Kingdom, the First Protocol. However, the vast majority of individual complaints are addressed at non-EU member states.[89] This is due to the fact that within Europe individuals can also petition the European Court of Human Rights (ECtHR). The ECtHR issues legally binding judgments as opposed to the rulings of the HRC, which are not legally binding but merely of high authority. Furthermore, although the protection in the wording of the European Convention of Human Rights (ECHR) is similar to the provisions in the ICCPR, the case law of the ECtHR is more developed than the case law of the HRC. Nevertheless, this does not undermine the fact that the ICCPR and the case law of the HRC are also applicable in the member states of the EU.

2.5 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) concluded the Bill of Rights. The ICESCR contains a collection of economic, social and cultural rights which were put forward in general terms in the UDHR

83 *Canepa v Canada* (n75).
84 *Stewart v Canada* (n75).
85 *Hendrick Winata, So Lan Li and Barry Winata v Australia* (n77).
86 *Truong v Canada* (n81).
87 *Madafferi v Australia* (n82).
88 Comte and Burchill (n78) p 230-231, S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: cases materials and commentary* (OUP 2004) p 596.
89 cf *Byahuranga v Denmark* (2004) 8 Selected Decisions of the Human Rights Committee 406 .

but were not within the scope of the ICCPR. The ICESCR was adopted by the General Assembly in 1966, but did not enter into force until sufficient parties ratified it in 1976.[90] The Economic and Social Council (ECOSOC) of the United Nations is responsible for the monitoring the ICESCR, as it does not contain any provisions establishing an independent monitoring organisation like the ICCPR has. In 1985 the ECOSOC instituted the Committee on Economic, Social and Cultural Rights (CESCR) to monitoring compliance with the ICESCR. It consists of eighteen independent experts. The signatory states are required to submit reports on compliance with the ICESCR.[91] Each signatory state submits a report once every five years. These reports are considered in the meetings of the CESCR. If the CESCR finds problems in the compliance of the ICESCR, it can publish Concluding Observations in which the problems are outlined. Unlike the ICCPR, the ICESCR does not contain an individual complaint mechanism. However, an optional protocol to the ICESCR has been adopted which provides for an individual complaint mechanism.[92] The optional protocol entered into force on 5 May 2013. As of yet, sixteen states have ratified the Optional Protocol.[93] The various documents produced by the CESCR are not legally binding, but are nevertheless of high authority.

Like the ICCPR, the ICESCR does not contain an explicit right to family unification, but several provisions are relevant for the right to respect for family life in migration cases. Article 10(1) provides that

> *"the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."*[94]

However, there is no provision similar to Article 17(1) ICCPR on interferences with the right to respect for family life. Because of this, and because there is no individual complaint mechanism, the case law of the CESCR on the rights to respect for family life in migration cases is less developed. However, the CESCR did develop guidelines on how the reports submitted by states should look.[95] In paragraph 39 it is stated that states should *"provide information on the economic and social rights of asylum seekers and their families and on legislation*

90 The selected member states for this research (Denmark, Germany, the Netherlands and the United Kingdom) have all ratified the ICESCR.

91 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 16(1).

92 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, ratified 5 May 2013).

93 None of the member states selected in this research have ratified the Optional Protocol.

94 Art 10(1) ICESCR.

95 UN ECOSOC, *Note by the Secretary-General: Guidelines on Treaty-specific documents to be submitted by states parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights* ((2009) UN Doc E/C12/2008/2, 2009).

and mechanisms in place for family unification of migrants."[96] This suggests that family unification in particular and the right to respect for family life in migration cases in general is within the ambit of the ICESCR. It remains to be seen whether the institution of the individual complaint mechanism will result in an elaboration of the CESCR case law on the right to respect for family life in migration cases, as it is uncertain whether individual complainants will direct their complaint to the CESCR or the HRC. The latter is more likely as the ICCPR contains more explicit provisions on the protection of the family and the case law of the HRC is already more established.

The ICESCR does not contain any provision specifying whether it applies to non-nationals. However, in many of its provisions it is stated that it applies to everyone.[97] Furthermore the CESCR has interpreted the ICESCR as applying to everyone within the jurisdiction of a signatory state.[98] This also extends to non-nationals.[99] The CESCR does not clarify whether the ICESCR applies equally to short-term, long-term and irregular residents.[100] It is important to determine whether (different categories of) non-nationals fall within the scope of the ICESCR, as other rights are dependent on this. For example, Article 6(1) ICESCR protects the right to work. The broadest interpretation of the personal scope of the ICESCR would limit states in their capacity to regulate access to the labour market. For the enjoyment of the substance of the rights protected by the ICESCR, also by family migrants independent of their residence status in the host state, it would be necessary to determine whether the ICESCR applies without restrictions. Unfortunately the documents produced by the CESCR do not provide clarity on this issue.

The CESCR has commented only occasionally on specific issues within family unification law. The Danish increase in the age limit for family unification from 18 to 24 years of age was criticised by the Committee.[101] Subsequently, the Committee called upon Denmark to repeal or amend the contested legislation.[102]

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96 Ibid para 39.

97 Art 6, 7(a), 8(1)(a), 9, 11, 12, 13(a), 15(1)(a) and 15(1)(b) ICESCR.

98 Social and Cultural Rights UN Committee on Economic, *General Comment No 1 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2004)* (UN Doc HRI/GEN/1/Rev7, 2004) para 3.

99 ege.g. Social and Cultural Rights UN Committee on Economic, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Liechtenstein 06/09/2006 (9 June 2006)* (UN Doc E/C12/CO/LIE/1, 2006) paras 11 and 25.

100 ege.g. Social and Cultural Rights UN Committee on Economic, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic 12/12/1997 (23 December 1997)* (UN Doc E/C12/1/Add16 1997) para 34.

101 UN Committee on Economic Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Denmark 12/14/2004 (14 December 2004)* (UN Doc E/C12/1/Add102, 2004) para 16.

102 Ibid para 29.

2.6 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the UN General Assembly in 1979 and came into force in 1981.[103] The Committee on the Elimination of Discrimination against Women monitors the Convention. The state parties are obliged to submit a report on the implementation of the Convention every four years. The Committee is authorised to submit suggestions and general recommendations after examining the periodic reports of the state parties.[104] The CEDAW does include an individual complaint mechanism in an optional protocol.[105] The conclusions of the Committee are not binding for the state parties.

As its aim is to combat discrimination against women, the Convention does not include any explicit provisions on the right to family unification. However, the Committee has touched on this issue on a few occasions, pointing specifically towards the discriminatory effect domestic legislation may have on women. Article 15(4) of the Convention prescribes that the state parties should ensure that men and women have the same rights with regards to the law relating to the free movement of persons and the freedom to choose the place of residence and domicile.[106] Article 16 CEDAW prescribes that states should take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, including the obligation that states shall ensure that men and women have the same right to freely choose a spouse. The Committee has remarked in General Recommendation 21 that *"[m]igrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them."*[107] The Committee has also voiced concern on the imposition of an age limit for family unification.[108] When Denmark increased its age limit from 18 to 24 years of age to combat forced marriages, the Committee regretted the introduction of the new legislation and urged Denmark to find other ways

103 The selected member states for this research (Denmark, Germany, the Netherlands and the United Kingdom) have all ratified the CEDAW.

104 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13(CEDAW) art 21.

105 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted on 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 art 2.

106 Art 15(4) CEDAW.

107 UN Committee on the Elimination of Discrimination Against Women, *'General Comment No 21: Equality in marriage and family relations' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2004)* (UN Doc HRI/GEN/1/Rev7, 2004) para 10.

108 Chinkin C, Freeman M & Rudolf B (eds), *The UN Convention on the Elemination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, 2012) p 424.

to combat forced marriages.[109] The Committee expressed concerns about the discriminatory effect on women of the Dutch application of income and civic integration requirements.[110] It finds the "severe" requirements for family unification in breach of the obligations under the Convention.[111] Furthermore, the long time period necessary for the acquisition of independent residence permits is a concern of the Committee.[112]

2.7 Convention on the Rights of the Child

The UN Convention on the Rights of the Child was adopted by the General Assembly of the UN in 1989.[113] In 1990 sufficient signatory states had already ratified the Convention to allow it to enter into force. With more than 190 signatory states, it is the world's most proliferate human rights treaty.[114] All 27 member states of the EU are party to the Convention. The Committee on the Rights of the Child is in charge of monitoring the implementation of the Convention. The state parties of the Convention are obliged to submit a report every five years on the status of the implementation of the Convention. The Committee examines these reports and formulates recommendations to the state in the form of Concluding Observations. The Convention does not provide for an individual complaint mechanism. However, on 19 December 2011 an Optional Protocol to the Convention was adopted which includes an individual complaint mechanism.[115] The Optional Protocol entered into force on 14 April 2014, after ten signatory states had ratified it.[116] The Committee also issues General Comments on the interpretation of the content of the Convention. The documents of the Committee are considered of high authority, but are not legally binding. The Convention is specifically intended to protect the human rights of children. It contains human rights that are also present in other human rights treaties, but it specifically targets children.

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109 UN Committee on the Elimination of Discrimination Against Women, *Concluding comments of the Committee – CEDAW: Denmark* ((21 June 2002) UN Doc A/57/38 2002) para 345-346.

110 UN Committee on the Elimination of Discrimination Against Women, *Concluding comments of the Committee – CEDAW: The Netherlands (5 February 2010)* (UN Doc CEDAW/C/NLD/CO/5 2010) para 42.

111 Ibid para 43.

112 UN Committee on the Elimination of Discrimination Against Women, *Concluding comments of the Committee – CEDAW: The Netherlands (2 February 2007)* (UN Doc CEDAW/C/NLDCO/4 2007) para 27.

113 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

114 Only Somalia, Sudan and the United States have not ratified the CRC.

115 Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted on 19 December 2011, entered into force on 14 April 2014).

116 Out of the four selected member states of this research, only Germany has ratified the Optional Protocol.

The Convention contains several provisions relevant for the right to family unification. The leading principle of the Convention is that in all state action the best interests of the child should be a primary consideration.[117] The precise meaning of the best interests concept is unclear.[118] For unaccompanied minors the Committee has held that "a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life."[119] The Committee has not formulated any criteria by which the best interests of the child should be judged. The wording of the provision, "shall be the primary consideration", indicates that there are other considerations which may play a role. The best interests of the child therefore do not necessarily form the decisive consideration, but should be the primary consideration. Without specifying the meaning of the concept, the Committee regularly urges the state parties to make sure the concept is adequately integrated into all legal provisions and applied in judicial and administrative decisions.[120]

Article 10 of the Convention deals solely with family unification. Article 10(1) provides that states shall deal with applications for family unification by a child or his or her parents in a positive, humane and expeditious manner. Article 10(2) provides that a child whose parents reside in different states has the right to maintain personal relations and direct contact with both parents on a regular basis. It should be observed that the wording of Article 10 is less strong than the wording of Article 9, as the latter prescribes that children shall not be separated from their parents. The Convention does not provide an explicit right to family unification. It merely states that applications to that end should be dealt with in a positive, humane and expeditious manner. This somewhat weaker formulation reflects the hesitation by states to grant a right to family unification. The provision also does not contain any reference to the right to remain in a state to enjoy family life. The Committee has voiced concerns on the implementation of Article 10 in regard to a few issues. Age limits under 18 years to become eligible for family unification were deemed

117 artArt 3(1) CRC.

118 M. Freeman, *Article 3 The Best Interests of the Child: A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007), C. Smyth, *The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance* (E.M. Meijers Instituut 2013).

119 UN Committee on the Rights of the Child, *General Comment No 6 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2004)* (UN Doc HRI/GEN/1/Rev7 2004) para 19.

120 ege.g. UN Committee on the Rights of the Child, *Concluding observations: Netherlands (27 March 2009)* (UN Doc CRC/C/NLD/CO/3 2009) para 29.

incompatible with the Convention.[121] Also lengthy procedures for family unification were deemed incompatible with Article 10.[122]

As mentioned in the previous paragraph, Article 9(1) of the Convention provides that children shall not be separated from their parents against their own will, except where such separation is necessary in the best interests of the child.[123] Where the provision on family unification does not go into the right to remain in a state for the purpose of enjoying family life, Article 9(1) can be used in establishing whether an expulsion of a settled migrant is in accordance with the rights of the child. In situations in which one parent is threatened with expulsion, Article 9(1) could be invoked to prevent the separation of parent and child. Until now the Committee has not paid attention to this issue.

Despite the fact that the complaint mechanism is relatively young, having entered into force only in 2014, and the fact that the observations of the Committee are not legally binding, the Convention is an important source of law for other (international) tribunals. Regional human rights settlement mechanisms, such as the ECtHR frequently interpret provisions of their own legal texts in the context of the Convention. In EU law, the principle of the best interests of the child has found its way into EU family unification law.[124] This shows that the sphere of influence of the Convention far exceeds the UN framework in which it was established.

2.8 International Convention on the Protection of the Rights of All Migrant Workers

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW) was signed in 1990 and entered into force in 2003.[125] The Convention governs the protection of migrant workers and the members of their family. The Committee on Migrant Workers (CMW) monitors the implementation of the Convention. All signatory states have to submit implementation reports to the CMW every five years.[126]

121 ege.g. UN Committee on the Rights of the Child, *Concluding observations: Denmark (23 November 2005)* (UN Doc CRC/C/DNK/CO/3 2005) para 30-31.

122 ege.g. UN Committee on the Rights of the Child, *Concluding observations: Austria (31 March 2005)* (UN Doc CRC/C/15/Add251 2005) para 35-36.

123 Art 9(1) CRC.

124 The best interests concept is specifically mentioned in Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12 (FRD) art 5(5) and in Art 24 of the Charter of Fundamental Rights of the EU.

125 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICPMW).

126 Art 73 ICPMW.

The Convention has an individual complaint mechanism,[127] though only ten states have accepted this procedure. The Convention has been ratified by 45 states. None of the member states of the EU have ratified the Convention.

Article 44(1) of the Convention positions the family as the natural and fundamental unit of society and therefore the state should take measures to ensure protection of the unity of the families of migrant workers.[128] State parties should furthermore facilitate the reunification of migrant workers with their spouses and minor dependent unmarried children.[129] For other members of the family, states should favourably consider granting equal treatment.[130] The scope of these provisions is limited as the Convention provides that states retain the competence to establish the criteria governing the admission of migrant workers and the members of their family.[131] The Convention therefore does not further concretise the conditions under which migrants may enter and reside for the purpose of family unification.

As mentioned before, none of the EU member states have ratified the Convention.[132] Furthermore, as the Convention does not have a bearing on the conditions of entry, the Convention is of limited relevance for this study.

2.9 CONCLUSION

None of the investigated sources of international (human rights) law contain a self-standing right to family unification. This is a remarkable observation, considering that the family is positioned as the most fundamental unit of society in the Universal Declaration of Human Rights. Several reasons for the absence of a right to family unification in international human rights law can be identified. Firstly, the core of the human rights treaties were developed at a time when the mobility of the family was much lower than it is nowadays. The advancement in communication technology and the reduction of travelling costs have made it possible for more people to move to other states to develop family life. The issue of family unification has become much more relevant today than it was decades ago. Secondly, immigration law is a field in which the member states are reluctant to commit themselves to international obligations. A good illustration of this is the International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Family.

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127 Art 72 ICPMW.

128 Art 44(1) ICPMW.

129 Art 44(2) ICPMW Next to married spouses the provision also covers legal partnerships which have the same status as a marriage in national law.

130 Art 44(3) ICPMW.

131 Art 79 ICPMW.

132 See for an analysis of the reasons for the non-ratification of the Convention E. MacDonald and R. Cholewinski, *The Migrant Workers Convention in Europe* (UNESCO Migration Studies, 2007) p 50-65.

The Convention, which is not ratified by any of the member states of the EU, expressly does not regulate the right to entry and residence, not even of the family members of migrant workers. States are reluctant to give up any competence in their sovereign right to control the entry and residence of foreign nationals.

This leaves us with a body of international (human rights) law that, although not containing an explicit right to family unification, is still relevant when it comes to how states regulate family unification. The extent to which the various investigated sources of law are relevant for the field of family unification differs in two ways. Firstly, there is a substantive difference relating to the core subject and objectives of the instruments. The ICCPR and the ICESCR are treaties which have a more general nature, whereas the CRC, the CERD and the CEDAW have a very specific objective and scope. This influences the manner in which the different instruments are used. Where one seeks to rely in general on the protection of the right to respect for family life, recourse to the ICCPR is the most logical step. If however an application for family unification concerns children, the invocation of the CRC is the path to follow. The relevance of the various instruments analysed in this chapter therefore depends on the individual characteristics of an application for family unification. Secondly, the relevance of the various instruments of international (human rights) law also depends on the regional and domestic protection of the right to respect for family life. Where regional or domestic human rights protection is at a high level, recourse to international (human rights) law may simply not be necessary. For example, if a person can rely on the protection of Article 8 of the European Convention of Human Rights, which is analysed in the next chapter, it is not necessary (and formally not allowed) to also petition to the Human Rights Committee. As the judgments of the European Court of Human Rights are binding and that Court seems to go further in finding obligations for states in the field of family unification, it is understandable that applicants within the jurisdiction of one of the contracting parties to the ECHR would rather petition to the ECtHR than to the Human Rights Committee.

For this reason, the relevance of international (human rights) law for the field of family unification must not be overstated. None of the various sources contains a subjective right to family unification and often regional or even domestic systems of human rights protection go further than the obligations in international (human rights) law. However, for specific questions relating for example to the best interests of the child concept, instruments of international (human rights) law can be highly relevant.

3 European Convention on Human Rights

3.1 Introduction and methodological approach

In this chapter the looking glass is directed at the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The main research question addressed in this chapter is whether a right to family unification can be derived from the ECHR. Besides the question of the existence of a right to family unification, the manner in which the ECHR is relevant for the discipline of family unification is also discussed.

When defining the scope of this dissertation, the analysis was limited to admission cases. This means that expulsion cases are only analysed if they are quasi-admission cases. The case law of the European Court of Human Rights (ECtHR) in pure expulsion cases falls outside the scope of this dissertation and is therefore not discussed further in this chapter. However, expulsion cases which take the form of admission cases, are identified as quasi-admission cases and are included in the analysis. Quasi-admission cases are cases where the applicant factually resides in the host state, but for one reason or another the legal question is whether the host state should allow the residence of the applicant.[133] The notion of quasi-admission cases is applied widely, opening up room to discuss expulsion cases which are also relevant in the context of admission, but at the same time limiting the scope of the dissertation to exclude cases which have little relevance in answering the research questions.

As to these admission cases that fall within the scope of this dissertation, all case law of the ECtHR has been included in the analysis. The body of case law is sufficiently concise to make this possible. Where a case is not explicitly discussed in this chapter, it may be assumed that the case was not deemed to be relevant to contribute to the discussion of the relevant legal questions. The choice was made to discuss the facts and the merits of the judgments in the selected cases. The reason for this being that it is found that the case law of the ECtHR often draws heavily on the facts of the case at hand. It is difficult to understand the approach of the Court without specific guidance from the factual circumstances. The result of this is that this chapter has a casuistic approach.

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133 See paragraph 1.4. of this dissertation for a discussion on what is understood by the term quasi-admission cases.

The chapter is structured as follows. Firstly, the background of the ECHR is briefly sketched. Secondly, Article 8 ECHR on the right to respect for private and family life is introduced as the most relevant provision for the right to family unification. This section forms the core of the chapter. In this section, it is analysed who belongs to the definition of the family in the case law of the ECtHR (section 3.3.1.). What follows is an analysis of the early case law of the ECtHR on family unification and the grass roots of the family life elsewhere doctrine, which is identified as the central factor in the balancing of interests of the Court (section 3.3.2.). After that, the legal test on the justifications for interference with the right to respect for family life is analysed (section 3.3.3) In this section, those cases are discussed in which the ECtHR dealt with expulsion cases where there was no public order element except the fact that the substantive requirements for a residence permit were no longer fulfilled. The analysis in the next section concerns 'pure' positive obligations (section 3.3.4.). In this section the case law of the Court in admission cases is analysed. There are however also cases which at first sight do not appear to be admission cases, but are due to the factual circumstances relating to the residence right and the expulsion. For example, cases in which the right to reside was revoked with a retroactive effect, making an admission case of what appears to be an expulsion case. Such cases, which are identified as 'hybrid obligations', are analysed in the next section (section 3.3.5.). This leaves the types of admission cases where there has been a right of residence before, but the applicant has left the country and later seeks to reinstate his right of residence. These cases are discussed in a separate section (section 3.3.6.). After the analysis of the different types of admission cases, the analysis focusses on the best interests of the child in the balancing of interests (section 3.3.7.). Lastly, a recommendation is made to streamline the reasoning of the ECtHR in order to create consistency and coherence in the case law and to do justice to the best interests of the child concept (section 3.3.8.). Thirdly, the scope of Article 13 ECHR on the right to an effective remedy in the context of family unification is analysed. Fourthly, the relevance of the prohibition of discrimination as laid down in Article 14 ECHR for family unification is assessed. The chapter ends with concluding observations.

3.2 Background to the ECHR

The ECHR is a regional human rights treaty drafted by the Council of Europe.[134] The ECHR entered into force in 1953. Compliance with the rights protected by the ECHR is monitored by the ECtHR. The ECtHR is authorised to receive individual applications for alleged violations of the ECHR, as well as

134 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS No 005 (ECHR).

inter-state applications.[135] The ECHR does not contain any explicit reference to the right to family unification. However, several provisions of the ECHR are relevant for the right to family unification.

Article 1 ECHR prescribes that the state parties to the Convention shall secure the rights and freedoms laid down in the Convention to all persons within the jurisdiction of that state. This means that the scope of the ECHR is not limited to own nationals; foreign nationals also enjoy the protection of the Convention.[136] Furthermore, foreign nationals who are not (yet) within the territory of the state, but who nevertheless fall within its jurisdiction, are protected by the ECHR. In the text of the ECHR itself there are no references to the rights of migrants. Only in the additional protocols to the ECHR were migrant-specific issues addressed. For instance, access to social security for migrants is laid down in the First Protocol and collective expulsions are prohibited by the Fourth Protocol. This indicates a development in which political awareness of the importance of the protection of the rights of migrants has grown. This is also visible in the case law of the ECtHR, which has extended the interpretation of several provisions, most notably Articles 3 and 8 ECHR, to include the protection of the rights of migrants. This is possible as the ECtHR has ruled that the ECHR should be seen as a living instrument, in which the interpretation of a Convention provision can vary over time and place.[137]

A basic principle underlying the ECHR is that the primary responsibility to protect the rights and freedoms laid down in the Convention lies with the state parties.[138] It is the state parties who should incorporate these rights in their domestic legal systems. The ECtHR plays a subordinate role in this protection. It is only when the domestic authorities fail to sufficiently protect the rights and freedoms laid down in the Convention that the supranational ECtHR will intervene. Therefore, an important admissibility criteria of the ECtHR is whether the applicant has exhausted domestic legal remedies against an alleged violation of the Convention. Individuals must seek redress in their domestic legal system before applying to the ECtHR.[139] This gives the domestic legislators and adjudicators an important role in supervising compliance with the ECHR. When the primary protection provided in the domestic legal system is adequate there will be no intervention by the ECtHR. An assessment of the legal landscape throughout Europe learns that the way in which the ECHR is implemented in the state parties varies.[140] In Chapter 10 of this dissertation,

135 Art 34 and 33 ECHR.

136 P. Van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) p 13.

137 *Tyrer v United Kingdom* [1978] Series A no 26.

138 See for example *Markovic and others v Italy* (2010) 44 EHRR 1045.

139 Art 35(1) ECHR.

140 J. Gerards and J. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak: Een rechtsvergelijkend onderzoek* (Onderzoek uitgevoerd in opdracht van het Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), 2013).

the question of how the obligations of the selected member states under Article 8 ECHR are implemented is investigated.

There are several provisions in the ECHR which are relevant for the right to family unification. Most notably, Article 8 ECHR protects the right to respect for family life. The specific characteristics of the case law of the ECtHR on this Article are outlined in the following sub-section.

3.3 ARTICLE 8 ECHR ON THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

Article 8 ECHR does not contain any explicit right to family unification in the text of the provision. Instead, Article 8 ECHR obliges the contracting states to respect the private and family life of everyone within its jurisdiction. This obligation also applies in immigration cases. Article 8 ECHR, which protects the right to respect for family life, was interpreted as a limitation on the state competence to expel settled immigrants and, in a few cases, also as an obligation to accept the entry and residence of immigrants on their territory. However, the scope of the positive obligation to admit is narrower than the negative obligation not to expel, as will be shown below.

Article 8 ECHR on the right to respect for private and family life reads:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

As expulsion cases fall outside the scope of this research, the focus will lie more on family life rather than private life. The protection of the right to private life is usually invoked if a person has been a settled migrant for a long period of time and does not have strong family ties to rely on. The ECtHR has recognised that it must be established in each case whether the focus lies on the private life or family life aspect of a case, and that it may be difficult to make a strong distinction between these two.[141] As the objective of the dissertation is to find out whether a right to family unification exists, the primary focus of the analysis in this chapter lies on the right to respect for family life. Where aspects of private life are deemed relevant, this is mentioned.

141 See for example *Maslov v Austria* (2008) 47 EHRR 20 paras 61-64.

3.3.1 Definition of the family

Before the analysis of what constitutes a violation of Article 8 ECHR, it is necessary to determine the personal scope of this provision. The case law of the ECtHR provides for many different family constructions which have been accepted as family life within the scope of Article 8 ECHR. For the question of whether family life exists, case law outside the scope of family unification may also be relevant.

Generally the ECtHR takes an inclusive approach in what it considers to constitute family life. It looks at the factual reality rather than the legal formality of whether family life exists. In the *Al-Nashif v. Bulgaria* case the ECtHR gave a summary of its case law on what constitutes family life:

> *"The existence or non-existence of "family life" is essentially a question of fact depending upon the reality in practice of close personal ties. […] When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means."*[142]

The relationship between married partners constitutes family life.[143] In *Abdulaziz, Cabales and Balkandali v. United Kingdom*, the ECtHR accepted that also the situation in which the couple were not yet married but were planning to get married amounted to family life.[144] In the abovementioned case *Al-Nashif v. Bulgaria*, the Court held that family life "*encompasses both families based on marriage and also de facto relationships.*"[145] Whether an unmarried partnership falls within the scope of the protection of family life depends on the specific circumstances of the case. Cohabiting same-sex relationships amount to family life.[146] Also same-sex relationships in which there is no cohabitation "*for professional and social reasons*" constitute family life.[147] The recognition of non-married relationships as family life is a rather recent development.

The minor child born out of a marriage is *ipse jure* considered to be part of the family.[148] Also a child born outside marriage is considered to be part

142 *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 para 112.

143 In *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 para 62 the Court stated that "[w]hatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage […].".

144 Ibid.

145 *Al-Nashif v Bulgaria* (n 142) para 112.

146 *Schalk and Kopf v Austria* (2011) 53 EHRR 20 para 94.

147 *Vallianatos and others v Greece* App nos 29381/09 and 32684/09 (ECtHR 7 November 2013) para 73.

148 *Gûl v Switzerland* (1996) 22 EHRR 93 para 32.

of the family.[149] The bond between parent and child is so strong that it can only be broken in exceptional circumstances. There has been no case in which the ECtHR held that the relationship between parent and child did not amount to family life. In *Tuquabo-Tekle v. Netherlands* it was ruled that a mother and daughter had family life despite the fact that the parental control over the daughter had been in the hands of another family member for seven years.[150] In *Boughanemi v. France* the ECtHR ruled that there was family life despite the fact that the father only acknowledged the child after ten months, hardly ever saw the child and did not provide for any maintenance for the child.[151] The termination of the relationship between husband and wife does not influence the family life between parent and child, even if the child is not cohabitating with the parent.[152] The relationship between siblings is also considered to be part of family life.[153]

The relationship between a parent and a child who has reached the age of majority does not automatically fall within the scope of the protection of the right to respect for family life. In those cases, an increased level of dependency is required in order to rule that there is family life within the scope of Article 8 ECHR.[154] Whether this level of dependency is present depends on the particular circumstances of the case.

In *Marckx v. Belgium*, the ECtHR accepted the relationship between a child and its grandfather as family life.[155] This is a good illustration of the inclusive approach visible within the case law of the ECtHR, in which the factual relationship between the family members involved is relevant in determining whether there is family life within the scope of Article 8 ECHR.

Even though it is necessary to have family life within the context of Article 8 ECHR, this does not mean that if family life is established a right to reside in the host state can automatically be derived from this. Instead, it needs to be established whether based on the family life the host state is under the obligation to allow residence to the family member. The threshold to fall within the definition of family life may be not that high, but the burden to prove that the host state is under the obligation to allow for residence is much higher.

149 *Boughanemi v France* (1996) 22 EHRR 227 para 35.
150 *Tuquabo-Tekle v Netherlands* App no 60665/00 (ECtHR 1 December 2005).
151 *Boughanemi v France* (n 149).
152 *Berrehab v Netherlands* (n 37) para 21.
153 *Moustaquim v Belgium* (1991) 13 EHRR 802 para 36.
154 See *Slivenko v Latvia* (2004) 39 EHRR 24 para 97 and *Khan v United Kingdom* (2010) 50 EHRR 47 para 32.
155 *Marckx v Belgium* (1979) 2 EHRR 330.

3.3.2 The origins of the family life elsewhere doctrine

As a starting point it must be noted that in every single case relating to immigration, the ECtHR emphasises that

> *"a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. […] The Convention does not guarantee the right of an alien to enter or to reside in a particular country."*[156]

I find it peculiar that the ECtHR in every single case emphasises the wide margin of appreciation of the state in these words, considering that, as will be shown below, the same Court has ruled numerous times that the right to respect for family life does impose an obligation for a contracting state to allow the residence of an immigrant in its territory. The question then arises whether this standard formulation in the case law is just an empty phrase. I believe that this is not the case. It is the basis for the entire body of case law. When the European Commission of Human Rights (EComHR) first started dealing with Article 8 ECHR complaints relating to the admission of immigrants, it developed the doctrine that there is no violation of Article 8 ECHR if family life is possible in another state. This reasoning still resounds in current case law, as will be shown below.

One of the very first cases concerning family unification dealt with by the EComHR concerned a citizen of the United Kingdom and Colonies from Mauritius who moved to the United Kingdom in order to seek employment in July 1966.[157] After he found work as a packer, his wife and two children joined him in December 1966. As he could not obtain a permanent work permit, the first applicant went back to Mauritius in January 1967. His wife, who was very shortly expecting another child, remained with the two children in the United Kingdom with relatives. In July 1967, the first applicant came back to the United Kingdom as his wife was about to give birth to their third child. The applicant was refused entry to the United Kingdom at the airport. In August 1967, after legal proceedings, the United Kingdom authorised the stay of the applicant for one month, considering his wife's circumstances. Subsequently, however, the United Kingdom gave the applicant a permanent residence permit. When lodging their application with the EComHR, the permanent residence permit had not yet been issued. In their petition, the applicants claimed the right for the first applicant to enter and reside in the United Kingdom, the right to a fair and impartial hearing and damages. On

156 See for *Nunez v Norway* (n 38) para 66. The first time the ECtHR used a similar formulation was in *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143) para 67.

157 *X, Y, Z, V & W v United Kingdom* (1976) Yearbook of the European Convention on Human Rights 1967 p 528 App no 3325/67.

the question of whether there had been a violation of Article 8 ECHR, the EComHR held that:

> *"it is to be observed that the refusal by the authorities of entry or continued residence of the husband did not prevent the wife and children from joining him abroad, no reason appearing, given the short period of their residence in the United Kingdom, why they would not do so; and whereas the refusal, therefore, would not have constituted a separation of the family by the authorities, if the wife and children were entitled to, and chose, to remain in the United Kingdom."*[158]

The EComHR declared the application inadmissible as manifestly ill-founded. Illustrative for this approach is that no interference with the right to respect for family life is found. Instead of using the legal test enshrined in Article 8(2) ECHR, the EComHR developed its own criterion. The criterion is that when family life can be exercised in another state, there is no obligation for the host state to provide residence to the applicant.

Another early case concerning family unification concerned a Cypriot man who had entered the United Kingdom as a student. After his studies he started part-time continuing education and found a job as a packer. In addition, he married a UK citizen of Cypriot origins. The applicant applied for a permanent residence permit but this application was refused. After his appeals were rejected in the final domestic instance, he petitioned to the EComHR. The EComHR held that there was no legal obstacle preventing the applicants from establishing their family life in Cyprus.[159] In reply to the questions whether the refusal of residence constituted an interference with the right to respect for family life and whether the United Kingdom citizen spouse could be expected to follow her spouse to Cyprus, the EComHR held that

> *"a refusal by her not to [follow her husband to Cyprus] because she chooses to stay in the United Kingdom (as she is entitled to do) does not, in the circumstances of the case, mean that there has been thereby an interference by the United Kingdom authorities with the applicants family life within the meaning of Art. 8(1) of the Convention."*[160]

In later case law, the fact that the applicant in *X & Y v. United Kingdom* already had a residence permit based on his previous lawful residence in the United Kingdom would have meant that the termination of his lawful residence the United Kingdom would interfere in the right to respect for family life, triggering a different legal test. This is analysed in more detail below.

Another case concerned the application for family unification of an Indian citizen who resided in Kenya to join his wife who is also an Indian citizen and who lawfully resided in the United Kingdom. The couple submitted that

158 Ibid.
159 *X & Y v United Kingdom* (1972) 39 Collection of Decisions 104.
160 Ibid.

they would not qualify to exercise their family life in Kenya together, and that therefore the United Kingdom should allow for family unification. The EComHR decided that there does not appear to be any obstacle preventing this applicant and his wife from living together in India. The EComHR added that

> *"[i]f the only legal residence which they can find is in a country unconnected with either of them, the exclusion from residence in the "home" country of one of them might constitute a violation of Art 8."*[161]

Here the EComHR explicitly repeats the availability of an alternative location to enjoy family life as the central criterion to determine whether the state is under the obligation to allow for residence of the applicant under Article 8 ECHR. It furthermore makes this criterion more specific in the sense that it adds that if that alternative location is unconnected with either of the family members, this might result in finding a violation of Article 8 ECHR.

Even back then, the EComHR was not always consistent in the manner in which it applied the family life elsewhere criterion. The case *Mohamed Alam and Mohamed Khan v. United Kingdom* concerned a Pakistani citizen who moved to the United Kingdom in 1957 and obtained lawful residence there. In 1961 he was joined by his eldest son from his first marriage. In 1963 the applicant moved back to Pakistan, but in 1965 he returned to the United Kingdom with his two minor sons from his second marriage. Upon arrival in the United Kingdom, the applicant was allowed to enter but one of his minor sons was detained and deported back to Pakistan as the United Kingdom did not believe that he was in fact the son of the applicant. The applicant complained that the refusal of entry to his son amounted to a violation of Article 8 ECHR. The EComHR declared the application admissible. This is interesting concerning the case law above. The EComHR could have applied the reasoning it developed itself and declare the application inadmissible as manifestly ill-founded considering that the applicant could be expected to follow his son to Pakistan.

I argue that the family life elsewhere doctrine is in fact the central argument of the ECtHR in all its case law and I identify this as the only consistent trend in the case law of the Court. Firstly, it must be noted that it is quite remarkable that the EComHR and later the ECtHR sought an alternative legal test to determine whether a contracting state acted in compliance with Article 8 ECHR, considering that Article 8(2) ECHR contains an explicit test to determine whether an interference with the right to respect for family life is justified.

161 *X v United Kingdom* (1971) 43 Collection of Decisions 82.

3.3.3 The justification test of Article 8(2) ECHR and negative obligations

To determine whether an action by a state is in accordance with Article 8 ECHR, the first step is to establish whether family life does in fact exist.[162] Secondly, it needs to be ascertained whether there is an interference with the right to respect to family life. In the context of family unification, most typically an interference is the termination of lawful residence or expulsion. Later in this chapter the question is posed whether the refusal of entry and residence can and should also be considered an interference with the right to respect for family life. When an interference with the right to respect for private or family life is found, the test to determine whether the interference is justified is enshrined in Article 8(2) ECHR. An interference with the right to respect for private and family life should be made in accordance with the law. To determine whether an interference is in accordance with the law, the ECtHR has developed a three-fold test. The interference with the right to respect for family life must have a basis in national law. This national law must be accessible and must be formulated in such a way that the interference with the right to respect for family life is foreseeable.[163] When the law in a member state does not provide for sufficient legal safeguards against interferences with the right to respect for family life, the interference is unlawful. In that case the reminder of the test described below is not relevant. This was for example the case in *Al-Nashif v. Bulgaria*. This case concerned the deportation of a stateless Palestinian man from Bulgaria despite the fact that his family resided in Bulgaria. The ECtHR held that because the deportation was ordered pursuant to an inadequate legal regime that did not provide for sufficient safeguards, there had been a violation of Article 8.[164]

Once the ECtHR has accepted that an interference with the right to respect for private and family life has a legal basis in national law, the interference should be motivated by one of the specified legitimate aims. Article 8(2) ECHR provides an exhaustive list of legitimate aims, namely the protection of public security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others. In the application of Article 8 ECHR in immigration cases, the ECtHR is often not very strict in applying the requirement that an interference has a legitimate aim. A good example of this is the *Palanci v. Switzerland* case. This case concerns the refusal of Switzerland to prolong the residence permit of the applicant, who had been living in Switzerland for over eighteen years, because he had been convicted and had accumulated considerable debts. After considering the facts and the domestic proceedings, the ECtHR stated that "the domestic authorities rightly assumed

162 See section 3.3.1.
163 *Huvig v France* (1990) 12 EHRR 528.
164 *Al-Nashif v Bulgaria* (n 142) para 128.

that the applicant's behaviour had been a threat to public order."[165] This is a curious finding considering that protecting the public order is not one of the listed legitimate aims in Article 8(2) ECHR. The concurring judges point to this in their opinion annexed to the judgment.[166]

The last condition for an interference to be justified is that it must be necessary in a democratic society. The determination of whether an interference is necessary in a democratic society involves two aspects: the nature of the democratic necessity and the proportionality of the interference. The nature of the democratic necessity is the identification of a legitimate aim for which the interference is necessary in a democratic society. When it is established that a particular interference is necessary in a democratic society, it needs to be evaluated whether the interference with the right to respect for family life is no greater than is necessary to address the pressing social need underlying that legitimate aim. The criteria to determine the proportionality of an interference are not clearly defined in the case law of the ECtHR.[167]

In cases in which it is held that there is no interference with the right to respect for private or family life, the question that arises is whether there is a positive obligation for the state to facilitate family life by allowing entry and residence. The line between the negative obligation to refrain from interferences with the right to respect for private and family life and the positive obligation to take state action to guarantee the enjoyment of this right can be very thin. Section 3.5. of this dissertation on 'hybrid' obligations is focused on cases in which the ECtHR itself admits that it is difficult to make a sharp distinction between negative and positive obligations.

The scope of Article 8 ECHR is much wider in cases concerning the expulsion of settled immigrants. When it is established that private or family life exists, expulsion constitutes an interference with the right to respect for family life. States have the negative obligation to refrain from unjustified interferences with the right to respect for private and family life. The case law of the ECtHR on this issue focuses on whether interferences are justified. A large majority of the available case law focuses on the expulsion of settled immigrants who have been convicted for a criminal offence and face expulsion as a result of their criminal behaviour. The legitimate aim pursued by the state in these cases is the prevention of disorder or crime. Often the ECtHR accepts this as a legitimate aim in the context of the margin of appreciations enjoyed by the states.

The scope of this research is limited to admission and quasi-admission cases. The latter category is defined as cases which explicitly deal with the

165 *Palanci v Switzerland* App no 2607/08 (ECtHR 25 March 2014) para 58.

166 See the concurring opinion of the judges Raimondi, Sajó and Spano.

167 A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' [1999] The Modern Law Review p 687.

question of whether the expulsion of a person is in accordance with Article 8 ECHR but implicitly deal with the question whether the state should admit a person and should allow residence within its territory.

The case *Berrehab v. Netherlands*, the first immigration case in which the ECtHR found a violation of Article 8 ECHR, concerned the expulsion of a settled Moroccan who resided in the Netherlands with his wife and minor daughter. When the marriage between the applicant and his wife ended in a divorce, the Dutch authorities withdrew the residence permit of the applicant considering that the basis of this residence permit, namely his marriage to a Dutch national, was no longer applicable. The applicant was subsequently deported to Morocco. Shortly after the deportation the former wife and his daughter visited him in Morocco for two months. After obtaining a temporary visa to the Netherlands, which was initially refused, the applicant travelled to the Netherlands where he remarried his former wife and subsequently was once again issued a residence permit on the grounds that he had family life with his wife. The applicant complained to the ECtHR that his deportation to Morocco had been in violation of his right to respect for family life. The ECtHR accepted that there was family life between the applicant and his minor daughter. The Court furthermore accepted that the deportation had a legitimate aim, namely the preservation of the country's economic well-being, considering that the Dutch government was in fact concerned to regulate the labour market because of the population density. In determining whether the interference was necessary, the ECtHR took note of the fact that the case did not concern the first admittance of the applicant in the Netherlands. Instead, the applicant had been lawfully residing in the Netherlands for several years and had a job. Furthermore, the applicant had real family ties with his daughter who was at a very young age, making her dependent on contact with her father. Accordingly, the ECtHR held that the interference was not necessary in a democratic society and therefore concluded that there had been a violation of Article 8 ECHR. In this first judgment in which the Court found a violation, I believe that the ECtHR, albeit implicitly as it does not discuss this topic, applied the family life elsewhere doctrine. The applicant's former wife and mother of his daughter could, at the time of the deportation, not be expected to follow her former husband to Morocco. For that reason, the deportation of the applicant meant that the family life between the applicant and his daughter was ruptured. It was therefore the separation of the parents which essentially lead to the finding of a violation; if the applicant and his wife had been married while the applicant faced expulsion, his wife could be expected to follow her husband to Morocco.

The ECtHR elaborated on the termination of lawful residence based on divorce in the *Ciliz v. Netherlands* case.[168] The case concerns a Turkish man

168 *Ciliz v Netherlands* App no 29192/95 (ECtHR 11 July 2000).

who came to the Netherlands in 1988. He met and married another Turkish national and obtained a residence permit. In 1990 a son was born out of the marriage. In 1991, the couple separated and divorce proceedings were initiated. This started a legal battle concerning an arrangement for access to the child for the father. Furthermore, he was refused an extension of his residence permit and was facing deportation. Despite the fact that the child custody proceedings had not yet been finalised, the applicant was deported to Turkey. He complained that this violated his right to respect for family life. The ECtHR held that there was family life between the applicant and his son despite the fact that there had only been limited contact and the father did not contribute to the maintenance of the child. The Court held that states are under the positive obligation to ensure that family life between parents and children can continue after divorce and under a negative obligation to refrain from measures which cause family ties to rupture.[169] The ECtHR held that it was the decision not to allow the applicant to continue to reside in the Netherlands pending the custody proceedings which frustrated these proceedings and therefore the Court looks at the negative obligation not to rupture family life. According to the Court, the deportation of the applicant denied him access to the procedure relating to the custody proceedings of the child. Accordingly the ECtHR held that the interference in the right to respect for family life of the applicant was not necessary in a democratic society. Applying the family life elsewhere doctrine to this case, I observe that it could not be expected of the mother of the child to follow the applicant to Turkey considering that they were divorced and in fact were in a legal battle over the custody of the child. The inability to exercise family life in the country of origin was the decisive factor for the ECtHR here.

There is not a lot of case law relating to negative obligations where there is no public order element. Most case law relating to the expulsion of settled immigrants concerns the termination of lawful residence after criminal convictions. As stated before, this body of case law falls outside the scope of this research.

3.3.4 'Purely' positive obligations

Article 8 ECHR contains both positive and negative obligations. A positive obligation entails an obligation for the state to guarantee the protection of human rights when there is no interference by the state. In the context of migration and Article 8 ECHR, a positive obligation for a state can occur when an immigrant who resides in another state applies for residence with a family member in the host state. The ECtHR is reluctant to extend the scope of positive obligations, especially in the field of immigration. It is only in exceptional

169 Ibid para 62.

circumstances that the ECtHR is willing to rule that there is a violation of Article 8 ECHR when an immigrant is denied entry. The standard formulation of the ECtHR is that Article 8 does not impose a general obligation on a state to respect the choice of matrimonial residence and to authorise family reunion in its territory.[170] However, Article 8 in some circumstances can impose such an obligation. In such cases, a fair balance needs to be struck between the competing interests of the individual and the community as a whole. In this balance, the state enjoys a certain margin of appreciation. The margin of appreciation is so large in cases of first admission that only in exceptional circumstances would the refusal to allow entry and residence to a family member give rise to a violation of Article 8 ECHR.

In order to determine whether Article 8 ECHR imposes a positive obligation to admit and to allow residence in a specific case, the ECtHR generally does not make use of the justification test enshrined in Article 8 ECHR. In most cases concerning a positive obligation, the Court states that

> "*the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation*"[171]

From this the ECtHR derives a 'fair balance test' which in most cases is applied to the particular circumstances of the case. This fair balance test does offer the guidance laid down in Article 8(2) ECHR. The analysis of the case law of the ECtHR below shows that this leads to inconsistency and incoherence.

One of the first cases in which the question was whether the state should allow the entry and residence of a family member was the abovementioned case *Mohamed Alam and Mohamed Khan v. United Kingdom.* In the admissibility decision the ECommHR declared that the application of a Pakistani national who sought family unification with his son in the United Kingdom was admissible. In this decision, the ECommHR does not provide further argumentation as to the question of why family life could not be practised in the country of origin. It has been suggested that it was the fact that the application concerned the entry of a minor child that was decisive in this case.[172] This case has not resulted in a judgment by the ECtHR.

Another relevant decision by the ECommHR is *Lambrati v. Netherlands*.[173] This case concerns a Moroccan national who had been residing in the Netherlands since 1976. From the marriage with his first wife, the applicant

170 *Gûl v Switzerland* (n 148) para 38.
171 *Tuquabo-Tekle v Netherlands* (n 150) para 42.
172 P. Van Dijk and G. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Martinus Nijhoff Publishers 1998).
173 *Lambrati v. Netherlands.*

had six children. The six children and their mother had always lived in Morocco. In 1986 the applicant married a second wife, who already had three children from a previous marriage. That same year, the second wife and her children came to the Netherlands and obtained a residence permit on the grounds of family unification. In 1990 the marriage between the applicant and his first wife was dissolved. That same year, the applicant applied for entry visas to bring his six children from his first wife to the Netherlands. As their mother had renounced her rights towards her children, the applicant's mother had been taking care of them in Morocco. As she was now eighty years old and in poor health, the applicant argued that his mother could no longer take care of the children. The Dutch authorities rejected the application on the grounds that the children did not in fact belong to the applicant's family in the Netherlands. The ECommHR ruled that with respect to the two eldest children, they had already reached the age of majority at the moment of the application and, as there was no further indication that there were more than normal emotional ties, they fell outside the scope of the protection of Article 8 ECHR. For the four youngest children, the ECommHR held that the relationship between the applicant and these children amounts to family life. The ECommHR furthermore held that "*the refusal to allow them to enter the Netherlands must be considered as an interference with their right to respect for their family life.*"[174] The ECommHR subsequently looked at the justification of the interference. It accepted that the refusal of entry pursues the legitimate aim of the preservation of the country's economic well-being. As to the proportionality of the refusal, the ECommHR notes that the four youngest children have never lived in the Netherlands and have strong links with Morocco, where they have a strong social network. There are no indications that the children are living in Morocco without the necessary care. Additionally, the refusal of the Netherlands to allow for family unification does not mean that the relationship between the applicant and his children will be broken. The applicant will be able to maintain the family life with his children in the same manner as he did in the years preceding the application for family unification. Under these circumstances, the ECommHR considers that the individual interests do not outweigh the public interest relating to Dutch immigration policy and therefore the Netherlands had struck a fair balance between the competing interests involved. The reason that this case is discussed at length here is that in a clear admission case, the ECommHR fully endorsed the approach of Article 8(2) ECHR. In later cases, the ECtHR does not do so.

The first case in which the ECtHR, as opposed to the ECommHR, dealt with the issue of family unification was *Abdulaziz, Cabales and Balkandali v. United Kingdom*.[175] The applicants in this case were three women who were lawfully and permanently settled in the United Kingdom and who sought family

174 *Lambrati v. Netherlands.*
175 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143).

unification with their husbands or fiancées. Mrs. Abdulaziz was stateless and held a Malawian travel document. She entered the United Kingdom in 1977 and was issued a permanent residence permit in 1979. She met a Portuguese national, Mr. Abdulaziz, who was a visitor in the United Kingdom and they got married. Subsequently they applied for a residence permit based on their married status. This application was rejected. Mr. Abdulaziz remained in the United Kingdom illegally. Mrs. Cabales was a United Kingdom citizen residing in the United Kingdom. She originated from the Philippines. She arrived in the United Kingdom in 1967 and obtained a residence permit there. In 1977, the applicants met and in 1980 they got married in the Philippines. In that same year Mrs. Abdulaziz applied for the entry of her husband. At the time of the application she was not yet a citizen of the United Kingdom. The application was rejected. Between 1980 and 1984 the applicants lived separated from each other. However, after that, the applicant was allowed to enter the United Kingdom and, after a troublesome procedure, was granted a residence permit there. Mrs. Balkandali was born in Egypt and came to the United Kingdom in 1973. She was issued a residence permit which was prolonged on various grounds. In 1978, she married a United Kingdom citizen, on the basis of which she obtained a permanent residence permit and later also United Kingdom citizenship. The marriage between the applicant and her husband was dissolved in 1980. He entered the United Kingdom in 1979 and he obtained a residence permit as a student. The extension of his residence permit was refused as the applicant had not attended his educational course. In 1979 Mr. Balkandali and Mrs. Balkandali started cohabiting. In 1980, their common son was born. In 1981, they got married. Mr Balkandali applied for a residence permit based on his relationship and later marriage with Mrs. Balkandali. The application was rejected. In 1984, after Mrs. Balkandali had acquired United Kingdom citizenship, Mr. Balkaldali was issued with a residence permit. All applicants had been rejected based on the fact that the applicants were not United Kingdom citizens who had been born in the United Kingdom or whose parents had been born in the United Kingdom. For the present analysis, only the Article 8 ECHR claim is relevant.[176] The Court remarks that

> *"[immigration law] is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."*[177]

The Court observes that the applicants in this case did not leave any family member behind in the country of origin when they came to the United Kingdom, but rather contracted the marriages after becoming settled in the

176 For an analysis of Art 14 ECHR in conjunction with Art 8 ECHR, see paragraph 3.5. For an analysis of the Art 13 claim, see paragraph 3.4.

177 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143) para 67.

United Kingdom.[178] The applicants, according to the Court, did not substantiate that there were obstacles to exercise family life in the country of origin or that there were special reasons why this could not be expected of them. Accordingly, the Court held that there was no "*lack of respect*" for family life and therefore did not find a violation of Article 8 ECHR taken alone. The test used to determine whether there is a violation in *Abdulaziz* is thus centred on the question of whether the applicants could be expected to exercise family life in the country of origin of the spouse.

The ECtHR systematically dealt with the issue of positive obligations in the context of family unification in *Gül v. Switzerland*.[179] The case concerned a Turkish man of Kurdish origin who moved to Switzerland in 1983 to apply for asylum. His asylum claim was rejected in 1989, but he obtained a residence permit for humanitarian reasons in 1990. In 1987, his wife joined him in Switzerland because in the region where she was living in Turkey the medical treatment she needed after an accident was not available. Their two minor sons remained in Turkey. In 1990 the applicant asked for the family unification of his two sons. This application was rejected on the grounds that the applicant did not comply with the accommodation requirement and the fact that the eldest son was older than eighteen at the time of application. The ECtHR considered that it saw as its task to determine "*to what extent it is true that Ersin's move to Switzerland would be the only way for Mr Gül to develop family life with his son.*"[180] In other words, the Court limited itself to the question of whether family life could be exercised elsewhere. In order to answer this question, the Court considered that the father had shown by short visits that his residence in Turkey would not be problematic, that it was not substantiated that his wife could not get the required treatment in a Turkish hospital and the fact that the applicant and his wife did not have a permanent residence permit in Switzerland but instead a humanitarian residence permit which could be withdrawn. Based on this the ECtHR held that the family could exercise their right to respect for family life in Turkey and therefore Switzerland did not fail to fulfil the obligations arising under Article 8 ECHR. In applying the family life elsewhere doctrine in the test whether Switzerland was under the positive obligation to admit the sons of the applicant, the ECtHR set the standard for the future test for positive obligations which is different from the justification test enshrined in Article 8(2) ECHR. In a dissenting opinion, Judge Martens expresses his worries regarding the distinction between positive and negative obligations as follows:

> *"The Court has repeatedly stressed that the boundaries between the two types "do not lend themselves to precise definition". […] The present case well illustrates the truth of this*

178 Ibid para 68.
179 Gûl v Switzerland (n 148).
180 Ibid para 39.

proposition since the question whether the Swiss decision violated a positive or a negative obligation, if either, seems hardly more than one of semantics: the refusal of the Swiss authorities to let Ersin and his parents be reunited may be considered as an action from which they should have refrained, whereas it could arguably also be viewed as failing to take an action which they were required to take, namely making a reunion possible by granting the authorisation. If one takes the view that, if there is a violation at all, it must be of a positive obligation – a view that finds support in the aforementioned Abdulaziz, Cabales and Balkandali judgment – then one has to put up with the rather awkward systematic inconsistency that exclusion of a person from a state where his family lives does not fall into the same category of breaches as expulsion of a person from a state where his family lives: the former decision may be in breach of a positive obligation under Art 8 (art. 8), whereas the latter may be in breach of a negative obligation."[181]

This, according to Judge Martens, would be immaterial if both types of obligations were treated alike. Martens observes that there was a time when this was not the case, but that times have changed and now a fair balance must be struck between the competing interests of the individual and the community in both the context of a negative as well as a positive obligation. Therefore, according to Martens, the refusal of the Swiss authorities to allow for family unification amounts to a violation unless it is deemed justified under Article 8(2) ECHR. Martens essentially argues that if the applicable principles are similar, the result must be the same as well. However in his own dissenting opinion he finds that this is not the case. In showing the manner in which the tests differ, Martens in my opinion shows exactly that the test as enshrined in Article 8(2) ECHR is principally different to the fair balance test which is essentially nothing more than applying the family life elsewhere doctrine. Instead, I believe it is a conscious attempt by the Court to limit the implications of Article 8 ECHR in entry cases. I will come back to this argument in section 3.7. of this chapter.

The ECtHR applied its reasoning from *Gül v. Switzerland* in *Ahmut v. Netherlands.* This case concerned a Moroccan man who came to the Netherlands in 1986 after he divorced his Moroccan wife who remained in Morocco with their five common children. In 1990 the applicant obtained Dutch citizenship. In 1987 his wife died, and the children remained in Morocco under the care of their paternal grandmother. In 1989 and 1990 the second and third son of the applicant obtained a residence permit in the Netherlands based on study. His other two minor children, a daughter and son remained in Morocco with their grandmother. When the health of the eighty-year-old grandmother deteriorated, the applicant sought to take his remaining children to the Netherlands. They travelled to the Netherlands without the required provisional entry visa. The daughter formed a family herself and was not relevant for the application. The application for a residence permit of the youngest son, Souffiane, was

181 Dissenting Opinion of Judge Martens approved by Judge Russo, para 7.

rejected by the Dutch authorities. In 1991, Souffiane left the Netherlands. He was placed in a boarding school in Morocco. The ECtHR considered that it was the conscious decision of the father to settle in the Netherlands. Furthermore the applicant retained his Moroccan citizenship. Based on this it appears to the Court that the applicant

> "*is not prevented from maintaining the degree of family life which he himself had opted for when moving to the Netherlands in the first place, nor is there any obstacle to his returning to Morocco.*"[182]

Based on this the ECtHR holds that there is no violation of Article 8 ECHR. In this case the ECtHR only looks at the question of whether the applicant can be expected to exercise family life in Morocco. No other considerations are even considered in the Court's assessment of the case. This limits the question whether there is a positive obligation to admit the son of the applicant to the question of whether the father can be expected to exercise family life with his son in Morocco. The factual circumstance that the effect of the entire situation is that the son is placed in a boarding school in Morocco is not considered relevant by the ECtHR. Also, the Dutch citizenship of the father does not play any role in this regard. The judgment of the Court in *Ahmut* was not anonymous. Four out of the panel of nine judges did not agree with the majority and wrote a dissenting opinion. Judge Martens in his dissenting opinion argues that there is an interference with the right to respect for family life, like he did in his dissenting opinion in the *Gül* case.[183] In applying the justification test, Martens attaches considerable weight to the fact that the applicant is a Dutch national. He states that

> "*[i]f a father who is a Netherlands national wants to live with and care for his 9-year-old child in the Netherlands both father and child are, in principle, entitled to have that decision respected.*"[184]

In the admissibility decision *Haydarie v. Netherlands*, the applicant was an Afghan woman who came to the Netherlands as an asylum seeker.[185] She left three minor children behind in Afghanistan. Her asylum request was rejected, but she did obtain a residence permit on humanitarian grounds. Later in the procedure she also obtained Dutch citizenship. When the applicant learned that her children had resettled in Pakistan with their aunt, the applicant applied for family unification. This application was rejected, however, because the applicant did not meet the income requirement as she received social assistance benefits. As to the question of whether the state was under

182 *Ahmut v Netherlands* (1997) 24 EHRR 62 para 70.
183 Dissenting opinion of judge Martens, joined by judge Lohmus, para 3.
184 Ibid para 7.
185 *Haydarie v Netherlands (dec.)* App no 8876/05 (ECtHR 20 October 2005).

a positive obligation under Article 8 ECHR to allow family unification, the authorities stated that although it accepted that there might be problems for the applicant to settle in her country of origin, still a balance must be found between the applicant's personal interests and the general interests. Furthermore, the authorities considered that the applicant could comply with the income requirement within a reasonable period of time if she found paid employment. During the procedure, the applicant travelled to Pakistan to visit her youngest son who fell ill. In Pakistan, she suffered from a stroke which cause paralysis. She was relocated to the Netherlands where she was in hospital when the ECtHR decided on the admissibility of the case. The Court considered the crucial question in the case to be whether it could reasonably be expected of the applicant to comply with the income requirement. The Court found that in principle it was not unreasonable of the Dutch government to ask applicants for family unification to comply with an income requirement. As to the particular circumstances of the case, the Court held it against the applicant that she did not seek employment, but instead took care of her wheelchair-bound sister at home. The care of her sister could, according to the Court, be offered by an agency providing care for handicapped people. The ECtHR declared the application was inadmissible as it was manifestly ill-founded. The medical situation of the applicant herself did not play any role in the considerations of the Court, neither did the interests and circumstances of her minor children residing in Pakistan. In this case, the ECtHR did not go into the question of whether the applicant could be expected to exercise family life in the country of origin. In fact, the Dutch authorities themselves had stated that it might be problematic for the applicant to move to Pakistan. Instead, the Court focused on the reasonableness of imposing an income requirement. Using the framework of Article 8(2) ECHR, preserving the economic well-being of the country would have been a valid legitimate aim. However the test of Article 8 ECHR was not used. Instead, the Court tested the reasonableness of the income requirement, but did not consider any other circumstances, including the fact that the ruling of the Court actually made family life impossible for a considerable period of time.

In the admissibility decision *Chandra and others v. Netherlands*, which also considered the application of the income requirement by the Dutch authorities, the family life elsewhere doctrine was explicitly invoked by the ECtHR.[186] The case concerned the Indonesian mother of four children. After her marriage in Indonesia with the father of her children ended in divorce caused by her husband's abusive behaviour, the applicant came to the Netherlands where she married a Dutch national. She subsequently obtained Dutch citizenship. This marriage ended in divorce. Four years after the applicant first obtained a residence permit in the Netherlands, her four children came to the Nether-

186 *Chandra and Others v the Netherlands (dec)* App no 53102/99 (ECtHR 13 May 2003).

lands on a short-term entry visa. Once in the Netherlands, they applied for a residence permit for the purpose of family unification. This application was rejected on the basis that no appropriate long-term entry visa was obtained and furthermore because the applicant did not comply with the income requirement and the family bonds between mother and children had been broken because they had lived without her in Indonesia for a considerable period. In the appeal procedure, the regional court rejected the argument that the Netherlands was under the positive obligation to allow the residence of the four children based on Article 8 ECHR. It ruled that family life could be exercised in Indonesia. The Court observed that the mother waited for four years before applying for the family unification of her four children. Furthermore, at the time of the ECtHR's decision, two of the children had reached majority and the other two children were respectively fifteen and thirteen years old. According to the Court, at this age the children were not in need of as much care as younger children and they could reside in Indonesia with their father or with other relatives. As to the fact that the children had already resided in the Netherlands for six years when the ECtHR came to its decision, the Court held that the children came to the Netherlands without the appropriate entry visa and could not have reasonably expected that they would be allowed to remain in the Netherlands. Therefore the Court decided that the application was inadmissible as it was manifestly ill-founded. In this case, the Court did not focus in any way on the reasonableness of the income requirement, like it did in *Haydarie v. Netherlands*. Instead it looked at the question of whether family life could be exercised in Indonesia, as in the case law before the *Haydarie* decision.

A similar situation arose in *Benamar v. Netherlands*.[187] This case concerned a Moroccan woman who had four children with her Moroccan husband in Morocco. When the marriage ended in divorce, the custody of the children was awarded to the father and the mother moved to the Netherlands in 1991 where she remarried another Moroccan national who held a permanent residence permit. In 1997 the former husband and the father and caretaker of the four children died in Morocco. Subsequently, the applicant travelled to Morocco and took her four children to the Netherlands without the appropriate entry visa for long-term residence in the Netherlands. When the children applied for a residence permit, this application was rejected because the children had not obtained the required provisional entry visa, because the Dutch authorities claimed the family bond between mother and children had ceased to exist because she had remained in the Netherlands without her children for a long time and because the applicant did not comply with the housing requirement. The ECtHR considered that the children had lived all their lives in Morocco and that therefore they had strong links with the linguistic

187 *Benamar v the Netherlands (dec.)* App no 43786/04 (ECtHR, 5 April 2005).

and cultural environment in that country. Furthermore it had not been argued that the children could not stay with their maternal grandmother in Morocco and that the eldest sibling could not continue to take care of her younger siblings. The Court found no indication of any insurmountable objective obstacle for the applicant and her new husband, both being Moroccan nationals, to return to Morocco to exercise family life there. The fact that the children had resided in the Netherlands for eight years pending the procedure was deemed irrelevant. The Court considered that

> *"the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a fait accompli, any right of residence would be conferred on them."*[188]

Accordingly the application was declared inadmissible as it was manifestly ill-founded. In the *Benamar* case, the ECtHR does not go into the reasonableness of the imposed requirement which the applicants did not comply with, but instead applied the family life elsewhere doctrine when it argued that family life could be practiced in the country of origin. The interests of the children, who had been residing in the Netherlands for eight years at the time of the decision of the Court, were not further considered.

This overview of the case law of the ECtHR shows the reluctance of the Court to accept positive obligations in the domain of family unification. To me it seems that the reasoning of the Court in these cases is almost tailored to the outcome of not finding a violation. Why otherwise would the Court in *Haydarie v. Netherlands*, which actually concerned a situation in which the applicant could not return to her country of origin, focus on the reasonableness of the income requirement rather than on the possibility of exercising family life in the country of origin of the applicant. In two cases, however, the ECtHR did derive a positive obligation to allow entry and residence from Article 8 ECHR.

The first case in which the ECtHR derived a positive obligation from Article 8 ECHR in the context of family unification was *[a]en v. Netherlands*.[189] The case concerned a Turkish man who had moved to the Netherlands in 1977when he was twelve years old. In 1982 he married a Turkish national in Turkey. After the wedding, the bride initially remained in Turkey. In 1983 the first child from the marriage was born. The child was born in Turkey and remained there. In 1986 the wife moved to the Netherlands; the child remained in Turkey in the care of the brother and sister of his mother. In 1990 and 1994 two more children were born. They were born in the Netherlands and remained there all their lives. In 1992 the couple made an application for family unification for their oldest child. This application was rejected because the Dutch author-

188 Ibid.
189 *Sen v Netherlands* (2003) 36 EHRR 7.

ities believed that the family bond between parents and child had been broken because the child was cared for by the brother and sister of his mother. The ECtHR ruled that there is an ipse jure family relationship between a parent and a child.[190] Like in the *Ahmut* case, the Court held that the child had strong linguistic and cultural ties with the country of origin and it had been the conscious decision of the parents to leave the child behind in Turkey.[191] However, the ECtHR held that this case was different from *Ahmut* in the sense that there was a major obstacle for the Sen family to settle in Turkey. The husband and wife had established their married life in the Netherlands and the two youngest children were born and raised there. Furthermore, these youngest children had only weak links with Turkey.[192] Accordingly the Court held that the Netherlands was under the positive obligation to allow the family unification of the oldest child and had therefore violated Article 8 ECHR. It seems that the lawful residence of the siblings in the Netherlands was decisive in this case. Indeed, this differentiates the *Sen* case from the previous case law of the Court. It could not be expected from the siblings that they resettle in Turkey. In a concurring opinion, Judge Türmen expresses his agreement with the finding of a violation by the Court, but not with the argumentation. Türmen states that the finding of a violation was based on the presence of the two siblings in the Netherlands, and asserts that there might not have been a violation if these siblings had not been present in the Netherlands. According to Türmen, also when no siblings are present, a couple who are settled in a state to such an extent that they have a permanent right to reside should not be forced to give up that status in order to exercise family life with a child. The *Sen* case is a fundamental case in the sense that it was the first time that the ECtHR had derived a clear positive obligation from Article 8 ECHR to allow for the entry and residence of an immigrant in the context of family unification. However, the Court's emphasis on the position of the siblings in this case shows that it is not a departure from the family life elsewhere doctrine, but instead an application of this approach. Applying the family life elsewhere doctrine, the Court concludes that the Sen family cannot be expected to exercise family life in Turkey because of the lawful residence in the Netherlands of the siblings. The presence of the siblings in the Netherlands is the obstacle which triggers the conclusion that family life cannot be enjoyed in the country of origin.

The second and until now last case in which the Court accepted that a state is under the positive obligation to allow for the entry and residence of an immigrant on the basis of family unification was *Tuquabo-Tekle v. Netherlands*.[193] In this case, the applicant was a fifteen-year-old girl from Eritrea

190 Ibid para 28.
191 Ibid para 39.
192 Ibid para 40.
193 *Tuquabo-Tekle v Netherlands* (n 150).

who sought family unification with her mother and siblings who were lawfully residing in the Netherlands. Her mother had fled the civil war in their country after her husband and father of her children had died. She was granted refugee status in Norway, where she was able to find family unification with one of her sons. However, family unification with her daughter proved to be impossible. When her mother married a recognized refugee in the Netherlands, she moved to the Netherlands in 1993. In 1994 and 1995 two children were born from this marriage. In 1997, her mother made an application for the family unification of her daughter. This application was refused by the Dutch authorities on the basis that it was deemed that the family relationship between mother and daughter had ceased to exist because the daughter had resided for numerous years with her uncle and grandmother. In appeal, the district court ruled that no positive obligation to allow for family unification could be derived from Article 8 ECHR because there were no objective reasons why family life could not be exercised in Eritrea. The ECtHR applied the principles it established in *Gül v. Switzerland* and looked at whether it could be expected that the Tuquabo-Tekle family exercise family life in Eritrea.[194] The Court observed that the case was very similar to the *Sen v. Netherlands* case, as there were several young siblings.[195] In *Sen* it had been precisely this circumstance that lead the Court to the finding that the Netherlands had not struck a fair balance between the competing individual and general interests.[196] The Court considered that the applicant in this case was a relatively old minor and that it had held in previous cases (*Benamar v. Netherlands*, *I.M. v. Netherlands*, *Chandra and others v. Netherlands*) that such children have strong linguistic and cultural links with the environment in the country of origin. However, in the case of the applicant in *Tuquabo-Tekle* the Court accepted that in this case the age of the applicant meant that she was increasingly dependent on her mother considering that her grandmother had taken her from school and that she was at an age when she could be married off.[197] Considering these factors, the ECtHR considered that in refusing family unification the Netherlands had not struck a fair balance and therefore found that there was a violation of Article 8 ECHR. In my opinion, it was the combination between the application of the family life elsewhere doctrine, the Tuquabo-Tekle family could not be expected to relocate to Eritrea considering the settlement in the Netherlands of the young siblings of the applicant, and the increased dependence of the applicant on her mother which caused the Court to find a violation in this case.

194 Ibid para 43.
195 Ibid para 47.
196 Ibid para 48.
197 Ibid para 50.

One of the few cases that purely concerns the admission of a spouse is *Biao v. Denmark*.[198] In this case, the first applicant was born in Togo, but resided at the time in Denmark. He had acquired Danish citizenship. The second applicant was his wife. She is a Ghanaian citizen and sought admission to Denmark on the basis of her marriage to the first applicant. The application was rejected on the basis that the combined attachment of both partners with Ghana was stronger than the combined attachment with Denmark. This is a requirement in Danish family unification law.[199] When the application for a residence permit was rejected, the second applicant travelled to Denmark on a tourist visa and subsequently the couple settled in Malmö, Sweden. The applicants complained that the refusal of residence in Denmark amounted to a violation of Article 8 ECHR. The Court defined as the central issue at stake whether the Danish authorities had struck a fair balance between the competing interests at stake.[200] The Court observed that the first applicant had strong ties with Togo, Ghana and Denmark. The second applicant had strong ties with Ghana, but only weak ties with Denmark considering that she had lived there only for four months when she was there as a tourist and that she did not speak Danish.[201] The applicants had never been given any assurances that they would be allowed to reside in Denmark together. Furthermore, the first applicant admitted himself that he could settle in Ghana if he found paid employment there.[202] Consequently the Court found that Denmark had struck a fair balance between the competing interests at stake and had therefore not violated Article 8 ECHR. *Biao* is a case of a positive obligation to admit, in which the Court exclusively looks at the question of whether the couple could be expected to exercise family life in Denmark. In this case, the applicants also complained that the application of the combined attachment requirement breached Article 14 ECHR in conjunction with Article 8 ECHR. This issue will be separately considered in paragraph 5 of this chapter.

The overview of the cases presented above in my opinion clearly shows that it is the question of whether family life can be enjoyed in another country which is the guiding principle in the case law of the Court. The family life elsewhere doctrine can be found in all the cases discussed. In the case of positive obligations, the procedure where the Court uses this approach is the 'fair balance test', which the Court developed itself. In the 'fair balance test' the interests of the individual must be balanced against the public interests. It should be noted that in nearly all cases where the ECtHR employs the fair

198 *Biao v Denmark* App no 38590/10 (ECtHR 25 March 2014). The Biao v Denmark case has been referred to the Grand Chamber of the ECtHR on 8 septemberSeptember 2014, meaning that the Grand Chamber will reconsider the case.

199 See for an analysis of the attachment requirement in Danish law, section 7.3.6. of this dissertation.

200 *Biao v Denmark* (n 198) para 54.

201 Ibid para 56.

202 Ibid para 58.

balance test, the balance is struck in favour of the interests of the state. It is striking that the Court has developed its own Article 8 ECHR test considering that such a test is included in Article 8(2) ECHR. In applying the procedure to determine whether there has been a violation of Article 8 ECHR, the Court makes a distinction between interferences with the right to respect for family life, which it assumes is the case when a settled immigrant is expelled, and the question of whether the state is under a positive obligation to admit the immigrant on the grounds of the right to respect for family life. The distinction itself is understandable: there is a substantive difference between the expulsion of a settled immigrant and the admission of a 'new' immigrant. However, it is harder to grasp why in cases of a refusal of admission there is no interference in the right to respect for family life. This becomes even more apparent in the 'hybrid' obligation cases which are discussed below, where the difference between admission and expulsion proves to be very slight. This issue of the difference in the manner of testing whether there is an interference is further discussed in section 3.7. of this chapter.

3.3.5 Hybrid' obligations

There are many cases in which it is indeed difficult to establish whether the question is whether the state is under a negative obligation not to expel or under a positive obligation to admit. Often these cases arise when there has been an illegal entry or there has been a legal entry, but the visa was overstayed. In these cases the ECtHR often states that it is difficult to make a clear distinction between negative and positive obligations, but that it is not necessary to make this distinction considering that in both contexts a fair balance must be struck between the competing individual and general interests. It was already argued above, and will be discussed at length in section 3.7. of this chapter, that this approach by the Court is flawed. This section is devoted to the case law of the ECtHR in cases where it deems it unnecessary to make a distinction between negative and positive obligations. It will be shown that the Court is inconsistent in the manner in which it balances the competing interests. It must be mentioned from the outset that the categorization of the cases discussed in this section is not always crystal clear. One could argue that the decisions in *Haydarie v. Netherlands*, *Chandra and others v. Netherlands* and *Benamar v. Netherlands* should also be discussed in this chapter as the applicants in these cases already resided unlawfully in the Netherlands. On the other hand, some of the cases discussed in this section could also be discussed in the section on positive obligations. This once again illustrates that the Court is right in stating that it is difficult to make a sharp distinction between negative and positive obligations.

The case *Rodrigues da Silva and Hoogkamer v. Netherlands* concerned the residence of a woman with Brazilian citizenship with her child holding Dutch

citizenship in the Netherlands.[203] The applicant came to the Netherlands in 1994 at the age of twenty-two, leaving two minor children behind with her parents in Brazil. In the Netherlands she lived with a Dutch national with whom she had another child, Rachel, who acquired Dutch citizenship. No application for a residence permit was made because of difficulties relating to the availability of documents attesting the income of the partner of the applicant. In 1997 the applicant and her partner separated and a battle over custody started. Custody was awarded to the father. In this decision, the precarious status of the residence of the applicant was an important factor as awarding the custody to the applicant could have entailed that the applicant would take her child back to Brazil rupturing the family ties between Rachel and her father and paternal grandparents. This would, according to the competent authorities, be traumatizing for Rachel, considering she was very fond of her grandparents. In 1997 the applicant applied for a residence permit, but this application was rejected. She was subsequently told to leave the country, but ignored this. By 2002 she had a new Dutch national partner and applied for a residence permit based on family ties again, but this application was rejected because the applicant did not have the required entry visa for long-term residence. During the course of the years, both the applicant's Brazilian sons reunited with her illegally in the Netherlands. The ECtHR considered that in the context of both negative and positive obligations, a fair balance must be struck between the individual and general interests. The Court does not elaborate on this issue any further, and instead applies the fair balance test which essentially involved the question whether family life could be exercised in the country of origin of the applicant. The Court observes that if the applicant were to leave the Netherlands, she would be forced to leave her daughter behind considering that her daughter was under the custody of the father. The Court considered that like in the cases of *Berrehab* and *Ciliz*, the applicant had not been criminally convicted, but that she had not attempted to regularize her stay in the Netherlands. The applicant had faced the Dutch authorities with a *fait accompli* by developing family life while she was aware of the precarious nature of her residence in the Netherlands. On this issue the Court, however, considered that the applicant could have had lawful residence in the Netherlands in the period 1994-1997 when she was together with the father of her child. This, according to the Court, distinguishes the case from the *Solomon v. Netherlands* case, in which there had never been lawful residence.[204] According to the Court, the refusal of residence to the applicant would have far-reaching consequences for Rachel and it would clearly be in Rachel's best interests if her mother were to stay in the Netherlands.[205] Accordingly, the ECtHR held that the Netherlands had not struck a fair balance between the

203 *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34.
204 *Solomon v Netherlands (dec)* App no 44328/98 (ECtHR 5 September 2000).
205 *Rodrigues da Silva and Hoogkamer v Netherlands* (n 203) para 44.

individual and general interests and had therefore violated the obligations under Article 8 ECHR. I find the manner in which the Court comes to the conclusion that the case is not comparable to other cases in which there has never been lawful residence unconvincing. It might be true that the applicant could have been eligible for a residence permit at some time, but the fact remains that she never held any permit. The Court tries to find a distinguishing factor to differentiate this case from other cases in which there was never lawful residence and in which the Court ruled that there was no violation of Article 8 ECHR. In my view, the Court in *Rodrigues da Silva and Hoogkamer* does nothing more than apply the family life elsewhere doctrine. It could not be expected that Rachel follow her mother to Brazil. In fact, she would not even be able to do so considering that her father had custody over her. This leads to the conclusion that family life cannot be exercised in the country of origin of the applicant. Assuming that the applicant and her partner would have remained together, this conclusion would most likely have been different. In that case, it would have been difficult to find obstacles for the exercise of family life in the country of origin of the applicant.

A similar case in this regard is *Nunez v. Norway*.[206] In this case the applicant first arrived in Norway in 1996 as a tourist. After she was arrested for shoplifting she was given a fine and was deported back to her home country the Dominican Republic. Later the same year she returned using a false identity. She married a Norwegian citizen and successfully applied for a residence permit. In 2000 she obtained a permanent residence permit and applied for Norwegian citizenship. This application was rejected because her Norwegian spouse had applied for a separation. Later in 2001 the applicant started cohabiting with another citizen of the Dominican Republic. Together they had two children, who were born in 2002 and 2003. In 2001 the Norwegian police received an anonymous tip regarding the applicant's immigration fraud. In 2002 the work permit and permanent residence permit of the applicant were revoked. In 2005 she was ordered to leave Norway and was issued a re-entry ban of two years. The final decision on appeal was delivered by the Norwegian Supreme Court in 2009, which in majority held that the expulsion and re-entry ban did not constitute a violation of Article 8 ECHR. Subsequently, the applicant petitioned at the ECtHR. The Court held that since the applicable principles are similar, it is not necessary to determine whether the impugned decision is an interference in the right to respect for family life or involving an allegation of the failure of the state to comply with a positive obligation.[207] The Court emphasised the aggravated character of the applicant's administrative offences and held that the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of

206 *Nunez v Norway* (n 38).
207 Ibid para 69.

proportionality under Article 8 ECHR.[208] Furthermore, the Court observed that the applicant did not have any links with Norway when she re-entered Norway and that she was aware of her own immigration fraud when she created her family life there.[209] Then the Court stated that it would "examine whether particular regard to the children's best interest would nonetheless upset the fair balance under Art 8."[210] As to the best interests of the child, the Court observed that together with their father, the applicant is the most important persons in her children's life. In the event of the expulsion of the applicant, the children would remain with their father as he had custody over the children. This would mean that the family ties between the applicant and her children would effectively be ruptured. Furthermore, during the course of both the custody and the immigration proceedings, the children had suffered a lot of stress. This was also caused by the long duration of the proceedings. The Court concluded that the expulsion and the re-entry ban was a far-reaching measure vis-à-vis the children.[211] With an explicit reference to Article 3(1) CRC and the *Neulinger and Shuruz v. Switzerland* case, the Court ruled that the expulsion and the re-entry ban would entail a violation of Article 8 ECHR.[212] At first sight it seems that the Court in this case took the opportunity to give more weight to the best interests of the child in making its decision. However, closer inspection shows that this must be nuanced. In my opinion, the Court in *Nunez* merely applied the family life elsewhere doctrine. It could not be expected of the children of the applicant that they follow their mother to the Dominican Republic. On the contrary, like in *Rodrigues da Silva & Hoogkamer v. Netherlands,* the applicant in this case could not have taken the children as the father had custody over the children. As the couple were no longer together, the father could not be expected to follow his former partner to the Dominican Republic.

This reading of the *Nunez* case is confirmed in the subsequent *Antwi v. Norway* case.[213] This case concerns a Ghanaian national who used a false Portuguese passport. In 1997, while travelling in Germany the applicant meets a Ghanaian national who holds a residence permit in Norway. They get married and settle in Norway. The applicant obtains a residence permit in Norway as a national of a member state of the European Economic Area. In 2000, the wife of the applicant acquires Norwegian citizenship. In 2001, a daughter is born from the marriage, who automatically acquires Norwegian citizenship. In 2005 the couple marries in Ghana. Later that same year, the applicant gets arrested in the Netherlands when travelling to Canada. The

208 Ibid para 71.
209 Ibid para 74.
210 Ibid para 78.
211 Ibid para 83.
212 Ibid para 85.
213 *Antwi v Norway* App no 26940/10 (ECtHR 14 February 2012).

authorities discover his forged passport and notify the Norwegian authorities. In 2006, Norway revokes the residence permit with retroactive effect and decides that the applicant should leave the country. The applicant appeals this decision, and in 2010 the Norwegian Supreme Court finally rejects the appeal. The ECtHR repeats the legal framework it sketched in the Nunez case relating to the procedure of Article 8 ECHR.[214] It emphasises the aggravated character of the applicant's administrative offences. Furthermore, the Court observes that when the applicant arrived in Norway, he had no links with that country. His family ties in Norway were developed when he was illegally residing there.[215] As to his wife, the Court observes that she has strong links with Ghana and that there are no particular obstacles preventing her from accompanying her husband to Ghana. As to the child, the Court notes that she holds Norwegian citizenship, has lived in Norway all her life, is fully integrated in Norwegian society and has very limited links with Ghana. It would be difficult for the child to adapt to life in Ghana. For these reasons, the Court concludes that "*the implementation of the expulsion order would not be beneficial to her.*"[216] However, despite this conclusion, the Court concludes that there were no insurmountable obstacles in the way of the applicants settling together in Ghana.[217] According to the Court, the situation in *Antwi* is different than in *Nunez* because the child in *Antwi* "*had not been made vulnerable by previous disruptions and distress in her care situation.*"[218] Also, the proceedings had not taken as long as in *Nunez*. Therefore the Court concludes that

> "*[t]here being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.*"[219]

Accordingly the Court ruled that there had not been a violation of Article 8 ECHR. In a dissenting opinion, Judge Sicilianos, joined by Judge Lazarova Trajkovska, criticised the manner in which the majority evaluated the best interests of the child concept. The dissenting judges commented that

> "*[a]dmit[ing] that the impugned measure was "clearly not" in – i.e. against – the best interests of the third applicant, while at the same time affirming that such interests have been duly taken into account seems to pay lip service to a guiding human rights principle.*"[220]

214 Ibid para 89.
215 Ibid para 91.
216 Ibid para 97.
217 Ibid para 98.
218 Ibid para 101.
219 Ibid para 103.
220 Dissenting opinion of judge Sicilianos, joined by judge Lazarova Trajkovska, para 7.

In my opinion, the *Antwi* case shows that the Court had not departed from the family life elsewhere doctrine as the central factor in the Article 8 ECHR test. As the parents in *Antwi* were still together, and were both of Ghanaian origin, there were no insurmountable obstacles to exercising family life in Ghana. The fact that this was not beneficial to the child did not change this fact. The Court attempts to differentiate this case from *Nunez*, by referring to the length of the proceedings and the assertion that the child in *Antwi* had suffered from less stress since there had been no disruptions in her care situation. The issue in the care situation in *Nunez* was related to the unstable residence status of the applicant. It was for that reason that custody was awarded to the father. Therefore, the obstacle which was created for the family to resettle in the country of origin was the direct effect of the expulsion proceedings. It seems to me that the Court sought to limit the implications of the *Nunez* ruling by staying close to the family life elsewhere doctrine.

This approach was confirmed by the ECtHR in the *Arvelo Aponte v. Netherlands* judgment.[221] The case concerned a Venezuelan woman who met a Dutch man when she was in the Netherlands as a tourist in 2000 and whom she married in 2003 and had a child with in 2004. In order to be eligible for family unification, she travelled back to Venezuela and applied for an entry visa for long-term residence. This application was granted. When she travelled to the Netherlands and started cohabiting with her partner, she applied for a residence permit. This application was rejected because in the course of the application the applicant informed the Dutch government of a previous criminal conviction in Germany where she was sentenced to two and a half years imprisonment for drug smuggling. During the application for the entry visa, no questions were asked about the possibility of a criminal record. The applicant appealed the refusal of a residence permit without success. The ECtHR held that it is not necessary to differentiate between negative and positive obligations because the relevant principles are similar.[222] According to the Court, the following factors must be taken into account:

> "*the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.*"[223]

The Court pointed towards the serious nature of drugs-related offences.[224] Also the family life of the applicant was created at a time when she was aware

221 *Arvelo Aponte v Netherlands* App no 28770/05 (ECtHR 3 November 2011) .
222 Ibid para 53.
223 Ibid para 55.
224 Ibid para 58.

of her precarious immigration status. As to the question of whether there were insurmountable obstacles to exercise family life in Venezuela, the Court considered that the applicant was born and raised in Venezuela, that her husband had a reasonable command of the Spanish language and that her child was of a young and adaptable age. For these reasons, the Court held that it cannot be held that the Netherlands had not struck a fair balance between the competing interests and therefore there had been no violation of Article 8 ECHR. The judgment of the Court had the smallest possible majority of four against three votes. The three dissenting opinions point towards the fact that in their opinion the majority attached too much weight to the illegal character of the residence of the applicant in the Netherlands, during which time the applicant developed her family life.[225] In my opinion, the most contentious issue in this case is that the applicant did not have legal residence in the Netherlands. The result of the finding that there had never been lawful residence is that the justification test of Article 8(2) ECHR was not triggered. If that had been the case, then in the test of the proportionality of the interference the fact that a significant period of time had lapsed since the applicant's criminal conviction should have been taken into account. Also, in applying the criteria the Court developed in removal cases, the interests of the child would have been looked at, rather than the mere assertion that the child is of an adaptable age and therefore there is no obstacle for the child to follow her mother to Venezuela. When the applicant applied for an entry visa, the consideration of this application involved all aspects of the application. As the dissenting judges rightfully observe, the criteria to obtain an entry visa for the purpose of family unification are the same as the criteria for a residence permit. When the applicant travelled to the Netherlands, she had already received a positive advice from the Dutch authorities regarding the prospect of her application and had been issued with the appropriate entry visa. Therefore, she had all reason to believe that her residence in the Netherlands would be allowed and that she could start developing family life in the Netherlands. Central to the reasoning of the Court in this case is once again the possibility for the family to settle in Venezuela.

The *Berisha v. Switzerland* case concerns the application for family unification of three minor children of a Kosovar couple lawfully residing in Switzerland.[226] The first applicant arrived in Switzerland in 1997 as an asylum seeker. His asylum request was rejected, but he obtained a temporary residence permit and in 2000 he married a Swiss national. In 2005 the first applicant obtained a permanent residence permit. In 2006, the first applicant was divorced from his Swiss wife. One year later, the first applicant married a Kosovar woman who he had known since 1993 and with whom he already had three children. He applied for family unification with his new bride and she obtained a residence permit valid until 2012. In 2007 the couple applied

225 Dissenting opinion of judges Ziemele, Tsotsoria and Pardalos.
226 *Berisha v Switzerland* App no 948/12 (ECtHR 30 July 2012).

for the family unification of their three children who had remained in Kosovo. The application was refused. The Swiss authorities blamed the applicants that they had not told the Swiss authorities about their children before and because of this the applicants had not conducted themselves correctly with regard to the application and were therefore no longer eligible for family unification. In 2010 a fourth child was born. The ECtHR applied the principles developed in *Gül v. Switzerland* and *Ahmut v. Netherlands* in this case.[227] It furthermore emphasised the importance of the best interests of the child concept. According to the Court, especially the age of the children concerned, their situation in the country of origin and the extent to which they were dependent on their parents should have been considered in this regard.[228] The Court observed that the children were well integrated in Swiss society, but that they still had solid social and linguistic ties with the country of origin, where they grew up and went to school. Regarding the age of the children, the Court noted that the oldest children at the time of the judgment were already 19 and 17 years old. With regard to the youngest child, the Court found that

> "*the applicants are not prevented from travelling – or even staying – with her in Kosovo in order to ensure that she is provided with the necessary care and education so that her best interests as a child are safeguarded.*"[229]

Accordingly, the Court held that Switzerland had not overstepped the margin of appreciation it enjoys under Article 8 ECHR and that therefore there had not been a violation of Article 8 ECHR. In my opinion, despite the explicit reference to the best interests of the child, the possibility to exercise family life in the country of origin of the applicants is the decisive factor for the Court not to find a violation. In this regard, comparing the case to *Sen v. Netherlands* and *Tuquabo-Tekle v. Netherlands*, it is striking that the Court does not look at the position of the fourth child, who was born in Switzerland. In the cases mentioned, it had been the siblings specifically who could not be expected to join the applicant in the country of origin. Possibly in this case the Court did not look into this because of the young age of the sibling. However, in the judgment the position of the sibling is not even discussed, which is curious.

There have been two rulings in 2014 in which the ECtHR found a violation of Article 8 ECHR where the family was still intact and therefore could arguably have been expected to move to the country of origin to exercise family life.

The first of these cases is *Kaplan v. Norway*.[230] The case concerns a Turkish man of Kurdish ethnic origin who applied for asylum in Norway in 1998. He

227 Ibid para 49.
228 Ibid para 51.
229 Ibid para 61.
230 *Kaplan v Norway* App no 32504/11 (ECtHR 27 July 2014).

left his wife and two sons behind in Turkey. His asylum request was rejected. In 1999 the first applicant was convicted of ninety days imprisonment, of which sixty days were suspended, for the offence of aggravated assault. He had stabbed another man in the shoulder with a kitchen knife. The conviction was forwarded to the immigration authorities, who only warned him that his expulsion was pending in 2006. In the meanwhile, the applicant's wife and two sons entered Norway in 2003 and applied for asylum. Their asylum application was rejected. In 2005, the couple had a daughter. In 2006, the first applicant was detained for two weeks pending his deportation. In 2008, the wife and children of the first applicant were awarded a residence and work permit on humanitarian grounds. The youngest daughter of the applicant had been diagnosed with child autism and had special needs. The first applicant, however, did not get a residence permit. His criminal conviction was deemed sufficiently serious to warrant his deportation. In 2011, after having exhausted his domestic remedies against the expulsion order, the first applicant was deported to Turkey, while his family members remained in Norway. In 2012, his wife and children obtained Norwegian citizenship.

The ECtHR poses the question whether the Norwegian authorities failed to strike a proper balance between the right to respect for family life of the applicants and the public interest in ensuring effective immigration control.[231] According to the Court, the fact that the applicants remained in Norway illegally therefore breaching immigration control measures weighed heavily in this balance.[232] Furthermore, the first applicant, his wife and his two sons had lived in Turkey for a significant period of their lives and the youngest daughter was of a young and adaptable age, creating a situation where there were no unsurmountable obstacles for the family to resettle together in Turkey.[233] However, after concluding that there were no insurmountable obstacles, the Court considered whether

> "*the removal of the first applicant from Norway was incompatible with Art 8 of the Convention on account of exceptional circumstances pertaining in particular to the best interests of the youngest child.*"[234]

Considering the best interests of the youngest child, the Court concluded that, taking into account the close bonds of the youngest child with her father, her mental condition and the additional burden on the family in the event the father was expelled, that the expulsion of her father would constitute a very far-reaching measure especially vis-à-vis her.[235] Considering that the applicants criminal conviction was not that serious, that the Norwegian authorities

231 Ibid para 82.
232 Ibid para 83.
233 Ibid paras 84-87.
234 Ibid para 88.
235 Ibid para 89-93.

did not act promptly in seeking the first applicant's expulsion and the Court's assessment that there was no justification for the fact that similar immigration offences were not held against the applicant's wife, who did obtain a residence permit, the Norwegian authorities had not shown that the disputed interference was necessary within the meaning of Article 8(2) ECHR.[236] Having regard to the close bond between the applicant and his youngest daughter, her special care needs and the long duration of the immigration proceedings, the ECtHR was not convinced that sufficient weight had been attached to the best interests of the child.[237] Accordingly, the ECtHR unanimously found a violation of Article 8 ECHR.[238]

With regard to the question whether family life could be exercised in the country of origin, the reasoning of the ECtHR is particularly interesting. The Court first concludes that the applicant's youngest daughter can accompany the family back to Turkey because she was at an adaptable age and her health problems did not pose an obstacle to moving to Turkey. The Court justified this by referring to its restrictive case law on whether medical conditions and the presence of medical treatment facilities in the country of origin constitute a violation of Article 3 ECHR.[239] After concluding this, the Court started looking at whether there were exceptional circumstances pertaining to the best interests of the youngest child which would lead to a violation of Article 8 ECHR. In judging whether such circumstances existed, the Court considered similar factors which it had previously used in determining that there were no insurmountable obstacles to exercising family life in the country of origin. Even more strikingly, where it previously attached heavy weight to the breaches of immigration law by the applicant, in the assessment of the best interests of the youngest child the Court considered there was no justification for the unequal treatment between the first applicant and his wife, as his wife had also resided in Norway illegally but was still granted a residence permit on humanitarian grounds. Some of the factors which the Court took into consideration when evaluating the best interests of the child did not in fact concern the child as such at all. This is particularly true for the evaluation of the Court of the criminal conviction of the applicant. It seems that the Court in this case was reluctant to depart from the family life elsewhere doctrine altogether. Instead they applied it, like the Court always does, but afterwards considered that there were exceptional circumstances pertaining to the best interests of the child which led to a violation of Article 8 ECHR.

The second case in which the ECtHR found a violation of Article 8 ECHR even though the family was still together is *Jeunesse v. Netherlands*.[240] The

236 Ibid para 97.
237 Ibid para 98.
238 Ibid para 99.
239 *N v United Kingdom* (2008) 47 EHRR 39.
240 *Jeunesse v Netherlands* App no 12738/10 (ECtHR 3 October 2014).

applicant in this case is a Suriname citizen who started cohabitating with another Suriname citizen in 1989. In 1991, her partner came to the Netherlands for the purpose of staying with his father. In 1993 he acquired Dutch citizenship and subsequently lost his Suriname citizenship. Between 1991 and 1995 the applicant made five unsuccessful visa applications for the purpose of visiting a relative in the Netherlands. In 1996, her sixth visa application was granted. Using this visa, she travelled to the Netherlands in 1997, and did not return to Suriname when her visa expired. Instead, she applied for a residence permit in the Netherlands. It is contested between the applicant and the Netherlands whether she made an application for a residence permit on the grounds of family unification or on the grounds of work. The application was rejected, even though the applicant allegedly fulfilled the conditions for a residence permit at that time. In 2000 and 2005, two children were born, who acquired Dutch citizenship at birth. In 2007, the applicant applied for a residence permit to stay with her children. This application was rejected on the basis that the applicant did not have the required entry visa for long-term residence. In 2006, the applicant was ordered to report daily to the police. Later, this obligation was amended to an obligation to report once a month. The applicant failed to do so. In April 2010, the applicant was placed in detention pending her deportation from the Netherlands. When she was detained, it was discovered that the applicant was pregnant. She was kept in detention under a strict regime. For example, for safety reasons her husband was not allowed to accompany her for medical check-ups and she was handcuffed during transportation to the hospital. The applicant succeeded in her complaint against the detention regime during domestic proceedings. In its admissibility decision, the Court ruled that the application raised issues of fact and law that require an examination of the merits. Therefore it declared the application admissible. The section of the ECtHR dealing with the case relinquished jurisdiction to the Grand Chamber of the Court, which held a public hearing on the case on 13 November 2013. The Court delivered its ruling on 4 October 2014.

The ECtHR observed that the residency status of the applicant was irregular since she had entered on a tourist visa and that she was aware of her precarious immigration status when she commenced her family life in the Netherlands.[241] In such circumstances in which the respondent state is confronted with a fait accompli, only in exceptional circumstances will that state be found not have struck a fair balance.[242] The ECtHR considered four factors to determine whether such exceptional circumstances were present in this case. Firstly, the Court observed that the husband and children of the applicant were all Dutch nationals and that the applicant had previously held the Dutch national-

241 Ibid para 113.
242 Ibid para 114.

ity as well, which she lost not through her own choice.[243] Secondly, the applicant had resided in the Netherlands for over sixteen years. She did not have a right of residence during this time, but the Dutch authorities tolerated her stay while the applicant made requests for a residence permit and appealed negative decisions. This in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands.[244] Thirdly, although there were no insurmountable obstacles for the family to settle in Suriname, the applicant and her family would probably experience a degree of hardship when forced to move there.[245] Fourthly, the Court looked at the best interests of the applicant's children. The Court observed that the applicant was the primary carer for her children as her husband provided for the family by working full time. The children appeared to have no direct links with Suriname, as they had never even been there.[246] The Court accepted that, in examining whether there were insurmountable obstacles for the family to settle in Suriname, the Dutch authorities had some regard for the situation of the applicant's children. However, according to the Court, the Dutch authorities

> "*fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of children directly affected by it.*"[247]

Accordingly, the Court ruled by majority that a fair balance has not been struck between the competing interests involved and therefore there had been a violation of Article 8 ECHR.[248]

The test to determine whether a fair balance had been struck in this case is different to that applied in the case law discussed above. The ECtHR selected four criteria in the context of the fair balance test which were not based on previous case law. The first two criteria, the citizenship of the persons involved, does not generally play a major role in the case law. Here, the Court seemed to attach significant weight to the issue of the applicant involuntarily losing her Dutch citizenship when Suriname gained independence from the Netherlands. The second factor concerned the long irregular residence of the applicant in the Netherlands. The Court observed that the long residence of the applicant in the Netherlands was tolerated and that therefore she was allowed to develop strong ties in the Netherlands. It is unclear how this relates to the doctrine that family life cannot be created or developed when the applicant is aware of the precarious nature of the residence. The third factor considered by the

243 Ibid para 115.
244 Ibid para 116.
245 Ibid para 117.
246 Ibid paras 118-119.
247 Ibid para 120.
248 Ibid paras 122-123.

Court was the question of whether there were insurmountable obstacles to exercising family life in the country of origin. In this dissertation, it has been stressed that the question whether it is possible to practice family life elsewhere is in fact the core element in the reasoning of the Court in (quasi-) admission cases. In this case, the Court accepted that there were no unsurmountable obstacles to the family exercising family life in their country of origin. However, the Court contended that the family would experience a certain degree of hardship when forced to resettle in Suriname. From the ruling of the Court, it is unclear how much weight was attached to this hardship. It is clear however from the conclusion that the possibility of family life elsewhere was not decisive. The fourth and arguably decisive factor discussed by the Court was the best interests of the child determination. The Court observed that the mother is the primary carer for the children who are deeply rooted in the Netherlands and have no links with the country of origin of their mother. The determination by the Court that the Netherlands had fallen short of their obligation to consider the best interests of the child is remarkable. The Court formulates a new obligation for the contracting parties in taking the best interests of the child into account in family unification cases, namely to "*advert to and assess evidence in respect of the practicality, feasibility and proportionality*" of the deportation of a parent in the context of the best interests of the child determination. It is the first time that this obligation appears in the case law of the ECtHR. In section 3.3.6. the meaning of this new obligation is analysed.

3.3.6 Readmission cases

There have been a few cases which concern the readmission of a settled family migrant. These cases concern the situation that an immigrant is settled in the host state, but for some reason leaves the host state for a certain period. The question which the Court has to deal with in such cases is whether the host state is obliged to allow the readmission of the migrant.

One of the first times the Court considered the readmission of an immigrant was in the admissibility decision in *Ebrahim and Ebrahim v. Netherlands*.[249] The case concerned a Palestinian family who came to the Netherlands as asylum seekers. When the application for a residence permit based on asylum-related grounds was still pending, the eldest son was sent by his parents to Lebanon after problems in the family. After the applicants had been issued a residence permit and had subsequently been granted Dutch citizenship, an application was made for the family unification of the eldest son. This application was ultimately rejected. The Court considered that the essential question was whether the Netherlands is under the positive obligation to allow the entry

249 *Ebrahim and Ebrahim v Netherlands (dec.)* (2003) 37 EHRR CD59.

and residence of the applicant. The Court considered that the separation of the applicant and his parents was the result of a conscious decision by the parents to send their child to Lebanon. Although the applicants prefer to maintain family life in the Netherlands, no such right can be derived from Article 8 ECHR. The applicants could maintain their family life just as they did before the application for family unification was made. As regards the claims of the applicants that due to the citizenship status of the applicant, family life cannot be exercised elsewhere, the Court held that the applicant had not exhausted domestic remedies in their last application for an entry visa. For this reason, the application was rejected because of the non-exhaustion of domestic remedies.

In *Osman v. Denmark*, the applicant was born in 1987 in Somalia.[250] In 1995, she joined her father and sister who had been granted asylum in Denmark one year before. The applicant was a difficult child. She was expelled from various schools for disciplinary problems. She also had problems with her parents, who had difficulty with certain parts of her behaviour. In 2003, the father of the applicant sent her to Kenya to live with her grandmother. Because of this, her residence permit lapsed. In 2005, three months before the applicant turned 18, she applied to be readmitted to Denmark at the Danish representation in Kenya. The application was rejected because Denmark had changed its family unification law to only allow the family unification of children younger than 15. Appeals against this rejection were unsuccessful. In 2007 the applicant entered Denmark clandestinely. The Court considered that the refusal of a residence permit was an interference with the applicant's private and family life.[251] Consequently, the question was whether the interference was justified under Article 8(2) ECHR.[252] The Court considered that the applicant has strong ties with Denmark as she had spent the formative years of her childhood there and her parents and siblings resided there. However, she also had strong ties with Kenya and Somalia. The Court considered that for a settled migrant who had spent all or the major part of their childhood in the host state, the state must have very serious reasons to justify the expulsion of such persons.[253] The Danish legislation was accessible, foreseeable and pursued a legitimate aim. The question remained whether the refusal in this case was proportionate to this legitimate aim.[254] The Court differentiates this case from the decision in *Ebrahim and Ebrahim v. Netherlands* discussed above, as in that case the applicant had only spent a few years in the Netherlands.[255] The goal of the legislation was to discourage parents from

250 *Osman v Denmark* App no 38058/09 (ECtHR 14 June 2011).
251 Ibid para 56.
252 Ibid para 57.
253 Ibid para 65. In this context the Court made a reference to *Maslov v Austria*, which is the authority on the issue of the expulsion of settled minors.
254 *Osman v Denmark* (n 250) para 67.
255 Ibid para 68.

sending their children to the country of origin to be re-educated in a manner which is considered more consistent with their ethnic origins.[256] The applicant, however, maintains that she had been sent to Kenya to take care of her grandmother and that in making this decision her father had not acted in her best interests.[257] Lastly, the Court considered that the Danish legislation which determined that only children younger than fifteen qualify for family unification had been amended during the period that the applicant had been abroad.[258] Accordingly the Court ruled that it cannot be held that the applicant's interests have sufficiently been taken into account and therefore there had been a violation of Article 8 ECHR.

The applicants in *Hasanbasic v. Switzerland* are a Bosnian couple who had lived on a settlement permit in Switzerland since the early 1980s.[259] In August 2004 the applicant notified the Swiss authorities that he intended to resettle permanently in his country of origin, where he had built a house. However, in December 2004 he returned to Switzerland with the intention to remain there. Therefore the applicant made an application for family unification with his wife. This application was rejected on the grounds that the applicant had considerable financial debts, which amounted to 277,500 Euro, was in receipt of social assistance benefits and had been criminally convicted on multiple occasions. The Court considered that the refusal of a residence permit for the applicant amounted to an interference in his right to respect for private and family life considering the long duration of the applicant's residence in Switzerland.[260] Therefore the Court decided that the criteria it had developed in its judgment in *Üner v. Netherlands* were applicable in this case.[261] That judgment concerned the expulsion of a settled immigrant after a criminal conviction and in it the Court systematically laid down the criteria which must be applied to such cases. Applying these criteria, the Court considered the minor character of the applicant's criminal convictions.[262] The Court furthermore observed that the applicant had a strong social network in Switzerland and that returning to the country of origin could also be problematic considering the applicant's health status.[263] For these reasons, the Court held that the measure to withhold a residence permit from the applicant was not proportionate to the legitimate aim pursued and therefore constituted a violation of Article 8 ECHR.

The difference between the procedural approach in *Ebrahim and Ebrahim v. Netherlands* and the latter two cases is most likely that in the former case

256 Ibid para 69.
257 Ibid para 73.
258 Ibid para 75.
259 *Hasanbasic v Switzerland* App no 52166/09 (ECtHR 11 June 2013).
260 Ibid para 49.
261 *Uner v Netherlands* (2007) 45 EHRR 14.
262 *Hasanbasic v Switzerland* (n 259) para 58.
263 Ibid para 63.

the applicant had never had a residence permit in the Netherlands. In *Osman v. Denmark* the applicant had spent the major part of the formative years of her childhood in Denmark before she was sent to Kenya. In *Hasanbasic v. Switzerland* the applicant had been residing in Switzerland for a very long time. It is striking that in the readmission cases the role of the family life elsewhere doctrine seems to be limited: it is only one of the factors from the *Üner* criteria and it is never decisive. In none of the cases is it discussed and it does not seem that it has implicitly influenced this decision. Therefore I believe that the Court does not consider *Osman* and *Hasanbasic* to be admission cases, but rather treats them like expulsion cases. This is understandable considering that in both cases the applicants had, albeit clandestinely, resettled in the host state.

3.3.7 Best interests of the child

In its case law relating to family unification, the ECtHR increasingly makes reference to the best interests of the child concept derived from Article 3(1) of the UN Convention on the Rights of the Child (CRC). One of the first references to the best interests concept was made by the ECtHR in the *Rodrigues da Silva and Hoogkamer v. Netherlands* judgment. In that case the Court held that "*it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands.*"[264] However no reference was made to Article 3(1) CRC. An explicit reference to this provision was made by the ECtHR in the *Neulinger and Shuruk v. Switzerland* case, which concerned the wrongful removal of a minor child by the mother from Israel to Switzerland without the consent of the father.[265] However, this case did not consider family unification. At first sight it seemed that the ECtHR in *Nunez v. Norway* sought to give the best interests of the child concept a central role in the balancing of interests.[266] In that case, the appalling immigration history of the applicant was put aside in favour of the best interests of the child, which the Court presented as the crucial factor in finding a violation. The enthusiasm regarding this 'new' approach by the ECtHR was however short-lived. In *Arvelo Aponte v. Netherlands* the Court did not even mention the best interest of the child concept in its reasoning.[267] In *Antwi v. Norway*, in many aspects a similar case to *Nunez*, the ECtHR ruled that although resettling in the country of origin would not be beneficial for the child, there were nevertheless no insurmountable obstacles for the family life to be exercised in Ghana.[268] These seemingly different approaches in *Nunez*

264 *Rodrigues da Silva and Hoogkamer v Netherlands* (n 203) para 44.
265 *Neulinger and Shuruk v Switzerland* (2012) 54 EHRR 31.
266 *Nunez v Norway* (n 38).
267 *Arvelo Aponte v Netherlands* (n 221).
268 *Antwi v Norway* (n 213).

on the one hand and *Arvelo Aponte* and *Antwi* on the other hand, prompt the question whether the best interests of the child in *Nunez* was in fact decisive. Earlier in this chapter I argued that the Court merely applied its traditional family life elsewhere doctrine. Crucial for coming to this conclusion is that the only real difference between *Nunez* on the one hand and *Arvelo Aponte* and *Antwi* on the other hand seems to be that in *Nunez* the parents of the children were separated while in *Arvelo Aponte* and *Antwi* the parents were still together. It cannot be expected of the former spouse of a parent facing expulsion to join this person in the country of origin, while this can be expected when the partners are still together. The only case in which the best interests of the child seems to play a major role in a case in which both parents are still together is *Jeunesse v. Netherlands*.[269]

Since the judgment of the Court in *Antwi*, the Court has dealt with the issue of the best interests of the child numerous times, but has never ruled that there had been a violation of Article 8 ECHR, in neither admission cases nor expulsion cases until the rulings in *Kaplan v. Norway* and *Jeunesse v. Netherlands*.

A very interesting case in this regard is the expulsion decision in *Udeh v. Switzerland*.[270] Although expulsion decisions are excluded from the scope of this research, in this case it is relevant to discuss the case as it illustrates the manner in which the Court implements the best interests of the child concept. In this case, the Nigerian applicant had been convicted twice for possessing and smuggling relatively small amounts of cocaine. The family situation of the applicant is complicated. He has two children from his first marriage, but this marriage ended in divorce. After his expulsion decision he had a child with his new partner. The Court considers that the applicant did enjoy the protection of the right to respect for family life with the children from his first marriage, but not with the child from his new relationship. The Court motivates this by referring to the fact that the applicant established this family life at a time when he was aware of the precarious nature of his residence in Switzerland. Ultimately, the Court finds that the expulsion of the applicant would result in a violation of Article 8 ECHR. For the purpose of the present analysis, this finding is however of limited relevance. It strikes me that the Court establishes that the applicant does not enjoy the protection of the right to respect for family life with his child from his new relationship. The reasoning of the Court is understandable. It responds to the fear that a child is used as an 'anchor child' to claim lawful residence and the implications such precedent might have. However, in my view it does not do justice to the best interests of the child concept as enshrined in Article 3(1) CRC. I fail to see the justification on why the best interests of the child from the new relationship should weigh less than the best interests from the child from the

269 *Jeunesse v Netherlands* (n 240).
270 *Udeh v Switzerland* App no 12020/09 (ECtHR 16 April 2013).

first marriage. This also illustrates a fundamental problem with the family life elsewhere approach with respect to the best interests of the child. The new partner of the applicant in this case could be expected to follow her partner to his country of origin. However, the mother of his first two children could not be expected to do so, as she no longer had a formal relationship with the applicant. The right of the child to reside in the host state, through the application of the family life elsewhere doctrine, is made fully conditional on the right of residence of other family members, in this case the mother, in the host state.

The rulings of the Court in *Kaplan v. Norway* and *Jeunesse v. Netherlands* deserve special attention with regard to the incorporation of the best interests of the child concept in the Article 8 case law. It is striking that although the rulings were delivered within three months of each other, the reasoning concerning the best interests of the child concept is so fundamentally different. In *Kaplan*, the Court seemed to fully conclude that there was no problem for the family to resettle in the country of origin before asking the question whether there were exceptional circumstances pertaining in particular to the best interests of the child, which created the situation where the contracting party concerned did not strike a fair balance between the competing interests involved. In evaluating whether such exceptional circumstances occur, the Court partly looked at elements which had nothing to do with the best interests of the child, such as the nature of the criminal conviction of the father and the breaches of immigration law by both the mother and the father of the youngest child. The fact that the Court looked at these issues in the context of the best interests of the child determination is remarkable. It is furthermore striking that the ECtHR placed the best interests determination outside the main balancing exercise under Article 8: it is either the main question of whether the family can be expected to settle in the country of origin or exceptional circumstances pertaining to the best interests of the child concept. A similar pattern is visible in the judgment in *Nunez v. Norway*. This seems to suggest that the best interests of the child concept does not play any role in the question of whether the family can be expected to exercise their right to respect for family life elsewhere. An entirely different approach was adopted by the Grand Chamber in *Jeunesse v. Netherlands*.[271] In this case, the ECtHR considered four factors, of which the best interests concept came last. These four factors were considered in the context of the test of whether exceptional circumstances were present in the case to come to the conclusion that the Netherlands had not struck a fair balance between the competing interests involved. It is unclear from the ruling how much weight should be attributed to the best interests of the child concept compared to the other three factors, these being the citizenship configuration of the family, the long toleration of the applicant's stay in the Netherlands and the hardship that the family would suffer if they

271 *Jeunesse v Netherlands* (n 240).

were forced to resettle in Suriname. With regard to the content of the best interests determination, the Court ruled that the contracting parties must "*advert to and assess evidence in respect of the practicality, feasibility and proportionality*" of the expulsion of a parent. The principle which can be derived from this formulation is that the contracting parties, in the context of the balancing exercise under Article 8 ECHR, must look at the practicality, feasibility and proportionality of the expulsion of the parent with regard to the child(ren) involved. This test of the practicality, feasibility and proportionality of the expulsion of the parents exists separately to the 'ordinary' proportionality test conducted in the context of Article 8 ECHR. It is therefore very conceivable that a deportation decision is proportionate within the context of Article 8(2) ECHR, but not proportionate with regard to the interests of the child. The exact obligation the contracting parties have according to the Court is to advert to and assess evidence. The weight which must be afforded to the best interests concept remains unclear. It seems to suggest that a deportation decision may still be in accordance with the right to respect for family life under Article 8 ECHR even though the deportation is clearly not in the best interests of the child.

The lack of consistency in the case law of the ECtHR, both in terms of procedure and substance, is striking. The Court struggles to find a uniform approach for the inclusion of the best interests of the child concept in its Article 8 ECHR case law. In any case, the manner in which the ECtHR implements the best interests of the child concept is in my view not compatible with the view that children are rights holders on their own account.[272] Children are seen as accessories of their parents who under non-exceptional circumstances can be expected to accompany their parents to the country of origin of a parent. In Kaplan v. Norway, the Court held that

> "*[w]eighty immigration policy considerations in any event mitigate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and for the children.*"[273]

I find this remark by the Court to be illustrative of the manner in which the Court employs the best interests of the child concept. By making the right of the child to reside as a family member in the host state within the context of family unification completely derived from the right to reside of a parent, while at the same time emphasising the importance and relevance of the best interests concept, the Court makes its own jurisprudence seem inconsistent and at the same time does not provide adequate guidance to domestic courts to apply

272 See to this extent, Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (2005) p 2.

273 *Kaplan v Norway* (n 230) para 86.

the best interest of the child concept in the context of Article 8 ECHR. This is problematic given the subsidiary role the Court plays in the protection of the rights laid down in the Convention. The ECtHR could provide more guidance on the application of Article 8 to the domestic courts by increasing the consistency in its own case law, and by making the interpretation of the best interests of the child concept more concrete. This can be done by not referring to the facts of the case, but by making reference to the other provisions of the CRC which could be used in the interpretation of the best interests of the child concept.

3.3.8 Towards one test?

The analysis of the case law has shown two important basic premises in the case law of the Court. The first is that it is not necessary to determine whether in a specific case it is necessary to establish if the case raises the question whether an interference with the right to respect for family life is justified or if it raises the question whether the state is under the positive obligation to admit the applicant. In both contexts the applicable principles are the same. The second basic premise underlying the case law of the Court is that where family life can be exercised elsewhere, there is no obligation for the host state to allow the residence of the applicant. Below I will discuss these basic premises and I will argue why I believe it would be a positive development if the Court would let go of these premises.

Premise 1:
There is no need to differentiate between negative and positive obligations for the procedure of establishing whether there has been a violation of Article 8 ECHR
It has been found that the Court is increasingly stating that it is not necessary to make a distinction between negative and positive obligations considering that in both cases a fair balance must be struck between the competing interests involved. If the practice of the case law of the Court demonstrated that this is true, then there would not be any problem with this approach. This, however, is not the case. The case law of the ECtHR shows that it does matter which test is employed. If the Court finds an interference with the right to respect for family life, the justification test of Article 8(2) ECHR applies. This provision applies for an explicit procedure. The interference should have a basis in law and should pursue a legitimate aim. Furthermore, the measure constituting the interference should be proportionate to the legitimate aim. By stating these elements, Article 8(2) provides for a legal framework for determining whether an interference is justified and thus whether there has been an interference with the right to respect for family life. In this way, the justification test is transparent. This does not mean that no normative assessment of the facts is involved. In determining the proportionality of the

measure constituting the interference, normative questions still play an important role, for example when the seriousness of a criminal conviction must be assessed. In the 'fair balance test' associated with positive obligations, it is unclear in what way the different competing interests are balanced against each other. All factors are considered and the Court comes to its conclusion based on the facts of the case. This manner of determining whether there has been a violation of Article 8 ECHR is less transparent than the test provided in Article 8(2) ECHR.

Considering the subsidiary role played by the ECtHR in upholding the rights and freedoms protected by the ECHR, it is of paramount importance that the procedure to establish whether there has been a violation of the ECHR is transparent. It is the domestic administrations and judiciaries who have the primary role in protecting the rights and freedoms of the ECHR in their own jurisdiction. Confusion over what the legal test to determine whether there has been a violation of Article 8 ECHR should look like, leads to diverging practices across the contracting parties. Chapter 10 of this dissertation shows that the selected member states for this research follow a different procedure to establish whether there has been a violation of Article 8 ECHR. This is partly due to domestic factors, but can also be partly attributed to the confusion created by the ECtHR itself.

A possible motivation for the Court to make the differentiation in the test whether there has been a violation of Article 8 ECHR is that it seeks to limit the implications of the Article 8 ECHR case law in the field of immigration. In every single case investigated in this chapter, the Court emphasises that states are free to control the entry and residence of immigrants in their territory. However, the Court reiterates over and over again, that it must exercise immigration control while respecting Article 8 ECHR. The Court seems reluctant to find that the refusal of entry constitutes an interference with the right to respect for family life. This results in the practice that no interference is found and that the question is whether the state is under the positive obligation to allow for the entry and residence of the applicant for family unification. Although I understand why the Court adopts this approach, I find its reasoning unconvincing. I do not see how the refusal of a state to permit family unification in practice does not interfere with the applicant's right to respect for private and family life, considering that refusal is partly motivated by claiming that the applicant can exercise family life elsewhere. As it is undisputed that the sponsor does have a right to respect for family life somewhere, the decision to deny the applicant this right in the country of which he is a citizen or in the country in which he resides in my opinion does interfere with his right to respect for family life. This observation is unrelated to the question whether the interference is justified.

The recommendation to create more clarity regarding the procedure to be followed therefore does not correspond with a wish to increase the substantive protection of Article 8 ECHR. If an interference is found with the

right to respect for family life in an admission case, the question should always be whether that interference is justified. In the proportionality test which is enshrined in Article 8(2) ECHR, the contracting parties have a certain margin of appreciation. Undoubtedly the question whether there has been prior lawful residence should play an important role. In this way, the restrictive line of the Court with regard to attaching positive obligations to allow for the entry of immigrants would not have to be departed from if the test of Article 8(2) ECHR was to be employed in admission cases. The proportionality test would, however, force the contracting parties in each case to motivate how the measure of refusal of entry relates to the legitimate aim pursued. This would contribute to uniformity in the implementation of Article 8 ECHR and provide more legal certainty for applicants.

Premise 2:
Where family life can be exercised elsewhere, there is no obligation to allow for the entry and residence of the applicant.
Based on the analysis of the case law I argue that the family life elsewhere doctrine is the most relevant and in fact even the most decisive of all factors used by the ECtHR when balancing the interests in admission and quasi-admission cases. The Court is not always explicit in this, but the evaluation of all the case law conducted in this chapter reveals the nearly absolute weight the Court attaches to the factor that family life can be enjoyed in another country.[274] The reason that the Court adopted such an approach is most likely that from the outset it sought to limit the implications of the ECHR on national immigration law, arguably to prevent the legitimacy of the ECHR and the rulings of the ECtHR being undermined. The exercising of family life should be allowed somewhere, but not necessarily in the host state. The emphasis of the Court on the family life elsewhere doctrine goes so far that any other considerations seem to be of minor importance. Whenever it is established that family life is possible in another country, any other considerations only seem to play a marginal role.

I have two main problems with the weight the Court attributes to the possibility that family life can be exercised elsewhere. The first problem has a procedural nature. The idea that family life can be enjoyed elsewhere presupposes that the other state will allow for the family life to be exercised in that state. It is highly questionable whether this is true. The Court does not test whether the other state offers the possibility to exercise family life in its territory.

The second problem is normative. By attributing almost absolute weight to the factor that family life can be enjoyed elsewhere, the other factors do not carry sufficient weight. Most notably the best interests of the child is a factor which, considering the weight attributed to the possibility of family life

274 Exceptions being the recent *Kaplan v Norway* (n 230) and *Jeunesse v Netherlands* (n 240) cases.

elsewhere, is not sufficiently incorporated in the balancing of interests by the Court.

3.4 The right to an effective remedy

Article 13 ECHR protects the right to an effective remedy against a violation of a right protected by the ECHR. The Article reads:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*[275]

This provision implies that a national remedy should be available for alleged violations of the Convention. This national remedy should offer sufficient procedural safeguards so that the rights guaranteed by the ECHR are adequately protected. The required national remedy should include an examination of the substance of a complaint concerning a violation of the ECHR. In the context of the right to respect for family life, Article 13 ECHR requires that states must provide to individuals an effective possibility to challenge a deportation order or refusal of residence, and of having all the relevant aspects scrutinised by an independent and impartial authority.[276] Unlike in asylum cases, the ECtHR has not dealt with the issue of effective remedies within the context of Article 8 ECHR and family unification extensively. Only in a few cases has the protection of Article 13 ECHR been (successfully) invoked. These cases are discussed below. Some of these cases concern expulsion decisions. Although they are outside the scope of this research, these cases are included in this section because the focus of Article 13 ECHR is procedural and the principles discussed can also be relevant within the context of admission cases.

In the *Abdulaziz, Cabales and Balkandali v. United Kingdom* case, the applicants relied on Article 13 ECHR to argue that they did not have an effective remedy against a violation of the ECHR.[277] At the time of this judgment, the ECHR had not been implemented in national legislation. Therefore the domestic remedy available to the applicant was only present for the discrimination within the context of the domestic immigration rules, and not in the context of the ECHR. Therefore the Court concluded that there had been a violation of Article 13 ECHR. In this sense the case is a-typical and does not provide much guidance on the requirements of Article 13 ECHR in the specific context of family unification.

275 Art 13 ECHR.
276 *Al-Nashif v Bulgaria* (n 142) para 133.
277 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143).

This was different in the judgment in *Al-Nashif v. Bulgaria*.[278] The applicant in this case is a stateless person of Palestinian origin. He is married to a woman who also appears to be stateless and together they have two children. The children have obtained Bulgarian citizenship. The applicant and his wife obtained a permanent residence permit in Bulgaria. During his residence in Bulgaria, the applicant entered into an unrecognised religious marriage with a Bulgarian woman. However he remained living with his official wife and children. When the relationship between the applicant and his second wife ends, she makes a series of allegations of Islamic fundamentalism against the applicant. On this basis, the applicant is finally expelled to Syria as the authorities claimed he was a danger to public security. Among other complaints, the applicant complained that he did not have an effective remedy against the alleged violation of Article 8 ECHR. The Court first observes that the effectiveness of the remedy does not depend on the outcome of the substantive complaint.[279] As to the nature of the test concerning the effectiveness of the remedy, the Court observed that

> "*Art 13 in conjunction with Art 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality.*"[280]

In Bulgarian law, a deportation decision made on the grounds of 'public security' does not need to be motivated and is not subject to appeal. Bulgarian courts are not entitled to rule on the validity of the national security concerns and must reject any appeals against deportation decisions on this ground.[281] The Court admits that in cases of national security concerns certain limitations on the types of remedies available may be justified.[282] However, it cannot be justified that remedies are done away with all together when the executive chooses to invoke national security in a deportation decision.[283] Accordingly, the Court held that there had been a violation of Article 13 ECHR.

A case which is focused on the procedure of acquiring a residence permit based on family unification is *G.R. v. Netherlands*.[284] The case concerns an Afghan family consisting of a married couple with two children who came to the Netherlands as asylum seekers. After seven years of lawful residence in the Netherlands, the residence permit of the applicant, the father of the

278 *Al-Nashif v Bulgaria* (n 142).
279 Ibid para 132.
280 Ibid para 133.
281 Ibid para 134.
282 Ibid para 136.
283 Ibid para 137.
284 *G.R. v Netherlands* App no 22251/07 (ECtHR 10 January 2012).

family, was withdrawn on the grounds that he fell within the cessation clause of Article 1F of the UN Refugee Convention. In the same year, his wife and children obtained the Dutch nationality. In order to regularise his stay in the Netherlands, the applicant makes an application for a residence permit to stay with his wife. He also applies to be exempted from paying the administrative charge of 830 Euro. The authorities do not process his application because the administrative charge is not paid. This fee is not waived because the applicant failed to submit a declaration of income and assets, although he did provide a social assistance pay slip of his wife, which stated that the monthly income of the family is only a little bit higher than the administrative charge. Upon inquiry of the Court, the Dutch authorities declared that it would make no difference if the applicant still complied with the obligation to pay the administrative charge, because an *ex tunc* assessment would take place anyway. According to the Court,

> "*[t]he effect of Art 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief.*"[285]

According to the Court, although the procedure to obtain a residence permit was effective in law, the question was whether it was effective in practice given the level and the procedure regarding the administrative charge.[286] The Court reiterates its standing case law regarding financial restrictions on access to domestic courts under Article 6 ECHR. Although this provision is not applicable to immigration proceedings, according to the Court this does not mean that those principles are not applicable in the context of Article 13 ECHR, noting that the procedural safeguards under Article 13 are less stringent than under Article 6.[287] The Court however noted that "*the very essence of a 'remedy' as that expression is to be understood for the purposes of Art 13 is that it should involve an accessible procedure.*"[288] The sole concern of the Court is whether the procedure in place prevented the applicant from getting a remedy for his arguable claim under Article 8 ECHR.[289] Applying these principles to the circumstances of the case, the Court observed that there was a procedure in place in which the administrative charge could be waived.[290] The sole reason the application was not even considered was that the applicant failed to submit a declaration of income and assets. The Court finds that this information was available at the municipality where the applicant made his application and furthermore the Court fails to see what the required documents would have

285 Ibid para 44.
286 Ibid para 45.
287 Ibid para 50.
288 Ibid.
289 Ibid para 51.
290 Ibid para 52.

added to the social assistance pay slip that the applicant did provide.[291] Added to this, the Court took note of the disproportion between the administrative fee and the income of the applicant.[292] Based on these observations, the Court finds that the "e*xtremely formalistic attitude*" of the authorities unjustifiably hindered the use of an otherwise effective domestic remedy.[293] Therefore the Court finds a violation of Article 13 ECHR. The ruling of the Court in this case provides a few valuable insights. Firstly, it must be concluded that the requirement that there should be an effective remedy against the arguable claim of a violation of Article 8 ECHR in the context of family unification should at least mean that there is a procedure in place to obtain a residence permit based on family ties. If this procedure were not in place, an applicant would have no remedy against an arguable claim of an Article 8 ECHR violation in this context. Secondly, with regard to the procedure offered, this must be adequate to remedy an arguable claim of a violation of Article 8 ECHR. States may impose requirements, like charging an administrative fee, but the procedure determining whether there has been a violation of Article 8 ECHR must be suitable to determine whether a violation has occurred. Not taking an application into consideration because the administrative fee has not been paid makes the procedure unsuitable for determining whether there has been a violation of Article 8 ECHR. The balancing exercise which lies at the heart of the Article 8 ECHR assessment requires that all circumstances are taken into account. The automatic rejection of an application because one of the requirements is not complied with prevents a consideration of the different interests involved and is thus not in accordance with Article 13 ECHR.

Another case concerning the right to an effective remedy within the context of family unification is *De Souza Ribeiro v. France*.[294] This case, however, concerns the protection against expulsion and for that reason is outside the scope of this dissertation.

3.5 THE PROHIBITION OF DISCRIMINATION

Article 14 ECHR protects the right to freedom from discrimination in relation to the enjoyment of the rights laid down in the Convention. Article 14 ECHR states:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political*

291 Ibid para 54.
292 Ibid para 55.
293 Ibid.
294 *De Souza Ribeiro v France* (2014) 59 EHRR 10.

> *or other opinion, national or social origin, association with a national minority, property, birth or other status."*[295]

The prohibition of discrimination complements the other provisions of the ECHR; it has no meaning on its own. This means that when Article 14 ECHR is invoked, this must always be done in conjunction with another provision of the Convention.[296] For the field of family unification, this means that Article 14 ECHR must always be invoked in conjunction with Article 8 ECHR. The ECtHR takes a broad approach in determining whether a situation is within the ambit of one of the substantive provisions of the ECHR.[297] This does not mean that there can only be a violation of Article 14 ECHR if the Court finds a violation of one of the other substantive provisions. This was pointed out by the Court in the seminal *Abdulaziz, Cabales and Balkandali v. United Kingdom* judgment.[298] The Court held that

> *"[a]lthough the application of Art 14 (art. 14) does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter."*[299]

Abdulaziz clearly shows that the Court can find a violation of Article 14 ECHR in conjunction with Article 8 ECHR even though there was no independent violation of Article 8 ECHR. When it is established that a situation is within the ambit of one of the substantive rights, it must be established that the applicant was treated differently than a comparable group. This involves an assessment of whether the groups are in fact comparable. In the *Abdulaziz* case, the comparable group was wives who were eligible for family unification in comparison with husbands who were not. After it has been established that the applicant is treated differently than the comparator, the grounds for discrimination need to be specified. Article 14 ECHR lists different grounds: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In the *Abdulaziz* case, the grounds for discrimination was the sex of the applicant. In that case, the applicants also alleged discrimination based on race. The Court considered that the contested regulation did not discriminate on the

295 Art 14 ECHR.

296 Protocol 12 to the ECHR provides for a free-standing prohibition of discrimination which does not require that it is invoked in combination with another Convention provision. There has not been any case law on Protocol 12 which relates to family unification. For that reason, it is not further discussed.

297 B. Rainey, E. Wicks and C. Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) p 420.

298 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143). See section 3.3.4. for the facts of the case.

299 Ibid para 71.

grounds of race.[300] The ECtHR has held that for certain grounds of discrimination there should be 'very weighty reasons' to justify discrimination. For example, the ECtHR has held this to be the case for discrimination based on sex,[301] sexual orientation,[302] race or ethnicity[303] and nationality.[304] This, however, does not mean that the Court always applies the 'very weighty reasons' test in cases of nationality discrimination with regard to immigration law.[305] The ECtHR has accepted that 'immigration status' falls under the category of 'other status' mentioned in Article 14 ECHR. When the discrimination vis-à-vis the comparator and the discrimination grounds are established, it must be ascertained whether the discrimination is justified. For discrimination to have an objective justification, it must have a legitimate aim. Furthermore, there should be a meaningful link between the legitimate aim and the discrimination. Generally speaking, it is relatively easy for a state to prove that discrimination has a legitimate aim.[306] Even in the case of discrimination on the grounds of race, in *D.H. v. Czech Republic* the Grand Chamber of the ECtHR accepted the desire to find a solution for children with special educational needs as a legitimate aim.[307] In *Abdulaziz*, the United Kingdom argued that there was a larger proportion of men who were active on the labour market and therefore only the family unification of wives was allowed. The Court ruled that the protection of the domestic labour market was a valid legitimate aim. The question remained whether the discrimination between men and women in the context of family unification was necessary to pursue this legitimate aim. The Court answered this question in the negative. It considered that the discrimination between men and women in this context was not justified, especially considering the objectives of equality between the sexes.[308] In evaluating the link between the discrimination and the legitimate aim, the Court uses the principle of proportionality. It concludes that the discrimination was not necessary and therefore not proportional to the legitimate aim pursued.

Within the context of family unification, the Court has only ruled on a few occasions on questions relating to Article 14 ECHR.

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300 Ibid para 85.
301 Ibid para 78.
302 *Schalk and Kopf v Austria* (n 146) para 97.
303 *DH and others v Czech Republic* (2008) 47 EHRR 3.
304 *Gaygusuz v Austria* (1997) 23 EHRR 364.
305 For example in *Moustaquim v Belgium* (n 153), the Court accepted in regard to discrimination based on nationality within the context of an EU national who is being treated less favorably in his home member state than another EU national as a justification that the EU is a special legal order. There was not any mentioning of 'very weighty reasons' which would have to be present to justify discrimination.
306 Rainey, Wicks and Ovey (n 297) p 427.
307 *DH and others v Czech Republic* (n 303) para 198. The Court however did find a violation in that case.
308 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143) para 83.

The case *Kiyutin v. Russia* concerns a citizen from Uzbekistan who sought residence in Russia based on his marriage to a Russian national with whom he had a daughter.[309] When the applicant applied for a residence permit, he had to undergo a medical examination which revealed that he was HIV positive. For this reason alone, his application for a residence permit based on his marriage to a Russian national was rejected. Referring to *Abdulaziz*, the Court held that the applicant was within the ambit of Article 8 ECHR.[310] With regard to the grounds for discrimination, the Court accepted that 'health status' should be considered as an 'other status' within the definition of Article 14 ECHR.[311] Considering that the applicant's application for a residence permit was rejected for the sole reason of the applicant's health status, the Court considered that the applicant can claim to be in a situation analogous to that of other foreign nationals who can apply for a residence permit in Russia based on family ties. On the justification of the discrimination treatment, the Court considered that

> *"[i]f a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question."*[312]

According to the Court, people who are HIV positive form such a vulnerable group.[313] On the proportionality of the discrimination vis-à-vis the legitimate aim, the Court considered that Russia did not impose the requirement of not being HIV positive on tourists or other short-term visitors. The Court found it not necessary to impose this requirement on applicants for a residence permit but not on tourists and other short-term visitors. The argument that HIV positive applicants may become a public burden and place an excessive demand on the publicly-funded health care system did not hold equally considering that non-Russian citizens have no entitlement to free medical assistance.[314] The Court furthermore noted that excluding HIV positive applicants from family unification could have adverse effects because it could promote illegal residence to avoid HIV screening and the risks associated to this.[315] Considering these arguments, the Court considered that although the protection of public health is a valid legitimate aim, Russia had not sub-

309 *Kiyutin v Russia* (2011) 53 EHRR 26.
310 Ibid para 55.
311 Ibid para 57.
312 Ibid para 63.
313 Ibid para 64.
314 Ibid para 70.
315 Ibid para 71.

stantiated that excluding HIV positive persons was an effective way to attain this legitimate aim.[316]

The case *Hode & Abdi v. United Kingdom* concerns the application for family unification of a recognised refugee.[317] The first applicant was recognised as a refugee in 2005 and granted a residence permit valid for five years. In 2006 the first applicant met the second applicant. They married one year later in Djibouti. The applicants applied for family unification, but did not fall within the special provisions applying to the family members of refugees, considering that these only apply to family members who already formed part of the family before the refugee left the country of permanent residence. For that reason, ordinary rules on family unification applied, and following these rules, family unification was only allowed to a person who holds a settlement permit in the United Kingdom. As to the question of whether the situation falls within the ambit of Article 8 ECHR, the Court ruled that although states are not obliged to respect the choice of matrimonial residence, if a state confers a right to be joined by spouses for certain types of immigrants, they must do so in a manner which is compliant with Article 14 ECHR.[318] As to the grounds of discrimination, the Court accepted that 'immigration status' falls within the scope of the 'other status' category. The Court observed in this context that in the United Kingdom for the purpose of family unification, refugees were treated differently from students and workers and their spouses.[319] Furthermore, the Court held that the applicants were in an analogous situation to family members whose family relationship predated the arrival in the United Kingdom.[320] As for the justification of the discrimination, the Court was willing to accept that offering incentives to certain groups of immigrants may amount to a legitimate aim. However, it observed, with references to domestic case law, there was no justification for the discrimination.[321] With regard to the discrimination based on the moment when family life was established, the Court held that although the fact that the United Kingdom honoured international obligations to offer a more favourable regime to family members in a refugee context where the family ties predate the entry into the United Kingdom, the fact that for this particular group it fulfilled its international obligations does not mean that this in itself justified the difference in treatment.[322] For those reasons, the ECtHR held that there had been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.

316 Ibid para 72.
317 *Hode and Abdi v United Kingdom* (2013) 56 EHRR 27.
318 Ibid para 43.
319 Ibid para 49.
320 Ibid para 50.
321 Ibid para 53.
322 Ibid para 55.

In section 3.3.4. the case *Biao v. Denmark* was discussed in relation to the Article 8 ECHR complaint.[323] In this section, the Article 14 ECHR complaint is assessed. The case concerns the Danish requirement for family unification that the combined attachment of the sponsor and the migrating family member with Denmark should be greater than the combined attachment with the country of origin of the migrating family member. The alleged discrimination lies in one of the exemption grounds of this requirement. Persons who held Danish nationality for at least twenty-eight years are exempted from the attachment requirement. The applicants in this case considered that this to be discrimination. The Court first ruled, based on the wording of the relevant Danish legislation, that there was no direct discrimination based on the moment when the Danish nationality was acquired and also not on ethnicity.[324] However, there was indirect discrimination between Danish nationals of a Danish ethnic origin and Danish nationals of a non-Danish ethnic origin

> "*because de facto the vast majority of persons born Danish citizens would usually be of Danish ethnic origin, whereas persons who acquired Danish citizenship at a later point in their life would generally be of foreign ethnic origin.*"[325]

Based on this, the Court concluded that the applicants were treated differently because the first applicant had not been a Danish national for fewer than twenty-eight years as opposed to persons who had. This, according to the Court, made the applicant fall within the 'other status' category of Article 14 ECHR. As to the justification of the discrimination, the Court noted that it held in *Abdulaziz, Cabales and Balkandali v. United Kingdom* that within the context of family unification there are 'general persuasive social reasons' for giving special treatment to persons with a strong link to the country. This, according to the Court, was a valid legitimate aim for making the discrimination in the case of the Danish attachment requirement.[326] The Court was critical regarding the proportionality of the interference in general. It noted that the requirement that you need to have direct ties with Denmark in order to comply with the attachment requirement appeared to be excessively strict.[327] However, the Court took the view that it should not review the legislation in the abstract but instead rule on the specific case at hand.[328] It stated that it needs to be determined whether at the relevant time in 2004 the said discrimination was proportionate to the legitimate aim pursued. Concerning this question, the Court observed that the aggregate ties of the applicants to Denmark were

323 *Biao v Denmark* (n 198).
324 Ibid para 84.
325 Ibid para 90.
326 Ibid para 94.
327 Ibid para 99.
328 Ibid para 103.

clearly not stronger than the aggregate ties to another country and at the time of application the first applicant had only been a Danish national for two years.[329] Under these specific circumstances of the case, the Court ruled that there had not been a violation of Article 14 ECHR in conjunction with Article 8 ECHR. This ruling of the Court can be criticised for a number of reasons. Firstly, the Court concludes that there is indirect discrimination because *de facto* the application of the attachment requirement affects more persons from a non-Danish ethnic background. Despite this finding, the Court does not conclude that there has been discrimination on the grounds of ethnicity. Instead, the Court holds that the applicants fall within the scope of the 'other status' category of Article 14 ECHR. By doing so, the Court avoids the situation that very weighty reasons are required to justify such discrimination. I find the fact that the Court does not hold that there is indirect discrimination on the grounds of ethnicity arbitrary. The test on the justification for discrimination based on race or ethnicity is considerably stricter than discrimination on other grounds like those employed in this case.[330] By going around the issue of ethnicity as the grounds for discrimination, the Court avoids discussing the justifiability of discrimination based on race or ethnicity. Secondly, I find it peculiar that the Court considers that the time of application is the relevant moment in time to test the proportionality of the discrimination. Indeed, at the time of application, the applicant had only been a Danish citizen for two years. But at the time of the judgment by the Court the applicant had been a Danish citizen for twelve years. Considering the fact that the discriminatory treatment is ongoing, the applicant and his family are currently still residing in Sweden and not in Denmark, I would argue that the ECtHR should have assessed the discrimination at the time of the judgment and not at the time of the application for family unification.

Establishing a violation regarding discrimination based on the moment of establishing family ties is particularly interesting. The fact that the United Kingdom fulfilled international obligations towards a particular group did not automatically justify the discrimination between this group and comparable situations outside this group. In *Moustaquim v. Belgium*, the Moroccan applicant complained against his expulsion from Belgium after a series of criminal convictions.[331] As criminal convictions as a reason for expulsion lie outside the scope of this research, the case has not been discussed above. But it does raise some interesting points with regard to the prohibition of discrimination. The applicant argued in this case that he was being discriminated against on the basis of his nationality. He argued that he, as a Moroccan national, was treated less favourably than nationals of Belgium and nationals of member

329 Ibid para 106.

330 See for example *DH and others v Czech Republic* (n 303). See also para 9 of the dissenting opinion of judges Sajó, Vuèiniã and Kûris in *Biao v Denmark* (n 198).

331 *Moustaquim v Belgium* (n 153).

states of the European Community. The Court held that the applicant cannot be compared to Belgian citizens who have convictions, because as Belgian citizens they automatically have a right to reside in their own country. As for the discrimination compared to citizens of other member states of the European Communities, the ECtHR held that "*there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order.*"[332] According to the Court, the objective and reasonable justification for the discrimination on the basis of nationality is found in the sphere of the character of the state where the applicant is from. Following this reasoning, only for the reason of the organisation of the international community of states, persons may be treated differently. It is questionable how this general exception of the 'special legal order' of the EU within the context of Article 14 ECHR relates to the finding of the Court in *Hode and Abdi v. United Kingdom* that adherence to international obligations is not as such an objective justification for discrimination.

In my opinion, this point of view cannot be maintained in the long run, especially where the arbitrariness of the distinction increases. In *Moustaquim v. Belgium* the applicant merely complained that he was discriminated against based on the fact that he was not a Belgian citizen (as Belgian citizens cannot be expelled from Belgium) and based on the fact that he was not an EU citizen (as another legal framework on expulsion applies to EU citizens). However, with the advancement of the connection between free movement in the EU on the one hand and the strengthening of requirements for family unification on the other, the discrimination between on the one hand mobile EU citizens who have made use of their freedom of movement and on the other hand immobile EU citizens who remain in their home member state increases. I argue that there is a time when this unequal treatment can no longer be justified under Article 14 ECHR solely by pointing to the special legal order status of the EU.

One of the cases in which the ECtHR could have picked up on this issue was *Jeunesse v. Netherlands.* In this case, the applicant complained that she was treated differently based on the nationality of her husband.[333] If her husband were a national of another member state of the European Union, the applicant would not have been under the obligation to apply for an entry visa before being eligible for family unification. The Dutch government denied that this is true. The Court found that the applicant failed to substantiate that she was treated differently than the spouses of non-Dutch EU nationals and therefore declared this part of the complaint manifestly-ill-founded. By declaring this part of the application inadmissible, the Court avoids having to deal with the pressing issue of reverse discrimination between EU citizens. The reasoning of the Court that the applicant has not substantiated her claims is not convinc-

332 Ibid para 48.
333 *Jeunesse v Netherlands (dec)* App no 12738/10 (ECtHR 4 December 2012).

ing. The discrimination of the applicant compared to the spouses of other EU citizens residing in the Netherlands is rather obvious. As was mentioned before, as the arbitrariness of the discrimination increases, the ECtHR should reconsider its rather unconvincing line of reasoning.

Concluding, it can be stated that where no general obligation for family unification can be derived from Article 8 ECHR, when states do offer the possibility of family unification, they must do so in a manner which is compliant with Article 14 ECHR. An open issue remains discrimination which is the result of member states implementing the EU family unification law. This issue will be dealt with further in Chapter 4.

3.6 CONCLUSION

The research question addressed in this chapter was whether a right to family unification can be derived from Article 8 ECHR and in what manner Article 8 ECHR is relevant for the discipline of family unification law. In order to answer this question, the case law of the ECtHR was investigated.

The European Convention on Human Rights does not contain an explicit right to family unification. The ECtHR has not derived a general right to family unification from Article 8 ECHR. The basic starting point in the case law of the ECtHR is that in principle states are entitled to control immigration. In exercising this competence states are, however, limited by Article 8 ECHR. The manner in which the Court looks at the extent to which a state is under an obligation to allow for the residence of a foreign national depends on the specific circumstances of the case. A basic distinction that is made by the Court is between first admission cases and the deportation of settled immigrants cases. Depending on the type of the case, the margin of appreciation of the states differs. Generally, in first admission cases, the margin of appreciation of states is greater than in deportation cases. As the research question addressed in this chapter is whether a right to family unification can be derived from Article 8 ECHR, the boundaries of the obligations of states to allow for the entry and residence of foreign nationals is investigated. A number of conclusions can be derived from the analysis of the case law in this chapter.

First, it must be concluded that the ECtHR is very inconsistent in terms of the procedure to determine whether there has been a violation of Article 8 ECHR.[334] The Court does not always make use of the justification test as enshrined in Article 8(2) ECHR, but instead, especially within the context of admission cases, the Court employs the so-called fair balance test. The disadvantage of this test is that it does not follow a clear structure like the structure of Article 8(2) ECHR. Instead, the Court uses different factors identified

334 See also T. Spijkerboer, 'Structural Instability. Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML.

in its case law, though it is often unclear how much weight is attributed to each different factor. According to the Court, it is often unclear what the precise boundaries between positive and negative obligations are, but that it is not necessary to determine whether there is a positive or negative obligation at stake, as in any case a fair balance needs to be struck between the competing interests at stake. This entire approach would be unproblematic if both tests led to similar results, but this is not the case. The margin of appreciation granted to states when employing the fair balance test is significantly larger than when making use of the Article 8(2) ECHR proportionality test.

Secondly, the family life elsewhere doctrine plays an important role in the reasoning of the Court. This approach by the ECtHR means that a right to entry and residence based on Article 8 ECHR only exists when it cannot be expected of the family to settle in the country of origin of the applicant. Without exception, this approach is visible in all of the studied cases in this chapter. Where the Court found that there is a right to reside based on Article 8 ECHR, this was because for different reasons it could not be expected of the family of the applicant to settle in the country of origin. In some cases, this was because the parents of a child were divorced and therefore the expulsion of one of the parents would automatically mean the rupturing of family life with one of the parents. In other cases, it was the presence of siblings who had integrated into the society of the host state which was the crucial factor for the Court. It must be remarked that in the recent cases *Kaplan v. Norway* and *Jeunesse v. Netherlands*, the Court seems to attach less value to the possibility of family life being exercised in the country of origin. It remains to be seen how the case law of the ECtHR will develop in this regard.

Thirdly, the manner in which the Court incorporates the best interests of the child concept in its Article 8 ECHR case law is inconsistent. Children have always played a certain role in the case law, even in the early days, but there is no consistent way in which the Court involves the best interests of the child in its balancing exercise. In the *Nunez v. Norway* ruling, the Court placed the best interests ruling at the core of its reasoning. It first considered all relevant factors, based on which it concluded that the balance inclined towards not finding a violation, after which the best interests of the children were considered which formed the decisive factor by the Court in finding a violation. The ruling of the Court in *Nunez* was, however, followed by the ruling in *Antwi v. Norway*, where the Court found that the 'exceptional' circumstances present in the *Nunez* case were not present in the *Antwi* case, and by *Arvelo Aponte v. Netherlands*, in which the best interests of the children were not seperately assessed. Recently in *Kaplan v. Norway* the Court had seemed to follow the approach adopted in *Nunez*, but only a few months later a completely different approach was used to find a violation in *Jeunesse v Netherlands*.

Fourthly, with regard to the prohibition of discrimination as protected by Article 14 ECHR, the Court is once again not consistent. It seems that the Court

does not want to strictly scrutinise the discrimination that is inherent in immigration law. There are a few examples of this in the case law. The Court seems to avoid diving into the question of whether the reversed discrimination of own nationals that is caused by EU law is in conformity with Article 14 ECHR. In *Moustaquim v. Belgium* the Court accepted the 'special legal order' character of the EU as a legitimate justification for discrimination based on citizenship. In this chapter it was argued that the more arbitrary the discrimination, the more this justification comes under pressure. Another striking case in this regard is *Biao v. Denmark*, in which the Court unconvincingly held that the applicable grounds for discrimination fall within the requirements of the exemption regime for the application of the attachment requirement rather than finding that the applicable grounds for discrimination are race or ethnic origin.[335] By formulating the grounds for discrimination in these terms, the Court avoids the stricter justification test as would have been applicable for discrimination based on race or ethnic origin.

These conclusions are problematic considering the subsidiary role the ECtHR plays in the protection of the rights guarenteed by the ECHR. As the primary role in this protection lies with the contracting parties – at the legislative, administrative and judicial level – it is problematic if there is unclarity regarding the interpretation of the ECHR. Especially the inconsistency in the procedure to determine whether a state has the obligation to allow for residence makes it difficult to guarentee the effective protection of Article 8 ECHR at the domestic level. The diverging approaches the ECtHR itself uses can lead to different practices in the contracting parties. This in turn is detrimental for legal certainty for both the individual applicant and the state, as it often remains hard to predict whether the ECtHR will find a violation in a particular case or not.

335 Biao v Denmark (n 198) Note that the Biao v Denmark case has been referred to the Grand Chamber of the ECtHR.

4 European Union law and family unification

4.1 INTRODUCTION AND METHODOLOGICAL APPROACH

Compared to international and European human rights law, European Union (EU) law has detailed provisions determining the content and scope of the right to family unification. Where the European Court of Human Rights (ECtHR) stresses the sovereign right of the state to determine the admission and residence entitlement of foreign nationals,[336] EU law goes one step further and actively imposes positive obligations on its member states to facilitate family unification of certain categories of family migrants.

The central question addressed in this chapter is whether a right to family unification exists in EU law and in which way this right is regulated. In order to answer this question, the various legal instruments regulating the right to family unification as well as the case law of the Court of Justice of the European Union (CJEU) are analysed.

The chapter is structured as follows. In section 4.2. it is explained that EU law does not apply in purely internal situations. There must be a meaningful link with EU law before EU law is applicable. In section 4.3. the Family Reunification Directive (FRD) is analysed as the principle source of the right to family unification for third-country nationals within EU law. In section 4.4., the implications of the free movement of persons within the EU for the field of family unification are explained. In section 4.5., it is investigated under which circumstances a right to entry and residence could be directly derived from Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU). This will involve an analysis of the *Ruiz Zambrano* judgment of the Court of Justice of the European Union. In section 4.6., the provisions relating to family unification in other relevant directives are investigated. Lastly, in section 4.7., the role and content of the Charter of Fundamental Rights of the EU (the Charter) in the domain of family unification is investigated separately.

336 See for example *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143) and *Hendrick Winata, So Lan Li and Barry Winata v Australia* para 7.3.

4.2 PURELY INTERNAL SITUATIONS

From the outset it should be pointed out that the scope of EU law on family unification is limited. Not all cases of family unification involving the migration of a family member to a member state of the EU are covered by EU law. The provisions of EU family unification law do not apply if there is no meaningful link with any of the situations covered by EU law. This is the general rule developed in the case law of the CJEU. In *Morson and Jhanjan* the CJEU held that as there was no link with EU law, no rights could be derived from EU law.[337] The case concerned two Suriname nationals who applied to stay with their children who were Dutch nationals. Their children did not make use of their free movement of persons and were therefore outside the scope of EU law.[338] This was confirmed in *Uecker and Jacquet*.[339] That case concerned third-country national family members of German citizens who relied on EU law in employment conflicts with their employer, the government of the region Nordrhein-Westfalen. However, the German national sponsors never made use of their free movement of persons. The CJEU held that because there was no link with EU law, the situation was outside the scope of EU law.[340]

Therefore, when a right based on EU law is invoked, the first question which needs to be addressed is whether there is a meaningful link with EU law. Only once such a meaningful link has been established, can the material claim be considered. In the context of family unification, there are several types of situations in which there is a sufficiently meaningful link with EU law. The first possibility is to fall within the scope of Directive 2003/86 on the right to family reunification.[341] The scope of this Directive is limited to third-country nationals legally residing in an EU member state who seek to be reunited with their third-country national family member.[342] The Directive does not apply to any other categories. Secondly, a meaningful link with EU law is established when the sponsor falls within the scope of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.[343] This is essentially the case when an EU citizen sponsor makes use of the right to free movement of persons.[344] The right to free movement of persons for EU citizens also

337 Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] ECR 3723.
338 Ibid para 16.
339 Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171 .
340 Ibid para 19.
341 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.
342 Ibid art 1.
343 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 [2004] OJ L 158/77.
344 Art 3(1) CD.

applies to the third-country national family members of that EU citizen.[345] This implicitly attaches a right to family unification to the use of the free movement of EU citizens within the EU. As will be shown below, the creation of the right to family unification is meant to facilitate the exercise of the free movement of persons, and is therefore not an objective as such. However, the effect of the extension of the free movement of persons to third-country national family members of EU citizens is that a right to family unification is created. A third meaningful link with EU law is found where a right of residence of a third-country family member of an EU citizen can be directly derived from the Treaty on the Functioning of the European Union (TFEU). The CJEU has accepted in different situations and on different grounds that a right of residence can be directly derived from the TFEU where secondary EU law does not provide for such a right. These situations include EU citizens who have made use of their free movement of persons right but seek to return to their home member state with their third-country national family members, EU citizens who seek to derive a right of residence for their third-country national family members from their exercise of the free movement of services, EU citizens who have made use of the free movement of persons but who do not comply with the requirements listed in the CD and lastly immobile EU citizens who would be forced to leave the territory of the EU if their third-country national family members were not allowed to reside in the host member state. These situations are addressed below in section 5 of this chapter.

4.3 Family Reunification Directive

4.3.1 Background and negotiations

The only legislation at EU level that deals specifically with the right to family unification is the Family Reunification Directive (FRD).[346] The other sources of EU law that mention family unification have a different purpose. Unlike the free movement of persons, the FRD is a relatively recent directive, as it entered into force in 2003.

The discussion concerning the harmonisation of family unification law started in the early 1990s. In 1993 the interior ministers of the member states adopted a resolution on the harmonisation of national policies on family unification.[347] This was done outside the framework of the EU, as the EU was not yet competent to regulate in the field of immigration. The preamble of

345 Ibid.

346 FRD (n341).

347 See for the text of the Resolution, E. Guild and J. Niessen, *The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions* (Kluwer Law International 1996) p 251.

the resolution lays down that the resolution is not binding on the member states and that individuals cannot rely on it. This strongly diminishes the relevance of the resolution. It should be seen as the start of harmonisation in the field of family unification, and as such it is interesting to look at the substantive provisions of the resolution as the choices made in the resolution are apparent in the final negotiation result of the FRD which is analysed below. The resolution applies to non-EC nationals who are lawfully residing in the territory of a member state on a basis which affords them an expectation of permanent or long-term residence. This limitation of the personal scope was later taken over in the FRD. With regard to the definition of the family, in the resolution the member states agreed that family unification should normally be granted to the spouse and children. With regard to other family members, the member states agreed that the member states have the possibility to permit entry and stay for compelling reasons which justify the presence of the person concerned. The family unification envisioned by the member states in the resolution was not unconditional. It was agreed that the member states may require applicants for family unification to comply with requirements on accommodation, sufficient resources and health care insurance in order to avoid a burden being placed on the public funds of the member state concerned. As the analysis below shows, these requirements have found their way into the FRD. Furthermore, the member states agreed that an application for family unification should normally be made outside the territory of the host member state. This requirement has also been taken over in the FRD. As stated before, although the practical relevance at the time of the adoption of the resolution was limited due to the fact that it did not create binding obligations for the member states and individuals could not invoke the resolution, the resolution is still relevant in the process of harmonisation of family unification policy in the EU.

In order to follow up on the resolution, the European Commission proposed a Convention on rules for the admission of third-country nationals to the Member States in 1997, which included a chapter on family unification.[348] Interestingly, the Treaty of Amsterdam had already been agreed upon by the member states, which meant that the EU acquired competence in the field of immigration law. It was the intention of the Commission to develop the proposed Convention on migration law into EU law after the adoption of the Treaty of Amsterdam. The proposed Convention included a provision which stated that the family unification of all EU citizens is governed by the law on the free movement of persons. In this way, EU citizens who had not made use of their right to free movement of persons would be treated the same as EU citizens who had done so, solving the problem of reversed discrimination. The proposed Convention was meant to apply to third-country nationals

348 European Commission, *Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States* (COM(97) 387 final) .

seeking family unification with another third-country national. This clearly illustrates the intention of the Commission to create a level playing field for all EU citizens. This proposal was not included in the resolution adopted by the member states in 1993.

What started as cooperation between the member state outside the framework of the EU, evolved into an EU competence in the field of immigration law with the adoption of the Treaty of Amsterdam in 1998. Article 63(3)(a) of the EC Treaty (now Article 79(2)(a) TFEU) called on the Council to adopt measures on immigration policy within the area of the conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion. With the inclusion of this provision, immigration policy including family unification became a shared competence of the EU. However, at the initial stages it was no ordinary EU law. As Justice and Home Affairs had traditionally been an area in which the member states were reluctant to transfer competence, the member states retained a large degree of control in decision making in this area. This is mainly visible in the fact that measures in the Council at that time had to be adopted unanimously, granting each member state veto power in the adoption of any measure in this area. Furthermore, the role of the European Parliament was limited to consultation.[349] The obligation to consult the Parliament meant that the Parliament was asked for its opinion, but did not have any power in the adoption of the final Directive. This makes the Council the sole legislator. As a result, the negotiations on the FRD started in an environment in which the member states were aware of their large negotiation power. As the adoption of the directive required unanimity, the member states knew that their demands would be heard.

It was in this environment that the European Commission (Commission) presented its first proposal for a directive on the right to family reunification.[350] The initial proposal of the Commission aimed to create a level playing field compared to the rules on family unification within the context of the free movement of persons.[351] As was shown above, just five years before the member states had already expressed that they had a quite different intention in the resolution. The Council, however, was not always clear in the communication of its position. In fact, the idea that the rules in the measure on family unification should be similar to the rules within the context of the free movement of persons was laid down by the Council itself in the Tampere programme.[352] The proposal of the Commission was submitted to the Parliament,

349 Art 67 EC Treaty.

350 European Commission, *Proposal for a Council Directive on the right to family reunification* (COM(1999)638 final) .

351 T. Strik, *Besluitvorming over asiel- en migratierichtlijnen: de wisselwerking tussen nationaal en Europees niveau* (Boom Juridische Uitgevers 2011) p 66.

352 Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999* (1999) conclusions 18 and 21.

who proposed amendments to the Commission proposal.[353] Based on the amendments given by the Parliament, the Commission presented a second proposal.[354] Negotiations within the Council remained problematic. At the end of 2001 the European Council asked the Commission to come up with a new amended proposal. The Commission complied with a third proposal.[355]

The third proposal contains a few fundamental changes to the first two proposals. Firstly, the objective of the proposed directive was changed. Whereas in the first and second proposal, the objective of the directive was formulated as the establishment of a right to family unification,[356] in the third proposal the establishment of a right to family unification was no longer included in the text of the preamble. Instead, the preamble called for the necessity to determine the material conditions for exercising the right to family unification in order to protect the family and establish or preserve family life.[357] This amendment to the proposal indicated that the member states were reluctant to lay down in the preamble that the establishment of a subjective right to family unification was among the objectives of the directive. Another more substantive amendment was that EU citizens who had not made use of the right to free movement were excluded from the scope of the directive. In the first and second proposal the Commission had proposed that immobile EU citizens were within the scope of the directive, but should fall within the regulatory framework applicable to persons who fell within the scope of the free movement of persons.[358] This provision was removed in the third and final proposal. The third proposal explicitly states that the directive does not apply to third-country national family members of EU citizens.[359]

This proposal was again subject to fierce negotiations within the Council, which reached a political compromise in February 2003. The European Parliament, whose role was limited to consultation, proposed seventy amendments, but these were not further discussed in the Council. On 22 September 2003, the Council formally adopted the directive. The member states were under the obligation to implement the directive in their domestic legislation before 3 October 2005.

The European Parliament, which did not play a formal role in the adoption of the Directive and which observed that the seventy proposed amendments

353 European Parliament, *Report on the proposal for a Council directiveDirective on the right to family reunification (COM(1999)638 – C5-0077/2000 – 1999/0258(CNS))* (A5-201/2000, 2000).
354 European Commission, *Amended proposal for a Council Directive on the right to family reunification* (COM(2000) 624 final) .
355 European Commission, *Amended proposal for a Council Directive on the right to family reunification* (COM(2002) 225 final).
356 COM(1999) 638 final (n 350), preamble 7, p 23.
357 COM(2002)225 final (n 355), preamble 9, p 1.
358 COM(1999) 638 final (n 350), COM(2000)624 final (n354), Art 4.
359 COM(2002) 225 final (n 355), Art 3(3), p 3.

were ignored by the Council, challenged the Directive before the CJEU.[360] The Parliament initiated an action for annulment of the Directive pursuant to Article 263 TFEU (old Article 230 EC). According to the action by the Parliament, some provisions of the Directive were not in accordance with fundamental rights. The contested provisions were all stand-still clauses, which allowed some member states to retain their domestic rules without allowing other member states to introduce similar rules. The three provisions that were contested by the Parliament were Article 4(1) allowing integration requirements for children older than twelve, Article 4(6) allowing a maximum age for the family unification of children of fifteen years and Article 8 allowing for a waiting period of three years from the time of application until the time a residence permit is issued in the context of the reception capacity of the member states. The Parliament requested that these three provisions of the Directive be annulled. In turn the Council argued that the action should be declared inadmissible because the Parliament challenged only certain provisions and not the entire directive. Annulling these provisions of the FRD would change the substance of the Directive, placing the CJEU on the chair of the legislator. According to the Advocate-General, the action for annulment should have been dismissed on this ground, as the contested provisions could not be severed from the remainder of the Directive and the annulment of the entire directive would exceed the action of the Parliament and would furthermore be at odds with the interests of the Parliament, as the annulment of the entire directive would mean that there would not be a right to family unification in EU law at all.[361] Instead of ruling on the admissibility of the action for annulment of certain provisions of the Directive, the CJEU investigated first whether the contested provisions were in fact not in conformity with fundamental rights. With regard to the integration requirements for children older than twelve, the CJEU held that the possibility to impose such requirements cannot be interpreted as allowing the member states to adopt implementing provisions that would be contrary to the right to respect for family life.[362] With regard to the maximum age of fifteen years for the family unification of children aged fifteen or above, the CJEU held that even though the member states may impose such an age restriction, they must still have due regard for the best interests of the child concept and the right to respect for family life.[363] About the waiting period of three years, the CJEU held that the member states, in applying this waiting period, may not act in a manner which infringes fundamental rights.[364] The position of the CJEU is that the Directive itself does not infringe fundamental rights because the member states, which need to

360 Case C-540/03 *Parliament v Council* [2006] ECR I-5769 .
361 Opinion of A-G. Kokott, para 47-48.
362 *Parliament v Council* (n 360) para 70.
363 Ibid para 88.
364 Ibid para 103.

implement the Directive in their domestic legislation, are bound by fundamental rights. By adopting this reasoning, the CJEU does not have to rule on the question of whether specific provisions of the Directive can be annulled without annulling the entire directive. In ruling that the contested provisions do not infringe on fundamental rights, the CJEU made a few important general points which are relevant for the Directive. Firstly, the CJEU established that the Directive had created a subjective right to family unification.[365] The CJEU held that the Directive imposed precise positive obligations which correspond to clearly defined individual rights which do not grant member states a margin of appreciation. When the requirements of the Directive are fulfilled, a right to family unification exists. The emphasis of the CJEU on the establishment of a right to family unification is relevant because the creation of a subjective right to family unification was removed from the preamble of the Directive during the negotiations. Furthermore, the European Court of Human Rights refrains from recognising family unification as a right as such.[366] It does however impose a positive obligation for states to allow for the residence of a foreign citizen within the context of family unification in certain narrowly defined circumstances. The CJEU explicitly states that the obligations under the FRD go beyond the obligations that can be derived from Article 8 ECHR.[367] Secondly, the Court for the first time referred to the Charter of Fundamental Rights of the EU, even though that Charter did not have binding force at the time of the ruling. The Court motivated its reference to the Charter by the fact that the legislator did recognise the importance of the Charter by referring to it in the preamble of the Directive.[368] Thirdly, throughout the ruling the CJEU emphasises the need to take all individual circumstances into account and to observe the principle of the best interests of the child. In determining whether the contested provisions are in conformity with fundamental rights, the Court for each of these provisions emphasises the importance of the horizontal clauses in Articles 5(5) and 17 of the Directive. The member states are bound to have due regard for the best interests of the child and the individual circumstances of the case when applying the Directive, including the contested provisions. By emphasising the importance of the horizontal clauses the court motivates why the provisions in themselves do not infringe fundamental rights. By doing so the CJEU provides important guidance on the implementation of the Directive. A good example of this relates to the waiting periods in Article 8 of the Directive. The provisions as such seem to suggest that the waiting period can be imposed regardless of the circumstances of the case. By holding that the waiting period does not infringe fundamental rights

365 Ibid para 60.

366 R. Lawson, 'Family Reunification Directive – Court of Justice of the European Communities' (2007) 3 ECLRev p 340.

367 *Parliament v Council* (n 360) para 60.

368 *Parliament v Council* (n 360) para 38.

because the member states have to take due regard anyway of the best interests of the child and the individual circumstances of the case, the CJEU holds that the waiting period may not be imposed in all situations, contrary to what the text of the provisions seems to suggest.[369] However the CJEU refrains from further concretising what the best interests of the child concept means in this context.[370] Below, the meaning of the horizontal clauses is further analysed.

Article 19 of the Directive states that the Commission shall periodically report to the Parliament and the Council on the application of the Directive and the member states and that it shall propose such amendments to the Directive as may appear necessary. In 2008 the Commission published a report on the implementation of the Directive by the member states. In the report, the Commission concluded that the impact of the Directive on harmonisation in the field of family unification remains limited.[371] Furthermore, the Commission identified a number of areas in which implementation of the Directive was lacking. The implementation of the horizontal clauses relating to the best interests of the child (Art 5(5)) and the obligation to take due account of the individual circumstances of the case (Art 17) was one of the issues identified. The Commission announced that it intended to launch a wider consultation on the future of the family unification regime in the form of a green paper. In 2011 the Commission published its green paper in which it asked all stakeholders to comment on certain issues which had been identified by the Commission.[372] The publication of the green paper was preceded by lobbying efforts of the Dutch government which aimed to make it possible to have more strict requirements for family unification.[373] In 2014 the Commission published administrative guidelines on the implementation of the FRD.[374] The guidelines aim to provide guidance to the member states on the implementation of the FRD. Thematically the Commission gives its own interpretation of most substantive provisions of the Directive. Below, the content of the Directive is analysed. Where appropriate, reference will be made to the interpretation of the Commission expressed in the guidelines. It must be noted that the

369 M. Bulterman, 'Case C-540/03, Parliament v. Council, Judgment of the Grand Chamber of 27 June 2006, 2006 ECR I-5769' (2008) 45 CMLRev p 254.

370 E. Drywood, 'Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision' (2007) 32 ELRev .

371 European Commission, *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification* (COM(2008) 610 final) .

372 European Commission, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)* (COM(2011) 735 final) .

373 M. Klaassen and J. Søndergaard, 'The Netherlands as the black sheep of the family? How the Dutch response to the Commission's Green Paper on Family Reunification compares to the reactions of other member states' [2012] A&MR.

374 European Commission, *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 unification* (COM(2014) 210 final) .

guidelines of the Commission are not binding on the member states. Furthermore the Commission itself remarks that the guidelines are without prejudice to the case law of the CJEU and that the views of the Commission may change over time.[375] This makes the guidelines an instrument of soft law that has certain authority, but the influence of which must not be overstated.

4.3.2 Horizontal provisions

The Directive includes two horizontal provisions which are applicable to all other provisions of the Directive and are important in the implementation of the Directive. A general horizontal provision is to be found in Article 17 of the Directive. This provision lays down that in rejecting applications, withdrawing residence permits and refusing an application to renew a residence permit, the member states should take due account of the nature and solidity of the person's family relationship, the duration of his residence and the existence of family, cultural and social ties with the country of origin. This provision therefore entails the obligation to take individual circumstances into account when applying the provisions of the Directive. Therefore non-compliance with one of the substantive requirements laid down in the Directive may not automatically result in the rejection of an application without considering the individual circumstances involved.

Article 5(5) contains an additional horizontal clause laying down that when examining an application, the member states shall have due regard for the best interests of minor children. The CJEU has held that this provision requires that when a member state determines whether an applicant complies with the substantive requirements listed in Article 7 FRD, this must be done in the light of Articles 7, 24(2) and 24(3) of the Charter.[376] Based on the case law of the CJEU, the Commission contends that it must be ensured that a child shall not be separated from his or her parents against their will.[377]

4.3.3 Beneficiaries

The beneficiaries of family unification within the scope of the Directive 2003/86 are third-country national family members who seek to be reunited with a third-country national family member residing in a member state of the EU.[378] Directive 2003/86 therefore does not apply to EU citizens who seek family

375 Ibid p 2.
376 Joined Cases 356/11 and 357/11 *O, S & L* [2012] not yet published, see section 4.7. for an analysis of the Charter.
377 COM(2014) 210 final (n 374) p 26.
378 Art 1 FRD.

unification with their third-country national partner.[379] During the drafting of the Directive the European Commission also envisioned that the laws on the family unification of EU citizens would be harmonised by the Directive.[380] However, proposals to that end were rejected by the Council and for that reason were not included in the final amended Commission proposal.[381] The effect of this is that EU citizens who have not made use of their free movement of persons are not covered by EU law with respect to family unification. As the FRD does not apply, they cannot invoke its protection in domestic disputes concerning family unification. The limitation of the personal scope of the FRD to third-country nationals begs the question whether persons holding both the citizenship of a member state of the EU and the citizenship of a third state are covered. It could be argued that once a person holds the citizenship of a member state of the EU, this person is also an EU citizen and therefore is expressly outside the scope of the Directive.[382] However, this could mean that a third-country national who is within the scope of the Directive would fall outside its scope the moment that he acquires the citizenship of the member states he resides in. This would mean that his third-country national family members, who do not acquire the citizenship of the member state concerned, would also fall outside the scope of the Directive. Until now the CJEU has not ruled on the issue of multiple citizenships and the personal scope of the Directive.

4.3.4 Definition of the family

In the definition of family members in Directive 2003/86 four categories are included. The first category is the spouse.[383] For the purpose of facilitating integration and preventing forced marriages, member states may impose that the spouse is minimum 21 years old before an application for family unification is made.[384] Whether this can be interpreted as opening up the possibility to introduce a blanket age requirement or whether individual circumstances need to be considered when an application is lodged where the applicant does not fulfil the age requirement, is an issue which has not yet been answered in the case law of the CJEU. In the Guidelines, the Commission suggests that an application should not be automatically rejected for the sole reason that the age requirement is not complied with without regard to the individual circumstances of the case.[385] The Commission therefore interprets the age

379 Art 3(3) FRD.
380 COM(1999)638 final (n 350) p 11.
381 COM(2002)225 final (n 355).
382 See Art 3(3) FRD.
383 Art 4(1)(a) FRD.
384 Art 4(5) FRD.
385 COM(2014) 210 final (n 374) p 7.

requirement as a reference age which is only one of the factors which member states must take into account when examining an application. The Commission suggests that the member states should consider making an exception where justification of the age requirement, ensuring better integration and preventing forced marriages, is not applicable. According to the Commission, this applies for example when it is clear from the individual assessment that there is no abuse, such as in cases in which the couple has a common child.[386]

In *Noorzia* the CJEU established that the age requirement should be complied with at the time of application.[387] The case concerned the application for family unification of an Afghan national who was twenty years old when she made the application but twenty-one years old when her application was rejected by the Austrian authorities. At the time of the application the applicant did not comply with the age requirement. An Austrian court asked the CJEU whether a domestic rule stating that the applicant must have reached the age requirement at the time of application was in conformity with the Directive.[388] According to the CJEU, it is for the member states to determine whether or not to conduct an *ex tunc* or *ex nunc* assessment of the application, as this is not further specified in the Directive, as long as this does not impair the effectiveness of EU law.[389] According to the CJEU, the fact that the age requirement should be complied with at the time of application does not prevent the exercise of the right to family unification and does not render it excessively difficult.[390] Furthermore, it is compatible with the purpose of the age requirement, which is to prevent forced marriages.[391] Considering the case law of the CJEU in *Chakroun*[392] *and O.S. & L.*[393] and the Administrative Guidelines of the Commission, the conclusion that the member states may impose an age requirement which must be complied with at the time of application surprises me. In the *Noorzia* case there are no indications that the substantive requirements had not been fulfilled and furthermore nothing suggests that there were doubts regarding the status of the marriage of the applicant. In such circumstances, I disagree with the Court that it is not sufficient that the age requirement is complied with at the time of the administrative decision, without the consideration of the individual circumstances of the case. With this ruling, the CJEU has effectively introduced a waiting period which goes beyond the age requirement of twenty-one years. As applicants can only make an application when the age requirement is complied with, family unification can effectively only take place after the member state has decided on the application,

386 Ibid p 8.
387 Case C-338/13 *Noorzia* [2014] not yet published.
388 Ibid para 11.
389 Ibid para 14.
390 Ibid para 16.
391 Ibid.
392 Case C-578/08 Chakroun [2010] ECR I-1839.
393 O, S & L (n 376).

for which the member states have nine months pursuant to Article 5(4) of the Directive. This, according to the Court, does not render an application for family unification excessively difficult. In my opinion, the Court does not sufficiently take into account the hardship caused by the separation of spouses which is caused by the extension of the age requirement. The *Noorzia* case was the first ruling of the CJEU on the FRD after the Commission had published its Administrative Guidelines. It is striking that the CJEU does not refer to the Guidelines as a soft law instrument and does not consider the reasoning of the Commission in its ruling.

The second category of eligible family members are the minor children (younger than eighteen years old) of the sponsor and the spouse, including adopted children.[394] Also the children of the sponsor and of the spouse who are not the children of the sponsor are, if the spouse has custody of the child and the child is dependent on him, eligible for family unification.[395] The member states may require children who arrive independently of their parents and who are over 12 years old to conform to integration requirements, if the member states imposed these requirements before the date of implementation of the Directive.[396] Only two member states, Germany and Cyprus, have implemented this derogatory clause.[397] The other member states are not allowed under the FRD to impose such integration requirements. In a similar vein, the member states may require that the application for family unification is lodged before the child reaches the age of 15, if the member states had this legislation in place at the time the Directive entered into force. None of the member states have implemented this derogatory clause.[398] The CJEU has pointed out that in accordance with Article 5(5) and Article 17 the best interests of the minor child and the nature and solidity of the family should be taken into account when applying the requirements in Article 4(1) and 4(6).[399]

The member states may authorise the entry and residence, pursuant to the Directive, of first-degree relatives in the direct ascending line of the sponsor or his or her spouse who are dependent on them and who do not enjoy proper family support in the country of origin and the adult unmarried children of the spouse who are objectively unable to provide for their own needs on account of their state of health.[400] The member states may also apply the Directive to unmarried partners.[401] That this is mentioned in the Directive means that if the member states allow for this possibility, the provisions of

394 Art 4(1)(b) FRD.
395 Art 4(1)(c)&(d) FRD.
396 Art 4(1) FRD.
397 COM(2008)610 final (n 371) p 5.
398 ibid.
399 *Parliament v Council* (n 360) paras 63-64.
400 Art 4(2) FRD.
401 Art 4(3) FRD.

the Directive apply.[402] In its Administrative Guidelines, the Commission comments that the concept of dependency should be interpreted in the same manner as the concept is interpreted within the context of the CD.[403]

The introduction of the facultative regime in the Directive is curious. It was the result of a compromise reached in the Council. In the first two proposals of the Commission, dependent relatives in the ascending line, dependent adult children and unmarried partners were fully included within the scope of the Directive.[404] However in the third proposal, which aimed to reflect the state of negotiations in the Council, these categories were placed in a facultative regime in which the member states may provide for the possibility for family unification but are under no obligation to do so.[405] Despite the current formulation being the obvious result of a compromise in the Council, the creation of a facultative regime is questionable considering that the Directive already gives the member states the possibility to introduce more favourable provisions.[406] The member states are therefore already allowed to grant the right to family unification to these categories of family members. In this light the question is justified whether the facultative regime in Article 4(2) and 4(3) of the Directive can impose any obligations on the member states. The fact that the member states are allowed to implement these facultative provisions brings the subject matter of the provisions within the scope of the Directive. Therefore, where a member state implements the provisions, the Directive is applicable. The remaining question is whether the Directive is applicable in a situation where the member state did not formally implement the provision but does provide for the possibility of family unification for these categories of family members. For example, a member state may not offer the possibility for family members in the ascending line in its legislation or regulation explicitly, but may implicitly do so by the operation of some kind of hardship clause. In my opinion, the fact that a member state in practice offers the possibility of family unification must make the Directive applicable in such cases. Whether the facultative provisions have been formally implemented as such is, in my opinion, irrelevant. Especially the obligation to take individual circumstances into account may be relevant in this regard. Any other reading of these facultative provisions would render them meaningless. Regrettably, the Commission did not comment on such situations in its Administrative Guidelines.

402 This was confirmed by the European Commission in the evaluation of the implementation of the Directive. COM(2008)610 final (n 371) p 6 .
403 COM(2014) 210 final (n 374) p 6.
404 COM(1999) 638 final (n 350), COM(2000)624 final (n354), Art 5.
405 COM(2002) 225 final (n 355), Art 4(2)&(3).
406 Art 3(5) FRD.

4.3.5 Procedural rules

The host member state shall determine whether the sponsor or the family member should lodge an application for family unification pursuant to Directive 2003/86.[407] During the application, documentary evidence of the family relationship as well as evidence of compliance with Articles 4 and 6, and where applicable also 7 and 8, should be submitted to the authorities. Member states may carry out interviews with the sponsor and his family members and conduct other investigations to determine the actual existence of the family relationship. When a member state offers the possibility for the family unification of unmarried partners, it shall take factors such as a common child, previous cohabitation, registration of the partnership and other reliable means of proof into account.[408] The application for family unification should be submitted when the family member is residing outside the territory of the member state in which the sponsor resides, however member states may in exceptional circumstances accept applications submitted when the family member is already residing on its territory.[409] Many member states implement this provision by exempting the citizens of certain states from the obligation to issue an application while still residing in the country of origin. It is questionable whether this application of the possibility to allow for in-country application is in line with the prohibition of discrimination. It is straightforward that such application is a form of discrimination based on citizenship. This is in fact the objective of exempting the citizens of certain states from the obligation to make an application for family unification in the country of origin. The selection of the states which are exempted from making applications in the country of origin may however also lead to discrimination based on race. The ECtHR accepted in *Abdulaziz, Cabales and Balkandali v. United Kingdom* that the member states may use preferential admission schemes.[410] However this case did not concern the compatibility of the discrimination within the context of EU law and furthermore that ruling is rather old, meaning that it did not and could not take jurisprudential developments concerning Article 14 ECHR into account. The question whether this form of direct discrimination based on citizenship and possibly indirect discrimination on the grounds of race has not yet been answered by the CJEU. In my opinion, proponents of the view that this concerns unjustified discrimination[411] surely have a strong point.

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407 Art 5(1) FRD.
408 Art 5(2) FRD.
409 Art 5(3) FRD.
410 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143).
411 See for example P. Rodrigues, 'De Grenzen van het Vreemdelingenrecht' Inaugural address <http://media.leidenuniv.nl/legacy/oratie-peter-rodrigues.pdf> .

The Directive does not specify what should happen when an application is lodged when the family member is already in the host member state and there are, according to the authorities of that member state, no exceptional circumstances. It seems that this is left entirely to the discretion of the member state. In my opinion, the examination of whether exceptional circumstances exist is in principle within the scope of the Directive. Therefore, Articles 5(5) and 17 are applicable in determining whether there are exceptional circumstances, and so are Articles 7 and 24 of the Charter. It can therefore not be held that the member states are never bound by the Directive to allow for in-country application. The discretionary competence of the member states to allow for in-country applications should be applied in a manner which is in conformity with the Directive and with EU law in general, including the Charter of Fundamental Rights. This, means that in each case of an in-country application, a proportionality assessment must take place in which the refusal of an application on the sole ground that it was not made on the right location is balanced against all other relevant interests at stake. This implies that a member state may never reject an application without considering the other circumstances of the case. It is regrettable that the Commission did not pay any attention to this issue in the Administrative Guidelines.

The host member state should give written notification of the decision as soon as possible and at the latest nine months after the application, however in exceptional circumstances relating to the examination of the application, this time limit may be extended. The Directive does not specify how long this extension may be. Therefore the member states should specify in national legislation how they implement this discretionary competence. If an application is rejected this should be motivated by the member state.[412] During the examination of an application, the member states should have due regard for the best interests of minor children.[413] As soon as the application is accepted, the member states should authorise the entry of the family member on its territory.[414] After entry on the territory the member state shall issue the family member a residence permit for at least one year, which should be renewable.[415] In principle, the duration of the residence permit of the family member should not go beyond the expiry date of the residence permit of the sponsor.[416]

The Directive does not give any guidance on the fees the member states may charge for the submission of an application. The Commission has commented on administrative fees in the Administrative Guidelines.[417] The Com-

412 Art 5(4) FRD.
413 Art 5(5) FRD.
414 Art 13(1) FRD.
415 Art 13(2) FRD.
416 Art 13(3) FRD.
417 COM(2014) 210 final (n 374).

mission remarks that the member states are allowed to charge reasonable and proportional administrative fees, as long as they do not jeopardise the achievement of the objectives and the effectiveness of the Directive. The Commission refers in this regard to an infringement procedure with regard to the administrative fees levied in the context of Directive 2003/109/EC. The CJEU agreed with the Commission that the level of the administrative fees may not have the effect of creating an obstacle to obtaining the long-term resident status as otherwise the objective and the spirit of Directive 2003/109/EC would be undermined.[418] The analogy the Commission makes with administrative fees levied in the context of the FRD is convincing. Similar to Directive 2003/109/EC, the FRD does not contain any provisions regarding fees. Nothing suggests that the reasoning developed by the Court in *Commission v. Netherlands* is not relevant within the context of the FRD. In fact, the Dutch Council of State has held that the reasoning of the CJEU also applies to administrative fees levied within the context of the FRD.[419]

The Commission encourages the member states to exempt applications by minors from administrative fees in order to promote the best interests of the child. However, the member states are under no obligation to do so.

When a member state rejects an application for family unification or an application for a renewal of a residence permit, as well as when a residence permit is withdrawn or the expulsion of a family member is ordered, it should ensure that the sponsor or the family member have the right to mount a legal challenge to that decision. The exact procedure on how to effect the right to a legal remedy should be specified by the member states.[420] This formulation leaves a large margin of appreciation to the member states on issues like the status of the reviewing authority, the possibility to apply for interim measures to prevent expulsion, the procedures of the review and legal assistance schemes. However, in implementing Article 18 of the Directive, the member states should respect Article 47 of the Charter of Fundamental Rights, which prescribes that everyone is entitled to a fair and public hearing within a reasonable time and that legal aid should be available to those who lack sufficient resources.[421] Article 47 Charter prescribes judicial review by a court, which goes beyond the requirements in Article 18 FRD.

4.3.6 Admission requirements

The Directive lists three requirements which may be imposed on family migrants and their sponsor by the host member state. These requirements relate

418 Case C-508/10 *Commission v Netherlands* [2012] not yet published.
419 Council of State (09-10-2012) 201008782/1/V1 (NL).
420 Art 18 FRD.
421 Art 47 Charter.

to accommodation, health insurance and income. Furthermore, the member states may require third-country nationals to comply with integration measures, in accordance with national law. Even though this competence of the member states is not formulated like an admission requirement, it is still discussed in this context because certain member states have interpreted the provision as allowing them to require applicants for family unification to pass a pre-entry integration exam.

The first requirement member states are allowed to impose is the requirement that the sponsor has accommodation regarded as normal for a comparable family in the same region and which meets health and safety standards applicable in the member state concerned.[422] From the negotiation phase of the Directive, it seems that this requirement is meant to specify the size of the accommodation in comparison with the number of inhabitants.[423] In the Administrative Guidelines, the Commission has commented that a rental or purchase agreement may serve as evidence of appropriate accommodation. A rental agreement of limited duration may, according to the Commission, be deemed insufficient. The Commission furthermore comments that in the case of waiting periods and long processing times, it may be disproportionate to require the sponsor to substantiate that he has appropriate accommodation for his entire family at the time of application. Therefore the Commission encourages the member states to be flexible in this regard.[424] The implementation report of the Commission shows that most member states maintain an accommodation requirement.[425] No case law of the CJEU specifically addresses the accommodation requirement.

The second substantive requirement that member states may impose is that the sponsor may be asked to provide evidence that he has health insurance cover for both the sponsor and the family members involved.[426] The health care insurance which is required for applicants for family unification must cover all risks which are normally covered for own nationals. The requirement may not go beyond this threshold. In its Administrative Guidelines, the Commission remarks that the fulfilment of the health care insurance requirement must be assumed if a member state has compulsory universal health care insurance that is also available to and mandatory for third-country national residents.[427] The implementation report of the Commission shows that

422 Art 7(1)(a) FRD.
423 COM(1999) 638 final (n 350), p 15.
424 COM(2014) 210 final (n 374) p 11-12.
425 COM(2008) 610 final (n 371) p 6, only Finland, Austria, Slovenia and Sweden do not impose an accommodation requirement. In the Netherlands the accommodation requirement was abolished as it was deemed impossible to check compliance with the requirement.
426 Art 7(1)(b) FRD.
427 COM(2014) 210 final (n 374) p 12.

approximately half of the member states have implemented the health care insurance requirement.[428]

Thirdly, the member states may require the sponsor to comply with an income requirement, meaning that the sponsor needs to be able to provide evidence that he or she has sufficient '*stable and regular resources*' to maintain all the family members without recourse to the social assistance system of the host member state. The possible income of other members of the family do not need to be taken into account by the member states.[429] In establishing the characteristics of the income requirement, the member states may take the domestic level of minimum wages or pensions into account, as well as the amount of family members who need to be maintained.[430] It is unclear what the concept 'stable and regular resources' entails exactly. In the *Chakroun* case, the CJEU was asked to rule on the interpretation of the income requirement.[431] The case concerned the Dutch implementation of this requirement, which differentiated the income requirement depending on the moment that the family relationship was established. For family relationships which were established after the sponsor started residing in the Netherlands, an income requirement of 120% of minimum wages was used. The CJEU has held that the member states should interpret the income requirement restrictively since authorisation of family unification is the general rule.[432] The objective of the Directive is to promote family unification, which would be incompatible with a broad interpretation of the income requirement.[433] The Netherlands was not allowed to differentiate in income requirements. Furthermore, the income requirement may not be set higher than necessary to prevent applicants becoming a burden to the social assistance system of the member state. The member states are not allowed to set a reference amount under which all applications are rejected in case that amount is not met. Instead, member states must take due account of the specific circumstances of each case. The *Chakroun* case is not the only case in which the CJEU ruled on the income requirement. The other case is *O.S. & L.*[434] *In that case, the referring court initially asked the CJEU about an interpretation of the Ruiz Zambrano* ruling. The question was whether the children of the applicants, who were Swedish citizens, would be forced to leave the territory of the EU if the new third-country national spouse of their third-country national mother would not be allowed residence in Sweden. The Court was hesitant on that particular issue, but commented that the third-country national mother was entitled to be a sponsor under the FRD.

428 COM(2008) 610 final (n 371) p 6.
429 For the renewing of a residence permit, the income of the other family members should be taken into account pursuant to Art 16(1)(a) FRD.
430 Art 7(1)(c) FRD.
431 *Chakroun* (n 392).
432 Ibid para 43.
433 Ibid para 43.
434 O, S & L (n 376).

The problem in the joined cases was that the mother did not have sufficient income under Article 7 FRD. The CJEU repeats the rule formulated in *Chakroun* that the competence of the member states to impose an income requirement must be interpreted strictly. Considering that the Charter is applicable in the case, the Court considers that

> "*Art 7(1)(c) of Directive 2003/86 cannot be interpreted and applied in such a manner that its application would disregard the fundamental rights set out in those provisions of the Charter.*"[435]

The Court here seems to suggest that in the event the new spouses of the applicants were not allowed to join their wives in Sweden, this would result in a violation of fundamental rights, but leaves the concrete assessment to the referring court. In my opinion, the CJEU in *O.S. & L.* does not fundamentally change the approach advanced in *Chakroun*, but once again emphasises the limited margin of appreciation of the member states. The member states may only impose such income requirements as are necessary to prevent the family becoming a burden on the social assistance system of the member state. Furthermore, the competence of the member states to impose income requirements is limited by fundamental rights. How fundamental rights, especially Article 7 Charter, should be interpreted in such cases is unclear. Considering the case law of the ECtHR, which was shown to be rather strict on attaching positive obligations to admit new immigrants in the context of the right to respect for family life, it is doubtful whether the applicants in this case could derive a right to entry and residence from Article 8 ECHR.

Besides the substantive requirements which the member states may impose pursuant to Article 7(1) FRD, the member states may also require third-country nationals to comply with integration measures, in accordance with national law. The second paragraph of Article 7(2) Directive 2003/86 provides that family members of refugees may only be made subject to integration measures when they are already on the territory of the host member states. This could imply that in a non-refugee situation, member states may require family members to comply with integration measures in the country of origin. It is unclear whether an "integration measure" can entail an imperative requirement which must be complied with before family unification is allowed.[436] It is furthermore unclear how wide the margin of appreciation of the member states is, considering that the Directive allows member states to require integration measures "in accordance with national law". Referred questions on the com-

435 Ibid para 77.

436 See, for a critical overview of integration provisions in EU migration law, K. Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 EJML; K. Groenendijk, 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?' (2011) 13 EJML.

patibility of Dutch integration measures with Directive 2003/86 were declared inadmissible after the Dutch authorities issued an entry clearance for the particular individual involved.[437] The CJEU has therefore not yet ruled on whether pre-entry integration measures are permissible under the Directive. The CJEU has held that pre-entry integration measures may not be imposed on Turkish nationals falling within the scope of the Additional Protocol of 1970 to the Association Agreement between the EU and Turkey.[438] The reasoning of the Court, however, concerns the application of the stand-still clause within that Protocol, and not so much the question whether Germany has the competence to impose a pre-entry language requirement within the context of the FRD. In 2014, the Dutch Council of State asked for a preliminary ruling concerning the pre-entry integration exam imposed by the Netherlands.[439]

4.3.7 Right to permanent residence

After a period not exceeding five years, the member states shall grant an autonomous right of residence to a family member who is the spouse, unmarried partner or the child who has reached majority, who has stayed as a family member with the host member state during those five years.[440] For the categories mentioned in Article 4(2) Directive 2003/86, the member states may grant an autonomous right of residence.[441] The right to autonomous residence means that the right of residence cannot be terminated when the family relationship is terminated or when the sponsor moves to another country. The conditions and duration of the autonomous residence permit should be prescribed in national law.[442] The Directive does not oblige member states to grant a permanent right of residence. However, after the mentioned period of five years has passed, the family member is eligible for the status of long-term resident.[443]

4.3.8 Termination of family relationship

The Directive lists several circumstances in which residence rights are affected when the family relationship is ended. Member states may reject an application for family unification or for the renewal of a residence permit, and may also

437 Case C-155/11 *Imran* [2011] ECR I-5095.
438 Case C-138/13 *Dogan* [2014] not yet published.
439 Case C-153/14 *K and A* [2014] request for a preliminary ruling, see section 7.3.5. for an analysis of the case and the referred questions.
440 Art 15(1) FRD.
441 Art 15(2) FRD.
442 Art 15(3) FRD.
443 Art 4(1) LTRD.

withdraw an existing residence permit, where the sponsor and his family member no longer live in a real marital or family relationship[444] and where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person.[445] The Directive does not specify the characteristics of a "real marital or family relationship". In accordance with the second preamble of the Directive, the interpretation of a real marital or family relationship can be sought in the case law of the ECtHR on family life.[446] According to the CJEU, a marital relationship is only broken when the divorce is finalised in court.[447] After the initial period of five years has passed, the member states may limit the granting of an autonomous residence right in the case of the termination of the family relationship.[448] The Directive gives member states the competence to grant an autonomous residence permit to family members in the event of widowhood, divorce, separation or the death of first degree relatives. Member states are furthermore obliged to lay down provisions in domestic legislation on the granting of an autonomous residence permit in the event of particularly difficult circumstances.[449] Notwithstanding exceptional circumstances of hardship, the member states enjoy a wide discretion on the granting of residence rights after the termination of the family relationship.

4.3.9 Protection against expulsion

The member states may end the residence rights of a family member when the conditions prescribed in Article 7 are no longer fulfilled. This means that the right to family unification remains conditional, even after entry in the host member state. As mentioned before, in determining whether the income requirement is complied with, the member states should take into account the income of other family members together with the income of the sponsor.[450] Also, when the actual family relationship is broken, or when the member state discovers that the family member is married or has a durable relationship with another person, the right of residence may be terminated.[451] When false information was provided during the application process, or when it is established that the family relationship was created with the sole purpose of acquiring the right of residence, the member state may terminate the right

444 Art 16(1)(b) FRD.
445 Art 16(1)(c) FRD.
446 See section 2.1.3.4.
447 Case C-267/83 *Diatta* [1985] ECR 567 para 20.
448 Art 15 (2) FRD.
449 Art 15(3) FRD.
450 Art 16(1)(a) FRD.
451 Art 16(1)(b)&(c) FRD.

of residence.[452] The wording "sole purpose" in the definition of marriage of convenience seems to suggest that the acquisition of the right of residence pursuant to the Directive may play a role in the decision to get married; it may just not be the only goal. A marriage which has any other purpose than the acquisition of the right of residence can therefore not be regarded as falling under this provision. The member states are authorised to conduct specific investigations when there is reason to suspect that there is fraud or a marriage of convenience is involved.[453] When the residence of the sponsor in the host member state is terminated before the period of 5 years has passed, the family member may lose the right of residence.[454] When the residence rights of a family member are terminated, the member state should have due regard for the nature and solidity of the person's family relationship and the duration of the residence in the host member state, as well as for the cultural and social ties to the country of origin.[455] This provision aims to guarantee compliance with the case law of the ECtHR on Article 8 ECHR.

4.4 Free Movement of Persons

4.4.1 Background

One common internal market was one of the founding principles of what is now called the EU. The four fundamental freedoms – the freedom of movement of goods, services, capital and persons – form the cornerstone of European unification.[456] The free movement of persons and the free movement of services have implications for the right to family unification. As is shown below, it is considered to be detrimental to the effectiveness of the right to free movement if a family member, also a family member who is a third-country national, is not allowed to accompany his EU national family member who makes use, or intends to make use, of his free movement rights.

This category is similar to the previous category on family unification for spouses who are EU citizens. For third-country national family members of EU citizens who make use of their free movement rights, the same Directive 2004/38 applies. However, within that Directive specific provisions are made for third-country national family members, which on some occasions are different to the provisions for EU nationals.

A predecessor of the Citizenship Directive was Regulation 1612/68, which stipulates that family members can accompany a worker who makes use of

452 Art 16(2) FRD.
453 Art 16(4) FRD.
454 Art 16(3) FRD.
455 Art 17 FRD.
456 C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013).

his free movement of persons right irrespective of their nationality.[457] This means that third-country nationals can accompany a worker who makes use of his free movement of persons right to the host member state. In 1982 the CJEU held that only in cases in which the free movement of persons was used, can the provisions of Regulation 1612/68 apply.[458] In cases which do not have a factor linking them to EU law, there is a purely internal situation for the member states which is not governed by EU law. This line of reasoning became the standard case law of the CJEU in these types of cases.

4.4.2 Beneficiaries

Nationals of an EU member state who wish to move to another member state to live with a family member who is also a national of an EU member state, have the right to do so if they fulfil the criteria described in Article 7(1) CD. This means that an EU national family member wishing to reside in another member state should either be a worker or self-employed person, a self-sufficient person or a student.[459] Third-country national family members of an EU citizen who have made use of the free movement of persons are eligible to join that EU citizen in the host member state if the EU citizen fulfils the requirements of Article 7 CD.

Article 5 CD gives all EU citizens the right to enter another member state. Article 6 CD provides the right to stay in another member state for a period of up to three months. Article 7 CD provides the right of EU citizens to reside in another member state for a period longer than three months. Article 7(1)(d) CD extends the right to stay in the host member state to the family members of an EU citizen who fulfils the requirements of Article 7(1)(a), (b) or (c) CD.

As the Citizenship Directive does not cover EU citizens residing in their home member states, upon return to their home member states EU citizens have to rely directly on Article 21 TFEU for the residence of their third-country national family members. This reasoning was developed by the CJEU in *Surinder Singh*.[460] The extension of the right to free movement back to the home member state is further analysed in section 4.5.1.

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457 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2 art 10.

458 *Morson and Jhanjan* (n 337) para 16.

459 See section 4.4.5. for an analysis of these concepts.

460 Case C-370/90 *Surinder Singh* [1992] ECR I-4265 para 21 At the time of the Surinder Singh ruling, the equivalent of Art 21 TFEU did not exist yet, instead the ruling was based on the freedom of establishment because of the particular circumstances in that case. Currently the right to freely move and reside in another member state is laid down in Art 21 TFEU, which is currently the provision that can be relied upon.

4.4.3 Definition of the family

For the purpose of Directive 2004/38, the definition of family member encompasses the spouse, the partner with whom the EU citizen has contracted a registered partnership,[461] direct descendants under the age of 21 or over the age of 21 if the descendent is dependent on the parents and dependent on direct relatives in the ascending line.[462] Striking in this definition of family members is that it does not encompass unmarried partners. In Article 3(2) it is mentioned that the member states should facilitate the entry and residence of unmarried partners, but they are not within the scope of the provisions relating to family members in the Directive. Furthermore, there are ambiguities on the meaning and content of registered partnerships, as the member states have no common understanding of this concept. According to the European Commission, forced marriages and polygamous marriages fall outside the definition of family members. However, arranged marriages are supposed to fall within that category.[463]

In *Rahman* the Court of Justice of the European Union (CJEU) was asked to provide an interpretation of the notion of facilitation.[464] The Court did not provide much guidance, as it held that the notion of facilitation implies that the member states must "*confer a certain advantage*" on family members falling within the scope of Article 3(2) as compared to third-country national family members falling outside the scope of the Directive.[465] The Court further remarks that the member states must ensure that the domestic legislation contains criteria "*which are consistent with the normal meaning of the term 'facilitate'.*"[466] The Court provides no further guidance on the meaning of this term. The Court does provide that Article 3(2) CD is formulated not precisely enough to have direct effect, therewith limiting the practical significance of this provision.[467] This means that individuals cannot directly invoke this provision in their domestic legal system.

In the *Metock* ruling, the CJEU held that the purpose of the CD is to "*strengthen the right of free movement and residence of all Union citizens*"[468] and that therefore the CD should be interpreted broadly. Costello derives from this

461 Registered partnerships are only covered by the CD if the legislation of the host Member State treats registered partnership as equivalent to marriage.

462 Art 2 CD.

463 European Commission, *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (COM(2009)313 final) p 4.

464 C-83/11 *Rahman* [2008] not yet published.

465 Ibid para 21.

466 Ibid para 24.

467 Ibid para 25.

468 See recital 3 CD quoted in Case C-128/08 *Metock and others* [2008] ECR I-6241 para 59.

formulation that the personal scope of the CD should also be constructed broadly.[469]

4.4.4 Procedural rules

There are different procedural rules for EU citizens who seek to reside in another member state as the family member of an EU citizen and third-country nationals who seek to reside in another member state as the family member of an EU citizen.

Member states may require EU citizens who make use of their free movement of persons to accompany a family member in another member state to register pursuant to Article 8(1) of the Directive. They may not pose a deadline of less than three months after entry for the registration. The host member state may require certain documents to be submitted. These documents include a valid identity card or passport, documents to prove the family relationship and, in case specific conditions apply, the appropriate documents to demonstrate that those conditions are complied with.[470] Upon registration, the host member state shall issue a certificate attesting that the person has registered.[471] The possession of a registration certificate may not be made a requirement for the exercise of a right or the completion of an administrative formality.[472] For the issue of a registration certificate, the member states may not charge more than is charged to own nationals for the issue of a similar document.[473]

Third-country national family members of EU citizens within the scope of Directive 2004/38 are required to apply for a residence card. Member states may not require those family members to apply for the residence card within three months after entry in the host member state.[474] The host member state shall decide on the application for a residence card within six months, but shall issue a certificate that an application has been lodged immediately.[475] The member states shall require the following documents for the application of a residence card: a valid passport, a document attesting to the family relationship, a document attesting to the residence of the family member in the host state and those documents which prove that the specific conditions are met.[476] Member states may not require the submission of any other docu-

469 C. Costello, 'Metock: Free Movement and "Normal Family Life" in the Union' (2009) 46 CMLR p 600 .
470 See for an overview of these conditions Art 8(5) CD.
471 Art 8(2) CD.
472 Art 25(1) CD.
473 Art 25(2) CD.
474 Art 9 CD.
475 Art 10(1) CD.
476 Art 10(2) CD.

ments than those mentioned in the Directive.[477] The possession of a residence card may not be made a requirement for the exercise of a right or the completion of an administrative formality.[478] For the issue of a residence card, the member states may not charge more than is charged to own nationals for the issue of a similar document.[479]

It is important to note that residence cards and registration certificates have a purely declaratory character.[480] The right of residence exists by operation of law at the time that the requirements are fulfilled. The residence card is merely a manner to prove that this is the case.

4.4.5 Admission requirements

First it must be established who must fulfil the admission requirements. In case the family member himself is an EU citizen seeking to join another EU citizen residing in his home member state, the family member himself must comply with the admission requirements, i.e. he must be either a worker or self-employed person, self-sufficient person or student within the meaning of Article 7(1) CD. In case the family member is a third-country national family member seeking to join an EU citizen in a member state other than his own, the EU citizen sponsor must either be a worker, self-sufficient person or student within the meaning of Article 7(1) CD. However the relevance of this distinction must not be overstated. As is shown below, the requirements to be considered a working person within this provision are not very strict and in the determination of whether a person is self-sufficient, the origin of the resources is irrelevant, meaning that the required resources can come from the EU national sponsor.

This raises the question of who can be considered a worker and a self-employed person for the purpose of the Directive. In the case law of the CJEU, a worker is a person who performs services for and under the direction of another person in return for which he receives remuneration.[481] Also, a person genuinely seeking work is regarded as a worker.[482] A self-employed person is in actual pursuit of an economic activity through a fixed establishment for an indefinite period.[483] Another question is how to determine

477 Art 8(2) CD; *Metock and others* (n 468) para 53.
478 Art 25(1) CD.
479 Art 25(2) CD.
480 Case C-325/09 *Dias* [2011] ECR I-6387 para 49.
481 Case C-66/85 *Lawrie Blum* [1986] ECR 2121 para 17; Case C-138/02 *Collins* [2004] ECR I-2691 para 26.
482 Case C-292/89 *Antonissen* [1991] ECR I-745 para 13; Case C-85/96 *Martinez Sala* [1998] ECR I-2691 para 32 When the worker ceases to be a worker Art 7(3) CD determines under which circumstances the individual can still be considered as a worker.
483 Case C-221/89 *Factortame* [1991] ECR I-3905 para 20.

whether a person does not place a burden on the social assistance system. Member states are not allowed to pose a fixed requirement which is regarded as sufficient resources, but instead have to take the personal circumstances into account. Even so, the level of resources or income required should not be higher than the threshold below which nationals of the host member state become eligible for social assistance.[484] The rationale behind this provision is that the free movement of persons should not place an unreasonable burden on the social assistance system of the host state.[485] According to the CJEU, in determining whether a person has sufficient resources the member states are not allowed to place restrictions on the source of the resources or income, as this is not necessary to protect the public finances of the member states.[486]

4.4.6 Right to permanent residence

EU citizens who have resided for a continuous period of five years in another member state acquire the right of permanent residence in that member state.[487] This also counts for family members. Absences of less than half a year, or in particular circumstances even up to one year, do not influence the continuous character of the residence.[488] Once permanent residence is acquired, it can only be lost by a continuous absence of more than two years.[489]

4.4.7 Termination of family relationship

In the event of the termination of a family relationship through divorce, annulment of marriage or termination of a registered partnership, the family member who is a national of another member state will have to fulfil one of the requirements of Article 7(1). This means that the family member needs to be a worker or self-employed person, should not be an unreasonable burden on the social assistance system of the host state, should be a student or should have a family member residing in that state who fulfils one of the previous criteria.

The bond between parent and child is not automatically broken when they no longer cohabitate. According to the CJEU, it is possible to keep residence rights based on Directive 2004/38 even if a parent no longer lives together

484 Art 8(4) CD.
485 Preamble 10 CD.
486 Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 para 33.
487 Art 16(1) CD.
488 Art 16(3) CD.
489 Art 16(4) CD.

with his or her child.[490] The CJEU also established that the factual termination of a marriage is not sufficient to influence residence rights. A marriage needs to be legally terminated before residence rights can be affected.[491] These examples show that the CJEU urges member states to uphold the residence rights of family members as long as it is not legally certain that the family bond has been broken. This approach was later also adopted by the European Commission.[492]

4.4.8 Public policy, public order and public health exceptions

EU citizens retain the right of residence in another member state as long as they do not become an unreasonable burden on the social assistance system of the host member state.[493] However, an application for benefits within the social assistance system may not automatically lead to the termination of residence.[494] EU citizens hold the right to reside in the host member state as long as the criteria in Article 7(1) Directive 2004/38 have been fulfilled.[495] For family members this means that the EU national residing in the host state should continue to fulfil the criteria. For independent residence, it depends on the specific circumstances of the individual whether the residence right is retained after the termination of the family relationship.[496] Furthermore, the residence right of workers, self-employed persons and job seekers and their family members can only be terminated for the reasons mentioned in Chapter VI of Directive 2004/38.

This chapter provides that member states may restrict the free movement of persons right for reasons of public policy, public security or public health. The concepts of public policy and public security are as such not further defined in Directive 2004/38. This raises the question what these concepts mean essentially. The CJEU has numerously discussed the interpretation of public policy and public security in its case law. It has held that the particular circumstances justifying recourse to public policy exceptions may vary from one country to another and from one period to another and that member states should therefore have an area of discretion.[497] There is no scale of values imposed upon the member states for determining what is contrary to public

490 Case C-413/99 *Baumbast and R* [2002] ECR I-7091 paras 58-62.
491 *Diatta* (n 447) para 20.
492 European Commission, *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (COM(2001)257 final) p 15.
493 Art 14(1) CD.
494 Art 14(3) CD.
495 Art 14(2) CD.
496 See section 4.4.8.
497 Case 41/74 *Van Duyn* [1974] ECR 1667 para 18.

policy.[498] The member states are free to determine the requirements of public policy in the light of their national needs.[499] However, for specific grounds the CJEU has ruled that they do fall within the public policy or public security categories. For example, it held that the prevention of violence in large urban centres[500], the prevention of the sale of stolen cars[501] and the respect for human dignity[502] can be included in the concept of public policy.

4.5 Direct effect of Article 20 and 21 TFEU

When the substantive requirements of the FRD and the CD are not met, it is still possible that a right to family unification exists through the direct effect of TFEU provisions. Four variations of the direct effect of Treaty provisions are discussed below. Firstly, U-turn cases are analysed. The cases concern persons who have made use of the free movement of persons and were joined by a third-country national family member and are seeking to return to their home member state with their family member relying on Article 20 TFEU as the CD is not applicable to nationals residing in their member state of origin. Secondly, cases in which a right to family unification is derived from Articles 56 and 45 TFEU are analysed. These cases concern the free movement of services and the free movement of (frontier) workers who work in another member state but reside in their home member state, because of which they are not within the scope of the CD. Thirdly, cases are discussed in which a right to reside is based on the direct effect of Article 21 TFEU. These are cases involving economically inactive EU citizens residing in a different member state to their home member state whose third-country national family member can derive a right of residence from Article 21 TFEU. Fourthly, and lastly, cases in which a derived right of residence exists where an EU citizen would be forced to leave the territory of the EU if his third-country national family members were not allowed residence in the home member state of the sponsor.

4.5.1 U-turn cases

The CJEU held in *Surinder Singh* that a national of a member state might be deterred from returning to his member state of origin after making use of the free movement of persons if the conditions of entry and residence of his third-country national family member in his country of origin were different to those

498 Joined Cases 115 and 116/81 *Adoui and Cornuaille* [1982] ECR 1667 para 8.
499 Case 36/75 *Rutili* [1975] ECR 1219 para 26.
500 Case 67/74 *Bonsignore* [1975] ECR 279.
501 Case C-239/90 *Boscher* [1991] ECR I-2023.
502 Case C-36/02 *Omega* [2004] ECR I-9609.

in the host member state.[503] In other words, if the family member were not allowed to join his partner back in the member state of origin, this might deter the EU citizen from moving to his home member state. For example, if a national from the United Kingdom moves to Germany and based on the CD his family member is allowed to join him, his family member would also be allowed to accompany him if he seeks to move from Germany to any other member state, so including his country of origin the United Kingdom. If this were not the case, then factually the EU citizen would be deterred from making use of his free movement of persons again as he would have to leave his family member behind.

This line of reasoning was confirmed by the CJEU up till 2003, when the Court reversed its previous case law. Despite the absence of such provisions in the secondary legislation, Advocate General Geelhoed argued that member states should be able to require third-country nationals accompanying an EU citizen who makes use of their free movement of persons, to comply with immigration law conditions as laid down in the domestic law of the member states.[504] The CJEU accepted the proposal of the AG and determined that a family member of an EU citizen can only accompany him if he is also a lawfully residing resident in another member state.[505] This creates a situation in which the third-country national is subjected to domestic conditions of immigration law at least once and therefore subjected to migration control. After *Akrich* it was unclear whether the member states were actually under the obligation to require prior lawful residence in the home member state.[506] In the subsequent years the CJEU already toned down its conclusions in Akrich without actually coming back to their conclusions. The Court did so in the final ruling.[507] That ruling concerns a Dutch national who makes use of his free movement of persons right to take up employment in the United Kingdom. Once in the United Kingdom, the Suriname national daughter of the applicant joins him there. When the applicant seeks to return to the Netherlands, the Dutch authorities refuse entry to his daughter because the applicant was no longer economically active once he returned to the Netherlands. The Court did not make use of the reasoning in *Akrich* that the member state may require prior lawful residence before granting a right to return to the home member state. Instead the CJEU held that

> "*[b]arriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right*

503 *Surinder Singh* (n 460) para 19.
504 Case C-109/01 *Akrich* [2003] ECR I-9607 Opinion of AG Geelhoed para 136.
505 Ibid para 61.
506 A. Van der Mei, 'Comments on Akrich (Case C-109/01 of 23 September 2003) and Collins (Case C-138/02 of 23 March 2004)' (2005) 6 European Journal of Migration and Law.
507 Case C-291/05 *Eind* [2007] ECR I-10719.

of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter."[508]

The case is different from *Akrich* in the sense that it is about children instead of spouses.

The turning point in the case law of the CJEU finally came in 2008 with the *Metock* ruling. In a case which directly concerned the condition that the third-country national should have had lawful residence in the member state of origin of his family member before they would be allowed to accompany him to another member state based on EU law, the CJEU departed from its previous conclusions.[509] The CJEU acknowledged that according to Directive 2004/38 the Directive applies to all EU citizens and their family members irrespective of their nationality.[510] The requirement of previous lawful residence is not included in Directive 2004/38 and cannot therefore be imposed.

One question which remained was how long the residence in the other member state must be before a right of residence for the third-country national family member would exist in the home member state of the EU citizen sponsor. This question was addressed by the CJEU in *O & B*.[511] In this case, the Dutch Council of State referred questions for preliminary ruling in two separate disputes. The first case (O.) concerned a Nigerian national who was married to a Dutch woman. The Nigerian national moved to Spain with his Dutch spouse where he obtained a residence card as a third-country national family member of an EU citizen. The Dutch sponsor however moved to Spain for a period of two months, but moved back to the Netherlands as she could not find employment. She visited her spouse numerous times during short visits. The second case (B.) concerns a Moroccan national who unsuccessfully applied for asylum in the Netherlands. After his asylum request was rejected, he remained in the Netherlands without a residence permit and moved in with his future wife. After a number of years he was arrested for the use of a false passport and was sentenced to two months' imprisonment. After he had served his sentence, he was facing expulsion, as a result of which he was placed in detention. His, at that time, unmarried partner, moved to Belgium making use of her right to the free movement of persons, and after B. was released from detention he joined her there. When the couple applied to get permission to get married in Belgium, B. was issued an order to leave Belgium. Subsequently, B returned to Morocco, where the couple got married. When B. returned to the Netherlands, the couple relied on the free movement of persons to regularise B.'s residence in the Netherlands. The questions referred to the CJEU concerned the minimum duration of the residence in this host

508 Ibid para 37.
509 *Metock and others* (n 468) para 58.
510 Ibid para 54.
511 Case C-456/12 *O and B* [2014] not yet published.

member state, whether multiple short visits also sufficed and whether it was relevant that the couple had first moved to a third state before returning to the home member state. The CJEU held that a right of residence in the home member state only exists if the residence in the host member state was sufficiently genuine so as to enable the EU citizen to create or strengthen family life in that member state.[512] According to the CJEU, EU citizens who reside in another member state under Article 6 CD, that means residence shorter than three months, do not intend to settle in that member state "in a way which would be such as to create or strengthen family life in that Member State ."[513] This occurs in principle when an EU citizen resides in another member state under Article 7 CD, which allows for residence for periods exceeding three months if the substantive requirements in that regard are fulfilled.[514] Multiple shorter periods of residence fall under Article 6 and therefore do not enable the EU citizen to create or strengthen family life.[515] Interestingly, in the case of O. the Spanish authorities issued the applicant with a residence card as a third-country national family member of an EU citizen. According to the CJEU, the residence card has a purely declarative character and as such does not grant any rights.[516] This means that the Dutch authorities are competent to check whether the requirements in the host member state were met. In other words, the authorities in the home member state are allowed to check whether the residence card was issued in accordance with the CD by the authorities in the host member state. Therefore, it is possible that the host member state allows for the residence of a third-country national family member, thus granting the request for family unification under the CD, but that it does so not in accordance with the CD, enabling the home member state to reject the application for a residence card. In such situations, legally, the home member state disputes that a right of residence ever existed.

4.5.2 Direct effect Articles 56 and 45 TFEU

Out of the fundamental freedoms, a right to family unification can also be derived from the free movement of services.[517] The CJEU has held in *Carpenter* that it can be detrimental for the application of the free movement of services if an EU national residing in his home member state is not allowed to be accompanied in that member state by his third-country national spouse.[518] The case involved a British national who provided banking services to his

512 Ibid para 51.
513 Ibid para 52.
514 Ibid para 53.
515 Ibid para 59.
516 Ibid para 60.
517 Art 56 TFEU.
518 Case C-60/00 *Carpenter* [2002] ECR I-6279.

client in Germany. His spouse, a Philippine national, faced expulsion from the United Kingdom as she did not have a right of residence there. Due to the fact that the expulsion of his spouse would be detrimental to his ability to exercise his free movement of services, the CJEU held that the expulsion would constitute a disproportionate infringement on his right to respect for family life. The free movement of services precludes such infringements.[519] In this case the CJEU used the fundamental right to enjoy family life to interpret the fundamental freedom of free movement of services.[520] This is the only case in which the CJEU ruled on the right to family unification derived from the free movement of services. The test to determine the compatibility of the expulsion measure with the free movement of services resembles the test used by the ECtHR in Article 8 ECHR cases. It is striking that a similar test is not used in free movement of persons cases. For example in *Zhu and Chen*, the CJEU looked at the compatibility of the British interpretation of the sufficient resources requirement with the relevant Directive, and not at the question of whether the expulsion would be a disproportionate interference with the right to respect for family life. This shows that the right to respect for family life enshrined in the free movement of persons is different to that right enshrined in the free movement of services.

The CJEU adopted yet another approach in the case *S&G*.[521] This preliminary ruling originating from the Dutch Council of State concerned two different cases. The first case (*S.*) concerns a Dutch man residing in the Netherlands claiming a right of residence for his Ukrainian mother in law. He works for a Dutch company, but 30% of his working time he is busy preparing and conducting work in Belgium. His mother in law takes care of the applicant's minor son. The second case (*G.*) concerns a Dutch man residing in the Netherlands claiming a right of residence for his Peruvian spouse. The Dutch man works for a Belgian company in Belgium. The CJEU holds that any EU citizen who works in another member state under an employment contract falls within the scope of Article 45 TFEU.[522] The existence of a derived right of residence of a third-country national family member depends on whether the refusal of a right of residence of a third-country national family member would interfere with the exercise of the free movement by the EU citizen.[523] The CJEU leaves the assessment in the specific case to the referring court, however it does comment that the case of *S.* is different to the case of *Carpenter*, because the latter case concerned the spouse and not the mother in law. The CJEU does not make any reference to fundamental rights, like it did in *Carpenter*. It is

519 Ibid paras 45-46.
520 V. Skouris, 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance' (2006) 17 European Business Law Review p 238.
521 Case C-457/12 *S and G* [2014] not yet published.
522 Ibid 39.
523 Ibid 41.

remarkable that where in *Carpenter* the Court placed the right to respect for family life at a prominent position in its reasoning, it does not mention this at all in *S & G*. This, however, does not mean that fundamental rights are not applicable. As the CJEU rules that the situation is within the scope of Article 45 TFEU, the Charter is applicable and should be taken into account when deciding on the question of whether the EU citizen would be affected in his exercising of the free movement of workers.

4.5.3 Direct effect Article 21 TFEU

There are two cases in which the CJEU derived a right of residence directly from Article 21 TFEU where the substantive requirements of the CD were not fulfilled.

The first of those cases is the combined case *Baumbast and R*.[524] *Baumbast* concerns a German man who was a worker in the United Kingdom, where he lived with his Colombian wife and two children, of which one was a German national. At a certain point, he could not find a job in the United Kingdom, and he started working for a German company outside the EU. His family remained in the United Kingdom. After the British authorities initially refused to extend the residence permits of the entire family, the mother and her children were finally allowed to remain in the United Kingdom, but Baumbast himself was not. In *R.*, a French national, his American spouse and their two children, who both possessed French as well as US citizenship, were residing in the United Kingdom. After two years the marriage ended in divorce. The children went to school in the United Kingdom, and their mother sought to remain in the United Kingdom with her children. The CJEU concluded that the children had the right to stay in the United Kingdom to complete their studies. The Court furthermore established that for the right of the children to continue their education in the United Kingdom, it is necessary that their parents also have a right of residence. Without the residence of the parents, the right of residence of the children would be deprived of its useful effect.[525] The Court made a reference to fundamental rights, stating that the applicable secondary EU law must be interpreted in the light of the requirement of respect for family life as laid down in Article 8 ECHR.[526]

The second case is *Zhu and Chen*.[527] In this case, two Chinese nationals move to Northern Ireland when Mrs. Chen is pregnant with her second child, allegedly to circumvent the Chinese one-child policy. When their baby daughter was born, she acquired Irish citizenship under Irish citizenship law.

524 *Baumbast and R* (n 490).
525 Ibid para 71.
526 Ibid para 72.
527 *Zhu and Chen* (n 486).

Being an Irish citizen in the United Kingdom, the baby relied on EU law to have a right of residence for herself and for her mother. The CJEU established that baby Catherine had a right to stay in the United Kingdom because she had both health insurance and sufficient resources not to become a burden on the social assistance system, provided by her mother.[528] Applying the reasoning in Baumbast, the Court found that the right of residence of the Irish baby would be deprived of its useful effect if her mother, who is her primary carer, were not allowed to remain in the United Kingdom.[529] The CJEU came to this conclusion without a reference to fundamental rights. Where in *Baumbast* fundamental rights played an important role in the reasoning of the CJEU, in *Zhu and Chen* it seems to play no role at all. The Court based its reasoning solely on the useful effect of the residence rights of the EU citizen.

4.5.4 The-forced-to-leave-the-territory-of-the-EU-criterion

Every citizen of a member state of the EU is also an EU citizen.[530] This was introduced in the Treaty of Maastricht in 1992. There are a few rights that are explicitly recognised as rights from the status of EU citizenship, such as the right to vote during elections for the European Parliament and the right to move and reside freely in the territory of the member states.[531] The CJEU has recognised rights which are implicitly derived from EU citizenship. These rights focus on the right to equal treatment for EU citizens in the field of social assistance benefits.[532] Until 2011 there were no cases in which the CJEU derived a right to family unification solely from the status of EU citizenship. In both *Baumbast and R.* and *Zhu and Chen* there was always some form of meaningful link bringing the case within the scope of EU law.

This changed after the Belgian Supreme Court referred questions for preliminary ruling to the CJEU in the case of the *Ruiz Zambrano* family.[533] This case concerned the expulsion of the Colombian parents of two children holding the Belgian nationality. The applications for asylum by the parents were unsuccessful and therefore the Belgian authorities sought their expulsion. In the traditional approach of the CJEU, this would constitute a purely internal situation as there were no factors linking the case with any of the situations

528 Ibid para 28.
529 Ibid para 45.
530 Art 20(1) TFEU.
531 Art 20(2) TFEU.
532 eg *Martinez Sala* (n 482) The right of equal treatment in the context of entitlements to social security was limited in the *Dano* ruling, in which the CJEU held that a member state may deny social benefits to persons who do not qualify for residence under the CD. Case C-333/13 *Dano* [2014] not yet published.
533 *Ruiz Zambrano* (n 39) See Van Eijken, E. & De Vries, S., 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' [2011] 36 European Law Review.

covered by EU law.[534] The Advocate General, however, argued that situations of reverse discrimination should be covered by EU law in some circumstances. She proposed that the prohibition of discrimination in Article 18 TFEU should also apply in purely internal situations where a violation of fundamental rights occurs.[535] What entails a violation of fundamental rights should, according to the AG, be determined using the case law of the ECtHR. In other words, if the situation of the Zambrano family constituted a violation of Article 8 ECHR, the reverse discrimination would not be permissible under EU law either.

The CJEU did not follow the reasoning of the AG – it did not even refer to her proposal – but instead based itself on the EU citizenship status of the children.[536] The expulsion of the parents would force the children to leave the territory of the EU, as they would be forced to follow their parents to Colombia. According to the CJEU, national measures which deprive EU citizens from the enjoyment of the substance of the rights conferred by virtue of their status of EU citizen are not permissible.[537] The right to move and reside freely within the territory of the EU is part of the substance of the rights. A measure which has the effect that an EU citizen has to leave the territory of the EU, is therefore not permissible. Without further specification of the substance of the rights associated with EU citizenship status, the CJEU determined that the refusal of the right to reside in Belgium for the parents would deprive the children of their enjoyment of rights attached to their EU citizenship.[538]

Due to a lack of motivation the implications of this judgment remained unclear until subsequent case law of the CJEU arrived. Up till now, the CJEU has ruled in six cases on the implications of the *Ruiz Zambrano* ruling. These cases are *McCarthy*[539], *Dereci*[540], *Iida*[541], *O.S. & L.*,[542] *Ymeraga*[543] and *Alopka*.[544] Furthermore, the *Rendón Merín*[545] case is currently pending before the CJEU. These cases are discussed below.

In the *McCarthy* case, the CJEU answered preliminary questions referred by the British House of Lords.[546] The case concerns a woman with both British and Irish citizenship residing in the United Kingdom who sought family unification with her Jamaican partner. She argued that she lived in the United Kingdom as an Irish citizen and that therefore she should fall under the legal

534 *Morson and Jhanjan* (n 337).
535 *Ruiz Zambrano* (n 39), Opinion of AG Sharpston, para 147.
536 Ibid paras 40-45.
537 Ibid para 42 .
538 Ibid para 44.
539 Case C-202/13 *McCarthy* [2011] ECR I-3375.
540 Case C-256/11 *Dereci* [2011] ECR I-11315.
541 Case C-40/11 *Iida* [2012] not yet published.
542 *O, S & L* (n 376).
543 Case C-87/12 *Ymeraga* [2013] not yet published.
544 Case C-86/12 *Alokpa* [2013] not yet published.
545 Case C-165/14 *Rendon Marin* [2014] order for reference.
546 *McCarthy* (n 539).

regime covering the family unification of EU citizens who made use of their free movement of persons right. The CJEU rejected this argument because she had never made use of her free movement of persons right as she held the British nationality and had lived in the United Kingdom all her life. However, for the present analysis the case is relevant as the CJEU also looked at the point of whether the family unification of McCarthy and her partner fell within the substance of rights associated with EU citizenship, as was established in *Zambrano*. The CJEU ruled that this was not the case, as McCarthy would not be forced to leave the territory of the EU if her partner was not allowed to join her in the United Kingdom.[547] She would have the possibility to take residence in a member state of which she is not a national and let her partner accompany her there. The children of Zambrano did not have the possibility to move to another member state, as they were minor children under the care of their parents.

The CJEU further defined the scope of the *Ruiz Zambrano* ruling in the *Dereci* case, in which the CJEU answered preliminary questions from the Austrian Supreme court. The referral to the CJEU concerned five separate cases. The first case (*Dereci*) concerns a Turkish citizen who entered Austria illegally and married an Austrian national with whom he had three children, who all acquired Austrian citizenship. In the second case (*Kaduike*), the applicant also entered Austria illegally and married an Austrian national, but the couple did not have any children. In the third case (*Heiml*), a Sri Lankan citizen married an Austrian citizen and entered Austria legally, however her residence permit had since expired. In the fourth case (*Kokkollari*), the applicant entered Austria legally at the age of two. His parents at that time possessed Yugoslavian citizenship. He is now twenty-nine years old and he states that he is maintained by his mother, who has acquired Austrian citizenship. The fifth case (*Stevic*) concerned a 52-year-old woman who held Serbian citizenship and resided in Serbia who sought to enter Austria on the grounds of family unification with her father who had resided in Austria for many years and who had acquired Austrian citizenship. She regularly received monthly income support from her father and claimed he would continue to support her when she moved to Austria. In those cases the Austrian Supreme Court referred questions for preliminary ruling to the CJEU. With the first question the Austrian Supreme Court sought to find out whether third-country national family members of residents of Austria who have not made use of their free movement of persons right should be allowed to reside in Austria based on the EU citizenship of their family member.[548] The Court first established that Directive 2003/86/EC and Directive 2004/38/EC were not applicable because the sponsors were not third-country nationals and the sponsors had not made

547 Ibid para 49.
548 Ibid para 37.

use of their free movement of persons right.[549] Then the Court looked at whether a right to reside for the third-country national family members of immobile Austrian citizens could be derived from their sponsor's status as an EU citizen. The Court repeated the criteria that a right to reside based on the EU citizenship of the sponsor only exists in situations in which the EU citizen has in fact to leave not only the territory of the member state concerned but the territory of the EU as a whole.[550] The fact that it may be desirable for economic reasons or in order to keep the family together is in itself not sufficient to lead to a situation in which the EU citizen is forced to leave the territory of the EU as a whole.[551] The Court clearly differentiates in its assessment of whether an EU citizen is forced to leave the territory of the EU as a whole or whether the right to respect for private and family life obliges the member state to allow residence to a third-country national family member. For the Court this was a completely separate issue which was not concerned with the derived residence right based on the EU citizenship of the sponsor. On the role of the Charter of Fundamental Rights in this differentiation between EU citizenship-related rights and the rights related to respect for private and family life, the Court observed that the Charter is only applicable where the member states implement EU law. The Court leaves it to the domestic court to determine whether EU law is applicable. If the domestic court finds that the factual situation of a case is covered by EU law, the domestic courts must apply Article 7 of the Charter. If the domestic court finds that the factual situation of a case is not covered by EU law, the domestic courts must apply Article 8 ECHR.[552]

The facts in the *Iida* ruling are a bit peculiar.[553] The applicant in that case was a Japanese citizen who was married to a German citizen. While they lived in the United States, the couple had a daughter who acquired the German, Japanese and American citizenship. In December 2005 the couple moved to Germany. The applicant obtained a residence permit in Germany based on family reunion. In 2007, the spouse of the applicant moved to Austria. She took her daughter with her. In 2008 the couple separated, although they did not divorce. The residence permit of the applicant in Germany was revoked because he no longer fulfilled the requirements. However, he sought to remain in Germany as he had his job there. For this reason, he applied for a residence card as a family member of an EU citizen within the free movement of persons. The question relevant for the present analysis is whether the applicant had a right to reside in Germany based on the EU citizenship of his daughter. The Court observed that the applicant in this cases sought to reside not in the

549 Ibid para 58.
550 Ibid para 66.
551 Ibid para 68.
552 Ibid para 72.
553 *Iida* (n 541).

member state where his wife and daughter resided, but in another member state.[554] The wife and daughter, both EU citizens, had not been discouraged from making use of their free movement rights.[555] Together with the fact that the applicant was, at a later stage, issued with a residence permit in Germany on other grounds, the Court came to the conclusion that the wife and daughter had not been denied the enjoyment of the substance of the rights associated with their status as EU citizens.[556]

The issue of the dependency of minor children who are EU citizens on a third-country national family member was considered in the *O., S. and L.* ruling.[557] This case concerned two combined cases referred to the Court by the Federal Administrative Court of Finland. The first case (*O. and S.*) concerns a Ghanaian citizen who lived in Finland on the basis of a permanent residence permit. She was married to a Finnish citizen from whom she had a child who had also acquired Finish citizenship. The couple divorced and the mother was granted sole custody of the children. Subsequently, the applicant married a citizen of Ivory Coast, who applied for a residence permit to stay in Finland based on his marriage. The application was rejected on the grounds that the applicant did not have secure means of subsistence. In the meantime a child was born from this marriage. The child held Ghanaian citizenship. The family resided in Finland together. The second case (*L.*) concerned an Algerian citizen who held a permanent residence permit in Finland following her marriage to a Finnish citizen. The child born of this marriage acquired both the Algerian and the Finnish citizenship. When the couple divorced, the mother was awarded sole custody of her child. Subsequently the applicant married an Algerian citizen and an application for family unification was made. The couple had a child together who acquired Algerian citizenship. The application for a residence permit was rejected because the applicant did not have secure means of subsistence. The question relevant in this context is whether a right to reside in Finland for the new third-country national spouses can be derived from the Finnish citizenship and thus the EU citizenship of the children from the first marriage. The Court held that it is for the domestic courts to establish whether the Finnish children would be deprived of the genuine enjoyment of the substance of the rights associated with their status as EU citizens if the new spouses of their mother were not allowed to reside in Finland.[558] In making this assessment, the domestic courts must take into account that the mothers of the Finnish citizen children do have a right to reside in Finland and that this right is not subject to discussion in the current dispute.[559]

554 Ibid para 73.
555 Ibid para 74.
556 Ibid para 76.
557 *O, S & L* (n 376).
558 Ibid para 49.
559 Ibid para 50.

According to the Court, the fact that the children were part of a reconstituted family is relevant. The Court pointed towards the dilemma that if the mothers decided to move to the country of origin of their new spouses, they would rupture the family ties between their EU citizen children and their biological fathers. On the other hand, if they decided to remain in Finland, they would rupture the family ties between their youngest children and their biological father.[560] The Court, however, maintained that the central question for the domestic courts to answer is whether the Finnish citizen children would be forced to leave the territory of the EU. The Court does add that a blood relationship is not required between the minor EU citizen and the third-country national seeking residence.[561] It is the relation of dependency between the EU citizen and the third-country national family member which determines whether a right to residence for the latter exists.[562] The Court mentioned in this regard legal, financial or emotional dependency. This is interesting. It triggers the question concerning the situation when a child is dependent on a (foster) parent to such an extent that refusal of residence of the (foster) parent would lead to a situation where the child would be forced to leave the territory of the EU. After all, the child has the other parent whose right of residence is not disputed. The Court leaves this issue up to the domestic courts. This is rather unsatisfactory, because more guidance on this question is required, as shown by the analysis of domestic case law in Chapter 11 of this dissertation. I wonder whether the factual dependency on the residency of the third-country national foster parent for the minor EU citizen not to be forced to leave the territory of the EU, because the mother would be forced to accompany her new husband to his country of origin if he were not allowed to remain in Finland, would be sufficient to establish a derived residence right. In this regard, it would seem a logical step to me to make an assessment concerning the extent to which family ties would be ruptured in the different scenarios. Starting point for these scenarios should be that the mother has sole custody of the minor Finnish child. Therefore, the argument that the child can remain with the Finnish parent cannot hold. In the scenario that the mother would stay in Finland, the family ties with her husband and the ties between the father and the child would be broken if the father were forced to leave. In the scenario that the mother would accompany her new husband to his country of origin, the child would be forced to leave the territory of the EU. As this is not allowed, the Finnish authorities cannot argue that the mother should accompany the new husband to his country of origin. The Court repeated in its ruling the formula developed in *Dereci* that independent of the assessment whether the minor EU citizens would be forced to leave the territory of the EU, the domestic authorities are under the obligation to assess whether

560 Ibid para 51.
561 Ibid para 55.
562 Ibid para 56.

the refusal of a residence permit is in compliance with fundamental rights.[563] Involving Article 8 ECHR in this case, the fact that the family situation involves children from two different fathers and the fact that one of the fathers and one of the children has the Finnish nationality creates the situation that within the context of Article 8 ECHR it cannot be expected of the Finnish child to follow the mother and her new spouse to the country of origin of the new spouse. The circumstances of the case are somewhat similar to the *Sen v. Netherlands* case of the ECtHR.[564]

The *Ymeraga* ruling concerns extended family unification.[565] Kreshnik Ymeraga arrived in Luxembourg from Kosovo in 1999. Although his application for asylum was rejected, the applicant started living with his uncle, a Luxembourg citizen, and his situation was regularised in 2001. Between 2006 and 2008, Kreshnik's parents and two adult brothers arrived in Luxembourg. Their application for asylum was rejected and also their application for a residence permit based on the family ties with their son and brother, who had in the meantime obtained Luxembourg citizenship, was unsuccessful. During the domestic proceedings, the Administrative Court of Appeal referred questions for a preliminary ruling to the CJEU. The questions essentially asked to what extent EU citizenship entails a right to family unification with the third-country national parents and adult siblings and in what way the Charter of Fundamental Rights is relevant in this regard. The Court first established that Directive 2003/86/EC and Directive 2004/38/EC were not applicable. The Court then, after reiterating the principles established in the above-mentioned case law, held that the intention of Kreshnik to apply for the family unification of his parents and two adult brothers is not sufficient to hold that he would be deprived of the substances of the rights associated with the status of his EU citizenship if his family members did not get a residence permit in Luxembourg, as he would not be forced to leave the territory of the EU.[566] With regard to the Charter, the Court remarks that the Charter is only applicable where the member states implement EU law. This is not the case in the situation at hand.[567] The Court emphasises, however, that this does not mean that a right of residence automatically does not also follow from the provisions of the ECHR, as this requires a separate determination.[568]

In *Alopka*, the Court dealt with a case which concerns the right of residence of the third-country mother of two French minor children in Luxembourg.[569] The applicant was a citizen of Togo who had arrived in Luxembourg in 2006 where she applied for asylum. Her application was rejected but she was

563 Ibid para 59.
564 *Sen v Netherlands* See the analysis in section 3.3.4.
565 *Ymeraga* (n 543).
566 Ibid para 39.
567 Ibid para 43.
568 Ibid para 44.
569 *Alokpa* (n 544).

granted a discretionary leave to remain because she had given birth to prematurely born twins. The children were recognised by the French father, and therefore acquired French citizenship. Subsequently, the applicant applied for a residence permit within the context of the free movement of persons based on the French citizenship of her children. In the proceedings that followed, the Administrative Court referred a question for preliminary ruling to the CJEU. The referring Court essentially asked whether the third-country national mother should be allowed to remain in Luxembourg based on the French citizenship of her infant children. The Court first established that Directive 2004/38/EC was not applicable. However, the Court saw an analogy with the *Chen* case, which concerned the application for a residence permit of the Chinese parents of an Irish child residing in the United Kingdom, where the parents fulfilled the requirement of sufficient resources.[570] The Court held that the domestic court must assess whether the applicant in this case complied with the sufficient resources requirement.[571] If this was not the case, the domestic court must assess whether the children of the applicant would be forced to leave the territory of the EU if the applicant were refused a residence permit.[572] It could be the case that the applicant, as the mother of two French citizens, has the right to reside in France.[573] According to the Court, it was for the referring court to determine whether this was in fact the case.[574] It is logical that the Court left it up to the domestic court to assess whether the children would be forced to leave the territory of the EU if their mother were not granted a right to reside. In the particular circumstances of the case it was, however, also problematic. The Luxembourg courts were required to make an assessment of whether the applicant would have a right of residence in France. One could argue that this must be the case, because otherwise the children would be forced to leave the territory of the EU. This argument relies on the premise that France implements the obligations directly derived from Article 20 TFEU correctly. But what if this is not the case? The domestic court in Luxembourg is faced with the task of determining whether in fact France will grant a right of residence to the applicant. It could do so, for example, by studying the French implementation of the *Ruiz Zambrano* ruling. This, however, would require a prediction on the chance of a successful application in France. The domestic court in Luxembourg could also request guarantees from France that it will grant a residence permit to the applicant. Interestingly, the Court did not give any guidance on the manner of how the domestic court in Luxembourg should approach this problem.

570 *Zhu and Chen* (n 486) See section 4.5.3.
571 *Alokpa* (n 544) para 30.
572 Ibid para 33.
573 Ibid para 34.
574 Ibid para 35.

The case *Rendón Merín* concerned the termination of the lawful residence of the third-country national father of two EU citizens.[575] In this case, the applicant was sentenced to a suspended jail sentence of six months for domestic violence. The applicant had a Spanish citizen minor son and a Polish citizen minor daughter. He had sole custody of the children as the place of residence of the mothers is unknown. His application for the renewal of his residence permit was rejected because of the criminal record of the applicant. The question is whether the applicant had a right to remain in Spain, even though he had a criminal conviction, based on the EU citizenship of his children. The CJEU had to answer the question whether the minor EU citizen children would be forced to leave the territory of the EU if their father was not allowed to reside in Spain. In doing so, the Court had to shed light on the character of the derived residence right based on Article 20 TFEU.

The criterion that was put forward by the CJEU in the abovementioned cases is clear: there is only a derived residence right for a family member attached to the status of EU citizenship if the EU citizen, as a result of the refusal of residence for his family member, is forced to leave the territory of the EU. However, despite the fact that there have been six subsequent cases, how this criterion should be applied remains unclear. The question which arises is when an EU citizen would in fact be forced to leave the territory of the EU. The *Ruiz Zambrano* case shows that this would be the case if minor children who are EU nationals were forced to follow their parents outside the EU. It is, for example, unclear whether the same would have applied if only one parent with custodial rights was expelled. Would the child in those circumstances be forced to leave the territory of the EU? Or could it be reasoned that a child can remain with one of the two parents and therefore not be forced to leave the territory of the EU if the other parent is expelled? It is also unclear whether the derived residence right based on the *Ruiz Zambrano* ruling only applies to minor EU citizen children, or can it also apply to adults. This could, for example, be the case for individuals who are not fit for labour due to sickness or disability. Would these individuals be forced to leave the territory of the EU if the residence of the family member was refused?[576] How can this be determined? Possibly the Charter of Fundamental Rights can be of assistance in answering these questions. However, the Charter is only applicable where the member states implement EU law.

The formula offered by the Court in *Dereci* raises the burning question of when a situation is covered by EU law. Is the determination of whether an EU citizen be forced to leave the territory of the EU a situation which is covered

575 *Rendon Marin* (n 545).

576 See for a collections of questions relating to the scope of the 'forced-to-leave-the-territory-of-the-EU-criterion', G. Davies, 'Ruiz Zambrano en de non-EU ouders van (bijna) Nederlandse kinderen' [2011] A&MR.

by EU law? If the answer to this question is yes, then all situations in which a right to reside for a third-country national family member based on the EU citizenship of the sponsor being invoked would be covered by EU law. This is a far-reaching conclusion, as it effectively places all claims for family unification where the sponsor is an EU national within the scope of EU law. It seems that with the *McCarthy* and the *Dereci* ruling, the CJEU has tried to accomplish the opposite, namely to limit the implications of the *Ruiz Zambrano* ruling. However the alternative conclusion, that the determination of whether a person would be forced to leave the territory is not within the scope of EU law, is illogical and therefore inconceivable. If the determination of whether a person would not be within the scope of EU law, then the question is in which jurisdiction the determination of whether a person is forced to leave the territory of the EU takes place. It is exclusively relevant within the context of EU law and not at all in domestic law. Furthermore, the CJEU established that the Charter is applicable where a situation is covered by EU law. However, when it is determined that a person would be forced to leave the territory of the EU if his family member was not allowed residence, the derived right to reside is already established and the invocation of the Charter would no longer be necessary. An analogy can be found with the application of the admission requirements in the FRD. The FRD allows the member states to make the granting of a residence permit based on family unification dependent on satisfying certain substantive requirements. It would be illogical to assume that the Charter would only be applicable in cases where the member states have established that the requirements have been complied with. The opposite is true. The Charter is applicable in the interpretation of the provision of the Directive that allows the member states to impose requirements for admission. In the *Chakroun* ruling, the CJEU referred to the Charter in the assessment of whether the Dutch implementation of the income requirement was in compliance with the FRD.[577] Similarly, in answering difficult questions concerning the issue of whether an EU citizen would be forced to leave the territory of the EU if residence is denied to his third-country national family member, the Charter could and should be of assistance.

An associated problem is the role of fundamental rights in the equation. The Court places the determination of whether a child is forced to leave the territory of the EU solely within the framework of the rights of EU citizens. Fundamental rights, such as Art 8 ECHR, should be applied by the member states outside the framework of EU citizenship. Staples has question the premise that fundamental rights can in no way be part of the substance of the rights associated with EU citizenship.[578] I argue that fundamental rights, namely the right to respect for family life as laid down in Art 8 ECHR and Art 7 Char-

577 *Chakroun* (n 392) para 44.

578 Staples, 'To What Extent Has Reverse Discrimination Been Reversed?' (2012) 14 EJML p 169.

ter, should be used in determining whether in fact a child would be forced to leave the territory of the EU if his parent were not allowed residence. It is in that most relevant question relating to the Ruiz Zambrano criterion that fundamental rights must be used to determine whether a child would be forced to leave the territory of the EU.

This leads back to the central question of when an EU citizen is in fact forced to leave the territory of the EU. Is a child forced to leave the territory of the EU if one of his parents gets expelled but the other parent is allowed to stay, for example because that other parent is also an immobile EU citizen? I would argue that in the longer term it cannot be maintained that a child is not forced to leave the EU if one of his parents gets expelled. The *Ruiz Zambrano* ruling clearly stated that the children would be deprived of the genuine enjoyment of the rights associated with their status as EU citizens if their parents were not allowed to reside in Belgium. The case considered both parents. The CJEU has in fact never ruled on situations in which one of the parents has the nationality of the member state of residence. There can be situations in which the other parent is not able to provide for the care of the child. There can be various reasons for this, for example relating to the employment of the parent or special needs of the child.

Besides the fact that the exact implications of EU citizenship for residence rights remains unclear, the rulings of the CJEU have also been criticised for going beyond the competence of the CJEU in an attempt to weaken the effects of reverse discrimination by attaching residence rights to the status of EU citizenship.[579] In these rulings the CJEU develops a new doctrine based on the existing concept of EU citizenship which goes beyond the original meaning of that concept. This is not new as it also happened when EU citizenship was deemed applicable in situations which were principally not covered by EU law, such as child raising allowances[580] and student benefits[581] for economically inactive EU citizens. However, family unification is a politically highly sensitive field and an activist approach by the CJEU in this field could damage its legitimacy. This could explain the reluctant approach in the clarification of the *Ruiz Zambrano* ruling in the subsequent case law of the Court.

579 ege.g. P. Van Elsewege and D. Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 EJML p 456.

580 *Martinez Sala* (n 482).

581 Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

4.6 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

On 18 December 2000, the European Council and the European Parliament solemnly proclaimed the Charter of Fundamental Rights.[582] With this proclamation, the EU acquired a bill of rights comparable in content to the ECHR. At the time of proclamation, the Charter was not legally binding and could therefore not be relied upon in the domestic and EU courts. However, it was seen as an important source of the general principles of EU law. Despite its non-binding status, the legislator chose to refer to the Charter in Directive 2003/86. On that basis the CJEU ruled that it had jurisdiction to interpret the Charter when the European Parliament challenged provisions of Directive 2003/86 before the CJEU.[583] This was the first case in which the CJEU used the Charter to interpret EU law. With the entry into force of the Lisbon Treaty, the Charter acquired the status of primary law of the EU. The Charter has the same hierarchical position as the treaties. Now the CJEU, and the domestic courts, can invoke the Charter whenever a question on the interpretation of EU law arises.

The Charter can be invoked in action against the institutions and bodies of the Union and, when they are implementing EU law, the member states.[584] Thus, the member states are only bound by the Charter when they are implementing EU law.[585] During the negotiation process of the Charter, the formulation of its scope was a controversial issue.[586] It is not always apparent in which circumstances a member state is implementing EU law and in which circumstances it is not. However, in *NS* the CJEU established that the Charter is applicable even when the state is exercising a discretionary competence conferred in secondary legislation.[587] This indicates that all measures which implement any provision of EU law should be regarded as within the scope of the Charter. Even when states have a large margin of appreciation to determine whether a discretionary competence is exercised, the Charter is applicable.[588] Many of the Charter provisions bear a resemblance to provisions from the ECHR. Article 52(3) Charter provides that in so far as the Charter contains rights which correspond to rights protected by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR, while this does not mean that EU law cannot provide more extensive protection.

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582 Charter of Fundamental Rights of the European Union [2000] OJ C364/1 (Charter).

583 *Parliament v Council* (n 360) para 38.

584 Art 51(1) Charter.

585 In Case C-617/10 Åkerberg Fransson the Court established that the applicability of the Charter is not limited to situations in which the member states are strictly implementing EU law, but applies in situations which are within the scope of EU law.

586 See P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CMLRev.

587 Case C-411/10 *NS* [2011] ECR I-13905 para 68.

588 See Case C-617/10 *Åkerberg Fransson* [2013] not yet published.

For the purpose of interpreting the Charter, the protection offered by the ECHR therefore serves as a minimum threshold; EU law may provide a higher level of protection. Article 53(1) Charter provides that limitations to the exercise of the Charter rights must be in accordance with the principle of proportionality.

In family unification law there are several instances in which member states implement EU law. Firstly there is the implementation of secondary EU law on family unification. The Charter is applicable in both the transposition of this legislation and on all individual cases which fall within its scope. The CJEU held in *Dereci* that the Charter is applicable when the refusal of residence of a particular person is covered by EU law.[589] According to the same ruling, the Charter is not applicable to cases which have no factor linking them to EU law. Secondly, the Charter is applicable in cases which for other reasons fall within the scope of EU law. In *Ruiz Zambrano* the CJEU established that in particular circumstances, a right to reside for a family member in a member state can be derived from EU citizenship.[590] In *Carpenter* the CJEU derived a right to family unification from the free movement of services.[591] In all these situations, the Charter is applicable and the member states have to take it into account in the domestic procedures that determine whether the applicable requirements have been met.

The Charter itself contains several provisions relevant for the right to family unification. According to the CJEU, these provisions should be interpreted in the same way as the comparable provisions of the ECHR with its accompanying case law by the ECtHR.[592] The most relevant for the right to respect for family life is Article 7 of the Charter, which guarantees the right to respect for private and family life, home and communications. In the cited case C-400/10 PPU McB the CJEU held that the interpretation of Article 7 Charter is the same as the interpretation of Article 8(1) ECHR. It is striking that where Article 8(2) ECHR provides for the possibilities of derogations to the right to respect for private and family life, Article 7 Charter does not. This cannot automatically be interpreted as implying that Article 7 Charter has a wider scope than Article 8 ECHR. Article 52(1) provides for the possibilities that there are limitations to the rights protected in the Charter, which should be in accordance with the proportionality principle. This mitigates the lack of a justification for interferences formulated in Article 7 Charter. Article 52(3) Charter provides that in so far as the rights from the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same. The charter does not pose any possibility for derogations on the right to respect for family life, but this cannot be held to mean that this is an absolute right. The Charter

589 *Dereci* (n 540) para 72.
590 *Ruiz Zambrano* (n 39).
591 *Carpenter* (n 518).
592 Case C-400/10 *McB* [2010] ECR I-8965 para 53.

uses a similar formulation for the non-absolute rights protected by Articles 9, 10 and 11 ECHR, rights which have been formulated similarly to Article 8 ECHR. Consequently, Article 7 Charter must also be interpreted as a non-absolute right from which derogations are allowed. However, the EU general principles of effectiveness and proportionality should be respected in the interpretation of this right.

Article 21 Charter provides for a prohibition of discrimination. Article 21(1) prohibits any discrimination based on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, poverty, birth, disability, age or sexual orientation. Article 21(2) prohibits discrimination on the grounds of citizenship within the scope of application of the Treaties. These prohibitions of discrimination are relevant for the right to family unification in the sense that EU law or its implementation may not be discriminatory. Any decision of a national authority implementing EU law should respect the prohibition of discrimination as set forth in the Charter. This is an incorporation of the existing treaty Articles concerning non-discrimination. Article 18 TFEU prohibits discrimination on the grounds of nationality within the scope of application of the treaties. The prohibition of discrimination in the Charter goes beyond the protection against discrimination contained in Article 14 ECHR. The latter Article can only be invoked in combination with another right guaranteed by the ECHR and the interpretation of the ECtHR of the prohibition of discrimination is cautious.[593]

According to Article 24(2) Charter, the best interests of the child should be the primary consideration in all actions relating to children. The formulation of this provision equals Article 3 of the Convention on the Rights of the Child and is furthermore repeated in Article 5(5) FRD. This indicates the importance of the protection of child rights within EU law. There has been limited case law by the CJEU on the interpretation of the 'best interests' concept in EU law.[594] It is therefore difficult to assess the implications of the existence of this provision. Article 24(3) Charter provides that "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."[595]

Article 9 Charter guarantees the right to marry and establish a family. This right is similarly formulated as Article 12 ECHR. The case law of the ECtHR on this Article shows that it has a very limited scope and is of little relevance for the right to family unification. Article 19 Charter offers protection against

593 See sections 3.5. and 11.4.2.

594 One of the few cases is Case C-648/11 *MA and others* [2013] not yet published, in which the CJEU interpreted the Dublin Regulation using the best interests concept as enshrined in Art 24 Charter.

595 Art 24(3) Charter.

removal, expulsion or extradition. However, this provision seems to be primarily directed at asylum cases, as Article 19(2) Charter provides that a person may not be removed, expelled or extradited in cases where there is a serious risk of subjection to the death penalty, torture or other inhuman or degrading treatment or punishment. For that reason, the relevance for the right to family unification of this provision seems to be limited.

The right to an effective remedy is protected by Article 47 Charter. It states that everyone whose rights and freedoms derived from EU law have been violated has a right to an effective remedy before an independent and impartial tribunal.[596] The scope of this provision is wider than Article 17 FRD for example, which lays down that the sponsor or his family members may mount a legal challenge against a negative decision.[597]

The Charter is an important source for the interpretation of EU family unification law. Provisions in EU family unification law must be read in accordance with the relevant Charter provisions. Even though the rights from the Charter largely correspond to the rights from the ECHR, the Charter also introduces new instruments, such as the codification in primary EU law of the best interests of the child concept.

4.7 Conclusion

The question addressed in this chapter is whether and in which situations a right to family unification can be derived from EU law. The analysis has shown that EU family unification policy is highly fragmented in terms of personal and material scope.[598] The different legal instruments that exist are applicable depending on the characteristics of the sponsor for family unification. If the sponsor is a third-country national who lawfully resides in one of the member states of the EU, then the FRD is applicable. If the sponsor is an EU citizen who has made use of his free movement of persons right and resides in another member state, then the Free Movement of Persons Directive prescribes that a right of residence exists for his third-country national family members. For a long time the CJEU had ruled that the provisions on the Free Movement of Persons are not applicable in purely internal situations, but in *Ruiz Zambrano* and subsequent case law, the Court has nuanced this point of view.

The answer to the research question addressed in this chapter is therefore that EU law provides for a right to family unification to some categories of sponsors. To a large extent, the specific characteristics of the sponsor determine

596 Art 47 Charter.

597 See for an analysis of the scope of the right to an effective remedy Reneman M, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart 2014).

598 A. Staver, 'Free Movement and the Fragmentation of Family Reunification Rights' (2013) 15 EJML.

whether a right to family unification exists. The right to family unification is most strongly protected in cases where the sponsor is a citizen of one of the member states of the EU who has made use of his free movement of persons right. In this case, there are only minimal requirements. In terms of the level of protection of the right to family unification, the next category of sponsors are third-country nationals who lawfully reside in the territory of one of the member states. Such third-country nationals enjoy a right to family unification subject to meeting the substantive requirements that will be further analysed in chapter 7. The requirement for the exercise of this right is considerably higher than for a sponsor who is a citizen of one of the member states of the EU who has made use of the free movement of persons right. Apart from certain exceptions, no right to family unification can be derived from EU law for citizens of a member state of the EU who have not made use of the free movement of persons right. Such 'immobile' EU citizens are outside the scope of EU law. In order for them to be eligible for family unification, they have to rely purely on domestic law. In the case law of the CJEU an exception is made for immobile EU citizens who would be forced to leave the territory of the EU if their third-country national family member were not allowed to reside in the EU.

This fragmented nature of EU family unification law would be unproblematic if the legal principles underlying the different instruments were similar. This is not the case however. The legal regime offered in the Free Movement of Persons Directive is considerably more lenient than the requirements which the member states are allowed to impose within the context of the FRD. This creates a situation where applicants can make use of the free movement of persons right to become eligible for family unification under the more lenient regime, thus bypassing the domestic family unification policies and possibly undermining the legitimate objectives the member states have in pursuing these policies.

The different levels of legal protection necessarily create discrimination of sponsors based on their migration status. The justification for this discrimination in the context of Article 14 ECHR, EU law and domestic law is discussed in section 11.5.

PART II

Domestic law

5 Structure of domestic law in the selected member states

5.1 INTRODUCTION

Even though to a certain degree the right to family unification is regulated at the supranational level, all applications must be made in the member states. Therefore in this research the domestic law of four member states is analysed in order to see how the international obligations are implemented. The member states selected for analysis are Denmark, Germany, the Netherlands and the United Kingdom. In this chapter, the research question addressed is whether there are structural and systematic characteristics of the legal systems in the selected member states which shape their domestic family unification law. The chapter is divided into four themes. The first theme (section 5.2.) being the system of immigration law where the general system of immigration law is analysed. The main characteristics of the legal systems are described and the place of immigration law in domestic legislation is sketched. The second theme is the status of international and European law in domestic law. Considering that there is a large body of different sources of international and European law relevant to domestic family unification law, it is important to look at the status of these international sources within the domestic legal systems. The member states selected for this research have fundamentally different ways to implement international and European law, shaping the domestic family unification law. In the third theme, the position of family unification in domestic immigration law is analysed. The fourth theme looks at the application process from the perspective of the applicant. The general objective of this chapter is to introduce the legal framework on family unification in the selected member states. As was indicated in section 1.6., English translations of the foreign legal instruments are used in this dissertation. In this chapter, when an instrument is mentioned for the first time, the original language name of the instrument is provided in brackets.

5.2 SYSTEM OF IMMIGRATION LAW

5.2.1 Denmark

Denmark is a unitary state. The central government is competent to legislate in the field of immigration law. Denmark has a Constitution (*Danmarks Riges*

Grundlov),[599] however in Danish immigration law the Constitution does not play an important role. The Danish courts are reserved when it comes to interpreting the Constitution and the constitutionality of legislative and administrative acts. Denmark does not have a constitutional court. Instead, the single-chamber parliament (*Folketing*) plays an important role in upholding the rule of law and the Constitution. The bill of rights enshrined in the Constitution is limited and plays a marginal role in Danish (immigration) law. The Constitution does contain a right to judicial review of administrative decisions.[600]

The formal law governing immigration law in Denmark is the Aliens Act (*Udlændingeloven*). This Act contains detailed provisions on the entitlement to residence in Denmark. The Aliens Act is subject to frequent amendment, increasing the complexity of Danish immigration law.[601] It can only be amended following the approval of parliament. After the legislative procedure is followed, parliament approves or rejects new legislation or amendments to existing legislation. The preparatory documents produced during the legislative process are an important tool in the interpretation of legislation. The conditions for a residence permit and more procedural issues are further specified in the Aliens Order (*Udlændingebekendtgørelse*). Amendment of the Aliens Order does not require approval from parliament. The government may amend the Aliens Order by its own motion.

Article 2(4) Aliens Act states that the responsible minister will lay down rules implementing EU migration law. The minister did this in the EU Residence Order (*EU-opholdsbekendtgørelsen*). Like the Aliens Order, the EU Residence Order is not a statute. The EU Residence Order implements all EU law concerning the free movement of persons.

The executive agency responsible for the operation of Danish immigration policy is the Immigration Service (*Udlændingestyrelsen*). The Immigration Service operates under the responsibility of the Ministry of Justice (*Justitsministeriet*).

5.2.2 Germany

In Germany immigration law is a branch of administrative law (*besonderes Verwaltungsrecht*). Germany is a federation consisting of sixteen states (L*änder*). In the distribution of competences, the federal government is competent to legislate in the field of immigration law. The adopted laws are therefore concluded at the federal level, and not at the regional level. However, the states play an important role in German immigration law, as instead of a central

599 Danmarks Riges Grundlov, Act No 169, 5 June 1953 (DK).
600 Art 63 Grundlov (DK).
601 J. Vested-Hansen, 'Grundbegreber og hovesondringer i udlændingeretten' in L. Christensen and others (eds), *Udlændingeret* (3rd edn, Jurist- og Økonomforbundets Forlag 2006) p 8.

agency (like the Home Office in the United Kingdom), the application of immigration law falls largely to the different states.

The federal constitution in Germany is called the Basic Law (*Grundgesetz*[602]*).* The basic law is of specific relevance for immigration law, which is described further below.

In 2005 the system of German immigration law was radically reformed when the Immigration Act (*Zuwanderungsgesezt)* came into force.[603] The Immigration Act consists of several different acts (*Gesetze*) and regulations (*Verordnungen*). The entry and residence of foreigners is regulated in the Residence Act (*Aufenthaltsgesetz, AufenthG*[604]). The Residence Act contains provisions concerning the entry, residence and settlement of third-country nationals in Germany. The norms from the Residence Act are further specified in the Residence Regulation (*Aufenthaltsverordnung*[605]). The structure of the Residence Regulation generally follows the structure of the Residence Act, which makes it easy to find the corresponding provisions in the Act. Specific guidance for decision makers is provided in the Administrative Guidelines (*Verwaltungsvorschrift*).[606]

The entry and residence of EU nationals and their family members is regulated in the Free Movement Act (*Freizügigkeitsgesetz/EU*[607]). In the Free Movement Act, which contains a mere thirteen provisions, the EU law instruments are implemented in German law. This Act is further elaborated upon in the Administrative Guidelines for the Free Movement Act (*Allgemeine Verwaltungsvorschrift zum Freizgügigkeitsgesetz*). Asylum-related matters are regulated in the Asylum Procedures Act (*Asylverfahrengesetz).*[608]

In Germany, the Ministry for internal affairs (*Bundesministerium des Innern*) is the ministry within the federal German government responsible for immigration policy. However the Ministry for foreign affairs (*Auswärtiges Amt*) is responsible for visa applications. An application for a long-term residence visa is forwarded to the responsible regional Foreigners Authority (*Ausländerbehör-*

602 Grundgesetz für die Bundesrepublik Deutschland from 23 May 1949 (BGBl. S. 1), lastlylastl changed on 21 July 2010 (BGBl. I S. 944) (GER).

603 Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern from 30 July 2004 (BGBl. I S. 1950) (GER).

604 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet from 25 Februari 2008 (BGBl. I S. 162), lastlylastl changed on 22 December 2011 (BGBl. I S. 3044) (GER).

605 Aufenthaltsverordnung from 25 November 2004 (BGBl. I S. 2945), lastly changed on December 2011 (BGBl. I S. 3044) (GER).

606 Bundesministerium des Innern, *2009* (Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz).

607 Gesetz über die allgemeine Freizügigkeit von Unionsbürgern from 30 July 2004 (BGBl. I S. 1950, 1986), lastlylastl changed on 22 November 2011 (BGBl. I S. 2258, 2267) (GER).

608 Asylverfahrensgesetz in der Fassung der Bekanntmachung vom 2. September 2008 (BGBl. I S. 1798), lastlylastl changed on 22 November 2011 (BGBl. I S. 2258) (GER).

de). All counties and bigger cities have separate Foreigners Authorities. Various Foreigners Authorities are therefore responsible for the execution of immigration law.[609] Every Foreigners Authority applies the federal immigration laws in their own way. One consequence of this is that there are no standard forms for applications for example.

5.2.3 Netherlands

In the Netherlands immigration law is a branch of administrative law. This means that the general provisions of administrative law apply. The Netherlands is a unitary state. Only those competences that have been expressly conferred to regional authorities are exercised at the regional level. For immigration law this means that the involvement of regional and local authorities is marginal.

The Netherlands has a written Constitution (*Grondwet*).[610] However, unlike many other states, the Netherlands does not have a constitutional court. Furthermore, the Dutch judiciary is not authorised to test whether formal laws are compatible with the Constitution.[611] The Constitution does contain a bill of rights, but due to the prohibition of constitutional scrutiny, the significance of the constitutional bill of rights is limited.

Dutch immigration law has a layered structure of hierarchical regulations. The formal law regulating immigration is the Foreigners Act (*Vreemdelingenwet*). In this act the main principles of Dutch immigration law are laid down. These provisions are further developed in lower regulations. Below the Foreigners Act there are three levels of regulation. The Foreigners Decree (*Vreemdelingenbesluit*) and the Foreigners Regulation (*Voorschift Vreemdelingen, VV*) contain elaborations of the general provisions of the Foreigners Act. The specific policy rules based on those regulations are described in the Foreigners Circular (*Vreemdelingencirculaire, Vc*). The Foreigners Circular contains specific policy rules which are used to interpret the more general regulations in individual cases. All levels of regulation can be involved in an individual procedure.

The Foreigners Act is a formal law, which can only be amended in accordance with the ordinary legislative procedure. This includes the advice obtained from the Advisory Division of the Council of State (*Afdeling Advisering Raad van State*) and approval by both chambers of parliament. The Foreigners Decree and the Foreigners Regulation can be amended by the minister responsible for immigration policy. For such amendment no formal approval from parliament is required. However, the Advisory Division of the Council of State must be consulted. The Foreigners Circular can be amended by the responsible minister without approval or consultation.

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609 See Art 71(1) Residence Act (GER).
610 Grondwet (NL).
611 Art 120 Grondwet (NL).

In the Netherlands the Deputy Minister of Security and Justice (*Staatssecretaris van Veiligheid en Justitie*) is currently responsible for immigration. The organisation responsible for handling immigration applications is the Immigration and Naturalisation Service (*Immigratie en Naturalisatiedienst*, IND). The IND is the responsibility of the Deputy Minister of Security and Justice. The policy on entry and visas is the responsibility of the Ministry of Security and Justice (*Ministerie van Veiligheid en Justitie*) together with the Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*). After the reform of the procedure in 2012, a family migrant should lodge an application for a provisional entry visa to the Deputy Minister of Security and Justice. The application will be assessed on its merits by the IND under the responsibility of the Deputy Minister.

5.2.4 United Kingdom

The United Kingdom (UK) has a legal tradition which is different from the legal traditions of the other countries selected for this research. For instance, the UK is the only member state selected in this research which does not have a written constitution. The UK is composed of four countries: England, Scotland, Northern Ireland and Wales. Immigration law is a field of law that is regulated at the level of the UK. Therefore, it is possible to refer to the law of the UK in this research. The UK has a common law system. Within the common law system the judiciary plays an important role in interpreting written and unwritten legal concepts. Decisions of courts form precedent which must be followed by other courts.

The system of immigration law consists of statutes, policy rules, lower forms of regulation and case law. A statute can be compared to a formal law in Germany and the Netherlands. A statute is adopted after a bill has passed both the House of Commons and the House of Lords, the two chambers of the UK parliament. The competence to regulate in the field of immigration law is laid down in the Immigration Act 1971.[612] Since then, many statutes have been adopted, amending and specifying the 1971 act.[613] In the hierarchy of legislation, later statutes override previous statutes to the extent that the subject matter is covered by the subsequent statute. Besides statutes there are also statutory instruments. These are a form of secondary legislation which usually implement a statute. An example of a statutory instrument are the Immigration

612 Immigration Act 1971 (UK) Art 4(1).

613 Clayton identifies the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants etc) Act 2004, the Asylum and Nationality Act 2006, the UK Borders Act 2007 and the Borders, Citizenship and Immigration Act 2009 as the main statutes. See G. Clayton, *Textbook on Immigration and Asylum Law* (6th edn, OUP 2014) p 30.

(European Economic Area) Regulations 2006.[614] This statutory instrument implements the European Communities Act 1972.

The statutes do not cover the content of the requirements for entry or residence. These requirements are largely covered by the Immigration Rules. The Immigration Rules are not a statute and are also not part of a statute. Instead, the Immigration Rules are administrative rules made by the Home Secretary. The Home Secretary can change the rules without prior approval from parliament. The competence of parliament is restricted to the negative resolution procedure, by which parliament may object to amendments to the Immigration Rules. Parliament may not make amendments to changes themselves, it can only reject a proposal for changes. The Immigration Rules contain practical rules on the procedures and the requirements for entry and residence. The rules cannot be applied mechanically in the sense that they require some level of judgment on the question of whether the set criteria are complied with.[615]

Below the Immigration Rules there are several forms of lower regulation. In policy documents guidance can be given on the application of discretionary competences. The Immigration Directorate Instructions (IDI) is a code of guidance on the interpretation of the Immigration Rules. As the Immigration Rules do not cover all possible situations, sometimes concessions are issued. Concessions can be announced in parliament, and are sometimes the predecessor of changes in the immigration rules. For example, the extension of the right to family unification to unmarried partners was made by a concession announced in parliament on 10 October 1997.[616] Individual exceptions can also be made, which in turn can become established concessions when the compassionate circumstances taken into account in a particular case are also applied in other cases.[617]

Besides statutes, the Immigration Rules and lower forms of regulation, case law also plays an important role in UK immigration law. The court interpretation of a statute provision enjoys the same authority as the statute itself. The case law of the Supreme Court is binding on all lower instance courts. The case law of the Court of Appeal is binding on itself and on the lower instance courts. The decisions of the Upper tribunal are binding on the First-tier tribunal. This creates a hierarchy of case law in which the relevant authority

614 Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (UK).

615 House of Commons Home Affairs Committee, *Immigration Control, Fifth Report of Session 2005-06, Volume 1* para. 123.

616 Concession outside the Immigration Rules for unmarried partners: Persons present and settled in the United Kindom, or being admitted on the same occasion for settlement, or who are in the United Kingdom in a category leading to settlement, or who have been granted asylum, announced by Immigration Minister Mr O'Brien on 10 October 1997 (UK) .

617 I. MacDonald and R. Toal, *MacDonald's Immigration Law & Practice* (7th edn, LexisNexis 2008) p 44-45.

is usually the judgment of the highest court which has interpreted a certain legal principle.

In the UK the Secretary of State for the Home Department (Home Secretary) is responsible for immigration policy.[618] His department, the Home Office (formerly also known as the Home Department), is responsible among other things for immigration control. The UK Border Agency, the agency that is in charge of the control of the UK borders, is an executive agency operating under the wings of the Home Office. Besides the Home Secretary himself, there are several ministers working at the Home Office; one of those is responsible for immigration, asylum and border controls. Applications for a visa for family unification must be made with the UK Border Agency. More on the application process follows below.

5.3 Status of international and European law

5.3.1 Denmark

Denmark has a dualistic legal system and therefore international (human rights) treaties must be implemented in domestic law in order to be directly applicable in Danish law. The ECHR is the only human rights treaty which was incorporated as a whole in Danish law,[619] and is therefore directly applicable. All other human rights treaties have not been directly incorporated in domestic law and can therefore not be invoked in courts or with administrative authorities, unless there is a specific reference to a treaty provision in legislation. Danish courts are generally cautious about interpreting international obligations which have not been implemented in domestic legislation.[620] In the Aliens Act (*Udlændingeloven*), reference is made in some provisions to international human rights law. For example, the UN Refugee Convention is mentioned in a number of provisions.[621] When this occurs, the relevant provision is applicable in Danish law. Whenever international law is invoked in the Danish courts, it must be done through the domestic implementing act.

EU law is directly applicable in Danish immigration law without prior implementation. Article 2(3) Aliens Act states that the Aliens Act is only applicable for immigrants who are covered by EU rules to the extent that the domestic provisions are consistent with EU law. In this way, the supremacy of EU law is expressly recognised in the Aliens Act.

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618 Art 4(1) Immigration Act 1971 (UK) .

619 Bekendtgørelse af lov om Den Europæiske Menneskerettighedskonvention, Act nr 285 of 29 April 1992 (DK).

620 L. Rehof, 'The Danes, their Constitution and the International Community' in B. Dahl, Melchoit. T. and D. Tamm (eds), *Danish Law in a European Perspective* (2nd edn, GadJura 1996)p. 83.

621 ArteArt 7 Aliens Act (DK).

After Denmark initially rejected the Maastricht Treaty following the 1992 referendum, it negotiated four opt-outs. These opt-outs include the fields EU citizenship and Justice and Home Affairs. The opt-out on EU citizenship does not have any practical implications. However Justice and Home Affairs is the policy area which includes immigration policy. The FRD was negotiated in the framework of Justice and Home Affairs. Therefore the FRD is not applicable in Denmark. The Free Movement of Persons Directive (CD) was not negotiated within the scope of Justice and Home Affairs and is therefore applicable in Denmark.

5.3.2 Germany

Germany has a dualist legalist tradition with a strong domestic protection of human rights. The Basic Law includes an entrenched bill of rights. International (human rights) treaties, such as the ECHR, enjoy the same status as German statutory law.[622] This means that international law is lower in hierarchy than the Basic Law.[623] However, international human rights law, including the ECHR and the case law of the ECtHR, play an important role in the interpretation of the fundamental rights enshrined in the German constitution. This doctrine has been developed by the Federal Constitutional Court (*Bundesverfassungsgericht*).[624] This gives international human rights law constitutional importance.[625] German law must be interpreted in accordance with international law, including the ECHR.[626] International treaties are seen as ordinary statutory law and may be relied upon in court. For the Constitutional Court, individuals may claim that an administrative decision breaches international law, but they must formally do so by claiming a violation of the domestic human right.[627]

The status of EU law in the German legal system has also been the topic of extensive legal debate. The Constitutional Court has ruled on the supremacy of EU law on multiple occasions. Article 23(1) Basic Law provides that sovereign powers can be transferred to the EU. Within the German legal system, the supremacy of EU law over German law stems from German constitutional

622 Art 59(2) Constitution (GER).

623 See H. Jarass and B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (Beck 2004), Art. 25 at para. 10.

624 See for instance BVerfGE (17-07-1985) 2 BvR 1190/84 (GER); BVerfGE (26-03-1987) 74, 358 (GER).

625 See D. Ehlers, 'Allgemeine Lehren der EMRK' in D. Ehlers (ed), *Europäische Grundrechte und Grundfreiheiten* (3rd edn, De Gruyter 2009).

626 BVerfGE (14-10-2004) 2 BvR 1481/04 (GER) para 48.

627 S. Belijn, 'Bundesverfassungsgericht on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order' [2005] European Constitutional Law Review p 565.

law rather than from EU law directly.[628] However, the Constitutional Court has placed limits on the acceptance of the supremacy of EU law. In the case *Internationale Handelsgesellschaft* the Constitutional Court held that Article 24 Basic Law cannot be used to transfer competences which are an essential feature of the German legal system such as the protection of fundamental rights.[629] In a later judgment, which became known as the *Solange II* ruling, the Constitutional Court held that it retains jurisdiction over the protection of fundamental rights, but that it would not exercise that jurisdiction as long as the ECJ upheld the level of human rights protection.[630] This makes it more unlikely that there will be a clash between the Constitutional Court and the CJEU over the protection of fundamental rights.[631] There has also been case law by the Constitutional Court on other issues relating to the supremacy of EU law, such as competence distribution[632] and constitutional identity.[633] This illustrates the ambiguous nature of the supremacy of EU law in Germany.

Unlike Denmark and the United Kingdom, Germany has not negotiated any opt-outs from EU law. That means that the CD, the FRD as well as the Charter of Fundamental Rights are applicable in Germany.

5.3.3 Netherlands

The Netherlands has a moderate monistic legal system. Provisions of international and European law which are sufficiently clear are directly applicable in Dutch law.[634] Therefore individuals can rely directly on international or European law to claim residence rights or to challenge a decision of the Minister.

In the case of human rights law this means that individuals can rely directly on international human rights treaties. Therefore an entitlement to entry or residence can be based on a provision of Dutch law, but also on a provision from international human rights law. Some provisions of human rights law have also found their way into Dutch immigration regulations. However, the implementation of a provision is not a requirement for the applicability of human rights law. In the Dutch legal system, developments in human rights

628 A. Voâkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review p 190.
629 BVerfGE (29-05-1974) 37, 271 (GER) .
630 BVerfGE (22-10-1986) 73, 339 (GER) .
631 P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011).
632 See BVerfGE (12-10-1993) 89, 155 (GER) for a comment see for example M. Herdegen, 'Maastricht and the German Constitutional Court, Constitutional Restraints for an Ever Closer Union' (2005) 31 CMLR.
633 BVerfGE (30-06-2009) 123, 267 (GER), for a comment see D. Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 CMLR.
634 Art 93 Constitution (NL).

law, for example new case law by the ECtHR, often gives rise to new questions regarding the interpretation of Dutch law. When ruling in a dispute, the domestic courts often refrain from implementing human rights norms in the absence of case law from supranational tribunals.

EU law does not also require implementation in Dutch law, but is directly applicable in the Dutch legal system if the particular provision is sufficiently clear. Although the doctrine of direct effect, and the supranational nature of EU law, already entails the direct enforceability of EU law in the domestic legal orders, the Dutch legal system also expressly recognises this. Therefore individuals can invoke provisions from primary or secondary EU law when they feel EU law is incorrectly implemented in Dutch regulations. When a question of interpretation of EU law arises, the Dutch courts may request a preliminary ruling from the Court of Justice of the EU (CJEU) pursuant to Article 267 TFEU. Since the Lisbon treaty reform, lower instance courts, such as the District Courts (*Rechtbanken*), also have the competence to submit questions for preliminary ruling to the CJEU. The court of highest instance, the Council of State (*Raad van State*), has the obligation to submit questions for preliminary ruling if the interpretation of EU law is not clear.[635] However, it is questionable whether the Council of State always adheres to the duty to refer questions for preliminary ruling to the CJEU. In the following chapters examples will be provided of potential preliminary questions which were not submitted for preliminary ruling by the Council of State.
The full range of EU law relevant to the right to family unification is applicable in the Netherlands. The Netherlands did not negotiate any opt-outs.

5.3.4 United Kingdom

The UK has a dualistic legal system. This means that provisions of international law must be transposed in domestic law before they can be invoked in the courts. Until 1998 there was no formal codification of the ECHR. This situation changed with the enactment of the Human Rights Act 1998 (HRA). With this statute the principles of human rights law, derived from the ECHR, became directly applicable in the UK. This does not mean that ECHR provisions and case law can be invoked at any point of any procedure in immigration proceedings. The HRA prescribes that courts and tribunals must 'take into account' the judgments of the ECtHR.[636] This provision does not, however, state that the UK courts are bound by the case law of the ECtHR. But the courts are bound

635 However, according to the CILFIT doctrine developed by the CJEU, a preliminary question need not to be asked in cases of 'acte éclairé' (the question was already answered by the CJEU or can be inferred from earlier case law) or 'acte clair' (the interpretation of EU law is sufficiently clear). Case C-283/81 *CILFIT* [1982] ECR 3415.

636 Art 2 HRA 1998.

by the case law of the ECtHR by virtue of Article 30 ECHR. In case law it was established that UK courts must 'follow any clear and constant jurisprudence' of the ECtHR, as an opposite approach could lead to applications to the ECtHR in individual cases.[637] The case law of the ECtHR is an important element in the interpretation of ECHR provisions. Also, pursuant to section 3(1) HRA, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the rights protected in the ECHR. The statutes on immigration as well as the Immigration Rules and subordinate regulations should therefore be read in accordance with the rights protected in the ECHR. Anyone within the jurisdiction of the ECHR may make a human rights claim under the HRA pursuant to section 7. In the section below on the remedies against negative decisions, the possibility to challenge decisions on human rights grounds will be outlined.

EU law poses a real challenge for UK law. In a state in which parliamentary sovereignty has high authority, the supremacy of EU law over national law is difficult to accept. The EU courts may put forward that there is supremacy of EU law over the national law of the member states, but this must be accepted within the domestic legal systems in order to be effective. For that reason a statute was set up to implement EU law in the UK legal system. The European Communities Act 1972 (ECA) states that:

> *"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom […]."*[638]

Furthermore, the wording of section 4 ECA seems to suggest that also in UK law EU law takes precedent over UK law if there is a conflict of law.[639] This view was confirmed by the House of Lords.[640] For those reasons, questions about whether there is binding EU law in a certain area is always a question of EU law, not of UK law. Provisions of EU law which have direct effect are therefore also directly effective in UK law. This does, however, mean that when there is a dispute in which EU law is decisive, EU law will always be invoked. In the legislative tradition in the UK, despite the direct applicability of EU law in the UK legal system, even directly applicable EU instruments such as regulations are still often implemented in UK law through statutes. The discussion on the status of EU law in the UK is intense. Before the *Factortame* ruling by the House of Lords, the appellate courts were willing to set aside EU law in

637 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [26] per Lord Slynn (UK).
638 Art 2(1) European Communities Act 1972.
639 M. Elliot and R. Thomas, *Public Law* (OUP 2011) p 329.
640 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

favour of UK law.[641] According to Wade and Forsyth this is an example of the difficulties of the ECA.[642] When considering the implementation of EU law in the UK, it is important to note this sensitivity.

The UK has negotiated several opt-outs in specific policy areas. This means that in those areas in which the UK has opted out, the EU regulations on that particular topic are not applicable to the UK. Relevant for this dissertation is that the UK has opted out of the Schengen acquis,[643] the EU policy in the Area of Freedom, Security and Justice (AFSJ),[644] and the Charter of Fundamental Rights of the EU.[645] In the AFSJ the UK can opt into any EU legislation if it wishes to do so. The UK has for example opted-in for the asylum directives. However, it did not opt into the FRD. This means that the FRD is not applicable in the UK. As it was shown in the previous chapter, the FRD is an important source for the right to family unification. The UK did not negotiate an opt-out for the free movement directives. This means that the Free Movement of Persons Directive is applicable in the UK. Provisions on the right to family unification in the scope of this directive are therefore applicable in the UK. During the negotiations of the Lisbon Treaty, the UK also negotiated an opt-out of the Charter of Fundamental Rights of the EU. This makes the provisions of the Charter not binding in the UK.[646] The CJEU has, however, established that the negotiated opt-out does not mean that provisions of the Charter should not be complied with.[647]

5.4 Family unification in domestic law

5.4.1 Denmark

The Danish constitution does contain a limited bill of rights, but this bill of rights does not include a right to family unification nor a right to respect for family life. It does include a right to respect for private life,[648] but this did not have a significant impact on family unification law.

Article 9 Aliens Act is the only provision in the act which concerns family unification. However it has thirty-one paragraphs. This provision lays down

641 Ibid.
642 H. Wade and C. Forsyth, *Administrative law* (10th edn, OUP 2009) p 169.
643 Art 4 of Protocol (No 19) on the Schengen Acquis Integrated into the Framework of the European Union. [2010] OJ C 83/290.
644 Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice. [2010] OJ C 83/295.
645 Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. [2010] OJ C 83/313.
646 However the CJEU has held in C-411/10 *N.S.* [2011] ECR I-13905 para 116-122 that in fact the UK is bound by the Charter.
647 Joined Cases C-411/10 and C-493/10 NS [2011] ECR I-13905para 118 .
648 Art 72 Constitution (DK).

the detailed conditions which are required to be fulfilled in order to obtain a residence permit based on family ties. In the Aliens Act there is no legally codified right to family unification. Instead, in the wording of Article 9 a residence permit based on family ties *may* be issued. However, this does not mean that the authorities may refuse an application for family unification if all the conditions laid down in Article 9 have been met. This was expressly mentioned by the government in the preparatory documents of an amendment to the Aliens Act aimed at reducing the amount of applications for family unification.[649]

Chapter 3 of the EU Residence Order concerns family unification within the scope of the free movement of persons. This chapter contains the material and procedural requirements for applications for family unification which fall under EU law.

5.4.2 Germany

In Germany the right to respect for family life is enshrined in Article 6 Basic Law. Article 6 contains, amongst other rights, the right to marry and to form a family and the right to reside together as a family.[650] There is a direct reference to the constitutional protection of family life in Article 27(1) Residence Act. Article 6 Basic Law does not contain a right to family unification as such.[651] The Constitutional Court has held that no right to enter or residence for the purpose of family unification can be derived from Article 6 Basic Law.[652] Even though the right to live together is within the scope of Article 6, the Constitutional Court held that the family could also live together in a country other than Germany.[653] Although no direct right to entry or residence based on family relationships can be derived from Article 6, it does require the balancing of the constitutional family rights with the public interest to pursue an immigration policy.[654] Article 6 Basic Law confers the competence to determine the conditions under which a family migrant may enter and reside in Germany to the legislator.[655] The reference to Article 6 in Article

649 Ministeriet for Flygtninge Indvandrere og Integration, *Bemærkninger til lovforslaget, Forslag til lov om ændring af udlændingeloven og ægteskabsloven med flere love. (Afskaffelse af de facto-flygtningebegrebet, effektivisering af asylsagsbehandlingen, skærpede betingelser for meddelelse af tidsudbegrænset opholdstilladelse og stramning af betingelserne for familiesammenføring m.v.)* (Folketingsåret 2001-02, 2 samling, L 152, 2001).

650 BVerfGE (12-05-1987) 76, 1.

651 A. Schmitt-Kammler, 'Art. 7: Schulwesen' in M. Sachs (ed), *Grundgesetz: Kommentar* (6th edn, Beck 2011) para 22f.

652 BVerfGE (12-05-1987) 76, 1 para 47.

653 ibid para 48.

654 ibid para 50.

655 K. Hailbronner, *Asyl- und Ausländerrecht* (3rd ed, Kohlhammer 2014) p 203.

27(1) Residence Act underlines that the legislator implements Article 6 with this provision.

In the Residence Act the rules on family unification are laid down in Articles 27 to 36. In Article 5 of the Residence Act the general requirements for entry and residence in Germany are laid down. These requirements include a minimum subsistence requirement, proof of identity, the absence of reasons for expulsion, the absence of a danger to the public order, a valid passport and a valid visa for the intended purpose of the stay.[656] In addition, special requirements apply for family unification. These are laid down in Articles 27 to 36 Residence Act. The general requirements are listed in Article 29(1) Residence Act. Firstly, the sponsor needs to be a lawful resident in Germany. Secondly the sponsor needs to have sufficient accommodation. Besides these requirements, the Residence Act specifies different requirements for different categories.[657] The specific characteristics and requirements are discussed in the following chapters. For these reasons, it is first necessary to determine which category applies to the sponsor, before the substantive applicable conditions and procedures can be determined.

In accordance with Article 2(2)(1) Free Movement Act the family members of EU citizens making use of their right to the free movement of persons have the right to reside in Germany irrespective of their nationality. This means that third-country nationals who are such family members also have a right to enter and reside in Germany under this provision. The family unification of persons within the scope of the CD is regulated by the Free Movement Act and therefore not by the Residence Act. As the conditions and procedures differ, it is necessary to determine which law applies to an individual. The specific characteristics and requirements are discussed in the subsequent chapters.

5.4.3 Netherlands

In the Dutch Constitution there is no reference to a right to family unification. There is a constitutional right to respect for private life, but this does not extend to family life.[658] Due to the constitutional prohibition of testing whether a law is compatible with the Constitution, an explicit reference to

656 Art 5(1) and (2) Residence Act (GER).

657 The rules on the family unification of persons entitled to constitutional asylum and other refugees are laid down in Art 29(2) and (3) Residence Act. The family unification of third-country nationals whose sponsor is a third-country national residing in Germany is regulated in Art 30 Residence Act. The family unification of minor children whose sponsor is a third-country national lawfully residing in Germany is laid down in Art 32 Residence Act. The rules on the family unification of third-country nationals whose sponsor is a German national are laid down in Art 28 Residence Act.

658 Art 10 Constitution (NL).

a right to family unification or a right to respect for family life could not be relied on in court in an individual case anyway. The Foreigners Act also does not contain a right to family unification or a reference to the right to respect for private and family life. Instead, Article 14 Foreigners Act gives the Minister the authority to issue residence permits to certain groups. Which groups exactly is specified further in the Foreigners Decree. It should be noted that even this provision formally grants a right to family unification. In the wording of the Foreigners Act, it is at the discretion of the Dutch minister to allow for family unification. It is not an individually enforceable right. The authorities, however, have the obligation to adhere to the law which specifies the exact conditions under which the minister is required to apply his authority to issue residence permits. This system, however, indicates that the Dutch system does not follow a rights-based approach to family unification, but instead views family unification as a discretionary competence of the state which is bound by the self-made policy. Considering the limited parliamentary involvement in creating the rules, procedures and requirements for family unification, the Minister is merely bound by the rules in the Foreigners Decree, the Foreigners Regulation and the Foreigners Circular, which the Minister himself is responsible for. So in practice, the Minister in the field of family unification is only bound by rules which he may amend at his own initiative, illustrating the fundamentally discretionary character of family unification in the Netherlands. Whether this results in practices which are incompatible with the ECHR, for example, will be discussed in the following subjective chapters.

The authority of the minister to issue residence permits for family unification is laid down in Article 3.4(1)(a) of the Foreigners Decree. In this provision there is a distinction between family unification (*gezinshereniging*) and family formation (*gezinsvorming*). In this system, there can only be family unification when the family relationship already existed in the country of origin of the family migrant. In the case of a partner, there should have been cohabitation in the country of origin for the rules on family unification to apply. In all other cases, in which the family relationship is established while the family migrant is in the country of origin, but the sponsor is in the country of destination, the rules on family formation apply. This distinction was important mainly to determine the applicable income requirement. For family formation the required income was higher than the amount required for family unification. However, after the *Chakroun* ruling of the CJEU there is now a uniform income requirement, which diminishes the relevance of the distinction between family formation and family unification.[659] In the remainder of this dissertation the term family unification will be used also in cases which under Dutch law are labelled as family formation. Where the distinction remains relevant this will be explained.

659 *Chakroun* (n 392).

The rules on who is eligible for a residence permit are laid down in Article 16 Foreigners Act. The further specific requirements applicable for family unification are laid down in the Foreigners Decree. A family migrant cannot apply directly for a residence permit, but must first get a provisional entry visa (*Machtiging tot voorlopig verblijf, Mvv*). The requirements for a provisional entry visa are the same as the requirements for a residence permit.

The requirements of Article 16 Foreigners Act are the following. Besides a provisional entry visa,[660] the family migrant needs to possess a valid travel document.[661] The family migrant or the sponsor should have sufficient and sustainable means of subsistence.[662] He or she may not pose a threat to public order or national security,[663] and should be willing to undertake a medical examination.[664] The family migrant also needs to comply with an integration requirement.[665] Lastly, the immigrant should comply with the requirements which are specific to the purpose of family unification.[666] The specific requirements of this residence purpose are contained in Articles 3.13 to 3.56 Foreigners Decree. The specific provisions on the definition of the family and on substantive requirements are analysed in the following chapters.

5.4.4 United Kingdom

In the United Kingdom no formal right to family unification is laid down in domestic regulation. According to section 1(4) Immigration Act 1971, the Home Secretary is required to govern the entry of certain types of immigrants, such as workers and students. However, entry for the purpose of family unification is not one of the prescribed categories. Instead, the substance of UK family unification law is laid down in the Immigration Rules. In order to be eligible for family unification, a third-country national family member seeking entry to the UK must comply with the requirements laid down in Part 8 of the Immigration Rules. The fact that the substantive conditions for family unification are laid down in the immigration rules and not in a statute makes it easier for the government to amend the procedures and requirements. As was mentioned above, no parliamentary consent is required to amend the rules. Part 8 of the Immigration Rules extends from paragraph 277 until paragraph 319. The content of the Immigration Rules on family unification is further specified in chapter 8 of the IDI.

660 Art 16(a) Foreigners Act (NL).
661 Art 16(b) Foreigners Act (NL).
662 Art 16(c) Foreigners Act (NL).
663 Art 16(d) Foreigners Act (NL).
664 Art 16(e) Foreigners Act (NL).
665 Art 16(h) Foreigners Act (NL) The integration requirement is further defined in lower regulations. The integration requirements will be separately addressed in section 7.3.5.
666 Art 16(g) Foreigners Act (NL).

The rules for the entry and residence of family members within the scope of EU law are laid down in the Immigration (European Economic Area) Regulations 2006.[667] This means that those rules are not covered by the Immigration Rules. This was the case until the enactment of these regulations,. These were established under section 2(2) of the European Communities Act 1972 and section 109 of the Nationality, Immigration and Asylum Act 2002. The regulations implement Directive 2004/38 on the free movement of persons. The specific procedures and requirements posed in the regulations will be analysed in the following chapters.

5.5 APPLICATION PROCESS

5.5.1 Denmark

An application for family unification for a third-country national applying to stay with a family member who resides in Denmark must usually be made in the country of origin or in the country in which the applicant has resided for at least three months prior to the application.[668] When the applicant already has a valid short-term visa, is exempt from the visa requirements or holds a valid residence permit with another residence purpose, the application for family unification may be made in Denmark.[669] If the residence permit has to be applied for abroad, this can be done at a Danish representation. If the residence permit is applied for in Denmark, this can be done at the Service Centre of the Immigration Service, or at the local police department if the sponsor lives outside the Greater Copenhagen area. If an applicant decides to make an application in Denmark it is firstly determined whether the application should have been made abroad. If this is not the case, the application will be considered on its merits. In 2012 the administrative fee charged for an application for family unification, which was 7,775 DKK (1,045 EUR), was abolished. Now applications for family unification are free of charge.[670] If the application is successful, a residence permit (*opholdstilladelse*) is issued. The residence permit allows for entry and residence in Denmark. Once arrived in Denmark, the holder of the residence permit does not have to apply for another permit or document.

Family members of EU citizens, both EU citizens and third-country nationals, acquire the right to reside by operation of law in accordance with the CD. However, they still need to apply for a residence card. An application for a

667 Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (UK) (n 614).
668 Art 9(18) Aliens Act (DK); Art 26(2) Aliens Order (DK).
669 Art 9(22) Aliens Act (DK).
670 Notes to the Act, L 104 (Forslag til lov om ændring af udlændingeloven og forskellige andre love) 2011-2012.

residence card for family unification for a family member who is a third-country national based on EU law must be made within three months after admission in Denmark.[671] No administrative fee is charged for applications for family unification based on EU law. The requirement to apply for a residence card and the formalities of this application may not be used to refuse entry or residence if the family relationship has been substantiated to the authorities.[672]

5.5.2 Germany

An application for family unification should be made at a German representation (*Auswärtigen Amtes*) in the country of origin. The family migrant should apply for a national visa (*Visum für das Bundesgebiet*), and not for a Schengen visa. The requirements for the national visa are the same as the requirements for a residence permit for the purpose of the stay.[673] The German representation where the application was made will forward the application to the responsible Foreigners Authority.[674] When the Foreigners Authority has made a decision, it forwards this decision to the referring representation which is formally authorised to decide on the application. Appeals against the decision of the representation should be lodged against that representation; there is no remedy available directly against the decision of the Foreigners Authority underlying the decision of the representation.

When the family migrant has obtained a national visa and has used it to travel to Germany, he needs to apply for an extension of the permit, which is then called a residence entitlement (*Aufenthaltstitel, Aufenthaltserlaubnis*).[675] The application has to be made at the Foreigners Authority of the region where the sponsor resides. The particular Foreigners Authority is also responsible for assessing the application. Without a national visa it is not allowed to apply for a residence permit for family reasons.[676] The non-compliance with the national visa obligation will not be held against the applicant if it is unreasonable in the individual circumstances for the applicant to travel to the country of origin to apply for a national visa.[677] Given normal circumstances, dispensation from the national visa requirement cannot be derived from Article 6 Basic Law, as was held by the Constitutional Court in a case in which the applicant wished to remain in Germany even though he did not apply for a national visa.[678] The Court held that Article 6 Basic Law does not contain

671 Art 25 EU Residence Order (DK).
672 Art 5(4) CD.
673 Art 6(3) Residence Act (GER).
674 Art 31 Residence Regulation (GER).
675 Art 27 and 81(1) Residence Act (GER).
676 Art 5(2)(1) Residence Act (GER).
677 Art 5(2)(2) Residence Act (GER).
678 BVerfG (04-12-2007) 2 BvR 2341/06 (GER) In atypical circumstances, dispensation can be based on Art 6 Basic Law.

a right to enter or reside and that it cannot be relied on to claim residence.[679] Besides the nationals of the member states of the EU and the European Economic Area,[680] the nationals of Australia, Israel, Japan, Canada, South Korea, New Zealand and the United States are exempted from applying for a national visa.[681] They can apply directly for a residence permit at the Foreigners Authority when they arrive in Germany.

The family members of EU nationals falling under the CD, notwithstanding their nationality, acquire the right to family unification by operation of law. However third-country nationals are required to obtain an entry visa when they do not have a residence card issued by another member state.[682] This visa does not have to be a national visa, as is required with family unification outside the scope of the CD.[683] When they arrive in Germany, a residence card should be applied for within six months after entry.[684] However, as the right of residence is acquired by operation of law, these formal requirements may not be used to refuse entry or a residence card when the family relationship is substantiated to the authorities.[685]

5.5.3 Netherlands

As mentioned before, family migrants first need to apply for a provisional entry visa before they can travel to the Netherlands.[686] The application for a provisional entry visa needs to be submitted at a Dutch consulate in the country of origin of the family migrant or in the country in which he or she has a residence permit for at least three months.[687] The application will be forwarded to the Immigration and Naturalisation Service, who will decide on the application in the name of the Deputy Minister of Security and Justice. The application needs to include a completed application form and all the required extra documents supporting the application. Also, the required administrative fees need to be paid before the application can be examined on its merits. The fee for an application for a provisional entry visa is 225 Euro. The Minister should decide on an application for a provisional entry visa within ninety days, but this term can be extended for three more months.[688]

679 Ibid para 8 This mirrors the standard passage in the case law of the ECtHR in family unification cases. See section 3.3.2.
680 Art 12 Free Movement Act (GER).
681 Art 41 Residence Regulation (GER).
682 Art 2(4) Free Movement Act (GER).
683 Ibid.
684 Art 5(2) Free Movement Act (GER).
685 Art 5(4) CD.
686 See para 8.3.1. for a list of the states whose nationals are exempted from the requirement that a provisional entry visa should be obtained in the country of origin.
687 Art 2k(1)(a) Foreigners Act (NL).
688 Art 2m Foreigners Act (NL).

If the application is accepted, the family migrant will receive an entrance visa to the Netherlands in the form of a notification in the passport.[689] This visa can be issued up to three months after the minister has issued a positive decision.[690] This visa is valid for a maximum of three months.[691] Once the family migrant has arrived in the Netherlands, he will receive a residence permit.

If the application for a provisional residence permit is rejected, the family migrant may appeal against the negative decision at the District Court of The Hague.

5.5.4 United Kingdom

An entry clearance is required for migrants who plan to stay for a period of more than six months in the UK. An entry clearance is a visa required for entry. The entry clearance requirement does not apply to persons who derive a right to enter from EU law.[692] Family migrants must apply for the entry clearance abroad. If the application meets the requirements in the Immigration Rules, entry clearance is issued and the family migrant may travel to the UK. The family migrant will receive a leave to enter which is valid for a certain period depending on compliance with the requirements.[693] The leave to enter is issued for a period not exceeding twenty-seven months, or, depending on compliance with the requirements, indefinitely. An administrative fee of GBP 826 (1,055 Euro) is charged. The requirements which must be fulfilled are laid down in paragraph 281 of the rules. There are different categories of requirements applying to different groups of people. In the chapters on entry requirements the contents of the requirements will be analysed. If the entry clearance is denied, this decision may be appealed. However, during the appeal the applicant must stay abroad. Third-country national family members of a national of one of the states which are party to the European Economic Area need to apply for an EEA family permit before travelling to the UK.[694] The conditions on the right to enter the UK are laid down in section 11 of S.I. 2006/1003. The procedures and requirements, as well as compliance with Directive 2004/38 on the free movement of persons, will be assessed in the following chapters.

In some circumstances leave to remain may be applied for in the UK itself. This is only possible if the family migrant had a different residence entitlement

689 Art 2n Foreigners Act (NL).
690 Art 2j(1) Foreigners Act (NL).
691 Art 2j(2) Foreigners Act (NL).
692 Art 7(1) Immigration Act 1988 (UK).
693 Art 282 Immigration Rules (UK).
694 Art 11(2)(b) Immigration (European Economic Area) Regulations 2006 (UK).

in the UK prior to the application for a residence permit. The condition posed is that the initial residence permit, issued for different grounds for residence, should be valid for more than six months, commencing from the day that the permit was granted.[695] This excludes visitors, student visitors and prospective students from the scope of application of this exemption of the entry clearance requirement, as these categories get leave to remain for a maximum of six months. The requirements which apply are laid down in section 284, and are generally the same as for spouses who apply from outside the UK. Through the six months residence requirement, the procedure to apply in the UK for residence as a family member cannot be used by illegally residing immigrants to regularise their stay. If an illegally residing immigrant wishes to legally stay with a family member in the UK he must go to the country of origin to apply for an entry clearance.

5.6 CONCLUSION

In this chapter the research question concerning whether structural and systematic characteristics of the legal systems in the selected member states exist which shape their domestic family unification law was addressed. It was found that the selected member states have different legal traditions and different ways of codifying the right to family unification in their domestic legal systems. Another objective of this chapter was to introduce the legal framework on family unification in the selected member states. To this end, the different legal instruments of the selected member states were discussed. To provide an overview of the translated names of those instruments, the table below provides the names of the different legal instruments that are used throughout the comparison in the following chapters. An asterisk (*) after the instrument indicates that the instrument is a formal law.

Denmark	*Germany*	*Netherlands*	*United Kingdom*
Aliens Act* Aliens Order EU Residence Order	Residence Act* Residence Regulation Administrative Guidelines Free Movement Act*	Foreigners Act* Foreigners Decree Foreigners Regulation Foreigners Circular	Immigration Act 1971* Immigration (European Economic Area) Regulations 2006 Immigration Rules Immigration Directorate Instructions

Table 5.1. The different legal instruments in the selected member states.

The system of immigration law is largely similar in the four selected countries. In each country one or more formal laws exist supported by lower regulations.

695 Art 284(1) Immigration Rules (UK).

Similarities can be found between the Netherlands and the United Kingdom, where the substance of family unification rules is not laid down in a formal law, but in lower regulations. In Germany and in Denmark the substantive requirements are laid down in formal law. In Denmark the wording of the provision on family unification in formal law indicates that the granting of family unification is a discretionary competence, but in fact the authorities are bound by the restrictions placed upon them by the legislation and therefore the discretionary character of the provision is limited. A similar approach can be seen in the Netherlands. Because of certain opt-outs to EU legislation, the FRD is applicable in Germany and the Netherlands, but not in Denmark and the United Kingdom. It could be expected that this would be visible in the general characteristics of the law on family unification in these countries. However this is not the case. All of the member states allow for family unification within their legal systems. The fact that Denmark and the United Kingdom are not under any obligations under the FRD does not alter this. An explanation for this is that domestic immigration law, including the law on family unification, existed long before the enactment of the FRD and the structures did not change after the adoption of this Directive. In the following chapters it will be shown that in terms of definition of the family and substantive and procedural requirements, difference do exist between the selected member states.

6 Definition of the family

6.1 INTRODUCTION

In Chapter 3 of this dissertation, it was argued that Article 8 ECHR on the right to respect for private and family law lays down minimum rules which are binding on the contracting states. In each case concerning family unification, the ECtHR needs to establish whether the circumstances of the case amount to private or family life within the scope of Article 8 ECHR. By doing this, the ECtHR created minimum norms as to who qualifies as a family member. As the definition of the family in the domestic law of the selected member states is not directly derived from the definition of the family in the case law of the ECtHR, the latter merely lays down minimum norms for who qualifies as a family member, the domestic law of the selected the member states on the definition of the family is analysed in this chapter. Where this is relevant it is investigated whether the domestic definition of the family corresponds to the minimum standards provided by the case law of the ECtHR.

In Chapter 4 of this dissertation, the different legal regimes on the right to family unification within EU law were identified. The distinction between family unification within the context of the free movement rights and family unification outside this context was explained. As there are different legal regimes covering the right to family unification, different definitions of the family are also used.

The research question addressed in this chapter is who is eligible for the right to family unification. In section 1 of this chapter, the definition of the family used in situations within the scope of the free movement of persons is assessed. In section 2 of this chapter, family unification outside the scope of the free movement of persons is evaluated. Germany and the Netherlands are bound by the FRD, while Denmark and the United Kingdom are not. The differences and similarities resulting from the (in)applicability of the FRD are analysed. Sections 1 and 2 are each divided into sub-paragraphs on a different category of family members. For each category, the applicable EU law is first analysed, after which the domestic law is evaluated based on the minimum standards offered by the case law on Article 8 ECHR.

6.2 FAMILY UNIFICATION WITHIN THE SCOPE OF THE FREE MOVEMENT OF PERSONS

The Free Movement of Persons Directive (CD) is applicable in all the member states investigated in this research. No member state is allowed to opt-out from the CD. The definition of the family is laid down in Article 2(2) CD. The member states are obliged to allow family unification of all those family members covered by Article 2(2). Besides this provision, the member states are also obliged to facilitate family unification of those categories of family members defined in Article 3(2) CD. The member states must undertake an extensive examination of the personal circumstances and must justify any denial of entry or residence to family members included in this category. There is a clear distinction between Article 2(2) and Article 3(2) CD. Where Article 2(2) defines the family members who have a right to family unification based on the CD, Article 3(2) merely urges the member states to facilitate entry and residence of the mentioned family members. In that provision it is unclear, however, what the notion of facilitation implies precisely. See for further analysis section 4.4.3.

6.2.1 The sponsor

EU law

The scope of the CD is limited to EU nationals who move to or reside in another member state than that of which they are a national and their family members, irrespective of the nationality of the family member.[696] This means that the nationals of a member state who reside in their home member state are in principle outside the scope of the CD. However, the CJEU has developed case law extending the scope of the CD to EU nationals who reside in their home state. In order for the CD to be applicable to EU nationals residing in their home state, there should be a meaningful link between that person and EU law. For EU law to be applicable, there needs to be a sufficient link between a particular situation and EU law.[697] When such a meaningful link is found, the CJEU established that EU law is applicable. In *Surinder Singh*, the CJEU accepted the situation where a British national moved with his Indian spouse to Germany, to later return to the United Kingdom, constituted such a meaningful link with EU law.[698] Even though in *Akrich* the CJEU nuanced this reasoning,[699] by allowing member states to require prior lawful residence in the home member

696 Art 3(1) CD.
697 *Morson and Jhanjan* (n 337).
698 *Surinder Singh* (n 460) para 21.
699 *Akrich* (n 504).

states, in *Metock* the Court fully endorsed its own approach from *Surinder Singh*.[700]

By making use of the free movement of persons right and returning to the home member state, a home national comes within the scope of EU law. The CD can therefore be applicable to home nationals. It needs to be established in the domestic proceedings whether a sufficiently meaningful link with EU law exists. The determination of whether such a sufficiently meaningful link exists is a question of EU law, although the determination is made by the domestic administrations and the domestic judiciary.

Domestic law

In *Denmark* the definition of the family is laid down in the EU Residence Order. The wording of the EU Residence Order suggests that it only applies to non-Danish EU citizens as sections 8 to 12 refer to the family members of an EU citizen, and section 13 refers to the family members of Danish citizens. Section 13 lays down that, to the extent that it follows on from EU law, family members of a Danish national have a right of residence in Denmark extending for longer than the three- or six-month period pursuant to section 2(1) and (2) of the Aliens Act.[701] How this provision for Danish national sponsors should be implemented, is further specified by a Notice of the Immigration Service on the processing of applications for family unification under EU rules where the sponsor is a Danish citizen.[702]

In *Germany* the Free Movement Act is only applicable to non-German EU nationals within the scope of the free movement of persons. Article 1 Free Movement Act excludes German nationals from the scope of the Act. For this reason German nationals cannot be sponsors within the scope of the Act. As such, this infringes EU law as considering the case law of the CJEU, German nationals who made use of their free movement rights are also within the scope of EU law and should therefore also be within the scope of the Free Movement Act.[703] However, the scope of the Free Movement Act is in practice extended to include German nationals who are within the scope of EU law.

In the *Netherlands* the implementation of the definition of the family within the context of the free movement of persons is laid down in Article 8.7 Foreigners Decree. However, in Article 8.7(1) Foreigners Decree a distinction is made between Dutch national sponsors and non-Dutch national (*vreemdeling*) sponsors. This distinction stems from the fact that home citizens fall outside

700 *Metock and others* (n 468) See section 4.5.1. for further analysis.
701 Section 13 EU Residence Order (DK).
702 Udlændingeservice, *Meddelelse om Udlændingeservices sagsbehandling af ansøgninger om familiesammenføring efter EU-reglerne, hvor referencen er dansk statsborger* (2011).
703 A. Fischer-Lescano, 'Nachzugsrechte von drittstaatsangehörigen Familienmitgliedern deutscher Unionsbürger' [2005] ZAR p 288.

the scope of the CD, although the CD applies by analogy to returning home citizens. Before the latest amendment of the Foreigners Circular it stated that Article 8.7 Foreigners Decree also applied to returning Dutch citizens.[704] This provision has, however, now been removed from the Foreigners Circular. This does not mean that administrative practice has changed, but rather that it is no longer provided for in the policy rules. As long as in practice the CD is applied by analogy to returning Dutch citizens, there is no implementation problem.

In the *United Kingdom* the sponsor is referred to as the 'qualified person'. A qualified person is an EEA national who fulfils one of the substantive requirements.[705] Citizens of the United Kingdom who return to the United Kingdom with their third-country national family members qualify as sponsors if they are a worker or self-employed person and are living together with the third-country national family member.[706] It is curious that workers and self-employed persons are singled out as the only home citizens who qualify for a derived right of residence and the other categories are not mentioned.

Interim Conclusion

Denmark, Germany and the Netherlands have implemented the CD in such a way that their implementing legislation excludes own nationals who are within the scope of the free movement of persons. This can be explained by the fact that in the CD itself home citizens are explicitly excluded from the scope of the directive. The member states have found ad-hoc solutions to include home nationals in particular circumstances in the scope of the free movement of persons in their domestic legal system without principally amending the implementing legislation. What should, however, be emphasised is that the determination of whether a home national is within the scope of the free movement of persons is always a question of EU law, even if the conclusion is that in the particular circumstances of the case there is no sufficient link with EU law.

6.2.2 Spouses and registered partners

EU law

Spouses are within the scope of the CD pursuant to Article 2(2)(a) CD. The meaning of the term spouse is not further defined in the CD. Therefore it is

704 See the former Art B10/5.3 Foreigners Circular (NL).
705 Art 6 Immigration (European Economic Area) Regulations 2006 (UK) The substantive requirements are discussed in section 7.2.2.
706 Art 9 Immigration (European Economic Area) Regulations 2006 (UK).

unclear from the text of the CD what exactly constitutes a spousal relationship. Generally it is understood that this category covers marriages. Unmarried partners are not considered to be spouses, as in *Reed* the CJEU established that the term spouse only refers to marital relationships.[707] According to the interpretative guidelines issued by the Commission, polygamous and forced marriages are outside the scope of the definition of the family in the context of the CD.[708]

The CD does not contain any explicit reference to same-sex marriages. Recital 31 of the Directive states that the member states should implement the Directive without discrimination on, amongst others, grounds of sexual orientation. Therefore in theory every marital relationship legitimately contracted in any state is recognised in principle under the Directive as a spousal relationship, including same-sex marriages and these are therefore within the scope of the Directive.[709] However many member states do not seem to recognise the validity of same-sex marriages, and it is questionable whether in these states same-sex marriage partners are recognised as spouses.[710] It therefore depends on the legislation and practice in the member states whether partners in same-sex marriages are recognised as spouses and are therefore within the scope of the Directive.

Pursuant to Article 2(2)(b) CD, registered partners are included in the definition of the family and therefore derive a right to family unification from the Directive, if in the host member states the status of a registered partnership is equivalent to the status of a marriage. If this is the case, same-sex registered partnerships should also be recognised in the host member states. However, if in the host member state the status of registered partnership does not exist, or if it is not deemed equivalent to a marriage, registered partnerships are not included in the definition of the family and therefore the member states would not have to provide for family unification. To conclude, the question of whether a right to family unification for registered partnerships exists under the CD depends on the domestic legislation of the member states.

Domestic law

In *Denmark* Article 2(1) EU Residence Order qualifies spouses as family members within the scope of the free movement of persons. Danish legislation provides for same-sex marriages. Legitimately contracted same-sex marriages are accepted as spousal relationships under Danish law and are therefore

707 Case C-59/85 *Reed* [1986] ECR 1300 para 15.
708 COM(2009) 313 final (n 463) p 4 .
709 C. Waaldijk, 'Free Movement of Same-Sex Partners' (1996) 3 Maastricht Journal of European Comparative Law p 278.
710 Fundamental Rights Agency, *Same-Sex Couples, Free Movement of EU citizens, Migration and Asylum* (2012).

eligible for family unification under the EU Residence Order. In Denmark registered partners are treated as spouses with regard to family unification in the context of the free movement of persons pursuant to Article 1(2) EU Residence Order. There is no distinction between spouses and registered partners in Danish legislation.

In *Germany* the spouse is considered to be a family member within the scope of the free movement of persons pursuant to Article 3(2)(1) Free Movement Act. Germany does not allow for same-sex marriages. Same-sex marriages contracted in another country are not recognised in Germany and are therefore not seen as a spousal relationship in the context of the Directive.

Germany does not provide for family unification of registered partners in the context of the free movement of persons. However it does have a registered partnership status in its domestic legislation. This is laid down in the Registered Partnership Act (*Gesetz über die Eingetragene Lebenspartnerschaft*). Article 11(1) of this Act provides that the registered partner is considered to be a family member unless other provisions say otherwise. Article 2(2) CD provides that a registered partnership is considered to be a family relationship in so far as the domestic legislation of the host member state grants the same status to registered partnerships as it does to marriages. The question of whether the absence of the possibility of family unification in the context of the free movement of persons for registered partners is an infringement of the CD, depends on the assessment of whether the status of registered partners in Germany can be considered similar to the status of marriage. According to Hailbronner, the status of registered partnerships and marriages is sufficiently different to conclude that Germany is not under the obligation to recognise registered partnerships as family members in the context of the CD.[711] However, in the conformity study of the implementation of the Directive by Germany commissioned by the Commission it is argued that the status of registered partnership should be considered as similar to marriage and it therefore concludes that Germany is not in conformity with Article 2(2) CD.[712] However, as admitted in the conformity study, this is mitigated as the same category is considered as a family member under Article 3(2) CD which is applied in such a way that the right to family unification is granted anyway, as is outlined below.[713] This is, however, the reason that in the implementation report by the Commission Germany is not listed as one of the member states which considers registered partners as family members thereby granting the same right to family unification to same-sex couples.[714]

711 Hailbronner (n 655) p 444.

712 Milieu Ltd, *Conformity Study for Germany: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (Commissioned by the European Commission, 2008) p 7.

713 Ibid p 24.

714 COM(2008) 840 final (n 371) p 4.

In the *Netherlands* spouses are considered to be family members within the scope of the free movement of persons as laid down in Article 8.7(2)(a) Foreigners Decree. Like in the CD, the definition of the notion of spouse is not further elaborated. In Dutch legislation same-sex marriage are allowed. Same-sex marriages legitimately contracted in another state are accepted as spousal relationships under Dutch law. The rules on which marriages are legitimately contracted abroad are the same for same-sex and different-sex marriages.[715]

In the Netherlands registered partnerships enjoy the same status as a marriage. The registered partnership is also open to different-sex couples.[716] Family unification is possible for family members who are the registered partner of a Union national pursuant to Article 8.7(2)(b) Foreigners Decree. A prerequisite is that the registered partnership contracted abroad is considered as valid in accordance with Dutch private international law. The question of whether a registered partnership is contracted in accordance with Dutch private international law depends on whether the registered partnership contracted abroad is in conformity with Article 2(5) Act on the conflict of laws in registered partnerships ('*Wet Conflictenrecht Geregistreerde Partnerschappen*').[717]

In the *United Kingdom* the spouse is considered to be a family member within the scope of the free movement of persons pursuant to Article 7(1)(a) Immigration (European Economic Area) Regulations 2006. The legislation of the United Kingdom does not provide for same-sex marriages. Instead same sex marriages may be recognised as civil partnerships covered by the same provision. In theory, however, same-sex marriages would be recognised under the IDI if certain conditions are fulfilled.[718] However, in practice same-sex marriages are recognised as civil partnerships and under that provision, which in the domestic legislation is exactly the same provision as for spouses, are eligible for family unification within the scope of the free movement of persons.

The legislation of the United Kingdom, does offer the possibility of civil partnerships in domestic legislation. In the United Kingdom civil partnerships are only open to same-sex couples.[719] Civil partners are eligible for family unification within the scope of the free movement of persons pursuant to Article 7(1)(a) Immigration (European Economic Area) Regulations 2006. Registered partnerships which are contracted overseas are eligible for family unification if certain conditions are met. Schedule 20 to the Civil Partnership Act 2004 contains a list of foreign civil partnerships which are recognised in

715 Those rules are laid down in Art 5 Wet Conflictenrecht Huwelijk (NL) (Act on conflicts of law relating to marriage).

716 Art 1:80a(1) Burgerlijk Wetboek (NL) (Civil Code).

717 See I. Curry-Summer, 'Private International Law Aspects of Homosexual Couples: The Netherlands Report' in J. Van Erp and L. Van Vliet (eds), *Netherlands Reports to the Seventeenth International Congress of Comparative Law* (Intersentia 2006).

718 Art 2 IDI Chapter 8 Section 1 Appendix B (Recognition of Marriage and Divorce).

719 Art 1(1) Civil Partnership Act 2004.

the United Kingdom. Those registered partnerships are eligible for family unification. If a registered partnership from a particular country is not on the list, it may still be recognised if under the law of the country where the relationship was formed the relationship is exclusive in nature, is indeterminate in duration and results in the parties to the relationship being regarded as a couple or treated as married.[720]

Interim Conclusion

All selected member states allow for the family unification of spouses within the scope of the free movement of persons. The only contested issue is the recognition of same-sex marriages as spousal relationships. This is the case in the Netherlands and Denmark, where same-sex marriages are allowed for in domestic legislation, but not in the United Kingdom and Germany where this is not the case. The United Kingdom does grant the right to family unification within the scope of this Directive by recognising same-sex marriages as civil partnerships.

All selected member states have a form of registered partnerships in their domestic legislation. Only Germany does not allow for family unification of registered partnerships within the scope of the free movement of persons under Article 2(2)(b) CD. However, Germany does provide for the possibility for family unification for same-sex couples under Article 3(2)(b) CD. Therefore, the possible infringement of Article 2(2)(b) CD by Germany is of less practical significance. Both the Netherlands and the United Kingdom have laid down detailed rules on the recognition of registered partnerships contracted abroad in their domestic legal system.

6.2.3 Unmarried partners

EU law

Unmarried partners fall under the regime of Article 3(2) CD, meaning that the member states are under the obligation to facilitate the family unification of this category, but that no separate enforceable right to family unification for unmarried partners exists under the CD.

In *Reed*, the CJEU ruled on the free movement of unmarried partners. In this case, the British national applicant sought residence in the Netherlands based on the fact that her British partner lawfully resided as a worker in the Netherlands. At the time of the dispute, Regulation 1612/68 covered the free movement of persons and their family members. The CJEU held that nothing

720 Art 4 IDI Annex 8 Section 2 Annex H (Civil Partnerships).

suggested that unmarried partners should be regarded as spouses, but that the principle of non-discrimination based on nationality precludes domestic legislation which treats unmarried EU citizens with another nationality different to unmarried domestic citizens. In other words, if domestic Dutch legislation provided for the family unification for unmarried partners of Dutch nationals, then this must also be the case for other EU citizens.[721]

Domestic law

In *Denmark*, the rules covering family unification within the scope of the CD for unmarried partners are the same as the rules covering spouses and registered partners. Unmarried partners are defined as family members in Article 2(3) EU Residence Order. The origin of the equivalent regimes lies in Article 9(1)(1) Foreigners Act, in which spouses and unmarried partners are given the same status. Based on the prohibition of discrimination based on nationality apparently laid down in the *Reed* ruling of the CJEU, the equalisation of the marriage and unmarried partner status was paralleled in Article 9 EU Residence Order.[722] To determine whether a genuine unmarried partnership exists, the partners must substantiate that they have lived together approximately one and a half to two years. If, due to particular circumstances, the cohabitation was less than this period, for example because of visa regulations or other practical or legal obstacles, other factors substantiating the genuineness of the unmarried partnership may be taken into account, such as proof of communication, common children or the acquisition of common property.[723]

In *German* legislation it is laid down that life partners ('*Lebenspartner*') not falling under the definition in Article 3(2)(1) EU Residence Order, fall under the provisions covering 'life partners' in the Residence Act. This is however misleading as the Residence Act does not mention the notion of 'life partner'. What is meant instead is that unmarried partners do not fall under the EU Residence Order but under the Residence Act, like is the case for German nationals who do not make use of their free movement rights. This provision effectively implements the ruling of the CJEU in *Reed*, in which it was established that if domestic legislation provides for the family unification of unmarried partners of own nationals, this should also apply for sponsors who are mobile EU citizens. Therefore, other EU nationals, who would normally not fall under the provisions applicable to German national sponsors, actually fall under these provisions pursuant to Article 3(2)(1) EU Residence Order.

In the *Netherlands* unmarried partners are not included in the list of eligible family members of Art 8.7(2) Foreigners Decree, but they are mentioned separately in Article 8.7(4) Foreigners Decree. However, in this provision it

721 *Reed* (n 707) para 29.
722 Vested-Hansen, 'Familiesammenføring' (n 601) p 138.
723 Ibid.

is mentioned that the unmarried partner of a foreigner ('*vreemdeling*') who is an EU national and comes to the Netherlands or already resides in the Netherlands has the right to family unification with an unmarried partner. This formulation is curious as it excludes Dutch sponsors, who by making use of their free movement right are within the scope of the CD, from the right to family unification derived from the CD. As was the case for Germany, this could be the implementation of the *Reed* ruling of the CJEU, which required equal treatment of nationals and other EU citizens with regard to the family unification of unmarried partners. However, this formulation places Dutch citizens at a disadvantageous position, as Dutch citizens in this way are not covered by the CD, though they are entitled to it. When the Netherlands chooses to provide the right to family unification of unmarried partners to Dutch nationals outside the scope of the CD, it may not discriminate based on nationality and exclude unmarried partners from the scope of the implementation of the CD, as this discrimination on the grounds of citizenship is prohibited by Article 18 TFEU, which is reiterated in recital 20 of the CD. The existence of a genuine unmarried partnership is assumed when the relationship is comparable to a marriage to a sufficient extent.[724] Before an amendment of the Foreigners Circular, the policy rules stated that a genuine unmarried partnership is assumed when the applicants can provide evidence that they have cohabited for at least six months or when there is a common child.[725] It can therefore be held that the policy guidance has become vaguer.

In the *United Kingdom* unmarried partners are covered in the Immigration (European Economic Area) Regulations 2006 under Article 8 on extended family members. This provision implements the entire facultative regime of the CD. There is, however, a distinction between family members falling under the obligatory regime, which is laid down in Article 7, and family members falling under the facultative regime, falling under Article 8. Article 12(1) Immigration (European Economic Area) Regulations 2006 establishes that an Entry Clearance Officer 'must' provide an EEA permit in the case of family members covered by Article 7 and 'may' provide a permit for extended family members if it appears appropriate to the Entry Clearance Officer to issue such a permit.[726] Article 12(3) Immigration (European Economic Area) Regulations 2006 provides that an extensive examination of the personal circumstances involved needs to take place and that negative decisions should be motivated, as is required by Article 12(2) CD. This means that in the case of extended family members there is a wide margin of discretion for the authorities, while in the case of family members there is a legally enforceable right to family unification. In line with the ruling issued much later by the CJEU in *Rahman*, the Asylum and Immigration Tribunal held that Article 3(2) CD does not create

724 Art B7/3.1.1. Foreigners Circular (NL).
725 See the former Art B10/1.7 Foreigners Circular (NL).
726 Art 12(2)(c) Immigration (European Economic Area) Regulations 2006.

any legally enforceable right to family unification as such.[727] It can therefore not be held that the wide discretionary competence of the administration in this regard infringes the CD.

Interim Conclusion

Denmark is the only member state investigated in this research which fully extends the right to family unification within the scope of the CD to unmarried partners. Germany, the Netherlands and the United Kingdom do so to some extent, partly to implement the CJEU ruling in *Reed*, but not fully. Germany grants the right to family unification to unmarried partners within the scope of the CD in the same way as unmarried partners of German residents outside the scope of the CD are regulated. This places this category of family unification effectively outside the scope of the CD. In the Netherlands the right to family unification within the scope of the CD is only granted to foreigners, excluding Dutch nationals, even in the case a Dutch national is within the personal scope of the CD. If this regulation is also applied in this manner, it would constitute an infringement of EU law. In the United Kingdom, Entry Clearance Officers have wide discretion in determining whether an unmarried partner is granted an EEA permit.

6.2.4 Direct descendants

EU law

Direct descendants under 21 of both the sponsor and the spouse are within the definition of the family pursuant to Article 2(2)(c) CD. Direct descendants older than 21 belong to the definition of the family as long as they are dependent on their parents. According to the interpretative guidelines issued by the Commission, direct relatives also include adoptive relationships, minors who are under the custody of a permanent legal guardian. Foster children might fall under the definition of the family depending on the strength of the family ties.[728] Unmarried partnerships are not included in Article 2(2) CD and the member states are not obliged to allow for family unification of unmarried partners under Article 3(2) CD. The direct descendants of the family member in an unmarried partnership are equally not covered by Article 2(2) CD, but neither by Article 3(2)(b) CD. They could be covered by Article 3(2)(a) CD, provided that they are dependent on the sponsor. This means that to a large extent the direct descendants of the family member in an unmarried partnership are not covered by the CD at all. It should be noted that the direct des-

727 *AK (Sri Lanka)* [2007] UKAIT 00074 (UK).
728 COM(2014) 210 final (n 374) p 5.

cendants of both the sponsor and the family member in an unmarried partnership are covered by Article 2(2) CD as the direct descendants of the sponsor. Ironically this creates the situation that the member states are obliged to allow the family unification of the direct descendants from an unmarried partnership, but are not obliged to allow the family unification of the unmarried partner.

To determine whether a family relationship can be characterised as being 'dependent', the factual circumstances must be evaluated. In practice this means that it must be established whether material support is provided to the family member by the Union citizen or his spouse.[729] It is not relevant for what reason the family member is dependent, neither whether the family member could provide for himself by taking up paid employment.[730] Any appropriate means of documentary evidence of dependence may be used to determine whether a dependent family relationship exists.[731]

Domestic law

In *Denmark* direct descendants are eligible for family unification within the scope of the free movement of persons pursuant to Article 2(1)(ii) EU Residence Order. Direct descendants cover both children and grandchildren. Both the children of the sponsor and the children of the spouse are covered by the provision. Only children under the age of 21 and other dependent descendants are entitled to family unification within the free movement of persons. As unmarried partnerships enjoy the same status as spousal relationships, the direct descendants from unmarried relationships are also covered by Article 2(1)(ii) EU Residence Order.

In *Germany* direct descendants are covered by Article 3(2) (1) Free Movement Act. The category of direct descendants covers both children and grandchildren. As Germany does not provide for the family unification of unmarried partners within the scope of the CD, the direct ascendants of the family member in an unmarried partnership are also not covered by the EU Residence Order. However, when a child is born from an unmarried partnership, the child is eligible to join the sponsor in Germany. But the unmarried partner, and co-parent of the child, is not within the scope of the CD and the EU Residence Order. This does, however, not exclude the possibility that such parent is eligible for family unification under ordinary domestic immigration law.

In the *Netherlands* direct descendants under 21 years old or dependent on the sponsor or the family member of both the sponsor and the family member are covered by Article 8.7(2)(c) Foreigners Decree. Article B10/1.7 Foreigners Circular explains that grandchildren and great-grandchildren are also covered by this provision. The direct descendants of unmarried partners are covered

729 Case 316/86 *Lebon* [1987] ECR 2811 para 22; Case C-1/05 *Jia* [2007] ECR I-0001 para 36-37.
730 *Jia* (n 729) para 22; *Baumbast and R* (n 490) Opinion of AG Geelhoed para 39.
731 Case C-215/03 *Oulane* [2005] ECR I-1215 para 53; *Jia* (n 729) para 41.

by Article 8.7(4) Foreigners Decree. The limitation included in this paragraph is that the direct descendants must be younger than 18 years of age. This means that the Netherlands has a different regime for direct descendants from spousal relationships and registered partnerships on the one hand and direct descendants from unmarried partnerships on the other hand. Article 8.7(4) Foreigners Decree does not mention the possibility for the family unification of dependent direct descendants over 18.

In the *United Kingdom*, direct descendants under 21 years old or dependent on the sponsor and the spouse are defined as family members in Article 7(1)(b) Immigration (European Economic Area) Regulations 2006. Direct descendants from the family member in an unmarried partnership are not covered by Article 7(1)(b) Immigration (European Economic Area) Regulations 2006, and are also not regarded as 'extended family members' pursuant to Article 8 Art 7(1)(b) Immigration (European Economic Area) Regulations 2006. See section 1.3 for more information on unmarried partners and extended family members. This means that the legislation of the United Kingdom does not provide for the family unification of the direct descendants of the family member in an unmarried partnership.

Proving dependency

The member states have different rules on proving a dependent family relationship.

In *Denmark,* the Immigration Service has issued guidelines on the application of the EU residence act. These guidelines contain specific norms on what constitutes a dependent situation within the meaning of the EU Residence Order. The requirements mentioned are that the family member must not be able to provide for his or her basic needs, the material needs of the family member must be covered by the EU citizen, the dependency should exist in the country of origin of the family member or in the state in which he resided when the application was made, the mere situation of support does not prove the existence of a real situation of dependency and there must be evidence of the need for material support.[732] Some of these criteria go further than what is allowed under EU law. It depends on the application of these criteria in practice whether this results in an infringement of EU law.

In *Germany,* the notion of dependency is not further defined in domestic regulation. In the commentaries to the EU Residence Order, the commentators refer extensively to EU law, but not to domestic practice or case law.[733]

732 Udlændingeservice, *Vejledning til statsforvaltningerne vedr. ophold efter EU-Opholdsbekendrgorel sen* (2009) p 59.

733 See for example R. Hofmann and H. Hoffmann (eds), *Ausländerrecht: Handkommentar* (Nomos 2008) section 3(II)(1)(g).

In the *Netherlands,* Article B10/2.2. Foreigners Circular lays down that in each case of family unification of a dependent relative, it needs to be established that the family member, considering his financial and social position, needs material support to meet the basic needs in the country of origin. This provision leaves a lot of margin of appreciation to the authorities. The sentence 'considering his financial and social position' seems to suggest that the factual presence of a material dependent relationship is in itself not always sufficient to establish a dependent family relationship. The position of the Council of State on this issue is ambivalent. In 2010 the Council of State ruled in a case in which a dependent relative older than 21 sought to reside in the Netherlands based on the family relationship with his parents who were within the scope of the free movement of persons.[734] The Council of State held that to determine dependency it should be established whether at the time of application the family member was dependent on the sponsor in the country of origin. The fact that the family member had already resided in the Netherlands for a long time was deemed irrelevant.[735] In 2012 the Council of State ruled in a case in which a dependent relative older than 21 sought to remain in the Netherlands based on the family relationship with his mother and stepfather who were within the scope of the free movement of persons.[736] The Council of State held that it is relevant to consider whether it is necessary that the family member is dependent on the sponsor.[737] However in the case law of the CJEU, the reasons for the dependent relationship and the question whether the applicant would be able to take care of himself by taking up paid employment are not relevant. This illustrates the problematic implementation of the notion of dependency in Article B10/2.2. Foreigners Circular.

In the *United Kingdom*, a person is considered dependent when he is not able to meet his essential living needs without the support of the sponsor or the family member.[738] The reason for reliance on support from the family is not relevant in this respect, neither is the possibility that the family member can meet his own needs by taking up paid employment.

Interim Conclusion

All member states allow for the family unification of direct descendants. Problems in the implementation of this provision can only be found in what constitutes a dependent relationship. EU law precludes domestic practices implementing the concept of dependency further than requiring material support. How this obligation is implemented in practice is often unclear. In

734 Council of State (25-01-2010) 200903327/1/V2 (NL).
735 Ibid para 2.2.2.
736 Council of State (30-08-2012) 201111140/1/V4 (NL) .
737 Ibid para 2.7.
738 European Casework Instructions (UK) chapter 5, p 4.

the Netherlands, the 'financial and social position' of the family member in the host state is considered. In the United Kingdom the determination of dependency is based on the notion of essential living needs. These implementations give the member states a considerable margin of appreciation. It is questionable whether such interpretations of the concept of dependency are in conformity with EU law, in which the decisive criteria is whether there is support, and not why the dependency exists.

6.2.5 Direct ascendants

EU law

The direct ascendants of both the sponsor and the spouse are included in the definition of the family pursuant to Article 2(2)(d) CD, provided that they are dependent on their children. Direct ascendants who are not dependent on their children are therefore excluded from the definition of the family. This excludes the possibility that a child can be the sponsor for the family unification of a third-country national parent.[739]

This was established by the CJEU in *Zhu and Chen*. In that case, the Chinese parents of a young child holding Irish nationality sought to reside in the United Kingdom with their child. The CJEU held that a parent cannot be dependent on a child as dependency requires some kind of material support. For that reason, the situation was not covered by the provision granting the right to family unification to dependent relatives in the ascending line. Instead, the CJEU held that the withdrawal of the right to reside in the member state of the parents would deprive the right of residence of the child of any useful effect. For that reason, the CJEU held that the parents of a child holding the right of residence in a member state derive a right to reside in that member state directly from what is now Article 20 TFEU. It must be noted that the right to family unification of the parents is accessory to the right of residence of the child, meaning that if one of the parents had had the right to reside, the other parent could potentially not have relied directly on Article 20 TFEU. This residence right for parents is derived directly from the Treaty and not from secondary law, and is therefore outside the scope of the CD.

In *Ruiz Zambrano* the CJEU considered whether the parents of an immobile EU citizen can derive the right to family unification from the CD. The CJEU held that as there was no cross-border element, the CD was not applicable. Again, the CJEU derived a right to reside in the host member state directly from the

739 See chapter 10 on the domestic implementation of the Ruiz Zambrano ruling for an analysis of the situation in which the child in effect serves as the sponsor for the family unification of its parent.

TFEU and not from the CD. The *Ruiz Zambrano* case is discussed at length in Chapter 9.

The issue of the right to family unification of a parent of an EU citizen arose again in the *Iida* case.[740] In this case, a Japanese national is the father of a German national child. After the marriage between the Japanese applicant and his German spouse collapsed, the German authorities decided to withdraw the residence permit of the applicant. In accordance with German legislation, the Japanese applicant could have been eligible for a residence permit based on his child, but since the mother took employment in Austria, she took the child to live with her there, making it impossible for the applicant to obtain a residence permit in Germany. The question is whether the cross-border element in this case, as the EU citizen child had moved to Austria, brings the case within the scope of the CD and whether the father can derive a right to family unification from the CD. There are three possible scenarios: the father has a right to family unification in Germany, where he currently lives and previously lived with his child, the father has a right to reside in Austria, where his child currently lives, or the father does not have a right to reside in any EU member state based on the relationship that exists between him and his daughter. Like in *Zhu and Chen*, based on the previous case law of the CJEU in *Lebon* it cannot be established that the father is dependent on the child.[741] Therefore, it cannot be held that Article 2(2) CD is applicable to this case. It could, however, be held that the father falls under the facultative regime of Article 3(2) CD, but this provision does not grant a legally enforceable right. It depends on the domestic legislation of the member state whether a right to family unification can be indirectly derived from this provision. It seems unlikely that the father in this case can derive a right to family unification directly from Article 20 TFEU, as in *Zhu and Chen* and in *Ruiz Zambrano*, because the right to reside in the EU of the child is not threatened by the absence of the right to reside of the father. What the CJEU will decide in this case remains to be seen. In any case, it seems unlikely that the applicant can derive a right to family unification from the CD.

The direct ascendants of the family member in an unmarried partnership are not included in the definition of the family of Article 2(2) CD and neither in Article 3(2) CD. It should be noted that the dependent direct descendants of the sponsor are eligible for family unification pursuant to Article 2(2)(d) CD.

Domestic law

In *Denmark* dependent relatives in the ascending line are included in the definition of the family pursuant to Article 2(1)(iv) EU Residence Order. As unmarried partnerships enjoy the same status as a spousal relationship in

740 *Iida* (n 541).
741 *Lebon* (n 729).

Danish legislation, the dependent direct ascendants of the family member in an unmarried partnership are also covered by Article 2(1)(iv) EU Residence Order.

In *Germany* dependent relatives in the ascending line derive a right to family unification within the scope of the CD pursuant to Article 3(2)(2) Free Movement Act.

In the *Netherlands* dependent relatives in the ascending line of both the sponsor and the spouse are included in the definition of the family pursuant to Article 8.7(2)(d) Foreigners Decree. Before the latest major amendment of the Foreigners Circular, Article B10/1.7 prescribed that direct relatives in the ascending line can be both parents and grandparents, however after the revision this was removed from the Foreigners Circular.

In the *United Kingdom*, dependent relatives of both the sponsor and the spouse or civil partner in the ascending line are included in the definition of the family pursuant to Article 7(1)(c) Immigration (European Economic Area) Regulations 2006.

Interim Conclusion

All selected member states have implemented the obligation to provide for the family unification of dependent relatives in the ascending line. Out of the four selected member states, only Denmark provides for the family unification of direct ascendants of the family member in an unmarried partnership.

6.2.6 Other family members

EU law

Article 3(2)(b) CD lays down that the member states must facilitate the family unification of all other family members who are dependent on the EU citizen holding the primary right of residence in the host member state or are members of the household and where serious health grounds strictly require the personal care of the family member by the EU citizen. It must once more be noted that the member states are under no legal obligation to provide for family unification of family members belonging to this category. The member states are only required to facilitate family unification.[742]

742 See section 4.4.3.

Domestic Law

In *Denmark,* persons falling within the scope of Article 3(2)(a) CD are included in the definition of the family pursuant to Article 2(1)(v)&(vi) EU Residence Order. They are included as ordinary family members who derive a right to reside in Denmark from the EU Residence Order. In this way, Denmark grants the right to family unification to this category, which goes beyond the facilitation of family unification, as required by the CD.

Germany did not implement the provision on the facilitation of the right to family unification of family members who are not covered by Article 2(2) CD. Article 3(2)(a) CD is not implemented in the Free Movement Act. This can be considered as a non-transposition of the obligation to facilitate.[743] Whether this results in infringements of this provision depends on administrative practice.

The *Netherlands* chose not to implement the notion of facilitation separately, but instead grants the right to family unification to persons falling under Article 3(2)(a) CD. This is laid down in Article 8.7(3) Foreigners Decree. This implementation goes beyond the requirements of the CD.

In the *United Kingdom* persons covered by Article 3(2)(a) CD can derive a right to family unification as extended family members from Article 8 Immigration (European Economic Area) Regulations 2006. However, pursuant to Article 12(2), Entry Clearance Officers have wide discretionary competence in determining whether a permit is granted. For more information on the United Kingdom policy on extended family members, see section 6.2.3. As the CD merely requires the member states to facilitate the family unification of persons covered by Article 3(2)(a) CD, the implementation of the United Kingdom does not infringe the CD.

Interim Conclusion

The selected member states have implemented the obligation to facilitate the family unification of persons covered by Article 3(2)(a) CD differently. The Netherlands and Denmark have opted to grant the right to family unification to these persons, which goes beyond the obligations from the CD. The United Kingdom does offer the possibility for family unification for this category, but with a wide margin of appreciation for the Entry Clearance Officer. This is in compliance with the CD, as the directive merely requires facilitation. Germany did not implement this provision at all. Depending on administrative practice, this might result in infringements of EU law.

743 Milieu Ltd (n 712) p 25.

6.2.7 Interim conclusion

The CD guarantees the right to free movement of EU citizens and their family members irrespective of their nationality. This grants a right to family unification to all the family members of EU citizens who are within the scope of the CD. The question addressed in this section is who is eligible for family unification within the context of the CD.

In order to answer this question, first the sponsor concept was investigated. An EU national qualifies as a sponsor under the CD if he makes use of his free movement of persons by moving to another member state. Based on a textual interpretation of the CD, nationals of the state they reside in are outside the scope of the CD. However, making use of the teleological interpretation, the CJEU has established that nationals returning home also qualify as sponsors within the scope of the CD. Efforts by some member states including Denmark to limit the right to family unification within the scope of the free movement of persons were ultimately unsuccessful.

All selected member states allow for the family unification of spouses. In Denmark and the Netherlands same-sex marriages are allowed and give access to family unification. In Germany and the United Kingdom this is not the case. All selected member states have included a form of registered partnerships in their domestic legislation. In Denmark, the Netherlands and the United Kingdom registered partnerships give access to family unification. In those member states the status of registered partnership is considered similar to the status of a marriage. However in Germany, where registered partnership also exists in domestic legislation, it is considered that the status of a registered partnership is not similar to the status of a marriage. For that reason in Germany registered partnerships do not give access to family unification pursuant Article 2(2) CD. This is an infringement of the Directive. However, as registered partnerships in Germany are eligible for family unification pursuant Article 3(2) CD, the effect of this infringement is mitigated.

According to Article 3(2) CD, the member states are allowed to extend the right to family unification to unmarried partners, but are under no obligation to do so. Of the selected member states, Denmark is the only member state which fully extends the right to family unification within the scope of the CD to unmarried partners. The other member states have diverging policies on this, following the ruling of the CJEU in *Reed*. In Germany, unmarried partners within the scope of the CD are treated as German nationals applying for the family unification of unmarried partners. This effectively places them outside the scope of the CD. In the Netherlands, only EU nationals who do not have Dutch nationality are eligible for the family unification of unmarried partners. This is an infringement of the CD. In the United Kingdom, Entry Clearance Officers have a wide discretion in whether to allow for the family unification of unmarried partners. The CD grants a wide discretion to the member states

in this respect. Only in the case of the Dutch implementation can it be held that there is an infringement of the CD.

Direct descendants aged 21 and younger are eligible for family unification within the scope of the CD as long as they are dependent on their parents. All selected member states allow for the family unification of direct descendants aged 21 and younger. The only contested issue is what constitutes a dependent relationship. The implementation of the notion of dependency is a matter of EU law. Within EU law, only material support is considered relevant to establish a dependent relationship. In the Netherlands, the 'financial and social position' of the family member in the host state is considered. This exceeds the requirements of EU law and is therefore not in accordance with the CD. In the United Kingdom, dependency is determined by the notion of essential living needs. This requirement also exceeds the margin of appreciation offered by the CD. There is not yet any CJEU case law on the determination of dependency.

All selected member states allow for the family unification of dependent relatives in the ascending line within the scope of the CD. Denmark extended this to include the family members in the ascending line in unmarried partnerships.

The CD prescribed that the member states should facilitate the family unification of family members who are not covered by Article 2(2) CD. There is no clarity on the exact meaning of the concept of facilitation. In *Rahman* the CJEU established that Article 3(2) CD does not have direct effect. The member states have implemented the obligation to facilitate family unification differently. Denmark and the Netherlands have opted to grant family unification to other dependent family members. In the United Kingdom, dependent other family members are eligible for family unification within the scope of the CD, but the Entry Clearance Officer enjoys a wide discretion in this respect. Germany did not implement the obligation to facilitate family unification to dependent other relatives in any way, which is an infringement of the CD.

Overall it can be concluded that there are only a few problems in the implementation of the CD with regard to family unification. Denmark and the United Kingdom have implemented the definition of family members of the CD without infringements. Germany infringes the CD in two ways, namely the exclusion of registered partnerships from the scope of Article 2(2) CD and the non-implementation of the obligation to facilitate the family unification of dependent other relatives. The Netherlands has one infringement of the CD, namely where it excludes Dutch nationals within the scope of the CD from the family unification of unmarried partners.

6.3 Family unification outside the scope of the CD

In this section the family unification of third-country national family members outside the scope of the free movement of persons is discussed. It should be

noted that Germany and the Netherlands are bound by the FRD, but Denmark and the United Kingdom are not. The United Kingdom has negotiated a flexible opt-out from instruments in the policy area of justice and home affairs, allowing the UK to opt into any instrument that is adopted within this area. The UK has not opted in for the FRD. Denmark has negotiated an overall opt-out from this policy area. This means that Denmark has an automatic opt-out from all instruments in this area. Like in the previous section, each of the paragraphs starts with an overview of EU law. Afterwards, the domestic law of the selected member state is analysed. For a comparative purpose, all selected member states are discussed in this section, even though the applicability in the member states is different.

The definition of the family is laid down in Article 4 FRD. The FRD makes a distinction between two categories of family members. For the first category, the member states 'shall' authorise family unification.[744] This creates a legally enforceable individual right to family unification for the family members covered by this provision. For the second category, the member states 'may' authorise family unification.[745] The family members covered by this provision do not derive a legally enforceable individual right to family unification. The member states merely have the discretion to allow for family unification. However, in the cases where the member states do choose to provide for family unification to these family members, they must do so in compliance with the procedural safeguards of the FRD.

6.3.1 Sponsors

EU law

The personal scope of the FRD is limited to sponsors who are third-country nationals residing lawfully in a member state.[746] The third-country national must furthermore have a residence permit for at least one year and should have a reasonable prospect of obtaining permanent residence.[747] The member states may require the sponsor to reside in the host state for a period of maximum two years before granting the right to family unification.[748] This provision was challenged by the European Parliament in front of the CJEU as an alleged breach of fundamental rights.[749] The CJEU, however, held that this provision of the FRD does not violate fundamental rights.[750] EU nationals who

744 Art 4(1) FRD.
745 Art 4(2)&(3) FRD.
746 Art 2(c) FRD.
747 Art 3(1) FRD.
748 Art 8 FRD.
749 *Parliament v Council* (n 360).
750 Ibid para 98.

reside in their country of origin are explicitly excluded from the scope of the FRD.[751] Asylum seekers whose application for international protection is being processed are outside the scope of the FRD.[752] Holders of temporary protection are outside the scope of the FRD.[753] The rules on the family unification of holders of temporary protection are laid down in the Temporary Protection Directive.[754] Holders of subsidiary forms of protection are outside the scope of the FRD.[755] The idea of the European Commission was that the family unification of holders of subsidiary protection would be regulated in the Qualification Directive.[756] However, this was not included in the final compromise.[757] After the recast of the Qualification Directive, the family members of holders of subsidiary protection are eligible for family unification without further conditions or requirements.[758] Illegally residing persons are not eligible to be a sponsor under the FRD. These exemptions limit the scope of application of the FRD to only cover a specific group of third-country nationals residing in a member state wishing to be unified with their third-country national family members.

It is unclear whether the FRD applies to persons holding both the nationality of an EU member state and the nationality of a third state. Article 1 FRD specifies that the purpose of the FRD is "*to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States.*" Furthermore, in Article 2(3) FRD the sponsor is defined as "*a third-country national residing lawfully in a Member State […].*" This wording suggests that dual nationals, being a third-country national, are within the scope of the Directive. However Article 3(3) FRD lays down that "*[t]his Directive shall not apply to members of the family of a Union citizen*", suggesting that dual nationals, being EU citizens, are outside the scope of the FRD. This issue of dual nationality was never discussed during the negotiation of

751 During the negotiations of the FRD this was a contested issue. See section 4.3.1.
752 Art 3(2)(a) FRD.
753 Art 3(2)(b) FRD.
754 Art 15 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/125.
755 Art 3(2)(c) FRD.
756 COM(2000)624 final (n 354), p. 3.
757 See Art 23 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.
758 Art 23 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 .

the FRD.[759] Groenendijk argues that it would be odd if a third-country national would lose the right to family unification the moment he acquires the nationality of the state where he resides.[760] However, in such a situation the said applicant would merely fall outside the scope of the FRD. The domestic family unification regulations would still apply. Walter argues that the "*applicability of Community law cannot be dependent on the construction of national (naturalisation) law.*"[761] Based on this, Hailbronner and Carlitz conclude that "*the Directive is to be applied on dual nationals who hold the nationality of the Member States concerned.*"[762] However, in *Rottmann* the CJEU, based on the fact that the Court ruled that the outcome of the case did not have disproportionate consequences, did not find it a problem that the applicability of EU law depended on domestic naturalisation law.[763] The question of whether the FRD applies to dual nationals is clearly a matter of EU law. It is therefore the CJEU which has the authority to rule on this issue when a case arises. Until now the CJEU has never been asked to rule on this issue. Instead, the domestic judges apply their own interpretation of the FRD without referring questions to the CJEU.

Domestic law

In *Germany* there are different regimes for sponsors who are German nationals and therefore outside the scope of the FRD and third-country nationals who are within the scope of the FRD. There are different requirements for the family unification when the sponsor is a German national and when the sponsor is a third-country national. Therefore it is important to establish whether a person is a German national or a third-country national. In practice, this means that German nationals enjoy a higher level of protection of the right to family unification than foreign nationals. This is based on the fact that German nationals have the constitutional right of free movement in the German Republic and that the residence of non-German family members is necessary to guarantee the effectiveness of the right to freely move within Germany.[764] Due to the different regimes depending on the nationality of the sponsor, in the remainder of this chapter the distinction must always be made between the situation when the sponsor is a German national and when the sponsor is a third-country national. There is no single provision in which the sponsor

759 K. Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 8 EJML p 228.
760 Ibid p 229.
761 A. Walter, *Reverse discrimination and family reunification* (Wolf Legal Publishers 2008) p 48.
762 K. Hailbronner and C. Carlitz, 'Interpretation of Council Directive 2003/86/EC of 22 September 2003' in K. Hailbronner (ed), *EU Immigration and Asylum Law: Commentary* (Beck and Hart 2010) p 185.
763 Case C-135/08 *Rottman* [2010] ECR I-1449.
764 Art 11(1) Basic Law (GER), see further Hailbronner (n 655) p 219.

concept is prescribed. Instead, the definition of the sponsor differs for German nationals and third-county nationals and furthermore the eligibility conditions for sponsorship depend on the nature of the family member.

The family unification of a German national sponsor is laid down in Article 28 Residence Act. As a principle, it cannot be expected of German nationals to enjoy family life in the country of origin of the family member.[765] Furthermore, as mentioned above, the constitutional protection of the right to move and reside freely in Germany offers protection for the right to family unification of German national sponsors. The eligibility of German nationals to be a sponsor under Article 28 Residence Act is subject to the condition that the German national resides in Germany. Holidays or short periods of residence abroad do not influence this. Only factual circumstances should be considered to establish whether a German national resides in Germany.[766]

The family unification of third-country national sponsors is laid down in Articles 29 to 36. In the terminology of these provisions, the sponsor is called foreigner ('*Ausländer*'), while family members are called such ('*Familienangehörige*'). Article 29(1) Residence Act lays down that the sponsor must have a valid settlement permit ('*Niederlassungserlaubnis*'), EC long-term residence permit ('*Erlaubnis zum Daueraufenthalt-EG*') or residence permit ('*Aufenthaltserlaubnis*'), and that sufficient living space must be available. The latter condition is discussed in section 7.3.2. on substantive requirements. The provision does not mention that there should be a reasonable prospect that the sponsor will obtain permanent residence. However, in the specific provision on the family unification of spouses to a third-country national, this obligation arising from Article 3(1) FRD is partly implemented. As this is specific to the family unification between third-country national sponsors and their spouse, this is discussed further in section 6.3.2 below.

For third-country nationals to be eligible as sponsor for family unification with their spouse or life partner in the case the spousal relationship or life partnership was entered into after the third-country national obtained his residence permit in Germany, that sponsor must have resided in Germany for at least two years pursuant to Article 30(1)(1)(3) Residence Act. It must be noted that this waiting period is only applicable if the abovementioned conditions apply, and is therefore not applicable to children.

Dual nationals are not within the scope of the FRD in Germany. The Federal Administrative Court has held that a person holding both the German and a third-country nationality is outside the scope of the FRD, as Article 3(3) FRD suggests that EU nationals are outside the scope of the FRD.[767] It is unclear

765 H. Welte, *Familiezusammenführung und Familienachzug: Praxishandbuch zum Zuwanderungsrecht* (Walhalla Fachverlag 2009) p 60.

766 G. Renner and others, *Ausländerrecht: Kommentar* (9th edn, Beck 2011) section 1.28.III.1 .

767 BVerwG (04-09-2012) 10 C 12 12 (GER) para 36.

whether this interpretation is correct. In my opinion, such questions should be referred for a preliminary ruling to the CJEU.

In the *Netherlands* there is one regime covering the right to family unification of Dutch national sponsors and third-country national sponsors. In Dutch legislation no distinction is made between third-country national sponsors, who are within the scope of the FRD, and Dutch national sponsors, who are outside the scope of the FRD. Even though the Dutch legislation applies to Dutch nationals and third-country nationals, their legal protection is slightly different. Third-country national sponsors, being within the scope of the FRD, can rely on the direct effect of the FRD. A Dutch national sponsor cannot rely on the FRD. According to the Council of State, persons holding Dutch nationality but also holding the nationality of a third state are outside the scope of the FRD.[768] It is questionable whether this interpretation by the Council of State is in conformity with EU law. A peculiarity in the Dutch situation is that there is one regime covering both Dutch national and foreign national sponsors. In the *Dzodzi* case the CJEU considered whether secondary EU free movement law was applicable to Belgian nationals not within the scope of the free movement of persons, in the situation that in Belgian legislation the rules applicable to persons within the scope of the free movement of persons would also be applicable to Belgian nationals.[769] The CJEU decided that when domestic law is applied in analogue with EU law, questions on the interpretation of national law also concern the interpretation of EU law and therefore the CJEU has jurisdiction over the matter.[770] However the question of whether national law is applied in analogy with EU law, is to be answered by the domestic legislature and judiciary.[771] Therefore if it is established that national law with no bearing on EU law is to be interpreted in analogy with EU law, the domestic courts may ask for preliminary references to the CJEU on the interpretation of EU law. However, if it is established domestically that domestic law is not to be interpreted in analogy with EU law, EU law does not have any bearing on a case.

During the implementation of the FRD, the Minister included a clause in the Foreigners Circular stating that even though the FRD is not applicable to Dutch nationals, the rules from the FRD are also applied to Dutch nationals.[772] From this it could be inferred that, like in the *Dzodzi* case, as Dutch law having no bearing on EU law in some situations is applied in analogy with EU law, the contested Dutch law should be applied in conformity with EU law. The Council of State decided differently. In its first ruling on this issue the Council

768 See Council of State (29-03-2006) 200510214/1 JV 2006/172 with annotation Groenendijk (NL); Council of State (23-11-2006) 200604478/1 JV 2007/39 with annotation Groenendijk.
769 Case C-297/88 *Dzodzi* [1990] ECR I-3763.
770 Ibid para 35 .
771 Ibid para 41 .
772 Former Art B2/1 Foreigners Circular.

of State simply established that as a Dutch national is outside the scope of the FRD pursuant to Article 3(3) FRD, a Dutch national cannot rely on the FRD.[773] In a ruling later that year the Council of State explicitly considered the passage in the Foreigners Circular stating that even though the FRD is not applicable to Dutch nationals, it will still be applied to Dutch nationals.[774] The Council held that in the memorandum of the change in the Foreigners Decree implementing the FRD there was no mention of the applicability of the FRD to Dutch nationals in purely internal situations.[775] Based on this, the Council of State held that Article B2/1 Foreigners Circular was not in conformity with the Foreigners Decree and should therefore be ignored.[776] Therewith the Council of State held that the Dutch provisions implementing the FRD did not mean that the FRD would be analogously applied to Dutch nationals in purely internal situations. Groenendijk argued that the fact that the memorandum did not mention that Dutch nationals were brought under the same regime did not mean that the provision in the Foreigners Circular would not be in conformity with the Foreigners Decree.[777] I agree with this reasoning. Shortly after these issues the passage was removed from the Foreigners Circular.[778] As this was an amendment of the Foreigners Circular, the Minister changed this provision without any involvement of parliament. This, however, does not change the fact that the same provisions of the Foreigners Decree are still applied to both third-country national sponsors and Dutch national sponsors. As there is one regime covering the family unification of sponsors who are third-country nationals and therefore within the scope of the FRD and sponsors who are Dutch nationals and therefore outside the scope of the FRD, from the perspective of legal certainty and non-discrimination, the same provisions must be applied equally to everyone within the scope of these provisions. However, as the CJEU held in *Dzodzi*, this is a matter of domestic law, not of EU law. In my opinion it can therefore not be held that the inapplicability of the FRD in the case of Dutch national sponsors is an infringement of the FRD as such.

On 17 December 2014 the Council of State abandoned its restrictive approach on the applicability of the FRD to Dutch nationals.[779] The Council of State decided that since the implementation of the FRD is equally applicable to Dutch nationals, the FRD is also directly and unconditionally applicable to Dutch nationals.[780] That particular case concerned an applicant holding both

773 Council of State (29-03-2006) (n 768) para 2.2.1.
774 Council of State (23-11-2006) (n 768).
775 Ibid para 2.2.1.
776 Ibid para 2.2.2.
777 See commentary by Groenendijk to Council of State (23-11-2006) (n 768).
778 See the decision of the Minister to amend the Foreigners Circular, WBV 2006/30 Strct 2005 nr 201 (NL) p. 193.
779 Council of State (17-12-2014) JV 2015/60 with annotation Groenendijk .
780 Ibid para 2.3.

Dutch citizenship and the citizenship of a third country. Nothing, however, suggests that the reasoning of the Council of State would be different if the applicant only possessed Dutch citizenship.

However, that does not mean that the exclusion of dual nationals from the scope of the FRD is in accordance with the FRD. As was established above, the question of whether the FRD applies is a matter of EU law. Considering the ambiguous wording of the FRD, it is unclear whether the FRD applies to dual nationals. The domestic courts should refer such questions to the CJEU for a preliminary ruling.

Since 2012 the Netherlands makes use of a waiting period of one year. This means that a third-country national who seeks to be unified with his third-country national family members must be lawfully resident in the Netherlands for a period of at least one year. With the introduction of the waiting period, the government sought to improve the integration of both the sponsor and the family member in Dutch society. This is based on the assertion that when the sponsor resides in the Netherlands for at least one year, some level of integration is reached and it can be assumed that the sponsor intends to stay in the Netherlands permanently.[781] As the FRD allows the member states to have a waiting period of two years, the Dutch waiting period of one year is in conformity with the FRD.

Only holders of a residence permit with a non-temporary purpose are eligible as sponsors under Article 3.15(1)(b) Foreigners Decree. What is defined as a residence permit with a temporary purpose is defined in Article 3.5 Foreigners Decree. All the residence purposes which are not listed in this provision are considered to be non-temporary. This provision implements the obligation from the FRD that the sponsor should have a reasonable prospect of permanent residence. It should therefore be noted that the question of which residence permit has a non-temporary purpose is a matter of EU law.

In *Denmark*, both Danish nationals and foreign nationals are eligible as sponsors, but different rules apply. There are four categories of sponsors: Danish nationals, nationals of the Nordic countries, foreign nationals with an international protection status and foreign nationals who have held a permanent residence permit for at least three years.[782] For the last category it should be noted that foreign nationals only get a permanent residence permit after having had a temporary residence permit for at least seven years. This means that foreign nationals can be obliged to wait for ten years before an application for family unification could be successful. The rationale behind this waiting period is that by requiring the sponsor to have had permanent

781 See the legislative memorandum to the amendment of the Foreigners Decree of 27 March 2012, Staatsblad 2012 nr 148 (NL).

782 Art 9(1) Aliens Act.

residence for at least three years, the integration of the spouse in Danish society will be more successful.[783]

In the *United Kingdom*, the sponsor is defined as

> "*the person in relation to whom an applicant is seeking leave to enter or remain as their spouse, fiancée, civil partner, proposed civil partner, unmarried partner, same-sex partner or dependent relative.*"[784]

One of the requirements to be eligible as a sponsor is that the sponsor must be 'present and settled' in the UK. In the Immigration Rules, the sponsor is specifically defined for each category of family members.[785] All different definitions have the phrase 'present and settled' in common. A person is settled in the UK if he is subject to no immigration restrictions on the length of stay and ordinarily resident in the UK.[786] Persons with a permanent residence permit ('indefinite leave to remain') and persons with the right of abode, meaning British citizens and certain Commonwealth citizens, are considered to be subject to no immigration restrictions and therefore settled. In cases of joined sponsorship, both sponsors should be present and settled.[787] The sponsor does not need to be present and settled in cases where the family members joins the sponsor when he enters the UK.[788] Students cannot be the sponsor for their unmarried partner.[789]

Interim Conclusion

In the FRD only third-country nationals residing lawfully in a member state are eligible to be a sponsor for the purpose of family unification, with certain exceptions. It is unclear from the wording of the FRD whether persons holding both the nationality of a member state of the EU and the nationality of a third state are within the scope of the FRD. The CJEU has never yet ruled on this issue. In Germany different rules apply where the sponsor is a German national and where the sponsor is a foreign national. The preferential treatment of German nationals flows from the constitutional protection of free movement in Germany, which would be hampered if a German national were not allowed to reside in Germany with his third-country national family members. Germany has a two year waiting period for foreign national sponsors with regard to the family unification of spouses. Dual national sponsors cannot rely on the

783 Vested-Hansen, 'Familiesammenføring' (n 722) p 134.
784 Art 6 Immigration Rules (UK).
785 The sponsor is defined in the Immigration Rules in E-ECP.2.1. Appendix FM of the Immigration Rules.
786 Art 33(2)(a) Immigration Act 1971.
787 *GG (HC 395, para 317; Joint Sponsorship) Jamaica* [2004] UKIAT 00095 (29 April 2004).
788 This is laid down in all different sponsor definitions listed in n 785.
789 p 76(1) Immigration Rules.

FRD in Germany, as the judiciary holds that they are outside the personal scope of the FRD. In the Netherlands there is one regime covering the family unification of sponsors who are Dutch nationals and sponsors who are third-country nationals. However, Dutch nationals cannot rely on the FRD, as they are outside the scope of the Directive. The Dutch judiciary furthermore excludes dual nationals from the scope of the FRD. For foreign sponsors, the Netherlands has a waiting period of one year, applying to all categories of family members. In Denmark, both Danish and foreign nationals can qualify as a sponsor. However, foreign nationals are only eligible to be a sponsor for family unification if they have a permanent residence permit. Permanent residence permits are issued after holding a temporary residence permit for at least seven years. For foreign sponsors, Denmark has a waiting period of three years. This means that the effective waiting period for a foreign national arriving in Denmark is ten years. In the United Kingdom, both UK and foreign nationals qualify as sponsors for family unification, provided that they are 'present and settled' in the UK. A person is settled if there are no immigration restrictions on the length of stay.

With regard to the compliance with EU law, only the treatment of dual national sponsors is problematic. In both Germany and the Netherlands, dual nationals cannot rely on the protection provided by the FRD. It is, however, all but clear that the FRD is not applicable on dual nationals. Both the German Federal Administrative Court and the Dutch Council of State did not refer questions for a preliminary ruling to the CJEU on this issue, even though they both considered this in their case law. As those courts are the courts of highest instance within their respective jurisdictions, they are obliged to refer questions for preliminary ruling when the interpretation of EU law is unclear. The fact that these courts have not done so is not in accordance with EU law. This has no bearing on Denmark and the United Kingdom, as the FRD is not applicable in these member states.

6.3.2 Spouse and registered partner

EU law

Member states are obliged to allow for the family unification of spouses.[790] Polygamous marriages are excluded from the scope of the FRD.[791] When one spouse is residing with the sponsor in a member state, that member state may not allow for the family unification of another spouse. Pursuant to Article 4(5) FRD, the member states may require that both the sponsor and the spouse are

790 Art 4(1)(a) FRD.
791 Art 4(5) FRD.

older than the age of majority, with a maximum of 21 years. This age requirement is further discussed in Chapter 8 on substantive requirements.

The status of a same-sex marriage lawfully contracted in another state is a contested issue. The FRD does not contain any reference to same-sex marriages. Recital 5 FRD states that the member states should give effect to the provisions of the FRD without discrimination on, among other grounds, sexual orientation. Article 4(1) FRD just mentions the term spouses, without any reference to the gender of the spouses. A marriage lawfully contracted in another member state, which is recognised as a lawful marriage under domestic international private law, should in principle be recognised as a spousal relationship and therefore be within the scope of the FRD. However, during the negotiation of the Directive the recognition of same-sex spouses was a contested issue.[792] Considering that the CJEU has not yet ruled on this issue, it remains to be seen whether same-sex marriages are considered a spousal relationship or whether they only qualify as registered partners under Article 4(2) FRD.

Registered partners do not derive a right to enter or reside from the FRD. The member states may allow for the family unification of a registered partner pursuant to Article 4(3) FRD, but are under no obligation to do so. That same provision also states that the member states may decide in domestic legislation that registered partners get the same rights to family unification as spouses, but the member states are again under no obligation do so.

Domestic law

In *Germany* Article 28 Residence Act covers the family unification of spouses where the sponsor is a German national. Article 30 Residence Act covers the family unification of spouses where the sponsor is a third-country national. The general conditions for spousal family unification, equally applicable to German and third-country nationals, is laid down in Article 27 Residence Act. Spousal family unification is not permissible where the marriage was contracted solely for the purpose of obtaining residence in Germany.[793] Furthermore, spouses in a forced marriage are not entitled to family unification.[794] Article 28(1) states that some provisions of Article 30 Residence Act are also applicable to German nationals, such as the age requirement and the knowledge of the German language requirement. These substantive requirements are analysed in Chapter 8 of this dissertation.

Article 28(1)(1)(1) Residence Act grants the right to family unification to spouses of German nationals. The marriage should be recognised under German private international law. Article 30 Residence Act grants the right to family unification to spouses of third-country nationals. For the spousal

792 Strik (n) p.

793 Art 27(1a)(1) Residence Act (GER).

794 Art 27(1a)(2) Residence Act (GER), see R. Göbel-Zimmerman and M. Born, 'Zwangsverheiratung – Integratives Gesamtkonzept zum Schutz Betroffener' [2007] ZAR p 54.

family unification of third-country national sponsors, the general requirements of Article 27 Residence Act are applicable. The further requirements listed in those provisions do not concern the spousal relationship as such and are therefore further analysed in Chapter 8 of this dissertation.

Registered partnerships do not enjoy the constitutional protection of Article 6 Basic Law. Instead, the Federal Administrative Court has held that registered partnerships are within the scope of Article 8 ECHR and should therefore be entitled to family unification.[795] Based on that ruling, the German legislature has made the rules applicable to spouses also applicable to registered partnerships.[796] However, only registered partnerships in same-sex relationships are recognised as registered partnerships from which a right to family unification can be derived.[797] In German legislation it is also not possible for partners with different sexes to enter into a registered partnership. In other member states this is different. The Federal Administrative Court is of the opinion that registered partnerships are within the scope of Article 8 ECHR, so there seems no reason why this reasoning would not apply to different-sex registered partnerships.

In the *Netherlands,* spouses and registered partners aged 21 and above derive a right to family unification from Article 3.14(a) Foreigners Decree. The marriage or registered partnership should be recognised under Dutch private international law.

In *Denmark*, spouses and cohabiting partners derive a right to family unification from Article 9(1) Aliens Act. Spouses and cohabiting partners are regarded as equal when it comes to family unification. Both the sponsor and the migrating spouse or cohabiting partner should be at least 24 years old.[798] This substantive requirement is analysed in Chapter 8. Furthermore, the marriage must be valid in accordance with Danish law. In Danish law, marriages which are contracted without the presence and full consent of both parties are not recognised. Proxy marriages can therefore not be the basis for family unification. Furthermore, the marriage must be recognised under Danish law, meaning that purely religious marriages for example are not recognised. Lastly, only one spouse is eligible for family unification in the case of a polygamous marriage.

In the *United Kingdom*, the right to the family unification of spouses and civil partners is laid down in Appendix FM to the Immigration Rules.[799] This is made subject to certain conditions relating to the marriage or civil partnership itself.[800] First, the partners must not be within the prohibited degree

795 BVerwG (27-02-1996) 1 C 41/93.
796 Art 27(2) Residence Act (GER).
797 Renner and others ibid (n 766) section 2.3.III.
798 Art 9(1)(1) Aliens Act (DK).
799 EC-P Appendix FM of the Immigration Rules (UK).
800 Requirements of a substantive and procedural nature are discussed in chapters 7 and 8.

of relationship.[801] The prohibited degrees of relationship are further specified in the IDI.[802] Second, the married partners must have met in person.[803] Because of this requirement married partners who married in a proxy marriage, which are concluded without both partners having met, are excluded from family unification. This creates interesting case positions. For example, the fact that both partners met when they were children is not considered sufficient to meet this requirement.[804] Also, a meeting of the partners at the age of 14 was deemed insufficient to meet the requirement.[805] To meet this requirement, in one case the fiancée and his parents stayed for a few days in the house of the sponsor and her mother. Even though for religious reasons the couple did not speak, they did meet the requirement.[806] Clayton reports that the Entry Clearance Guidance (SET 3.10) does not refer to the *Hashmi* case but does refer to the latter *Jaffer* case, concluding that the entry clearance service prefers the more restrictive definition.[807] Third, the relationship between the sponsor and the migrating spouse or civil partner should be genuine and subsisting.[808] In a case in which the partners did not live together for twenty years, but were still legally married, the Asylum and Immigration Tribunal decided that a marriage must have substance, and must not be merely a legal tie.[809] A set of criteria to determine whether a marriage or civil partnership should be considered as genuine and subsisting is laid down in the IDI.[810] Fourth, the marriage or civil partnership should be valid.[811] Fifth, any previous relationship of the sponsor and the migrating partner must have broken down permanently.[812] This requirement implies that the applicants should substantiate that any previous marriage has ended. Sixth, it is required that each of the partners intend to live permanently with each other as a spouse or civil partner and the marriage or civil partnership is subsisting.[813] This requirement intends to combat sham marriages, however it is criticised for being held

801 E-ECP AppedixAppendix FM to the Immigration Rules (UK).
802 Home Office, *Immigration Directorate Instruction, Family Migration: Appendix FM Section 1.0a, Family Life (as a Partner or Parent): 5-Year Routes* (2014).
803 E-ECP.2.5. Appendix FM of the Immigration Rules (UK).
804 *Meharban v ECO Islamabad* [1989] Imm AR 57.
805 *Jaffer* (4284) as reported in Clayton (n 613) p 272.
806 *Hashmi* (4975) as reported in Clayton (n 613) p 271.
807 Clayton (n 613) p 271-272.
808 E-ECP.2.6. Appendix FM of the Immigration Rules (UK).
809 *GA ('subsisting' marriage (Ghana)* [2004] UKAIT 00046.
810 Home Office, *Immigration Directorate Instructions, Family members under Appendix FM of the Immigration Rules, Annex GM Section FM 2.0., Genuine and Subsisting Relationship* (2014).
811 E-ECP.2.7. Appendix FM of the Immigration Rules (UK) What evidence needs to be provided to substantiate a valid marriage or civil partnership is laid down in paragraphs 22-26 of Appendix FM-SE of the Immigration Rules (UK).
812 E-ECP.2.9. Appendix FM of the Immigration Rules (UK).
813 E-ECP.2.10. Appendix FM of the Immigration Rules (UK).

against genuine marriages.[814] The requirement should be distinguished from the abolished 'primary purpose rule', which required that family unification should not be the primary purpose of a marriage. It was established that where the partners intend to live together, no matter what the purpose of the marriage was, the requirement is satisfied.[815] The requirement of intending to live together is satisfied when both partners intend to live together but are not able to live together permanently for reasons of work or education for example.[816] It has been reported that authorities often have difficulties in differentiating between the purpose of contracting the marriage in the past and the intention of living together in the future.[817] This overview shows that in regulations in the United Kingdom there are a number of requirements relating to the marriage or civil partnership itself which need to be fulfilled before family unification is allowed.

Interim Conclusion

In all the member states investigated in this research, spouses have a right to family unification. Registered partners equally enjoy a right to family unification in all selected member states. The differences among the countries are mostly procedural. For example in Germany, the right to family unification is derived from a different provision depending on the nationality of the sponsor. This is not the case in the Netherlands and the United Kingdom, which focus more on the residence status. The United Kingdom is the only country in which the right to family unification in a spousal relationship is made subject to requirements which deal with the spousal relationship itself. Member states which are bound by the FRD would not be allowed to impose such requirements, as specific requirements on what constitutes a spousal relationship within the meaning of the FRD are not included in the Directive.

6.3.3 Unmarried partner

EU law

Unmarried partners are within the scope of the FRD pursuant to Article 4(3). However, the member states are not under an obligation to provide for the family unification of unmarried partners. Instead the member states may allow

814 H. Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the UK' (2006) 8 European Journal of Migration and Law.
815 Clayton (n 613) p 274.
816 Ibid.
817 H. Wray, 'Hidden Purpose: Ethnic Minority International Marriages and "Intention to Live Together"' in P. Shah and W. Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (Rotledge-Cavendish 2006).

for family unification of unmarried partners, and if they do, they need to do this in conformity with the FRD. The member states may therefore decide for themselves whether to allow for the family unification of unmarried partners. The FRD does not specify any age requirement for the family unification of unmarried partners, which it does actually for spouses. From this it could be inferred that the age requirement cannot be imposed on unmarried partners, if a member states decides to grant the right to family unification to unmarried partners.[818] Alternatively, it could be argued that because the age requirement was the result of a late compromise in the final stages of negotiation,[819] it was not the intention of the drafters to impose an age requirement on spouses but not on unmarried partners, and from that it could be inferred that the age requirement is also applicable to unmarried partners. As the CJEU has not yet ruled on the interpretation of this issue, it is unclear whether the age requirement in Article 4(5) also applies to unmarried partners.

If the member state allows for the family unification of unmarried partners, the burden of proof to establish that the unmarried partnership is genuine lies with the applicants. Article 5(2) FRD lists some factors which need to be considered by the member states in determining whether a genuine unmarried partnership exists: a common child, previous cohabitation, the registration of the partnership and any other reliable means of proof. As the wording of this provision shows, this list is non-exhaustive.

Domestic law

In *Germany* unmarried partners are not and were never eligible for family unification. In so far as this could result in a violation of fundamental rights, family unification may be allowed by operation of the hardship clause as discussed in section 6.3.7. Of course, the hurdle of family unification not being allowed to unmarried partners can be taken by getting married, which is a possibility in most cases.

The *Netherlands* does provide for the family unification of unmarried partners.[820] The right to family unification for unmarried partners was abolished in 2012 but reintroduced in 2013 after a change of government. The reasoning of the previous Dutch government was that it is difficult to establish whether an unmarried partnership is genuine. The possibility to apply for family unification for unmarried partners was therefore prone to fraud and abuse.[821] However, with the reintroduction of this right in 2013, this problem was apparently deemed less serious than before.

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818 See the commentary of G. Lodder, P. Boeles and S. Guèvremont, 'Art. 4' in K. Groenendijk (ed), *SDU Commentaar Europees Migratierecht* (SDU 2011) p 292 .

819 See Strik (n 351) p 104.

820 Art 3.14(b)(2) Foreigners Decree (NL).

821 Staatsblad 2012 nr 14 (NL) p 9.

In *Denmark* unmarried partners have the same status as spouses. They are therefore eligible for family unification under Article 9(1) Aliens Act. There is, however, one additional requirement. Unmarried couples must substantiate that they are in a stable relationship of a longer duration. In practice, couples must show that they have been together for at least one and a half to two years. If there are detectable obstacles why the cohabitation was shorter than two years, like visa problems, other indicators of a stable relationship are taken into account.

In the *United Kingdom,* an unmarried partner, i.e. a person who has been living together with the sponsor in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, is eligible for family unification.[822] The possibility for the family unification of unmarried partners was introduced in the Immigration Rules in 2000 replacing certain concessions, for the reason that this would give effect to the right to respect for private and family life as protected by Article 8 ECHR.[823] The purpose of the possibility of family unification for unmarried partners is that existing unmarried relationships can continue, and is not intended for unmarried couples in the first stages of their relationship.[824] Short periods of not living together of less than six months are permissible if there is a good reason for this, such as education or employment.[825] All evidence demonstrating the commitment of both partners to each other, such as joint commitments, children, correspondence, records of a joint address, etc., may be used to substantiate the existence of the relationship in the past two years.[826] Furthermore, all the requirements applying to spouses and civil partners also apply for unmarried partners.[827]

Interim Conclusion

The two member states selected in this research which are not bound by the FRD do extend family unification to unmarried partners. However, the selected member states which are bound by the FRD either do not allow for the family unification of unmarried partners or have abolished and later re-established this. It is striking that it seems that unmarried partners seem to have a stronger position in the member states which are not bound by the FRD.

822 GEN.1.2.(iv) Appendix FM of the Immigration Rules.
823 MacDonald and Toal (n 617) p 723.
824 Section 8, Annex Z, para 2 IDI March 2006 (UK) .
825 Ibid.
826 Ibid.
827 Art 295A(ii),(v),(vi)&(vii) Immigration Rules (UK).

6.3.4 Minor direct descendants

EU law

Minor direct descendants of the sponsor and the spouse are eligible for family unification under the FRD pursuant to Article 4(1)(b) FRD. This includes adoptive children as long as the adoption is contracted in the member state or the member state is under the obligation to recognise the adoption according to its international obligations. Minor direct descendants of the sponsor and of the spouse, including adopted children, are eligible for family unification under the condition that the parent should have full custody over the child and that the parent should fully provide for the child.[828] The age of majority in the host member state is the determining factor in establishing whether the child is a minor. A further requirement is that the child should be unmarried. Pursuant to Article 4(6) FRD the member states may allow for the family unification of children born from a polygamous marriage to a parent other than the spouse who applies for residence or resides in the host member state, but they are not obliged to do so. It is, however, not to be excluded that the obligation to admit such children may flow from fundamental rights considerations and from Articles 5(5) and 17 FRD.

An issue which deserves specific attention is the requirement that the children of the sponsor and the children of the spouse, in other words the children the uniting couple have outside their own relationship, seem to only derive a right to family unification from the FRD if the parent has full custody over the child. From Article 4(1)(c)&(d) FRD it can be derived that member states are allowed to permit family unification in cases where there is shared custody and the other parent consents, but that they are not under an obligation to do so. It could, however, be inferred from the legislative development of the FRD that the intention of the legislator was not to create a facultative regime for children under shared custody, but only to lay down that family unification should only be allowed if the other parent with shared custody consents to family unification. The provisions are included in Article 4(1) FRD which prescribes who is eligible for family unification under the FRD instead of in Article 4(2) FRD, which contains the facultative regime. Furthermore, recital 10 indicates that the facultative regime only applies to direct relatives in the ascending line, adult unmarried children, unmarried or registered partners and children from an additional partner in a polygamous marriage. This recital does not mention children of the sponsor or the spouse who are not under full custody of the sponsor or the spouse. From the *travaux préparatoires* of the FRD it cannot be concluded that the member states consciously decided to put this category under the facultative regime. In a draft version

828 Art 4(1)(c)&(d) FRD.

of the Directive this category was not placed in the facultative regime and from the deliberations there is no indication of any decision made on this issue. Based on these considerations, it could be concluded that as there was no intention to put children from the spouse and the sponsor under shared custody under the facultative regime, the FRD should not be interpreted in this way.[829] On the other hand, the fact that the legislator amended the text of this provision could also indicate that there was a conscious decision to do this, despite that it was not motivated, and therefore it should actually be concluded that these provisions indicate that these are facultative provisions. In the implementation report, the European Commission does not address this issue.[830] The CJEU has not yet considered this issue.

The provision on the eligibility of minor children for family reunification contains two derogatory clauses. The first derogatory clause is laid down in Article 4(1) FRD and states that member states which required children older than 12 to comply with integration requirements before the adoption of the FRD may continue to do so. Only Germany and Austria have implemented this derogatory provision.[831] The second derogatory clause states that the application for family unification for minor children should be made before the age of 15. Also the application of this derogatory clause is only allowed if the legislation of a member state contained such a rule before the adoption of the FRD. None of the member states implements this derogatory clause.[832] The derogatory clauses were challenged by the European Parliament at the CJEU claiming that they infringe on fundamental rights. The CJEU held that the contested provisions are derogatory clauses and therefore the member states are not obliged to implement them.[833] It is up to the member states to guarantee that fundamental rights are respected in their domestic legal system. The CJEU emphasised that the member states must pay due regard to the best interests of the child, as laid down in Article 5(5) FRD, and should take into account the personal circumstances of each case, as laid down in Article 17 FRD. As Article 4(1) FRD does not contain a binding obligation on a member state, it cannot be held that the provision as such violates fundamental rights.

Domestic law

In *Germany* minor descendants of the sponsor and the spouse derive a right to family unification from Article 28(2) Residence Act where the sponsor is

829 See for example Lodder, Boeles and Guèvremont (n 818) p 289.
830 COM(2008) 610 final (n 371) .
831 Ibid p 6.
832 Ibid.
833 *Parliament v Council* (n 360).

a German national and from Article 32 Residence Act where the sponsor is a third-country national.

For the family unification of third-country national direct descendants of German national sponsors, it should first be established that the child is not a German national by virtue of the German nationality of the parent. Even though the family unification of third-country national direct descendants of German national sponsors is derived from Article 28(2) Residence Act, the requirements set out in Article 32 Residence Act are still applicable.[834] For both the family unification of third-country national direct descendants of third-country national sponsors and of German sponsors it is required that the minor direct descendants are below the age of 18 and unmarried, not divorced and not widowed at the time of application.[835] Adoptive children are recognised as direct descendants and are therefore eligible for family unification.

For the family unification of a third-country national direct descendent of a German national sponsor, it is not required that the German national has custody of the child. The only requirement is that the establishment of family life between the direct descendent and the sponsor is possible and to be expected. For the family unification of a third-country national direct descendent of a third-country national sponsor, the sponsor must have sole custody of and provide support to the minor direct descendent. A minor direct descendent under the shared custody of a sponsor residing in Germany and the other parent residing in the country of origin is not eligible for family unification. This is also the case even if the other parent residing in the country of origin expressly allows for the family unification of the child to Germany.[836] The reason behind this rule is that the separation with the parent in the country of origin and the fact that the single sponsor parent must provide care and support to the direct descendent is deemed to have negative consequences for the development of the child and its integration in German society and therefore also for German society itself.[837]

For the family unification of third-country nationals direct descendants of third-country national sponsors, it is required that both the parents, or the parent with sole custody, have a residence permit ('*Aufenthaltserlaubnis*'), settlement permit ('*Niederlassungserlaubnis*') or the status of a permanent residence in the EU ('*Erlaubnis zum Daueraufenthalt-EG*') and that the child relocates the central focus of its life ('*Lebensmittelpunkt*') with its parents.[838] The latter condition is usually deemed the case if the direct descendant moves

834 Art 28(3) Residence Act (GER).
835 Art 32(1) Residence Act (GER); BVerwG (30-04-1998) 1 C 1296 (GER).
836 Hailbronner (n 655) p 270.
837 Deutscher Bundestag, *Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)* (BT-Drs 15/420, 2003) p 83.
838 Art 32(1)(2) Residence Act (GER).

together with its parents to Germany or joins its parents within a period of three months after the parents moved to Germany.

Even though all minor direct descendants are eligible for family unification if the sponsors fulfil the requirements, the age of the direct descendant is relevant. The FRD allows the imposition of integration requirements to direct descendants who are older than 12 provided that the member state had already imposed these requirements at the time of the adoption of the FRD.[839] This was the case in Germany. Pursuant to Article 32(3) Residence Act, direct descendants under the age of 16 are not required to comply with any integration requirements. However, minor direct descendants aged 16 and above are obliged to substantiate that they speak German or that they will be able to integrate in German society based on their previous education.[840] Proficiency in the German language should be both oral and written. The objective of this integration requirement is that direct descendants aged 16 and above are able to enrol in schools or vocational training in the same manner as a German national would.

The direct descendants of parents with an asylum status or who are recognised refugees or who have a settlement permit pursuant to Article 26(3) Residence Act, have a right to family unification pursuant to Article 32(1)(1) residence Act. The children are allowed to enter Germany to reside with their parents separately or together with their parents as long as they are 18 or younger. The integration requirements imposed on direct descendants aged 16 and above are not applicable. Other substantive requirements, such as the accommodation requirement and the income requirement as discussed in Chapter 7, are also not applicable.

In the case where the third-country nationals have obtained a long-term residence permit in another EU member state and wish to move to Germany, their children are allowed to accompany their parents pursuant to Article 32(2a) Residence Act.

Article 32(4) Residence Act is a specific hardship clause applicable to the family unification of direct descendants. It provides that the requirements laid down in the Articles 32(1) to (3) can be lifted if the application of the requirements would lead to unreasonable hardship. Only in exceptional circumstances can this clause be used to not apply the requirements. One of the grounds to apply the hardship clause is that the refusal of family unification would be more detrimental to the applicant than it would be to foreigners in a comparable situation.[841] An important consideration is the best interests of the child. In principle, the hardship clause is not applicable if other family members or caregivers can provide for the care of the child in the country of origin. The age of the direct descendent and the extent to which he depends on the

839 Art 4(1) FRD.
840 Art 32(2) Residence Act (GER).
841 Hailbronner (n 655) p 253.

care of the sponsor are important factors in determining the applicability of the hardship clause.[842] The hardship clause can also apply in the case of sudden illness of the direct descendant. Grandparents cannot be the sponsor for the family unification of a grandchild under Art 32 Residence Act. This is only possible under exceptional circumstances under Article 36 Residence Act. See Section 3 of this chapter for an analysis of Article 36 Residence Act.

In the *Netherlands,* minor descendants of the sponsor are eligible for family unification pursuant to Article 3.14(b) Foreigners Decree. This is, however, bound to the condition that the minor descendant actually belongs to the family of the sponsor and already belonged to his family in the country of origin and that the minor descendent is under the parental custody of the sponsor. The FRD does not contain any provisions requiring the existence of an actual family bond in the country of origin. This condition therefore infringes the FRD.[843]

In *Denmark* the right to family unification of direct descendants of both the sponsor and the spouse is laid down in Article 9(1)(2) Aliens Act. Only children aged 15 years or younger are eligible for family unification, if they are unmarried and have not established a family themselves. This age requirement was introduced in 2004. Before that time, direct descendants under 18 years of age were eligible for family unification. The goal of lowering the age requirement was to promote children arriving in Denmark at as young an age as possible so that they would spend most of their childhood in Denmark. This in turn was believed to have positive effects on the integration of these children in Danish society. Only in exceptional cases can family unification be allowed for children between 16 and 18 years old. The memorandum supporting the legislative amendment provides for examples of such exceptional circumstances:

- when the denial of family unification leads to a violation of international obligations;
- when the denial of family unification would be humanitarianly irresponsible due to serious illness or severe disability;
- if the interests of the child in specific circumstances dictate that consent is given to family unification. This is the case for example when the child has only contact with the parent who is moving or moved to Denmark and not with the other parent or where a refusal of family unification would lead to a separation with other minor siblings;
- in special family circumstances such as when a Danish national lives abroad married to a foreign national and wishes to return to Denmark with his foreign national child after the marriage is dissolved;

842 BVerwG (29-03-1996) 1 C 2894 .

843 D. Baldinger, 'The Family Reunification Directive: A Survey of jurisprudence in the Netherlands' [2007] Migrantenrecht p 292.

- where the parents have commercial ties to Denmark, in the context of the need to attract skilled labour in certain areas.[844]

The immigration authorities are allowed to require applicants to participate in DNA testing to establish a family relationship.[845] A residence permit for family unification can, except in exceptional circumstances, be refused if the sponsor or the spouse have been convicted of an offence that can result in a deprivation of liberty committed against one or more minor children in the ten years before the moment of application.[846] If a previous residence permit has lapsed due to absence from Denmark for more than six months, a renewed application can only be accepted if the applicant's best interests make this appropriate.[847] A residence permit for the family unification of children cannot be issued if this would be manifestly contrary to the applicant's best interests.[848] The rationale behind this provision is that family unification of a child should not be allowed if, due to family circumstances, it can be predicted that the child will encounter serious social problems during its stay in Denmark. Such family circumstances may include the risk that the child will be forcibly removed from the family after arrival or the risk that the child will suffer physical or sexual abuse. In such circumstances the Immigration Agency may ask the local municipalities for an opinion.[849] Furthermore, if a parent has been criminally convicted for violations against one or more minor children, that parent will not be eligible to be the sponsor for the family unification of a child for a period of ten years after the conviction.[850] If the crime was attributable to a mental disorder which has been resolved, or to alcohol or drug abuse which has been stopped, this waiting period may be waived.

Adoptive children are covered by Article 9(1)(3) Aliens Act. This provision applies to adoptive children, children who seek to reside in Denmark with immediate family members other than the parents in case there are specific reasons that the child cannot live with the parents and children who seek to reside in Denmark to stay with caregivers where the care relationship is recommended by the local municipality based on an investigation.[851] The adoptive child should be younger than 18 years old. The age requirement of 15 years therefore does not apply.

Denmark imposes additional substantive requirements for the family unification of direct descendants. As these substantive requirements are unique

844 Following Vested-Hansen, 'Familiesammenføring' (n 722) p 145-146.
845 Art 40c Aliens Act (DK).
846 Art 9(16) Aliens Act (DK).
847 Art 9(14) Aliens Act (DK).
848 Art 9(15) Aliens Act (DK).
849 Art 9(25) Aliens Act (DK).
850 Art 9(16) Aliens Act (DK).
851 Art 27 Aliens Order (DK).

to Denmark, the other member states only impose substantive requirements on the family unification of spouses, registered and unmarried partners and other family members, these substantive requirements are discussed here, and not in Chapter 8. Firstly, it may be required from the sponsor that he substantiates that he is able to provide for the maintenance of the child seeking family unification, if essential policy considerations make this appropriate.[852] The sponsor is not in principle required to prove maintenance ability, only in exceptional circumstances will this be required.[853] This may be the case, for example, where there has not been any contact between the sponsor and the child for a long period of time.[854] In the case of an application for an adoptive or foster child, the sponsor's ability to provide for the maintenance should always be substantiated.[855] The rules on how to substantiate the ability to provide for the maintenance of the child are the same as the rules on maintenance requirements for spousal family unifications, which will be discussed in Chapter 8. Secondly, where specific policy considerations make this appropriate, it may be required to prove that they have a dwelling of a reasonable size available to live in with the child.[856] For adoptive and foster children, this housing requirement is automatically imposed.[857] The rules applicable to the housing requirement for the family unification of children are the same as those applicable for the housing requirement in the context of spousal family unification, which will be discussed in Chapter 8. Thirdly, in the situation where the applicant and one of the parents live in the country of origin or another country, family unification can only be allowed when the applicant has or is able to obtain such ties with Denmark so that there is a basis for successful integration.[858] This condition is not applied when the application is submitted at the latest two years after the sponsor residing in Denmark fulfilled the requirements to be a sponsor or in exceptional circumstances relating to the unity of the family.[859] This condition was introduced in 2004, when the lowering of the age requirement was also inserted in the legislation. The rationale behind this requirement is that applications are refused in which the sponsor deliberately failed to apply for family unification of the child at an earlier stage in order to ensure that the child is raised in accordance with the culture and customs of the country of origin and not by the values and norms in Denmark.[860] In applying this rule, the immigration authorities must

852 Art 9(12)(1st section) Aliens Act (DK).
853 Vested-Hansen, 'Familiesammenføring' (n 722) p 189.
854 Ministeriet for Flygtninge Indvandrere og Integration p 57.
855 Art 9(17)(1st section) Aliens Act (DK).
856 Art 9(12)(2nd section) Aliens Act (DK).
857 Art 9(17)(2nd section) Aliens Act (DK).
858 Art 9(13) Aliens Act (DK).
859 Ibid.
860 Ministeriet for Flygtninge Indvandrere og Integration, *Notat om praksis efter bestemmelsen i udlændingelovens § 9, stk. 13 (Mulighed for en vellykket integration)* (2007) p 2.

pay due account to the specific circumstances of the case and the integration potential of the family should be considered in particular.[861]

In the *United Kingdom*, the right to family unification of direct descendants is laid down in Appendix FM to the Immigration Rules.[862] The direct descendant must be under the age of 18 at the time of application,[863] and must not be married, registered as a civil partner or have established a family unit of its own.[864] When a child is underage at the time of application, but overage at the time of the decision, this will not be held against him. Parents include step-parents, adoptive parents and an unmarried father if paternity is accepted or proved.[865] When a child is joining both parents in the United Kingdom, or the only remaining parent, the child is eligible for family unification if substantive requirements are complied with.[866] When one of the parents is settled in the UK, but the other parent is not, it is required that the parent has sole responsibility over the child.[867] A parent is considered to have sole responsibility over a child where he is ultimately responsible for all major decisions relating to the child's upbringing and provides for the majority of the financial and emotional support the child requires.[868] Therefore the determination of whether there is sole responsibility is a factual determination of the relationship between parent and child in which all evidence must be considered. In a situation where both parents are involved in a child's upbringing, it will be exceptional that the sole responsibility of the sponsor is established.[869] When sole responsibility is not established, family unification may still be granted where there are "serious and compelling family or other considerations which make the exclusion of the child undesirable."[870] Factors which must be taken into account in establishing whether this is the case include the willingness and availability of the overseas adult to look after the child, the living conditions available for them, the greater vulnerability of small children and the need for family unity.[871] Children of persons who have been granted a refugee status in the United Kingdom are allowed to join their parent(s) if the child is under the age of 18, is not leading an independent life, is unmarried and is not a civil partner, has not formed an independent family unit, was part of the family unit of the person granted asylum at the time that

861 Ibid p 7.
862 EC-C Appendix FM of the Immigration Rules (UK).
863 E-ECC.1.2. Appendix FM of the Immigration Rules (UK).
864 E-ECC.1.3. and E-ECC.1.4. Appendix FM of the Immigration Rules (UK).
865 Art 6 Immigration Rules (UK).
866 See section 7.3.
867 E-ECC.1.6.(b) Appendix FM of the Immigration Rules (UK).
868 UK Visas and Immigration (Home Office), *Visas and immigration operational guidance – collection, Chapter 08: family members (immigration directorate instructions)* (2014) section 5A, annex M, para 4.1.
869 *TD (Paragraph 297(i)(e): 'sole responsibility') Yemen* [2006] UKAIT 00049 (24 May 2006) .
870 E-ECC.1.6.(c) Appendix FM of the Immigration Rules (UK).
871 Clayton (n 613) p 295.

the person granted asylum left the country of habitual residence in order to seek asylum and would not be excluded from a refugee status based on Article 1F of the Refugee Convention if he were to make a request for asylum on his own right.[872]

Interim conclusion

All of the selected member states allow for family unification of descendants. There is, however, some variation across the member states. Denmark has the most striking policy, in which the family unification of descendants is allowed until the child has reached the age of 15. The rationale behind this rule is that Denmark wants to prevent children spending their formative years in their country of origin. The Netherlands requires that the child actually belongs to the family of the sponsor and already did so in the country of origin. Germany has a similar requirement where the sponsor is a third-country national. In that case, it is required that the child relocates the central focus of its life, which is deemed to be the case if the family unification occurs immediately with the parents or within three months after the entry of the parents in Germany. As these requirements as operated by Germany and the Netherlands are not included in the FRD, they constitute infringements of the Directive.

6.3.5 Adult direct descendants

EU law

Adult direct descendants are within the scope of the FRD pursuant to Article 4(2)(b), however they fall under the facultative regime meaning that the member states may allow for the family unification of adult direct descendants but are not under a legal obligation to do so. Furthermore, in order to be eligible for family unification under the FRD, adult direct descendants must be unmarried and be objectively not able to provide for themselves on account of their state of health. This limits the eligibility of adult direct descendants significantly. It should be noted that the member states are allowed to have more favourable provisions in accordance with Article 3(5) FRD, mitigating the requirements laid down in Article 4(2)(b) FRD.

872 Art 352D Immigration Rules (UK).

Domestic law

Germany does not provide for the family unification of adult unmarried children. Article 6(1) Basic Law does include the constitutional protection of adult children,[873] but the family relationship between parents and adult children does not enjoy special protection under the Residence Act. Only in exceptional circumstances can the family unification of adult children be allowed under for example Article 36 Residence Act. This hardship clause is further discussed in section 6.3.7.

The *Netherlands* does not provide for the family unification of adult direct descendants. Before 2012 the family unification of unmarried adult direct descendants was possible under Article 3.23a Foreigners Decree though this was bound to strict requirements.[874] The Dutch government motivates the decision to no longer allow the family unification of unmarried adult children by the assertion that adult children would experience more difficulties in integrating and participating in the host society.[875] This assertion is however not substantiated. The Dutch government states that it will not admit adult unmarried partners unless by not accepting a person it would lead to a violation of Article 8 ECHR.[876] The abolishment of the possibility of the family unification of adult direct descendants is in accordance with the FRD, as the FRD does not oblige the member states to allow for this form of family unification.

In *Denmark*, adult direct descendants are in principle not eligible for family unification. Family unification may only be granted to adult direct descendants in exceptional circumstances.[877] This hardship clause is further discussed in section 6.3.7.

In the *United Kingdom*, adult direct descendants are eligible for family unification pursuant to Section EC-DR of Appendix FM to the Immigration Rules, if the requirements are met. The application must be made in the country of origin. It is not possible to apply for the family unification of adult direct descendants when the family member already resides in the United Kingdom on another residence entitlement or illegally.[878] The main requirement is that due to age, illness or disability the adult direct descendant requires long-term personal care to perform everyday tasks.[879] Everyday tasks include

873 Hailbronner (n 655) p 204.
874 P. Boeles, 'Verruimde gezinshereniging op zijn smalst' [2003] Migrantenrecht p 76.
875 Staatsblad 2012 nr 148 (NL) p 14.
876 Ibid.
877 Art 9c Aliens Act (DK).
878Home Office, *Immigration Directorate Instructions, Family members under Appendix FM of the Immigration Rules, Appendix FM Section FM 6.0, Adult Dependent Relatives* (2014) p 3.
879 E-ECDR.2.4. Appendix FM of the Immigration Rules (UK).

washing, dressing and cooking.[880] The inability to perform such everyday tasks should be substantiated through medical evidence.[881] The applicant must be unable to obtain the required level of care in the country of origin, even with the help and support provided for by the prospective sponsor in the UK, because that help is not available in the country of origin and there is no person who can reasonably provide the required care or afford it.[882] The persons who can be expected to provide for care in the country of origin are immediate family members (such as children, siblings and grandparents) but also other persons who can provide care (such as home helpers, housekeepers, nurses, caregivers or a care or nursing home).[883] Furthermore, if the applicant has more than one close relative in the country of origin, it should be expected that those relatives together provide the resources for the required care.[884] It is for the applicant to substantiate that the care is not available or not affordable in the country of origin. The applicant can substantiate this by a statement from a central or local health authority, a local authority or a doctor or other health professional. If the care has been provided through a private arrangement in the past, the applicant must provide details of that arrangement and why it is no longer available. If the issue is that the care is no longer affordable, the applicant must show the records of the care and why the payment cannot continue.[885] With all these requirements, the definition of who should be consulted to provide for care is very wide. In practice, this means that it is almost always possible to find someone in the country of origin who is able to provide for care. The IDI mentions the example of a 30-year-old son who cannot take care of himself after a road accident in his homeland Sri Lanka. His parents are settled in the UK. That person

> "*could meet the criteria if the applicant can demonstrate that they are unable even with the practical and financial help of the sponsor to obtain the required level of care in the country where they are living because it not available and there is no person in that country who can reasonably provide it or it is not affordable*."[886]

This means that if the parents settled in the UK have the financial means to place their son in a nursing home, the son is not eligible for family unification. The formulation of these requirements beg the question whether the level of protection provided for by these provisions rises above the minimum pro-

880 Home Office, *Immigration Directorate Instructions, Family members under Appendix FM of the Immigration Rules, Appendix FM Section FM 6.0, Adult Dependent Relatives* p 5.
881 Ibid.
882 E-ECDR.2.5. Appendix FM of the Immigration Rules.
883 Home Office, *Immigration Directorate Instructions, Family members under Appendix FM of the Immigration Rules, Appendix FM Section FM 6.0, Adult Dependent Relatives* p 5.
884 Ibid.
885 Ibid p 8.
886 Ibid p 6.

tection offered by Article 8 ECHR. The applicant must substantiate that the sponsor will be able to provide for accommodation, maintenance and care without recourse to the public funds.[887] The specifics of these substantive requirements are further discussed in Chapter 8. What strikes me is that on the one hand the applicant should substantiate that the sponsor is able to provide for maintenance, accommodation and care for a period of five years after the applicant entered the UK, but on the other hand, if the sponsor is financially able to provide for this maintenance and care in the UK, then it is likely that he is also able to provide for the maintenance and care in the country of origin. In other words, if the sponsor does not have sufficient resources to provide for maintenance and care in the UK, he is not eligible as a sponsor, and if he does, then the applicant might be not eligible because he can perform his everyday activities with the support of the sponsor. Therefore, I interpret the rules to mean that family unification could only be an option where, for example, the care facilities are not available in the country of origin. This could be the case when the treatment for a particular condition is not available in the country of origin, or there are no sufficient facilities available for mental health issues.

Before the changes to the Immigration Rules entered into force in July 2012, the family unification of adult direct descendants was only provided for in the most exceptional compassionate circumstances.[888] The threshold required to meet this condition was high. The situation that the family member should be within the most exceptional compassionate circumstances was already to be interpreted as meaning that these circumstances should occur despite the financial support of the sponsor settled in the UK. The new formulation therefore adds that the cause of the hardship should be found in age, illness or disability. It seems that other causes, such as for example the position of women in certain countries, are not considered to create a right to family unification if there are no elements of age, illness or disability involved. Under the old Immigration Rules, this occurred for example in a case in which it was held that a 22-year-old daughter from Bangladesh could not be returned to Bangladesh because of the social position she would find herself in there.[889] What furthermore changed is that previously applications for the family unification of adult direct descendants could be made in the UK. With the new rules, this is no longer possible. The effects of this latter amendment should not be overstated. Considering that the application of the old rules was already very restrictive, and that the rules are being made more restrictive by the amendments, I wonder whether in the case of an in-country application, a human rights claim based on Article 8 ECHR would be successful. In the case where an applicant is able to substantiate that he is not in any way, with any

887 E-ECDR.3.1. Appendix FM of the Immigration Rules (UK).
888 See the old Art 317(i)(f) Immigration Rules (UK).
889 *Husna Begum v Entry Clearance Officer, Dhaka* [2000] WL 1791476.

support, able to take care of himself in the country of origin without the support of his parents, it is likely that Article 8 ECHR would prohibit the expulsion of such person to the country of origin. However, because of the wording of the Immigration Rules, in practice the restrictive policy on in-country applications can have implications for applicants, even though applicants might be able to challenge individual decisions on human rights grounds.

Interim conclusion

Under the FRD, the member states bound by the Directive have the discretion to allow for family unification of adult direct descendants. In Denmark, Germany and the Netherlands the family unification of adult unmarried children is only allowed in exceptional circumstances of hardship. In the United Kingdom the family unification of adult unmarried children is allowed when the child, due to illness or disability, requires long-term personal care to perform everyday tasks. This provision, however, is applied restrictively, in the sense that the applicant should substantiate that, even with the support of the sponsor, this help is not available in the country of origin.

6.3.6 Direct ascendants

EU law

Direct relatives in the ascending line are within the scope of the FRD pursuant to Article4(2)(a). However they fall under the facultative regime meaning that the member states may allow for family the unification of direct ascendants, but that they are under no legal obligation to do so. Furthermore, the member states may only allow for the family unification of this category if the family members are dependent on the sponsor and do not have family support in their country of origin. This would seem to limit the competence of the member states, but in accordance with Article 3(5) FRD the member states may allow for a more favourable regime. Therefore, if a member state wishes to not require the family member in the ascending line to be dependent on the sponsor, they would be allowed to do so under the Directive. The direct ascendants of unmarried partners are not eligible for family unification, as unmarried partners are not listed in Article 4(2)(a) FRD.

The requirement of dependency of family members in the ascending line can render the family unification of parents who wish to join their children lawfully residing in the host member state impossible. The FRD does not mention anywhere that children could qualify as sponsors under the Directive.[890] An example can demonstrate that this situation is not completely

890 See chapterChapter 10 on the domestic implementation of the *Ruiz Zambrano* ruling.

hypothetical. In the ECtHR case *Rodrigues da Silva and Hoogkamer v. the Netherlands*, the applicant was a Brazilian national seeking to reside in the Netherlands with her child. Previously the applicant had been in a relationship with the father of the child, but that relationship had ended. Assuming that the child would have been a third-country national and therefore within the scope of the FRD, there is no provision in the Directive granting a right to family unification to the parent of a lawfully residing child. Based on the FRD, there would not have been a right to reside in the Netherlands for the applicant in this case. Article 3(5) FRD would not have been applicable since the parent was not dependent on the child. This shows that the provision on the right to family unification of direct ascendants does not include the right to family unification of parents joining their children.

Domestic law

In *Germany*, the direct ascendants of minor German nationals derive a right to family unification from Article 28(1)(3) Residence Act. Within this provision it is specified that the purpose of this category of family unification is that the parents can take care of a minor German national. The rationale behind this is that it cannot be expected of a German national to exercise family life in another country. If the parents were not allowed to join the German national child in Germany, the child would be forced to leave the territory of Germany. Only a parent who has custodial rights can derive a right to family unification from this provision. Custodial rights, however, are not sufficient as it should be considered whether the parent actually intends to take care of the child and whether family unification would lead to the establishment of family life in Germany.[891] It is not required that the parent and the child live together; the focus lies on the actual existence of a parental relationship between parent and child.[892] It is not relevant whether the parent other than the parent seeking admission also has custody of the child. There is a possibility for the family unification of the non-custodial parent as well.[893] One requirement, however, is that the parent and the child should have already lived together in Germany. This excludes family unification from the country of origin. It is meant to cover the parent of a minor German national who does not have custodial rights and was previously living with the minor German national, but who is now no longer living with him, for example due to the divorce of the parents.

891 Administrative Appeal Court Baden-Württemberg (15-09-2007) 11 S 837/06.
892 BVerfG (08-12-2005) 2 BvR 1001/04.
893 Art 28(1)(last sentence) Residence Act (GER).

Only in circumstances of exceptional hardship, is family unification of direct ascendants of sponsors who are not minor German nationals allowed.[894] See section 6.3.7. for an analysis of this hardship clause.

The *Netherlands* does not allow for the family unification of direct ascendants, as this possibility was abolished in a reform of the Foreigners Decree in 2012.[895] Before this reform, direct ascendants were eligible under strict requirements for family unification pursuant to Article 3.24 Foreigners Decree. The Dutch government motivated the abolishment of this form of family unification by the assertion that elderly immigrants would experience problems integrating and participating in society.[896] This assertion was however not substantiated. The family unification of family members in the ascending line is only permissible where an unaccompanied minor has received an international protection status.[897] If the application for family unification is made within three months after the granting of international protection, the sponsor is not required to comply with a maintenance requirement; if the application is made after those three months, the sponsor has to comply with a maintenance requirement.[898]

Denmark in principle does not provide for the family unification of family members in the ascending line. However, such family members may be granted family unification if exceptional reasons make this appropriate.[899] This hardship clause is further discussed in section 6.3.7.

The *United Kingdom* does provide for the family unification of family members in the ascending line for two categories.

Firstly, the parents of a minor British citizen or settled person living in the UK derive a right to family unification from Section EC-PT of Appendix FM to the Immigration Rules. The applicant parent should be 18 or older.[900] The child should be 18 or younger at the time of application.[901] The applicant for family unification must have sole parental responsibility for the child or the parent or caregiver with whom the child lives in the UK must be a British citizen in the UK or settled in the UK, and not be the partner of the applicant and nor be eligible to apply for entry clearance as a partner.[902] This means that the family unification of the parent residing outside the UK is only eligible for family unification with his child if he is not eligible for family unification with the parent partner. If the latter is the case, the rules on partner family unification apply. The applicant must substantiate that he has sole parental

894 Art 36 Residence Act (GER).
895 Staatsblad 2012 nr 148 (NL).
896 Ibid p 14.
897 Art 3.24a(1) Foreigners Decree (NL).
898 Art 3.24a(2) Foreigners Decree (NL).
899 Art 9c Aliens Act (DK).
900 E-ECPT.2.1. Appendix FM of the Immigration Rules (UK).
901 E-ECPT.2.2.(a) Appendix FM of the Immigration Rules (UK).
902 E-ECPT.2.3. Appendix FM of the Immigration Rules (UK).

responsibility for the child or access rights to the child and the applicant must provide evidence that he is taking, and intending to continue to take, an active role in the child's upbringing.[903] Furthermore, financial and language requirements must be met, which will be discussed further in Chapter 8.

Under the old Immigration Rules valid until July 2012, parents were also eligible for family unification with their minor child. A requirement was that the applicant parent must have a residence or contact order from a UK court or a certificate from a district court confirming the intention of the parent to maintain contact with the child.[904] As in practice such a statement could not be obtained, a sworn statement from the other parent also sufficed. This caused problems where the other parent was not willing to provide such a sworn statement. This requirement is no longer imposed in the new rules. Instead the applicant must substantiate that he has either sole parental responsibility for the child or access rights to the child.

Secondly, adult dependent relatives in the ascending line, meaning parents and grandparents, as well as brothers and sisters aged above 18, are eligible for family unification pursuant to Section E-ECDR.2.1. Appendix FM to the Immigration Rules if the requirements are met. The requirements are the same as for the family unification of adult direct ascendants. See paragraph 6.3.5. of this chapter for a more detailed discussion on the requirements. The application must be made in the country of origin of the applicant. The applicant must substantiate that the sponsor will be able to provide for accommodation, maintenance and care without recourse to public funds.[905] In-country applications are not permissible. It is therefore not possible to change the residence purpose to this category while residing in the UK or to regularise illegal stay using this category of family unification. The substantive requirement is that the adult dependent relative must require long-term personal care to perform everyday tasks due to age, illness or disability substantiated by medical evidence.[906] Even with the help of the sponsor, the required level of care must be unavailable in the country of origin to the applicant. Only when there is no person who can reasonably be expected to take care of the applicant, including third parties outside the extended family such as nurses or nursing homes, does a right to family unification exist.[907] The wide definition of who should be considered for care makes it difficult to meet the requirements. The IDI mentions several examples of situations where a right to family unification might exist and situations where this is not the case. An example is mentioned of a 70-year-old woman residing in India with her daughter settled in the UK. The daughter pays for the cleaning of the house of her mother. When the

903 E-ECPT.2.4.(a) Appendix FM of the Immigration Rules (UK).
904 The former Art 246 Immigration Rules (UK).
905 E-ECDR.3.1. Appendix FM of the Immigration Rules (UK).
906 E-ECDR.2.4. Appendix FM of the Immigration Rules (UK).
907 E-ECDR.2.5. Appendix FM of the Immigration Rules (UK).

daughter is worried that her mother is becoming increasingly frail and forgetful, the IDI suggests that the criteria are not met as her mother is able to perform everyday tasks and/or has help available with these tasks.[908] Another example provided is of an 85-year-old man residing in Afghanistan with his son settled in the UK. The man is suffering from poor eyesight and has suffered from a series of falls resulting in the replacement of his hip. His son sends his father money to pay a carer to visit each day to help him wash and dress and to cook meals for him. The IDI suggests that this would not meet the criteria as the sponsor is able to arrange the required level of care in the country of origin.[909] Another example provided for in the IDI is a couple who are both 70 years old from Pakistan. The wife demands personal care due to ill health because of which she is unable to perform everyday tasks. Even though her husband is in good health, he cannot provide for the care of his wife. They both seek to move to the UK to come and live with their daughter. The daughter can provide the full time care of her mother as she does not work because her husband provides for the income of the family. The applicants can provide the Entry Clearance Officer with the planned care arrangements in the UK. The IDI suggests that this could meet the criteria if the applicants can demonstrate that even with the practical and financial support of the sponsor they are unable to provide for the care of the woman and there is no person in the country of origin who can provide for the care or it is not affordable.[910] The distinction with the man from Afghanistan in the previous example is that in that case the son was able to hire someone to provide for the care, which was not apparent in the example of the Pakistani couple. Still, even in that case, the question which needs to be answered is whether the sponsor, considering the income of her husband, is able to provide for the care of her parents in Pakistan. Since the definition of what type of care and to be provided by who is so wide, the assessment of whether care is available in the country of origin is rather subjective involving many factors which are difficult to measure and compare. Furthermore, the question of who can be consulted to provide care is highly influenced by culture. Where in some countries it might be accepted to look to third parties to provide for care, this might not be the case in other countries. Also the level of care provided in, for example, nursing homes might differ significantly. This places a high level of discretion on the Entry Clearance Officer, who needs to balance all factors.

The new Immigration Rules on family migration are stricter on the family unification of dependent adult relatives than the old rules which were valid until July 2012. Under the old rules, adult dependent relatives aged 65 and older were eligible for family unification if they were financially wholly or

908 Home Office, *Immigration Directorate Instructions, Family members under Appendix FM of the Immigration Rules, Appendix FM Section FM 6.0, Adult Dependent Relatives* p 7.
909 Ibid.
910 Ibid.

mainly dependent on the sponsor.[911] This dependency must be based on necessity, in the sense that they had to substantiate the general need to be dependent on the sponsor. Where the parent or grandparent was younger than 65 years old, family unification was only granted in the most exceptional compassionate circumstances.[912] Now the requirement is shifted to the ability of the applicant to perform everyday tasks, with the support of the sponsor. This means that even if an applicant is completely dependent on the sponsor, family unification is only granted where there is nobody available to provide for the care of the applicant in the country of origin. This significantly raises the threshold. Furthermore, under the new rules, uncles and aunts are excluded from family unification, which was not the case under the previous rules.

Interim Conclusion

In EU law, the family unification of relatives in the ascending line is within the scope of the FRD, albeit under the facultative regime. Therefore the member states are not under any legal obligation to allow for the family unification of family members in the ascending line. If the member states do implement this possibility, the FRD requires the dependency of the migrating family member on the sponsor. This stands in the way of third-country national parents seeking family unification with their direct descendants legally residing in an EU member state.

Germany does allow for the family unification of the third-country national parents of minor German nationals. The family unification of other family members in the ascending line is only allowed in exceptional circumstances in accordance with the hardship clause. The Netherlands does not provide for the family unification of family members in the ascending line. A specific hardship clause for these family members was annulled in 2012. Family members can only apply for the general hardship clause, but the application of this clause is very restrictive. In Denmark family members in the ascending line can only be eligible for family unification in exceptional circumstances in accordance with a hardship clause. This hardship clause is applied restrictively. Both Denmark and the Netherlands do not have any specific policies for the family unification of parents with their minor direct descendants residing lawfully in Denmark and the Netherlands. In the United Kingdom both parents and other family members in the ascending line are eligible for family unification. The family unification of the parents of British citizens or persons settled in the UK is not made subject to further requirements than applying, for instance, for the family unification of children to their parents. However for the family unification of other relatives in the ascending line, it should be substantiated that the family member is not able to perform

911 The former Art 317(iii) Immigration Rules (UK).
912 The former Art 317(i)(d)&(e) Immigration Rules (UK).

everyday tasks, even with the support of the sponsor, in the country of origin. This is a tough requirement to meet, as the applicant should prove that the sponsor is not able to provide for the care in the country of origin, but is able to provide for the care in the UK.

Of the four selected member states, the United Kingdom is the only country which has regulated the family unification of direct ascendants, albeit under strict requirements. Denmark, Germany and the Netherlands only provide for the family unification of family members in the ascending line in exceptional circumstances of hardship. Denmark and the Netherlands furthermore specify that in principle extended family unification is only allowed if denial of this would result in a breach of international obligations under Article 8 ECHR. With respect to the family unification of parents with their children, Germany and the United Kingdom have policies specifically targeting this group. In Denmark and the United Kingdom, these parents can only rely on the hardship clauses. As long as this is done correctly, it does not necessarily result in violations of Article 8 ECHR. This topic will be discussed in more length in Chapter 10 on the domestic implementation of the *Zambrano* ruling of the CJEU.

6.3.7 Specific hardship clauses

Most member states provide for a hardship clause according to which family unification may be granted to other family members than is provided for in their legislation. The FRD does not have a hardship clause as such. There is no provision which obliges the member states to allow for family unification outside the nuclear family when exceptional hardship makes this appropriate. There are, however, several provisions which are relevant to consider in this context. First, there are two horizontal clauses which oblige the member states to take the best interests of children into account[913] and to take due account of the individual circumstances of the case.[914] As such, these provisions cannot be considered as a hardship clause, as they apply to all situations within the scope of the Directive. Second, there are several provisions which grant the member states the competence to allow for family unification, without laying down explicit obligations to do so. As was outlined above, this applies for first degree relatives in the ascending line and adult unmarried children.[915] Third, the FRD does not prevent the member states from adopting more favourable provisions.[916] Fourth, when implementing EU law, the member states should respect the general principle of proportionality as codified

913 Art 5(5) FRD.
914 Art 17 FRD.
915 Art 4(2) FRD.
916 Art 3(5) FRD.

in Article 52 Charter. The proportionality principle requires that limitations to fundamental rights, a denial of family unification can be claimed a limitation to the right to respect for family life under Article 7 Charter, may only be made if this is necessary and genuinely meets the objectives of general interest. Fifth, in *Chakroun* the CJEU held that individual circumstances must always be taken into account and fundamental rights should be respected in individual cases.[917] Based on these five factors, I would argue that although the Directive does not prescribe the member states to have a hardship clause, it may oblige the member states to allow for family unification outside the definition of the family as laid down in Article 4(1) FRD. As the FRD grants the member states the competence to allow for family unification of family members who are not covered by that provision, the exercising of this competence is within the scope of the FRD. In that case, the horizontal clauses are applicable, and so is the Charter of Fundamental Rights of the EU. In particular circumstances there may be situations in which the member state is obliged under the FRD to allow for family unification, even if the FRD does not formulate an explicit obligation. A supportive argument for this reasoning is that the discretionary competence of Article 4(2) would be rather meaningless in the context of Article 3(5) FRD, which allows the member states to have more favourable provisions anyway.

Domestic law

The legislation of *Denmark* provides for a hardship clause for the family unification of other family members pursuant to section 9c(1) Aliens Act. However family members other than children aged 15 years and younger and spouses and partners are only eligible for family unification when special circumstances apply. The unity of the family can be one of these reasons. In practice, this provision is implemented by implying that Denmark will only allow for the family unification of other family members if a denial of family unification would amount to a violation of Denmark's international obligations under Article 8 ECHR.[918] The Danish Supreme Court has confirmed that it was the intention of the legislature that only applications in which denial would result in a breach of Danish international obligations would be eligible under section 9c(1) Aliens Act.[919]

The memorandum supporting the legislative amendment which introduced this hardship clause in 2002 provides for some examples of situations where

917 *Chakroun* (n 392).

918 Ministeriet for Flygtninge Indvandrere og Integration, *Bemærkninger til lovforslaget, Forslag til lov om ændring af udlændingeloven og ægteskabsloven med flere love. (Afskaffelse af de facto-flygtningebegrebet, effektivisering af asylsagsbehandlingen, skærpede betingelser for meddelelse af tidsudbegrænset opholdstilladelse og stramning af betingelserne for familiesammenføring m.v.)* (Folketingsåret 2001-02, 2 samling, L 152, 2001).

919 Højesteret (29-08-2008) Sag 136/2007 (DK).

the hardship clause could apply.[920] These examples include the family unification of a parent aged over 60 years, the family unification of a spouse where the foreign sponsor did not have a permanent residence permit for three years, where a disabled person aged over 18 years is running the risk of being left behind in the country of origin because the other family members have been granted a residence permit in Denmark or where there is a care relationship among siblings in which an older sibling has taken care of and acted as a parent to minor siblings for a number of years before entering Denmark. Also, the memorandum mentions that family unification may be allowed under the hardship clause when the age requirement for spousal family unification, which at the time of the memorandum was still set at 18 years, is not met. These examples must, however, be seen in the light of the practice that family unification of other family members is only granted when this would lead to a violation of Denmark's international obligations.

In the abovementioned case of the Supreme Court, an Iraqi national who acquired refugee status in Denmark successfully applied for the family unification of his wife and children. Subsequently, he applied for the family unification of his mother under the hardship clause. When this application was rejected, the applicant appealed as far as the Supreme Court. Setting aside the factual issues arising in this case, the High Court scrutinised the hardship clause on two levels.[921] First, it established whether the denial of family unification would breach Denmark's international obligations under Article 8 ECHR. According to the High Court, there was no interference with the right to respect for family life, and even if that was the case, this interference would be proportionate to the legitimate aim of immigration control. Second, the High Court answered the question of whether the authorities had exercised their discretionary competence correctly. The High Court stated that the competence of the courts to review discretionary competence of the administration is limited to establishing whether the procedural rules had been followed correctly. The High Court concluded that there was no evidence to suggest that the administration had wrongly applied its discretionary competence in this case. The Supreme Court upheld the ruling of the High Court.

This case illustrates how the hardship clause is applied in practice. It is up to the immigration authorities to establish whether special reasons for granting family unification to other family members apply. In this assessment the administration may use the criterion that family unification of other family members is only granted when this would lead to a violation of Denmark's

920 Ministeriet for Flygtninge Indvandrere og Integration, *Bemærkninger til lovforslaget, Forslag til lov om ændring af udlændingeloven og ægteskabsloven med flere love. (Afskaffelse af de facto-flygtningebegrebet, effektivisering af asylsagsbehandlingen, skærpede betingelser for meddelelse af tidsudbegrænset opholdstilladelse og stramning af betingelserne for familiesammenføring m.v.)* (Folketingsåret 2001-02, 2 samling, L 152, 2001).

921 Østre Landsret (06-03-2007) (DK).

international obligations. The decision of the immigration authorities is subject to judicial review. In this judicial review, compliance with Article 8 ECHR is fully scrutinised as was done by the High Court. It concluded that there had been no breach of Article 8 ECHR as the interference was justified. However, the exercise of the discretionary competence of the administration is only tested on compliance with procedural rules.

Section 9c(1) furthermore provides that for the application of this hardship clause, the requirements of section 9(2) to (17) and 9(19) to (25) Aliens Act are complied with. This means that applicants for the hardship clause must comply with all the material conditions which are further analysed in Chapter 8 of this dissertation. This condition is formulated as mandatory; family unification may not be granted if these requirements are not fulfilled. However, when a denial of an application for family unification leads to a breach of Denmark's international obligations, a residence permit must still be issued under section 9c(1) Aliens Act.

In *Germany* Article 36(2) Residence Act provides for a hardship clause allowing family unification of other family members not covered by Articles 27 to 35 Residence Act. All members from the greater family, such as adult direct descendants, foster children, parents, grandparents, brothers and sisters, uncles and aunts and nephews and nieces, are in principle eligible for family unification under this provision. Spouses and minor children who fall under Articles 28 to 35 Residence Act are not eligible for family unification under Article 36(2) Residence Act. The other family members are only eligible for family unification if granting a residence permit is necessary to prevent extraordinary hardship ('*auâergewöhnliche Härte*'). Extraordinary hardship is only assumed when the particular circumstances of a case, in the context of the constitutional protection of the family under Article 6 Basic Law and in comparison with the right to family unification for the nuclear family under Articles 28 to 35 Residence Act, compel the granting of a residence permit. The consequences of denying the right to family unification should be so grave that this would be regarded as absolutely unacceptable.[922] Family unification should be necessary to prevent extraordinary hardship, meaning that if there are other means to prevent such hardship, such as temporary visits, written or telephone contact and financial support, no right to family unification would exist under Article 36(2) Residence Act. The goal of family unification should always be the restoration and maintenance of the family community (*'Herstellung und Wahrung der Familiengemeinschaft'*).

In the *Netherlands*, a specific hardship clause on the family unification of family members outside the nuclear family existed until 2012.[923] Other dependent family members were eligible for family unification if this led to disproportionate hardship in the case where the applicant would have to stay

922 Hailbronner (n 655) p 265.
923 See the former Art 3.24 Foreigners Decree (NL).

in the country of origin. In 2012, this clause was annulled. The reasoning behind this amendment was that family unification should only be allowed for the nuclear family.[924] The government aims to limit family unification to the nuclear family and to cases in which the refusal of admission would lead to a violation of Article 8 ECHR.[925]

There is, however, still a hardship clause in Dutch legislation. According to Article 3.13(1) Foreigners Decree, the Minister should grant applications in cases where the requirements set out in the subsequent provisions are met. However, the Minister is allowed to grant any application in which the requirements are not met pursuant to Article 3.13(2) Foreigners Decree. This means that the Minister is still allowed to grant an application for family unification, even to a family member outside the nuclear family. Until now this provision was mainly used when applicants did not fulfil the substantive requirements. For example, the Council of State has held that the Minister has the authority to issue a residence permit under Article 3.13(2) Foreigners Decree if he is not able to do so under Article 3.13(1) Foreigners Decree because the income requirement was not met.[926] However, for the family unification of categories of family members not eligible for family unification under the ordinary provisions, Article 3.24 Foreigners Decree was used. For example, the Council of State has accepted that in principle the family unification of a parent to a minor child can be permissible under Article 3.24 Foreigners Decree.[927] Now that Article 3.24 Foreigners Decree has been annulled, that option is no longer possible. Therefore when there is an application now for a residence permit for a category of family members which has not been provided for in the ordinary provisions, Article 3.13(2) Foreigners Decree has to be used. This can be the case for example when a refusal of admittance would lead to a violation of Article 8 ECHR.

The old Article 3.24 Foreigners Decree was applied very restrictively. For example, as a matter of principle any asylum-related grounds were not taken into account in the assessment of whether a refusal of admission would lead to disproportionate hardship.[928] It is questionable whether an assessment of disproportionate hardship which does not include all elements which can lead to disproportionate hardship is in conformity with the requirements of Article 8 ECHR.[929] Before the annulment of Article 3.24 Foreigners Decree, this hardship clause was reviewed in practice as an assessment of the compatibility of a refusal with Article 8 ECHR, which was disputably not applied correctly. Now that same assessment needs to take place in the context of

924 Staatsblad 2012 nr 148 (NL) p 13.
925 Ibid.
926 Council of State (04-06-2009) 200806544/1 JV 2009/322 (NL).
927 Council of State (11-10-2010) 201006332/1/V1 (NL).
928 Council of State (19-02-2003) 200206199/1 JV 2003/137 (NL).
929 See Boeles (n 874) p 76.

Article 3.13(2) Foreigners Decree. For a more detailed analysis on the application of Article 8 ECHR in the Dutch family unification practice, see Chapter 10 of this dissertation. The effects of the annulment of Article 3.24 Foreigners Decree, considering the application of that provision and of Article 3.13(2) Foreigners Decree in the context of Article 8 ECHR, should not be overstated.

The *United Kingdom* does not have a hardship clause in its immigration rules. It should be remarked, however, that the United Kingdom uses the broadest definition of the family of the selected member states. Besides the nuclear family, the Immigration Rules allow for the family unification of unmarried partners, adult direct descendants and family members in the ascending line, including brothers and sisters. It should be noted, though, that this is subject to requirements. However, when the regulation provides for a wide category of family members, a hardship clause on other family members becomes more relevant. Under the old Immigration Rules, dependent uncles and aunts were also eligible for family unification under the most exceptional compassionate circumstances. Since the amendment of the Immigration Rules in 2012, this is no longer provided for.

In theory it is possible that family unification is granted outside the Immigration Rules.[930] This is, however, limited to situations in which a concession provides for the right to family unification or in 'particular compelling circumstances'. When establishing whether 'particular compelling circumstances' are at stake, it must first be established that the applicant is not eligible for family unification under the Immigration Rules.[931] Considering that in the Immigration Rules a broad definition of the family is provided for, in most circumstances this will not be the case.

What occurs more often is that the requirements of the Immigration Rules are not fulfilled. If that is the case, family unification outside the rules is not possible. Instead, in-country applicants can apply for 'discretionary leave' based on human rights grounds. This will be discussed further in Chapter 9 on the application of Article 8 ECHR in the domestic legal system of the selected member states.

Interim conclusion

Denmark has a hardship clause which is applied when a denial of an application would lead to a violation of Article 8 ECHR. Germany has a hardship clause which is applied when the consequence of denial would be so grave that it would be absolutely unacceptable. In the Netherlands a hardship clause relating to family members not covered by ordinary regulation was annulled in 2012, but a general hardship clause still exists. According to the Dutch

930 UK Visas and Immigration (Home Office), *Chapter 01: general provisions, Section 14: leave outside the rules (immigration directorate instructions)* (2013) (UK).

931 Ibid para 2.2.

government, extended family unification is only allowed when a denial would result in violation of Article 8 ECHR. In the United Kingdom, the Immigration Rules do not provide for a hardship clause on other family members. It is in theory possible to apply for family unification 'outside the rules', but this is only possible where the Immigration Rules do not provide for the family unification of that family member. Furthermore, it is possible to make a human rights claim based on Article 8 ECHR. This is further discussed in Chapter 9 of this dissertation.

It is striking that in both Denmark and the Netherlands extended family unification is in practice only allowed where a denial would lead to a breach of international obligations. This illustrates that the protection of respect for family life in these jurisdictions is placed in the international, rather than the national, sphere. In Germany and the United Kingdom, the mitigation of exceptional hardship is placed within the domestic legal system. In these member states, it is domestic law which is interpreted in accordance with international law, whereas in Denmark and the Netherlands it seems that it is the other way around.

6.3.8 Interim conclusion

From the countries where the FRD is applicable, the Netherlands has chosen to make the same provisions applicable to both Dutch national sponsors and third-country national sponsors, whereas in Germany third-country national sponsors derive the right to family unification from a different provision than German national sponsors. This difference should, however, not be overstated as the provision applicable to third-country national sponsors is by analogy also applicable to German national sponsors. Both the Netherlands and Germany have chosen to only provide for the family unification of the core nuclear family. Where the FRD has a facultative regime, such as is the case for adult unmarried children and for direct ascendants, both member states have not implemented this option. Both countries do allow for family unification outside the core nuclear family in exceptional circumstances. What is striking is that in Germany the hardship clause is based on domestic law, while the Netherlands and Denmark only allow for extended family unification where a refusal of family reunification would result in a violation of Article 8 ECHR. This confirms the idea that while in Germany the right to family reunification is firmly rooted in domestic law, in the Netherlands the domestic protection is made conditional on international protection.

6.4 CONCLUSION

The research question addressed in this chapter was who is eligible for family unification. In order to answer this question, the EU law on the definition of the family in the context of family unification as well as the domestic law in the selected member states were analysed. This resulted in several findings, the most striking finding being that there is no straight answer to the research question addressed.

Within EU law, there are different definitions of the family. First it needs to be established which directive, if any, is applicable. The rules laid down in the Free Movement of Persons Directive differ to a wide extent from the rules laid down in the FRD. This is explained by the fact that both directives have a different negotiation history and in fact arose in different fields of EU law. The result, however, is that the definitions of the family are not consistent. For example under the CD, direct descendants are eligible for family unification until the age of 21, whereas under the FRD direct descendants are eligible for family unification until the age of 18. The consequence of this differential policy is that there are different levels of protection. If an individual cannot enjoy the protection of the FRD, because he lives in Denmark or the United Kingdom, he can always move to another member state, say Germany or the Netherlands, in order to fall under the protection of the CD. By doing so, the applicable EU law would change, creating a more favourable legal regime, without any law being violated.

In the relation between EU law and domestic law, it is striking that the CD is applicable in all of the selected member states, whereas the FRD is only applicable in two of the selected member states. This is explained by the fact that both directives have a different background. Denmark and the United Kingdom have always been bound by the legislation on the free movement of persons, and have negotiated an opt-out from certain instruments including the FRD. The result, however, is that there are common rules on the definition of the family with regard to the family unification in the context of the free movement of persons, but not with regard to the family unification of third-country nationals. Furthermore, the FRD in particular gives the member states a large margin of appreciation with respect to the definition of the family. The member states may allow for the family unification of adult children, relatives in the ascending line and unmarried partners, but are under no obligation to do so. With regard to registered partners, the FRD lays down that they need to be treated like spouses if under domestic legislation, spouses and registered partners enjoy the same status. With regard to the eligibility of spouses, the FRD lays down that a third-country national is eligible as a spouse if he or she has a reasonable prospect of permanent residence. These are examples of the large discretion member states have regarding the definition of the family. This, naturally, leads to diverging domestic practices which in turn goes against the principal objective which is harmonisation.

This becomes apparent when investigating the domestic law of the member states. As the margin of appreciation in the CD is smaller than in the FRD, the definition of the family under the CD is more harmonised than under the FRD. The Netherlands is especially active in seeking out the limits of the margin of appreciation under the FRD. For example on the issue of the family unification of unmarried partners, the Netherlands sought to annul their national law, as this was prone to fraud and abuse. However, when a new government was installed, the annulment of unmarried family unification was reversed. When the FRD is not applicable, the member states are able to require alternative conditions. For example in Denmark, only direct descendants aged 15 and younger are eligible for family unification. There is therefore a need for further harmonisation which would include the member states which are currently not bound by the FRD.

Purely looking at the compliance with both directives, it is striking that in general the directives are complied with by the selected member state. There are only minor issues on compliance. Within the context of the CD, Germany does not allow for the family unification of registered partners under the right provision and does not in any way facilitate the family unification of other family members. The Netherlands infringes the CD where it does allow for the family unification of unmarried partners of foreigners within the personal scope of the CD, but does not allow the same for Dutch nationals within the scope of the CD. Within the context of the FRD, the Netherlands requires the existence of a family bond in the country of origin for the family unification of direct descendants, infringing the FRD.

7 Substantive requirements for family unification

7.1 INTRODUCTION

This chapter addresses the issue of the substantive requirements member states impose on applicants for family unification and their sponsors. The research question to be considered in this chapter is which requirements do the member states impose within the context of family unification and how do these requirements relate to EU law.

In the first section the substantive requirements on family unification imposed within the scope of the Free Movement of Persons Directive (CD) are addressed. The second section focusses on the substantive requirements imposed within the context of the FRD. Here, for comparative purposes, the member states in which the FRD is not applicable (Denmark and the United Kingdom) are also analysed. Each section ends with concluding remarks in which the different implementations of the member states are compared. The chapter itself ends with a conclusion in which the substantive requirements within the context of the CD and the FRD are compared. Throughout the chapter, case studies are used to illustrate the findings and to show how similar factual circumstances can lead to different results in the member states.

7.2 FREE MOVEMENT OF PERSONS

7.2.1 EU law

Family members of EU citizens who have made use of their free movement of persons right, and for that reason are within the scope of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (CD), fall within the scope of that Directive. That means that any requirement placed on family unification of such family members must be in accordance with the CD. The requirements on the right to reside for the sponsor within the context of the CD are the same as the requirements placed on third-country national family members applying for family unification in order to join that sponsor.
Article 7(1) CD prescribes that all EU citizens have the right to reside in the territory of another member state for a period of more than three months, if they are either a worker or self-employed person, are self-sufficient or are a

student. These various possibilities to fall within the scope of Article 7(1) CD are discussed below.

The first line of Article 7(1)(a) CD grants the right of residence for longer than three months to workers and/or self-employed persons. The CD does not contain definitions of what workers and self-employed persons are. The case law of the CJEU must be consulted for further guidance on this issue. In *Lawrie-Blum* the CJEU held that an essential element of a worker is that "*for a certain period of time a person performs services for and under the direction of another person for which he receives remuneration.*"[932] Also a person who is in part-time employment qualifies as a worker.[933] The level of remuneration and the length of the employment contract are not relevant in establishing whether a person qualifies as a worker; the relevant criterion is whether the employment is real and genuine. The purpose of taking up employment is not relevant either. Purposefully creating the situation of a worker to fall within the scope of EU law is not considered to be an abuse of law.[934] For that reason it is possible for an EU national sponsor to move to another member state and take up employment there to qualify as a worker and to fall within the scope of the CD. For a self-employed person, the CJEU held in *Factortame* that it entails "*the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.*"[935] To be a worker or self-employed person is sufficient to qualify for residence in another member state; no other substantive requirements may be imposed.

Article 7(1)(b) CD regulates the right of residence for a period longer than three months for persons 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 in the host member state. Article 8(4) CD further defines that the member states may not lay down a fixed amount which they regard as sufficient resources, but must take into account the personal circumstances of the person concerned. The same provision does, however, limit the member states in the sense that the required amount, which may not be a fixed amount, may not be higher than the threshold below which nationals of the host member state become eligible for social assistance. The origin of the resources used to not become a burden on the social assistance system of the member state is not relevant. In *Commission v. Belgium* the CJEU held that a requirement as to the origins of the resources is not necessary for the attainment of the objective of preventing an applicant from becoming a burden on the social assistance system.[936] According to the CJEU, the competence

932 *Lawrie Blum* (n 481) para 17.
933 See for example Case 139/85 *Kempf* [1986] ECR 1741 .
934 See for example Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.
935 *Factortame* (n 483) para 20.
936 Case C-408/03 *Commission v Belgium* [2006] ECR I-2647 para 41.

of the member states to impose a resources requirement must be interpreted strictly as the free movement of persons is a fundamental principle of EU law.[937] A similar issue arose in *Chen*, in which the question was whether an EU national baby fulfilled the sufficient resources requirement. The CJEU held that although baby Chen did not fulfil this requirement herself, her mother did, and, as the directives did not contain a further limitation on the origin of the resources, those provisions should be interpreted restrictively in the light of the fundamental nature of the free movement of persons.[938] The member states must therefore interpret their competence to require sufficient resources restrictively.

Article 7(1)(c) CD grants the right to reside for a period longer than three months to persons who are enrolled at a private or public establishment, accredited or financed by the host member state on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training, and have comprehensive sickness insurance cover in the host member state. Article 7(2) CD states that the right of residence provided for in Article 7(1) CD shall extend to third-country national family members accompanying or joining the EU citizen who fulfils the requirements laid down in that provision. In Article 7(4) CD the eligible family members of students are limited to spouses, registered partners and dependent direct descendants. All dependent relatives in the ascending line of students fall under the facultative regime of Article 3(2) CD.

The member states may not impose any other substantive requirements under the CD. Because the CD also applies to the third-country family members of an EU citizen who makes use of his right to free movement of persons, this group is also within the personal scope of the Directive. Therefore, the member states may not impose any further conditions on the family unification of third-country national family members of EU citizens who have made use of their right to free movement of persons, besides the general requirements applicable to the sponsor as laid down in Article 7(1) CD.

7.2.2 Domestic law

In *Denmark*, the third-country national family members of an EU citizen living in Denmark within the scope of the free movement of persons have the right to enter and reside in Denmark for more than three months if the sponsor complies with the requirements for residing in Denmark.[939]

The following categories of EU citizens making use of their right to free movement of persons qualify to reside in Denmark for a period longer than

937 Ibid para 40 .
938 *Zhu and Chen* (n 486) para 30-31.
939 Art 8(1) EU Residence Order (DK).

three months: workers and self-employed persons.[940] The assessment of whether a person qualifies as a worker is made on an individual and case-by-case basis. The essential question being whether the employment is effective and genuine. A person who is in paid employment is recognised as a worker under EU law as long as the employment was not of a very marginal or ancillary nature. When a person only works a few hours each week, this may be an indication that the employment is marginal and ancillary. The usual threshold is a minimum amount of ten to twelve working hours per week. There is no minimum length of employment history. The ten-week limit recognised by the CJEU in *Ninni-Orasche* can only be regarded as an example of a situation in which ten weeks of employment was sufficient to be recognised as a worker.

The right to reside in Denmark for a period exceeding three months also applies to service providers who move to Denmark with the purpose of providing a service on behalf of a service provider established in the European Union,[941] students[942] and persons with sufficient means of subsistence.[943]

In *Germany*, family members of an EU national sponsor who is within the scope of the CD have the right to enter and reside without further requirements.[944] The following categories of EU nationals making use of their free movement of persons have the right to reside in Germany for a period longer than three months: workers,[945] self-employed persons,[946] service providers,[947] service recipients[948] and economically inactive EU citizens.[949] These concepts are not further defined by lower domestic regulation. Instead, the case law of the CJEU is used to interpret these concepts. The commentaries to the legislation, which are frequently used in the German legal system, contain references to the guiding rulings of the CJEU instead of domestic implementing norms. For that reason, the concepts are not further analysed above.

In the *Netherlands*, the family members of migrating EU citizens are recognised as 'Community nationals' ('*gemeenschapsonderdaan*'), and therefore enjoy the same entry and residence rights as EU citizens.[950] This is further specified in the Foreigners Decree, in which it is stated that the provisions relating to the free movement of persons apply to both EU nationals making

940 Art 3 EU Residence Order (DK).
941 Art 4 EU Residence Order (DK).
942 Art 5 EU Residence Order (DK).
943 Art 6 EU Residence Order (DK).
944 Art 3 Free Movement Act (GER).
945 Art 2(2)(1) Free Movement Act (GER).
946 Art 2(2)(2) Free Movement Act (GER).
947 Art 2(2)(3) Free Movement Act (GER).
948 Art 2(2)(4) Free Movement Act (GER).
949 Art 2(2)(5) Free Movement Act (GER).
950 Art 1(e)(2) Foreigners Act (NL).

use of the free movement of persons as well as to their third-country national family members.[951]

Workers, self-employed persons and jobseekers with a reasonable prospect of finding employment have the right to reside in the Netherlands for a period exceeding three months.[952] In the Foreigners Circular those concepts are further defined. It is laid down that a worker must be in real and genuine employment (*'reële en daadwerkelijke arbeid'*), which corresponds to the definition in the case law of the CJEU on this issue. A jobseeker has the right to reside in the Netherlands for a period longer than three months when there is a reasonable prospect of gaining employment substantiated by a letter from the prospective employer stating that the job application procedure is pending. When the majority of the income, meaning at least 50% of the level of minimum social security benefits, is earned through employment, it is not relevant whether the other income comes from other sources, including public assistance. When more than 50% of the income consists of other sources than the income from employment, then this casts doubt on the real and genuine character of the employment. Furthermore, the requirement of real and genuine employment is met when a person is in employment for at least 40% of the normal working time. Also the length and regularity of the employment plays a role in determining whether the employment is real and genuine.[953] In domestic case law, it was acknowledged that these specific implementing norms may only be used as indicators and not as requirements.[954] Any other reading of these provision would in my opinion not be in accordance with the CD.

Also, persons who have sufficient means of subsistence for themselves and their family members and who have sickness insurance coverage which fully covers healthcare in the Netherlands have the right to reside in the Netherlands for a period exceeding three months.[955] The standard amount of resources required to fulfil this requirement is set at the minimum wage level.[956] The source of that income is not relevant, as long as the resources are available to the EU national. Income from illegal sources is not taken into account when establishing whether the requirement for sufficient resources is complied with.[957] As the requirement does not seek to establish whether there is income at a certain level, but whether there are sufficient resources, it must be established that from the available resources an 'income' at the required level can

951 Art 8.7(1)&(2) Foreigners Decree (NL).
952 Art 8.12(1)(a) Foreigners Decree (NL).
953 Art B10/2.2. Foreigners Circular (NL).
954 Rechtbank 's-Gravenhage, zp Amsterdam (06-04-2007) AWB 06/1681.
955 Art 8.12(1)(b) Foreigners Decree (NL).
956 Art 3.74 Foreigners Decree (NL).
957 See the former Art 4.1. Foreigner Circular (NL). Currently the Foreigners Circular does not contain further guidance on when the sufficient resources requirement is deemed to be met.

be drawn. The period of the availability of the resources is not further laid down in the Foreigners Circular. This leaves the immigration authorities in the Netherlands with enough margin of appreciation to take into account all personal circumstances in a case to determine whether the sufficient resources requirement is complied with. However, in my opinion it also creates a lack of legal certainty regarding the required level of available resources. The fact that through the amendment to the Foreigners Circular further guidance was removed, does not contribute to building more legal certainty.

Lastly, also persons who are registered in an education programme that is registered in the Higher Education and Scientific Research Act (*'Wet op het hoger onderwijs en wetenschappelijk onderzoek'*) have the right to residence in the Netherlands for a period exceeding three months.[958] This also applies to the family members of such EU nationals,[959] with a limitation on the family members of students.[960]

In the *United Kingdom*, the conditions for the right to free movement of EU citizens and their family members are laid down in the Immigration (European Economic Area) Regulations 2006. In the UK the right to reside for a period of longer than three months is granted to 'qualified persons'.[961]

A jobseeker is considered to be a qualified person. A jobseeker is a person who enters the UK in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.[962]

Workers are also considered to be qualified persons. A worker is defined as a worker within the meaning of Article 45 TFEU.[963] With this definition the legislator did not implement the concept of a worker itself but instead refers to the EU law concept. In the guidance documents for case workers, the worker concept is further explained. A person qualifies as a worker if he is doing genuine paid work, carried out under the direction of someone else, on a full-time or part-time basis.[964] This corresponds to the requirements laid down in the case law of the CJEU.

A third category of qualified persons are self-employed persons. A self-employed person is defined in the legislation as a person who establishes himself in order to pursue activities as a self-employed person in accordance with Article 49 TFEU.[965] In the guidance documents for case workers, the concept of the self-employed person is further explained. A person qualifies

958 Art 8.12(1)(c) Foreigners Decree (NL).
959 Art 8.12(1)(d) Foreigners Decree (NL).
960 Art 8.12(1)(e) Foreigners Decree (NL).
961 Art 13 Immigration (European Economic Area) Regulations 2006 (UK).
962 Art 6(4) Immigration (European Economic Area) Regulations 2006 (UK).
963 Art 4(1) (a) Immigration (European Economic Area) Regulations 2006 (UK).
964 Home Office, *European Economic Area (EEA) and Swiss nationals: free movement rights* (2014) p 22.
965 Art 4(1) (b) Immigration (European Economic Area) Regulations 2006 (UK).

as a self-employed person if he is registered at HM Revenue & Customs for income tax and national insurance as a self-employed person.[966]

Self-sufficient persons are equally considered to be qualified persons. A self-sufficient person is a person who has sufficient resources not to become a burden on the social assistance system of the UK during his period of residence and has comprehensive sickness insurance cover in the UK.[967] The resources are regarded to be sufficient if they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system.[968] If the resources of the applicant exceed this maximum level he qualifies as a self-sufficient person. If a person does not exceed the maximum level of resources, the personal circumstances of the case must be assessed. These include financial commitments (such as rent, mortgages, utilities, loans, credit cards, other personal debts), additional costs (such a travel and food costs) and other circumstances.[969] It is not stated in the legislation nor the guidance documents what the level of resources is to become eligible for social assistance. As the system of social assistance in the UK does not use a single reference amount to determine whether a person qualifies for social assistance, it remains unclear what the real threshold is. In my opinion this does not necessarily need to lead to infringements of the CD, as there is room to weigh all personal circumstances. But it does lead to a lack of legal certainty regarding the required level of resources.

Lastly, students are also considered to be qualified persons. A student qualifies for the right to free movement of persons if he is enrolled in a registered private or public establishment for the principal purpose of following a course of study including vocational training, has comprehensive sickness insurance cover in the UK and has sufficient resources not to become a burden on the social assistance system of the UK during the period of residence.[970]

7.2.3 Interim conclusion

The member states do not enjoy a large margin of appreciation to impose substantive requirements on applications for family unification within the context of the free movement of persons. From the outset, the free movement of persons has been one of the fundamental freedoms of the internal market in the EU. The CJEU has traditionally been the protagonist of the internal market.

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966 Home Office, *European Economic Area (EEA) and Swiss nationals: free movement rights* (n 964) p 24.

967 Art 4(1)(c) Immigration (European Economic Area) Regulations 2006 (UK).

968 Art 4(4) Immigration (European Economic Area) Regulations 2006 (UK).

969 Home Office, *European Economic Area (EEA) and Swiss nationals: free movement rights* (n 964) p 24.

970 Art 4(1)(d) Immigration (European Economic Area) Regulations 2006 (UK).

The rulings of the CJEU in the field of the free movement of persons can therefore be largely categorised as the promotion of the free movement of persons. For example, the CJEU has broadly defined the worker concept and has restricted the member states in imposing strict requirements for the free movement of economically inactive EU citizens. Specifically with regard to the field of family unification, the CJEU has held that the refusal of family unification of a third-country national family member of an EU citizen may not deter that EU citizen from making use of his right to the free movement of persons. The protection of the right to family unification within the context of the free movement of persons by the CJEU should be placed in that context. When the CJEU rules that the refusal of family unification may not deter an EU citizen from making use of his right to the free movement of persons, the CJEU does not protect the right to family unification as such, but actually protects the free movement of persons as such.

The result of this approach is that within the context of the free movement of persons the member states are not allowed to impose any substantive requirements other than the requirements placed on the use of the free movement of persons by the EU citizen who acts as a sponsor for the applicant for family unification. When two member states attempted to restrict the consequences of this policy by requiring third-country national applicants for family unification to comply with the requirement of prior lawful residence in an EU member state, the CJEU eventually prohibited such a requirement. This makes family unification within the context of the free movement of persons an alternative for more restrictive family unification policies which are analysed below. By moving to another EU member state, an EU national sponsor can circumvent domestic family unification policies.

Even though the member states might be sceptical about the effects of family unification within the context of the free movement of persons, they largely respect the standards laid down in the CD. The Netherlands and the United Kingdom have scrupulously implemented the requirements of the CD in regulations. In Denmark, the legislation formally only applies to non-Danish EU citizens, but by analogy also applies to Danish EU citizens. For the latter category the Danish immigration service has written an extensive report on the application of the CD, implementing the norms arising from the case law of the CJEU. By analogy, this document can also be applied to non-Danish EU nationals. In Germany, the CD is implemented in legislation, but there are no lower forms of regulation implementing the statute besides the Administrative Guidelines for the Free Movement Act. Instead, the case law of the CJEU is used to interpret the CD and the German domestic implementing legislation. These different implementation methods are merely form; the content of the implementation is largely the same. A possible reason for this is the volume and the explicitness of the case law of the CJEU in the field of the free movement of persons.

7.3 FAMILY REUNIFICATION DIRECTIVE

The FRD provides for substantive requirements relating to age, accommodation, insurance, maintenance and integration. The FRD is not applicable in Denmark and the United Kingdom. For comparative purposes, the domestic policy on substantive requirements of these member states is nevertheless presented in this section.

7.3.1 Age requirement

EU law

The FRD prescribes that the member states may require both the sponsor and the spouse to be of a minimum age and a maximum of 21 years old in order "*to ensure better integration and to prevent forced marriages*."[971] During the negotiation of the Directive, the age requirement was a controversial issue. Sweden was the first country which proposed an age requirement in order to combat marriages of convenience.[972] The European Commission "*referred to different customs in certain third countries where an age difference does not necessarily imply the existence of a marriage of convenience*."[973] When the Swedish position found the support of some member states, the European Commission added the age requirement to the draft of the Directive, with the addition that the maximum level of the age requirement should be the age of majority.[974] The Commission motivated the age requirement by the assertion that an age requirement would prevent forced marriages.[975] During the negotiations, the newly appointed government in the Netherlands considered increasing the level of the age requirement to 21 and subsequently also proposed to set this age requirement in the Directive.[976] Initially there was little support for this proposal. However, after Denmark announced its support, the age requirement of 21 years was included in the text of the Directive.[977] The motivation for including an age requirement was previously not included in the text of the drafts, but was included in the final text. Strik interviewed selected repres-

971 Art 4(5) FRD.
972 Strik (n 351) p 104.
973 Council of the European Union, *Outcome of Proceedings of the Working Party on Migration and Expulsion on the Proposal for a Council Directive on the right to family reunification* (6504/00, 2000) p 4.
974 COM(2002)225 final (n 355) p 7 .
975 Ibid .
976 Council of the European Union, *Outcome of Proceedings of the Working Party on Migration and Expulsion on the Amended proposal for a Council Directive on the right to family unification* (10857/02, 2002) p 9.
977 Strik (n 351) p 104.

entatives from member states and the Commission. One of the members of the Dutch delegation commented that the Dutch government's position on the age requirement was not motivated by the premise that the age requirement would prevent forced marriages, but that this motivation did not harm the position and that therefore the Dutch government did not object to the formulation as it was finally adopted.[978]

Domestic law

In *Germany*, the minimum age for family unification is set at 18 years old.[979] This age requirement applies to both foreign and German nationals. Germany did not make use of the possibility offered to the member states in the FRD to set the minimum age at 21 years old. Even though the German legislator emphasised the need to combat forced marriages,[980] the imposition of a general age requirement set at 21 years was deemed incompatible with the constitutional protection of the family.[981] There is a special hardship clause for the family unification of spouses younger than 18 years of age.[982] The legislator included this hardship clause to make it possible that the age requirement is not imposed if this would lead to a breach of fundamental rights in an individual case.[983]

Before the adoption of the FRD, the *Netherlands* operated an age requirement of 18 years old. However in 2002 a new government was installed which aimed to improve the integration of immigrants by setting the age requirement for family unification at 21 years old for partners who had not lived together in the country of origin of the migrating family member.[984] This plan was codified in 2004 with the legislative amendment implementing the FRD. In the memorandum supporting this legislative amendment, the government states that the higher age requirement would enable the sponsor to meet the responsibilities he has for the integration of the migrating family member in the host society.[985] The prevention of forced marriages is not mentioned in the reasons for imposing the higher age requirement. In 2010 the age requirement was again amended following a ruling by the Court of Justice of the European Union in which the distinction made in Dutch legislation between the family unification of partners who had lived together in the country of origin and

978 Ibid.
979 Art 30(1)(1)(1) Residence Act (GER).
980 BT Drs. 16/5065, p. 172.
981 ibid., p. 173.
982 Art 30(2) Residence Act (GER).
983 Deutscher Bundestag, *Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union* (BT Drs 16/5065, 2007) p 173.
984 Parliamentary Documents II 2010/11, 32 417 nr 14 (NL) p 14.
985 Staatsblad 2004 nr 496 (NL) p 9-11.

partners who had not was deemed incompatible with the FRD.[986] As a result, the Dutch government was not allowed to operate two different age requirements. In reply to this ruling, the Dutch government decided to now require a minimum age of 21 years for all cases of family unification. In the memorandum supporting the legislative amendment, the government motivated this by repeating the formulation used in 2004 and by stating that the higher age requirement would better guarantee that the marriage was contracted voluntarily.[987] This latter assertion was not supported by any empirical evidence.

The FRD is not applicable in *Denmark*, and therefore the Danish legislator is not bound by EU law in imposing an age requirement. In Denmark both the sponsor and the migrating partner are required to be at least 24 years old in order to be eligible for family unification.[988] This makes Denmark the member state with the highest age requirement of all EU member states. The age requirement of 24 years old was introduced in 2000, before which the age requirement was set at 18 years old. The reason to increase the age requirement was that it was perceived that a higher age requirement would lower the risk of forced and arranged marriages.[989] The government reasoned that the increased age requirement would protect young people from pressure associated with marriage and prevent the situation in which a young person would be pressurised into telling the immigration authorities that family unification was at their own free will even if this was not the case.[990] In 2011, the age requirement of 24 years old was replaced by a points-based system in which eligibility for family unification depended on the amount of points obtained in a system based on integration potential.[991] In 2012 this points-based system was abandoned in favour of the old age requirement of 24 years.[992] In principle the age requirement is always applicable.[993] However, the age requirement can be waived in exceptional cases when the unity of the family requires this.[994] This is laid down in a specific hardship clause.[995] Under this provision, the age requirement can be waived when a denial of family unification would result in a breach of Denmark's international obligations, most notably under Article 8 ECHR.[996] From the legislative history, the following examples of such situations can be derived. Firstly, the age requirement can be waived

986 *Chakroun* (n 392).
987 Staatsblad 2010 nr 306 (NL) p 15.
988 Art 9(1)(1) Aliens Act (DK).
989 Ministeriet for Flygtninge Indvandrere og Integration p 29-30.
990 ibid., para 7.1.
991 Comments to the Bill of 17 March 2011, nr 168 (DK) .
992 Act of 12 May 2012, n. 418, amending the Aliens Act and various other acts (DK).
993 Comments to the Bill of 2 March 2012, no. 104, para. 3.2. (DK).
994 ibid.
995 Art 9c(1) Aliens Act (DK).
996 See for example Comments to the Bill of 15 December 2004, no. 149, para 10 (DK).

where the sponsor is unable to move to the country of origin of the migrating partner, for example because he was granted international protection in Denmark and faces the risk of inhuman treatment in the country of origin. Originally, this exemption of the age requirement was only applied in cases where both partners were already in a subsisting relationship before the sponsor entered Denmark for international protection.[997] However this limitation was dropped in a subsequent amendment.[998] Secondly, the age requirement is waived where the sponsor has custody or visitation rights over minor children residing in Denmark. In practice this is not applied to common children of the sponsor and the migrating partner. Vested-Hansen questions the legal basis of this distinction.[999] Thirdly, the age requirement is waived where, for reasons of severe illness or disability, the sponsor cannot move to the country of origin of the migrating family member because care or treatment is not available in that country. In all these examples it must, however, be assessed whether the denial of family unification would result in a breach of Denmark's international obligations. Besides the fact that the age requirement is waived if a denial would result in a breach of Article 8 ECHR, it is also waived if the sponsor has a certain occupation.[1000] The rationale behind this exemption is that it would not be beneficial for the Danish economy if a sponsor whose skills are needed in Denmark were forced to move to the country of origin of the migrating partner. The occupations which qualify for a waiver of the age requirement include engineers, medical specialists, IT specialists, nurses and teachers.[1001] The list of occupations is modified bi-annually.

The *United Kingdom* is not bound by the FRD and is therefore not limited by EU law in imposing an age requirement. In the UK, partners are allowed to get married with parental consent from the age of 16. Until 2003 this was also the age requirement for both the sponsor and the migrating spouse in the context of family unification. However, in 2003 the UK government raised the age requirement for the sponsor to 18 years. In 2004 the required age for the migrating spouse was raised to 18 as well. This was motivated by the belief that a higher age requirement for family unification would prevent forced marriages.[1002] In the subsequent years both academics and government agencies conducted research on the effects of increasing the age requirement in the prevention of forced marriages. Initially the UK Home Office contracted the team of Professor Hester to perform research on the link between forced marriages and the required age for family unification. After conducting their

997 Ministeriet for Flygtninge Indvandrere og Integration p 29, 34 and 50.
998 Act of 18 May 2005, no. 324, Comments to the Bill no. L78/2004-05, 2nd edition, p 17-18 (DK).
999 Vested-Hansen, 'Familiesammenføring' (n 722) p 131.
1000 Opholdsmeddelelse nr 7/03 of 12 June 2003 (DK).
1001 nyidanmark.dk, *Positivlisten* (2014).
1002 H. Wray, *Regulating Marriage Migration into the UK: A Stranger in the Home* (Ashgate 2011) p .

empirical research, Hester and her team concluded that there was no evidence that raising the age requirement further from 18 to 21 or 24 years would prevent forced marriages, as the affected communities would find ways to circumvent the increased age requirement by falsifying documentation or keeping the forced marriage partner in the country of origin until the required age was reached.[1003] Even though the Home Office commissioned this research, in 2008, after launching a public consultation,[1004] it issued a report in which was announced that the age requirement would be increased from 18 to 21 years as this would

> "*provide an opportunity for individuals to develop maturity and life skills which may allow them to resist the pressure of being forced into a marriage*", "*provide an opportunity to complete education and training*", "*delay sponsorship and therefore time spent with a (sometimes abusive) spouse if the sponsor returns to the UK*"

and

> "*allow the victim an opportunity to seek help/advice before sponsorship and extra time to make a decision about whether to sponsor.*"[1005]

Subsequently, the Immigration Rules were amended to increase the age requirement to 21 years. Two members of the research team of Professor Hester responded to the abovementioned assumptions made by the Home Office.[1006] Gangoli and Chantler specifically point towards the difficulties in using age as the only variable in the ability of women and men to resist forced marriages.[1007]

The increased age requirement was challenged in court in several cases. In 2009 the High Court ruled in a case in which an application for family unification was rejected even though the Home Office admitted that there was not the slightest suspicion of a forced marriage.[1008] The High Court reached the conclusion that under the case law of the European Court of Human Rights it cannot be established that the renewed refusal of admittance was an interference with the right to respect for family life as protected by Article 8(2) ECHR.[1009] In the appeal on this ruling, the UK Supreme Court overruled this decision.[1010] It held that the application of the age requirement was an inter-

1003 M. Hester and others, *Forced marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the UK as a spouse or fiancé(e)* (2007) p. 37.
1004 UK Border Agency, *Marriage to partners from overseas: a consultation paper* (2007).
1005 Home Office, *Marriage Visas: The Way Forward* (2008).
1006 G. Gangoli and K. Chantler, 'Protecting Victims of Forced Marriage: Is Age a Protective Factor?' (2009) 17 Feminist Legal Studies.
1007 Ibid p 286.
1008 *Quila v Secretary of State for the Home Department* [2009] EWHC 3189 (UK).
1009 Ibid para 65.
1010 *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* [2011] UKSC 45 (UK).

ference with the right to respect for family life[1011] and that this interference was not justifiable.[1012] The reasoning of the UK Supreme Court will be analysed in more detail in section 4. After the ruling by the UK Supreme Court, the UK Home Office lowered the age requirement back to 18 years.[1013] In its contribution to the Green Paper on family unification issued by the European Commission, the UK government expressed that it is disappointed by the ruling of the UK Supreme Court which led to the age requirement being lowered.[1014]

Interim conclusion

	Required age
Denmark	24
Germany	18
Netherlands	21
United Kingdom	18

Table 7.1. The required age for the family unification of partners

Under the FRD, the member states may impose an age requirement of maximum 21 years. All selected member states impose an age requirement. Denmark, not being bound by the FRD, has the highest age requirement of the EU, with a required age of 24 years. The Netherlands follows with an age requirement of 21 years, which it is allowed to have under the FRD. In Germany, where the age requirement is set at 18 years, the legislature deemed that the German Constitution precluded a higher age requirement. In the United Kingdom, the Supreme Court established that an age requirement of 21 years breaches Article 8 ECHR, after which the government lowered the age requirement back to 18 years.

7.3.2 Accommodation requirement

EU law

Under the FRD, the member states may require the applicant to substantiate that the sponsor has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety

1011 Ibid .
1012 Ibid .
1013 Statement of Changes to the Immigration Rules, HC 1622.
1014 *UK Response to the Commission Green Paper on Family Reunification* (2012) p 4 .

standards in force in the member state concerned.[1015] This broad formulation makes it possible that different accommodation requirements are imposed in different member states depending on the local circumstances. During the negotiation of the FRD, this provision was amended several times. Initially, the European Commission proposed the term 'adequate accommodation', but this was altered in the revised proposal.[1016] The formulation 'normal for a comparable family in the same region' gives the member states a margin of appreciation to determine what normal accommodation constitutes.

Domestic law

In *Denmark*, the spouse or partner acting as the sponsor for family unification must substantiate that he has accommodation of an adequate size at his disposal. In order to meet this requirement, the sponsor must own or rent this accommodation. If the accommodation is rented, the lease period must be permanent or at least extend to three years after the moment of application for family unification. Accommodation is of an adequate size if the total number of persons in an application is not more than twice the number of rooms or if the total residential area is at least 20 square metres per person. If the sponsor has recently returned to Denmark, the Immigration Service may postpone the time at which the sponsor must meet the accommodation requirement by up to six months after a residence permit has been granted.

In *Germany* the requirement that applicants for family unification must demonstrate that they have adequate accommodation available is only applicable when the sponsor is a third-country national.[1017] Accommodation which would be found suitable for social housing is considered adequate in the context of this requirement. Accommodation is not adequate when according to regulations it is by its nature and occupancy not sufficient for a family.[1018] Children younger than two do not count in establishing whether the accommodation requirement has been complied with. In general, it can be held that for accommodation to be adequate, it must be established that persons aged 6 or over have 12 square metres of living space and children aged 2 to 6 have 10 square metres of living space.[1019]

The *Netherlands* does not require applicants for family unification to comply with an accommodation requirement. In the past such a requirement did exist, but it was abolished because it was difficult to check the compliance with this requirement.

1015 Art 7(1)(a) FRD.
1016 Compare COM(1999) 638 final (n 350) and COM(2000) 624 final (n 354).
1017 Art 29(1)(2) Residence Act (GER).
1018 Art 2(4) Residence Act (GER).
1019 Hailbronner (n 655) p 231-232.

The *United Kingdom* requires applicants to provide evidence that there will be adequate accommodation for the family. This accommodation must also be adequate for other members of the family who are not included in the application. The applicant's family must own or exclusively occupy the dwelling. Accommodation is not regarded as adequate when it is or will be overcrowded or when it contravenes public health regulations.[1020] The applicant must convince the Entry Clearance Officer that the accommodation is adequate. For that purpose the officer may require a letter from the owner of the property.[1021] The guidance provided by the Housing Act 1985 is used to establish whether a dwelling is overcrowded. This Act specifies, for example, that in accommodation with two rooms, a maximum of three people sleeping in the accommodation are allowed.

Interim conclusion

Of the two selected member states in which the FRD is applicable, Germany has implemented the possibility of imposing an accommodation requirement and the Netherlands has not. However, Germany only imposes the accommodation requirement on third-country national sponsors and not on German national sponsors. The German implementation is in line with the FRD. Denmark and the United Kingdom, which are both not bound by the FRD, do impose an accommodation requirement on both third-country nationals as well as on home national sponsors. The three member states that impose an accommodation requirement use different criteria to determine whether the accommodation requirement is met. What the systems have in common is that they set a maximum on the occupancy of an accommodation.

7.3.3 Sickness insurance requirement

EU law

In accordance with Article 7(1)(b) FRD, the member states may require that applicants for family unification and their sponsor provide evidence that the sponsor has sickness insurance for himself and the members of his family. This sickness insurance must cover all risks that are normally covered for own nationals in the member state concerned. During the negotiations it was proposed that the required sickness insurance should cover all risks, but this proposal was not included in the final text of the FRD.[1022] To determine

1020 E-ECP.3.4. Appendix FM of the Immigration Rules (UK).

1021 UK Visas and Immigration (Home Office), *Visas and immigration operational guidance – collection, Maintenance and accommodation (entry clearance guidance)* (2013) para MAA11.

1022 COM(1999)638 final (n 350), p. 28.

whether a domestic sickness insurance requirement is in accordance with the FRD it should be ascertained whether the same standard of sickness insurance is also applicable on the member states' own nationals. Therefore, when a member state requires its own nationals to have comprehensive sickness insurance coverage, this may also be required of applicants for family unification and their sponsor.

Domestic law

In *Denmark*, no requirement for sickness insurance is imposed on applicants for family unification.

The *Netherlands* does not require applicants for family unification to comply with a sickness insurance requirement. In 2010, the newly-installed government proposed including such a requirement in the domestic regulations, but did not do so in the end.[1023]

In *Germany*, the sickness insurance requirement is included in the maintenance requirement. This means that in order to comply with the maintenance requirement analysed in more detail below, applicants and their sponsors are required to have sickness insurance coverage. As explained bellow, in principle this obligation does not apply to applications where the sponsor is a German national.

In the *United Kingdom*, sickness insurance coverage is not a requirement for family unification.

Interim conclusion

Out of the selected member states, Germany is the only member state which imposes a sickness insurance requirement on some applicants for family unification. The Netherlands, which is also covered by the FRD, did not implement such a requirement. Denmark and the United Kingdom do not have a sickness insurance requirement in their family unification policy. Even though this requirement is not imposed within the context of family unification, the member states do have a specific policy on obligatory health insurance coverage outside this domain.

7.3.4 Maintenance requirements

EU law

Article 7(1)(c) FRD allows the member states to require the sponsor to substantiate that he has

1023 Parliamentary Documents II 2010/11, 32 417 nr 14 (NL).

> "*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. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.*"

At the start of the negotiations, the European Commission proposed a definition of the income requirement which would leave less room for interpretation by the member states. The Commission proposed that the level of the maintenance requirement must not be higher than the level of the minimum income guaranteed by the state. If a member state does not provide for such social assistance, the required level must not exceed the minimum retirement pension.[1024] The Commission proposed setting a similar maintenance requirement as applicable within the context of the free movement of persons.[1025] The member states sought to preserve a larger competence in setting a maintenance requirement. This resulted in the significant weakening of the initial Commission proposal.

At the second Commission proposal, the wording "*may not be higher than the minimum income guaranteed by the State*" was replaced by "*stable resources, which are higher than or equal to the level of resources below which the Member State concerned may grant social assistance*", making the provision more vague.[1026] The third Commission proposal, included a line on the stability and regularity of the required available resources.[1027] In that proposal, the Commission included two clauses limiting the member states in imposing a maintenance requirement. Firstly, the Commission proposed that the maintenance requirement may only be imposed on the first application for a residence permit, making the maintenance requirement irrelevant for applications for the renewal of a residence entitlement. Secondly, the Commission proposed that where the applicant does not meet the maintenance requirement, the contribution of other family members to the household income should be considered as well.[1028] This was the final proposal of the Commission which finally resulted, after many amendments in the Council, in the adoption of the Directive. The Council deleted the two proposals of the Commission which limited the member states in imposing a maintenance requirement and further streamlined the wording of the provision.

The negotiations led to a finally adopted text in the FRD in which the original intention of the Commission, to set a similar maintenance requirement as applicable within the context of the free movement of persons, was not achieved. The Council created a rather vague provision leaving a large margin

1024 COM(1999)638 final (n 350), p 18.
1025 Ibid.
1026 COM(2000)624 final (n 354) p 13.
1027 COM(2002)225 final (n 355) p 18.
1028 Ibid p 19.

of discretion for the member states to interpret the maintenance requirement. The European Parliament, which only had a consultative role in the negotiations, did not propose any amendments to this provision. It also did not challenge the income requirement in the proceedings it initiated against the Council on the compatibility of the FRD with fundamental rights.

In the *Chakroun* ruling, the CJEU interpreted Article 7(1)(c) FRD. The case concerned the application for family unification of the wife of a Moroccan national residing in the Netherlands. The sponsor's income was less than the required income set by the Dutch authorities (see a more detailed analysis below in the discussion on the income requirement in the Netherlands). The CJEU held that the member states indeed have the competence to require sponsors to comply with a maintenance requirement, but as the authorisation of family unification is the general rule, the competence to require sponsors to comply with a maintenance requirement should be interpreted strictly.[1029] That competence may not be used "*in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.*"[1030] When the FRD specifies that the member states may take into account the level of minimum national wages and pensions and the number of family members, that competence may also not be used to undermine the said objective of the FRD.[1031] Furthermore, the CJEU held that although the member states are allowed to formulate a required sum of income as a reference amount, this amount may not be applied dogmatically, meaning that applications in which the sponsor does not comply with the reference amount required may not automatically be rejected. In line with Article 17 FRD, all individual circumstances must be considered.[1032] With the *Chakroun* ruling, the CJEU limited the competence of the member states to impose a maintenance requirement.

Domestic law

Germany does operate a maintenance requirement, but does not impose it on all applications for family unification.

In principle Article 5(1)(1) Residence Act prescribes that to grant a residence entitlement it must be ensured that the applicant's livelihood is secure. This general maintenance requirement is further defined in Article 2(3) Residence Act. This provision states that livelihood is secure when the sponsor is able to earn the living of the family, including health insurance coverage, without recourse to public funds. Some public funds, such as child benefits and contribution-based benefits, are not considered as public funds within the meaning

1029 *Chakroun* (n 392) para 43.
1030 Ibid.
1031 Ibid para 47.
1032 Ibid para 48.

of this provision. Unlike in the case of the admission of students and researchers, for the maintenance requirement within the context of family unification no reference amount is prescribed. In practice the immigration authorities and courts use Article 19 of Book II of the Social Code to establish whether the maintenance requirement has been met.[1033] The reference amount which is inferred from this method is the amount which a foreigner would be entitled to if he were to apply for unemployment benefits with an additional amount for accommodation rental.

In the case law of the Federal Administrative Court it was held that it should be expected that the livelihood of the family is secured without recourse to public funds for the entire period of validity of the residence permit.[1034] An issue with the application of this doctrine is that it leaves the possibility open that applications where the sponsor has a temporary employment contract may be rejected as the maintenance requirement is not met because it cannot be expected that the sponsor can maintain the family for the entire period of residence. It has been reported that Foreigners Authorities reject applications on this basis.[1035]

The maintenance requirement is imposed in applications for family unification in which the sponsor is not a German national.[1036] As a general rule, the maintenance requirement is not imposed on applications for family unification in which the sponsor is a German national.[1037] This is always the case when the family member is the minor, unmarried child of a German national or the parent of a minor, unmarried German national in the care of the applicant.[1038] However, in the case of the family unification of spouses the maintenance requirement may be imposed in exceptional cases. It is for the Foreigners Authority to establish whether an application can be classified as an exceptional case. Elements which are to be considered by the Foreigners Authorities include the residence rights and labour rights of the German national in the country of origin of the applicant, the possibility for the sponsor to earn a living in that country, whether the sponsor would face persecution in that country and other considerations which are relevant to establish whether it can be expected from the sponsor to move to the country of origin of the applicant. In order to evade this test, in practice it may be easier to substantiate that the maintenance requirement is met rather than to prove that there is no exceptional case.

In the *Netherlands*, a maintenance requirement is imposed. An entry visa or residence permit for the purpose of family unification is only issued when

1033 Hailbronner (n 655) p 217.
1034 BVerwG (16-11-2010) 1 C 20 09 para 24.
1035 T. Oberhäuser, 'Familienzusammenführung – nationale und europäische Entwicklungen' (Hohenheim Rechtsberarerkoferenz 2012) .
1036 Art 29(1) Residence Act (GER).
1037 Art 28 Residence Act (GER).
1038 Art 28(1)(2)&(3) Residence Act (GER).

the sponsor has sufficient long-term and independent means of subsistence.[1039] This maintenance requirement is imposed on all categories of family unification, including the family unification of children. In order to meet this standard, it needs to be established whether the sum of the income from employment, social insurance, profit from an enterprise owned by the sponsor and income flowing from private property is equal to or higher than the minimum wage as specified in the Act on minimum wages and minimum holiday allowance ('*Wet minimumloon en minimumvakantiebijslag*'). It is required that the applicant substantiates that the income is long-term('*duurzaam*'). This is the case when the income is available for at least one year from the date on which the application was made.[1040] Alternatively, it can also be established that the income is long-term when the income has been above the level of the maintenance requirement for a period of three years prior to the application.[1041] For income flowing from private property it is accepted that it is long-term when it has been available at least one year prior to the application.[1042]

The level of the maintenance requirement has not always been set at this level. Before the ruling of the CJEU in *Chakroun*, the Netherlands operated a distinction between family unification and family formation. Family unification was considered to occur when a family relationship already existed between the sponsor and the applicant in the country of origin of the applicant. All other situations were deemed to be family formation. The maintenance requirement for family formation was set at a higher level than for family unification. In the case of family unification, the required income was set at the income level at which a person is eligible for statutory assistance ('*bijstand*'). In the case of family formation the required income was set at 120% of the minimum wage as specified in the Act on minimum wages and minimum holiday allowance. The latter maintenance requirement was set at 120% because below that amount a person would still be eligible for different forms of social assistance.

In the *Chakroun* case, the wife of a Moroccan resident of the Netherlands sought family unification with her husband after living separately for decades. According to Dutch family unification law, the application was an application for family formation, and therefore the higher maintenance requirement applied. The sponsor's income consisted of payments from a social insurance against unemployment, at a level which was too low for the higher maintenance requirement, but higher than the low maintenance requirement. In the domestic proceedings, the applicant argued that the Dutch maintenance requirement was not in accordance with the FRD. The Council of State referred

1039 Art 3.22(1) Foreigners Decree (NL).
1040 Art 3.75(1) Foreigners Decree (NL).
1041 Art 3.75(3) Foreigners Decree (NL).
1042 Art 3.72(2) Foreigners Decree (NL).

this question to the CJEU for a preliminary ruling. The CJEU observed that in the FRD there is no distinction made between family unification and family formation. The CJEU observed that the moment on which the family is constituted in no way affects the level of stable and regular resources which are sufficient to maintain the family.[1043] The member states are therefore not competent to impose different maintenance requirements on different groups within the scope of the FRD. With regard to the level of the maintenance requirement, the CJEU held that in the Netherlands the minimum wage is considered sufficient to maintain a family and therefore the Netherlands may not impose a maintenance requirement set at 120% of the minimum wage.[1044] Furthermore, the CJEU held that the minimum wage level may be used as a reference amount, but not as a strict requirement. It should be considered taking into account all personal circumstances of the case whether using the reference number as a requirement is justified.

Following the CJEU ruling in *Chakroun*, the Dutch government lowered the maintenance requirement to 100% of the minimum wage as specified in the Act on minimum wages and minimum holiday allowance.[1045] The requirement by the CJEU that the minimum wage level may only be used as a reference amount is translated by the phrase that meeting the reference amount is 'in any case' sufficient to meet the maintenance requirement, leaving the possibility open that a lower income level also suffices.[1046] Furthermore, the distinction between family unification and family formation was abolished.[1047]

There are several situations in which the maintenance requirement is waived. First, the maintenance requirement is waived when the sponsor has reached the age of retirement, and when according to the minister responsible for immigration affairs the sponsor is permanently and fully unable to work.[1048] Second, the maintenance requirement is waived when the application for family unification is made within three months after the sponsor has been granted a resident permit for the purpose of international protection.[1049]

The application of the income requirement in the Netherlands causes several problems. Firstly, the requirement that the income should be long-term is implemented in such a way that the requirements are difficult to meet for young persons. Those who have just finished their education often have difficulties in finding a job where they get an employment contract of more than one year. Because of this it can be difficult to prove that the income will be available exactly one year after the moment of application. Persons who are still enrolled in an education programme can feel the incentive to quit their

1043 *Chakroun* (n 392) para 64.
1044 Ibid para 51.
1045 Parliamentary Documents II 2009/10, 32 175 no. 8 (NL).
1046 Art 3.74 Foreigners Decree (NL).
1047 Ibid.
1048 Art 3.22(2) Foreigners Decree (NL).
1049 Art 3.22(3) Foreigners Decree (NL).

studies and find employment in order to meet the maintenance requirement, as a result ceasing their education without a diploma. In the policy guidelines the fact that many people no longer get long-term employment contracts is mitigated by including the employment history of a person with a short-term employment contract in establishing whether the maintenance requirement has been met.[1050] This is, however, of no avail to persons who have just started their employment career. Secondly, self-employed persons often have difficulties in meeting the maintenance requirement. The reason for this is that the income of self-employed persons is equal to the profit of their enterprise. For reasons of investments and taxes, the net profit of an enterprise is often lower than the reference level of the maintenance requirement. Furthermore, for self-employed persons who have just started their enterprise it is impossible to demonstrate their income over the past three years. In the policy guidelines it is laid down that the income from this group does not count towards establishing whether the maintenance requirement has been met, considering the insecurity of the viability of the enterprise, irrelevant of the income of that starting self-employed person.[1051] These circumstances, however, do not necessarily mean that such self-employed persons would not be able to maintain a family. Thirdly, the requirement that the sponsor needs to meet the maintenance requirement independently makes it impossible that other family members, such as the applicant, can contribute towards meeting the maintenance requirement.

In my view, these problems might lead to infringements of the FRD where individual circumstances are not adequately taken into account. Young persons and self-employed persons might have difficulties meeting the reference amount, but that does not necessarily mean that they are not able to maintain themselves and their family without recourse to social assistance. Especially in the case of young persons, the contribution of a third party, such as the parents, towards meeting the maintenance requirement, could lead to a sufficient guarantee that no recourse would be taken to social assistance. According to the FRD, the member states may require the sponsor to substantiate that he has stable and regular resources to maintain himself and his family, without recourse to the social assistance system of the member state concerned. No exclusion is stated in this provision that a third party may guarantee the maintenance of the family to prevent the family from taking recourse to the social assistance system. According to the CJEU in *Chakroun*, the maintenance requirement provision in the FRD must be interpreted strictly. The Dutch approach where strict rules are imposed on the composition of the income that is taken into account to establish whether the maintenance requirement is complied with may lead to infringements of the FRD.

1050 Art B4.3.2. Foreigners Circular (NL).
1051 Art B4/3.4. Foreigners Circular (NL).

Denmark is not bound by the FRD, and is therefore free to impose a maintenance requirement. Denmark does require applicants for family unification to substantiate that the sponsor is able to maintain the spouse. However, no reference amount is included in Danish regulation. The sponsor may not have received public assistance under the Active Social Policy Act ('*lov om aktiv socialpolitik*') or under the Integration Act ('*integrationsloven*') for the three years prior to the application for family unification.

In the case of the family unification of children, Denmark only requires compliance with a maintenance requirement if essential considerations make this appropriate. In practice this is considered to be the case for example where the sponsor has deliberately not been in contact with the child for a long period of time.

Denmark's seemingly flexible stance towards the maintenance requirement may be explained by the fact that other requirements have a sufficiently restrictive effect. Requirements such as the age requirement and the attachment requirement as discussed in section 7.3.6. give Denmark extensive options to limit the right to family unification. Therefore reliance on the maintenance requirement as a main instrument of selection is not necessary.

The FRD is not applicable in the *United Kingdom*; the UK is therefore not limited by EU law in imposing a maintenance requirement. In the UK a maintenance requirement is imposed for both the family unification of spouses and partners as well as for the family unification of children.

In 2012 the application of the maintenance requirement in the United Kingdom was fundamentally reformed. The old immigration rules required that the sponsor and the migrating spouse would be able to maintain themselves and any dependents adequately without recourse to public funds.[1052] In that system, no reference amount was defined as to what would constitute a situation in which the sponsor and spouse would be able to maintain themselves adequately. Instead, the maintenance requirement was interpreted as meaning that the income after the deduction of the costs for housing, should be higher than the minimum level at which families become ineligible for income support.[1053] Following a Supreme Court decision, third-party income support became eligible for establishing whether the maintenance requirement was met.[1054] In 2011, the Home Office proposed increasing the level of the maintenance requirement.[1055] The Home Office proposed raising the maintenance requirement in order to provide more clarity regarding the maintenance requirement, ensure that spouses and partners were supported in their ability

1052 See the former r 281 Immigration Rules (UK) for the family reunification of partners.
1053 This method of establishing whether the maintenance requirement is complied with was established after *KA (Pakistan)* [2006] UKAIT 00065.
1054 *Mahad/AM (Ethiopia and Ors)* [2009] UKSC 16.
1055 Home Office, *Family migration: a consultation* (2011).

to participate and integrate in British society and to reduce the risk that the spouse or partner became a burden on the taxpayer.[1056]

For the family unification of spouses and partners the maintenance requirement is set at a gross annual income of 18,600 GBP plus 3,800 GBP for the first child and 2,400 GBP for each additional child. Alternatively, or in combination with the gross annual income, the maintenance requirement is also complied with if the sponsor provides specified evidence of savings worth 16,000 GBP plus 2.5 times the difference between the actual gross annual income and the required gross annual income.[1057] For example, for the family unification of a spouse in a family with two children the maintenance requirement is set at 24,800 GBP. If in this example, the gross annual income of the sponsor is 20,000 GBP, the sponsor needs to substantiate that there are savings worth 25,600 GBP. The maintenance requirement concerns the income of the sponsor. Income that counts for the maintenance requirement is: income from salaried employment of the sponsor and of the spouse if the spouse is already in the UK with permission to work, non-employment income such as income from property rental or dividends from shares, cash savings above 16,000 GBP under control of the sponsor and/or the spouse for at least 6 months, pension of the sponsor and the spouse and income from self-employment of the sponsor and the spouse if the spouse is already in the UK with permission to work.[1058] Income that is not counted in the maintenance requirement is third-party support, income from others who live in the same household, loans and credit, income-related benefits, some contributory benefits, Child Benefit, Working Tax Credit, Child Tax Credit and any other source of income not specified in the Immigration Rules.[1059]

For the family unification of children, the applicable maintenance requirement depends on the residency status of the parent. Where the parent is a British national or has an unlimited residence permit, the old maintenance requirement applies. This means that it should be substantiated that the sponsor parent can and will accommodate the child without recourse to public funds.[1060] Where the parent is a person with a limited residence permit for the purpose of family reunion, the new maintenance requirement as described above applies. The typical situation of a child falling under the higher maintenance requirement is the child who is not the child of the sponsor but is the child of the spouse or partner. It must be noted that the maintenance requirement must also be met for the spouse or partner, and therefore the implications of the increased maintenance requirement for the family unification of children

1056 Ibid p 22.
1057 E-ECP.3.1. Appendix FM of the Immigration Rules (UK).
1058 Immigration Directorate Instructions, Family Members under Appendix FM of the Immigration Rules, Annex FM Section FM 1.7, Financial requirement, p 12 (UK).
1059 Ibid p 13-14.
1060 Art 297(iv) Immigration Rules (UK).

will be limited. However, it is perceivable that the child of the spouse and not of the sponsor seeks to join his parent at a later moment than the family unification of the spouse himself or herself, which can influence the application of the maintenance requirement due to changed circumstances. This creates a double system in which the maintenance requirement for the family unification of a child depends on the residence status of the parent.

Interim conclusion

All the selected member states impose maintenance requirements. In table 7.2. below the required levels of income are shown. Germany and the Netherlands are limited by the FRD in imposing such requirements, Denmark and the United Kingdom are not. In Germany and Denmark no reference amount is laid down in domestic regulation. Instead, it is stated that the income of the sponsor should be so high that there is no eligibility for social assistance. In the Netherlands the income of the sponsor should be higher than the minimum wage level determined by legislation. This corresponds to a clear threshold above which the maintenance requirement is complied with. However, following the *Chakroun* ruling of the CJEU, this required income level is only a reference amount; all individual circumstances must be considered and it should be determined in each individual case whether it is justified to reject an application on the basis that the income of the sponsor is lower than the reference amount. In the United Kingdom, the maintenance requirement was drastically reformed in 2012. Since then, the required income level is 18,600 GBP plus an additional amount for each child. This makes the maintenance requirement in the UK the highest of all selected member states.

	Required income level
Denmark	No reference amount
Germany	No reference amount
Netherlands	Minimum wage level = 1,550 EUR per month
United Kingdom	Gross annual income :18,600 GBP, + 3,800 GBP for the first child and 2,400 GBP for each additional child

Table 7.2. Maintenance requirement in the selected member states

7.3.5 Integration measures

EU law

According to Article 7(2) FRD the member states may require third-country nationals to comply with integration measures in accordance with national law. With respect to refugees and the family members of refugees the member

states may only require the compliance with integration measures once family unification has been granted.

In the first proposal for a directive by the European Commission, the possibility to impose integration measures was not included in the draft text.[1061] When the third proposal of the Commission was discussed, Austria commented that it would like to see a language proficiency requirement in the Directive.[1062] Subsequently the Danish presidency suggested including a provision on integration measures in the Directive, in the formulation which was later adopted.[1063] Austria, Germany and the Netherlands supported this suggestion, while Belgium, France and Sweden questioned it.[1064] These member states later dropped their reservations.[1065] Strik interviewed selected participants of the negotiations. A representative of the German government commented that Austria, Germany and the Netherlands had completely different intentions with this provisions. According to this respondent it was clear that the Netherlands had the intention of requiring obligatory integration requirements, while Germany intended offering language courses after the person concerned had been granted family unification.[1066] With the formulation which was finally adopted, the question about what integration measures may entail remained unanswered.

In the various language versions of the FRD, the provision on integration measures can be interpreted differently. In the English text, the wording 'integration measures' is used. This corresponds to the French text ('mesures d'intégration') and the German text ('Integrationsmaßnahmen'). However in the Dutch text of the FRD, the wording 'integratievoorwaarden' is used. This can be translated into English as 'integration conditions'. The words 'measures' and 'conditions' can be interpreted differently. Article 1 FRD states in the Dutch language version: "*Het doel van deze richtlijn is de voorwaarden te bepalen voor de uitoefening van het recht op gezinshereniging […]*". The same sentence in the English language version reads: "*The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification […]*". This shows that within the context of the FRD, the Dutch word 'voorwaarden', should be translated as 'conditions', which is different than in the other language versions.

The CJEU dealt with the issue of integration measures in the *Dogan* case. The case concerned an application for family unification by a Turkish national to join her Turkish husband who had moved to Germany in 1998. In 2011 the German authorities rejected the application for family unification even though

1061 COM(2002) 225 final (n 355).
1062 10857/02 MIGR 66, p 12.
1063 13053/02 MIGR 96, p 12.
1064 Ibid.
1065 5508/03 MIGR 1, p 13.
1066 Strik (n 351) p 109.

the applicant had passed the language exam. The German authorities believed the applicant had learnt the exam questions by heart and that she did not fulfil the requirement because she was illiterate. The CJEU held that the standstill clause of Article 41 of the Additional Protocol to the Association Agreement between Turkey and the EU precluded national measures which require applicants for family unification to substantiate basic language proficiency. By basing its ruling on the Additional Protocol, the CJEU avoided a discussion on the compatibility of the language proficiency requirement with Article 7(2) FRD. Advocate General Mengozzi had proposed in the *Dogan* case that the basic language requirement would only be compatible with Article 7(2) FRD if the requirement can be waived after the consideration of the particular circumstances of the case at hand in which the best interests of minor children and unity of the family are taken into account. Furthermore, the AG argued that the availability of preparation materials and problems relating to the health and personal situation such as age, illiteracy, disabilities and level of education are taken into account. As the CJEU did not discuss the element of compatibility with the FRD, it did not rule on the points brought forward by the AG.

Based on the Dutch text of the FRD, the Netherlands implemented the provision by requiring applicants to pass an integration exam in the country of origin. Germany followed this Dutch example. The specific domestic implementation is analysed below.

Domestic law

Germany has introduced a series of integration measures related to proficiency in the German language. Firstly, applicants for family unification must comply with a pre-entry language requirement. Secondly, a higher level of language proficiency is required for obtaining a settlement permit. Thirdly, the same higher level of language proficiency is required for naturalisation. Only integration measures which are a condition for entry are analysed. The integration measures that are imposed after entry to Germany as preconditions for a settlement permit or naturalisation are not investigated further.

In Germany applicants for the family unification of spouses must demonstrate language proficiency before entry.[1067] The pre-entry language proficiency requirement was introduced in German legislation through the implementation of the FRD.[1068] The intention of the legislature was that an applicant should have a vocabulary of at least 200 to 300 words. The objective of the language proficiency requirement is to prevent forced marriages and to promote integration in German society. In order to achieve this aim, applicants must prove basic oral and written command of the German language at level

1067 Art 30(1)(1)(2) Residence Act (GER).

1068 Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlienen der Europäischen Union (Directive Implementation Act).

A1 of the Common European Framework of Reference for Languages (CEFR). All reliable and appropriate certificates of language proficiency are accepted. Several tests have been set up for this purpose. Most notably, the Goethe Institute, a German language institute with dependencies all over the world, has developed the test 'Start Deutsch 1' for the purpose of proving language proficiency for family unification.[1069] The test consists of a written test and an oral test in which writing, listening, reading and speaking are tested. When for some reason it is not possible for the applicant to obtain a language proficiency certificate, the Consulate where the application is submitted must ascertain whether the applicant complies with the language requirement. Proof of language proficiency is not required when it is apparent from the personal conversation with the consular staff that the applicant is proficient in German.[1070]

Not all applicants are required to comply with this language requirement. Mobile EU nationals are outside the scope of the family unification regulations and are therefore also not bound by the integration requirements. Furthermore, sponsors who are nationals of certain states are exempted from the requirement to serve the economic relations with these states.[1071] Besides exemptions based on the nationality of the spouse, it is also possible to be exempted from the language requirement based on humanitarian grounds. The spouses of persons who have been granted international protection are exempted from the language requirement. The same applies to spouses who are unable to provide evidence of language proficiency due to illness or disability. Illiteracy as such does not qualify for an exemption from the language requirement. Also the spouse of a highly skilled person, a researcher or a self-employed person is exempted from the language requirement, as this is in the interests of Germany.[1072]

The introduction of the pre-entry language proficiency requirement resulted in a decrease in the number of applications.[1073] However, over the course of two years, the number of applications returned to an almost similar level as during the first three quarters of 2007 (See Table 7.3.). The German government explained this trend from the fact that applicants needed to prepare for the exam and therefore the amount of applicants decreased immediately after the introduction of the requirement.[1074] In the evaluation by the German government it is not reported whether the introduction of the pre-entry language requirement has had any effect on the promotion of integration and

1069 See http://www.goethe.de/lrn/prj/pba/bes/sd1/enindex.htm.
1070 BRat-Drs. 669/09, p 248.
1071 This is the case for nationals of the US, Australia, Israel, Japan, Canada, the Republic of Korea, New Zealand, Andorra, Monaco, San Marino, Honduras, Brazil and El Salvador.
1072 See J. Leuschner, *Das Sprachvoerdernis bei der Familienzusammenfurung* (Wissenschaftlicher Verlag Berlin 2014) p 39-44 for a more comprehensive analysis of the exemption grounds.
1073 BTag-Drs. 17/3090.
1074 Ibid p 31.

on the prevention of forced marriages.[1075] Qualitative research has revealed that applicants for family unification do not understand how the pre-entry language proficiency requirement is instrumental in combatting forced marriages.[1076]

	2007				2008				2009			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
Number of applications	9449	9267	8603	5147	6458	7771	8445	8093	7825	8053	9027	8289

Table 7.3. Applications for a national visa with the purpose of family unification to Germany[1077]

The pre-entry language proficiency requirement has been the subject of judicial review. In 2010 the Federal Administrative Court ruled in the case of an illiterate mother of five children living in Eastern Turkey who sought family unification with her husband who resided in Germany. The applicant claimed that she was unable to obtain the required certificate because she had to take care of her children and could therefore not go to one of the locations where the language course was offered. She furthermore claimed that the German application of the pre-entry language proficiency requirement is not compatible with the German Constitution and the FRD. The Federal Administrative Court ruled that the requirement is compatible with the Constitution and with the FRD, even in the absence of a hardship clause mitigating the effects of the requirement on certain applicants.[1078] However, the requirements may not be unreasonably high.[1079] Applied to this specific case, the Federal Administrative Court found that the applicant would be able to obtain the required certificate of language proficiency within the reasonable time span of around one year.[1080]

In the *Netherlands* there are various integration measures. Firstly, applicants for family unification must obtain an integration certificate in the country of origin before coming to the Netherlands. Secondly, newly arrived immigrants must obtain an integration certificate or other language proficiency certificate in order to be eligible for an independent and permanent residence permit. Thirdly, the previous requirement also applies to naturalisation. Only the pre-entry integration measures are analysed below, as the post-entry measures are outside the scope of this research.

1075 ibid .
1076 M. Seveker and A. Walter, *Country Report Germany, Part of the INTEC project: Integration and Naturalisation tests: the new way to European Citizenship* (2010).
1077 BTag-Drs. 17/3090, p 32.
1078 BVerwG (30-03-2010) 1 C 8 09 (GER).
1079 Ibid para 27.
1080 Ibid para 50.

In the Netherlands, applicants for family unification are required to pass an integration exam in the country of origin or in the country of permanent residence before applying for an entry permit to the Netherlands. The integration abroad requirement is part of the general requirement that an entry visa for the purpose of family unification should be applied for in the country of origin or permanent residence. This requirement was introduced in 2006 by the Act on Integration Abroad (*'Wet inburgering buitenland'*), which is an amending act of the Foreigners Act and Foreigners Decree. The purpose of the pre-entry integration exam is to promote the integration of newcomers in Dutch society by already commencing the integration process before the arrival of the family migrant in the Netherlands.[1081] The integration exam is a standard exam consisting of three parts: a spoken Dutch test, a test on knowledge of Dutch society and a reading comprehension test. Applicants must demonstrate proficiency of the Dutch language at level A1 of the CEFR. During the test on knowledge of Dutch society, the applicants must answer 30 out of a 100 questions on Dutch society, which can be learned by heart. The reading comprehension test was added to the exam in 2011, creating a barrier for illiterates to meet the integration abroad requirement. The Dutch government does not organise any courses in anticipation of the exam. It did however develop preparation materials in the form of a photo book, a video and a language module. Participation in the exam is subject to the payment of a fee of 350 Euro.

Not all applicants for family unification are required to comply with the integration abroad requirement. It should be noted that the integration abroad requirement is part of the broader entry visa requirement. Therefore the exemptions from the entry visa also apply for the integration abroad requirement. All third-country national family members of mobile EU citizens are exempted as they fall under the domestic implementation of EU free movement of persons law. Secondly, the nationals of certain states are exempted from the entry visa and as a result also the integration abroad requirement.[1082] The integration abroad requirement furthermore does not apply to those persons that are exempted from the domestic integration requirements under the Integration Act (*'Wet inburgering'*). These are persons younger than 16 and older than 65, persons who have resided in the Netherlands for at least eight years between the age of 5 to 16, persons who can substantiate that they have the knowledge and skills to pass the integration abroad test by a diploma, certificate or other document, persons subject to compulsory education and persons who cannot be subjected to the integration exam under international or EU law. Turkish nationals are exempted on this ground from the operation of the integration abroad requirement after a ruling from the Administrative

1081 Parliamentary Documents II, 2003-04, 29 700, no. 3 (NL) p 3-4.

1082 Art 17(1)(a) Foreigners Act (NL). These states are Australia, Canada, Japan, Monaco, New Zealand, South Korea, Switzerland, United States, Vatican City.

High Court in 2011.[1083] The integration requirement does also not apply if the sponsor has been granted international protection in the Netherlands[1084] or has the status of long-term resident in the EU.[1085] The integration abroad requirement is equally not applicable if a person is not able to pass the integration abroad exam due to a mental or physical disability.[1086] Illiteracy and learning difficulties do not qualify for this exemption. Lastly, the integration abroad requirement is not applicable in situations where a rejection of the application for an entry permit because of non-compliance with the integration abroad requirement would be unreasonable according to the Minister responsible for integration policy.[1087] In her dissertation, De Vries has observed that no (convincing) explanation has been provided why the integration abroad requirement is waived in certain categories, like citizens from the exempted states. She concludes from this omission that the requirement should also apply in such cases, or that the differential treatment should be abolished in another manner.[1088]

The purpose of the integration abroad requirement is the promotion of the integration of newcomers in Dutch society. At the introduction, the government did not substantiate whether and how the integration abroad requirement would contribute to achieving this objective, but instead pointed towards the problems associated with the integration of certain groups. Initially the number of applications for an entry visa for the purpose of family unification declined, but in the following years numbers went up again (see Table 7.4.).

Year	2005	2006	2007	2008	2009	2010	2011
No. of applications	20,221	13,796	11,995	15,025	15,773	18,621	15,540

Table 7.4. Applications for an entry visa for the purpose of family unification in the Netherlands

Denmark is not bound by the FRD and is therefore not restricted by EU law in imposing integration measures or requirements. In Denmark there have been a lot of developments concerning integration measures and family unification in the past decade.

In 2006 a political agreement was reached on the introduction of an obligatory integration test in the country of origin. This test was planned to include both language and civic integration elements. This resulted in 2007 in a specific legal basis for this test in Danish law. Subsequently, a discussion took place on the way in which the pre-entry integration requirement should be imple-

1083 Administrative High Court (16-08-2011) LJN BR4959.
1084 Art 17(1)(e) Foreigners Act (NL).
1085 Art 17(1)(h) Foreigners Act (NL).
1086 Art 3.96a(3) Foreigners Decree (NL).
1087 Art 3.96a(4) Foreigners Decree (NL).
1088 De Vries (n 9) p 332.

mented in practice. This resulted in a parliamentary working group which found that the introduction of a pre-entry integration test would be very costly because course materials must be made available and test centres set up at the Danish consulates abroad. Subsequently in 2010 the legislative act was amended in such way that the integration exam had to be taken after arrival in Denmark. Later in 2010 the integration exam was introduced. This test included both a civic integration as well as a language element. In 2012 the integration exam in place at that time was eliminated and replaced by a language proficiency requirement. Within six months of arrival in Denmark, applicants for family unification must pass a language exam at the level A1 of the CEFR.

The *United Kingdom* is not bound by the FRD and is therefore not restricted by EU law in imposing integration measures or requirements.

In the UK there are three levels of integration measures. Firstly, applicants for family unification are obliged to comply with a language proficiency requirement in the country of origin. Secondly, family migrants lawfully residing in the UK must pass a language and knowledge of British society test before being eligible for an independent long-term residence permit. Thirdly, a similar requirement also applies for naturalisation. As this last requirement falls outside the scope of this research, it is not discussed further.

In the UK, applicants for family unification must comply with a language proficiency requirement in the country of origin.[1089] The language proficiency requirement before entry to the UK was introduced in 2010 after a long discussion. It had already been introduced for ministers of religion and highly skilled workers in 2004 and 2007. In 2007 the Home Office announced that it would examine the case for the introduction of a language proficiency requirement for the admission of family migrants.[1090] In 2008 the Home Office declared that it would delay the implementation of the language proficiency requirement because there was no sufficient access to English language classes overseas, and imposing a dogmatic requirement would keep British citizens away from their family members.[1091] In 2009, the Home Office concluded from a working group that setting a clear date for the introduction of the language proficiency requirement would generate a sufficient supply of language tuition courses, and therefore set the date for the introduction of the requirement for the summer of 2011. The objective of the language proficiency requirement was to promote integration into British society by improving employment opportunities, raising awareness of the importance of speaking English and helping to prepare the spouses for the test required for probationary citizenship.[1092] After the government changed in 2010, the

1089 E-ECP.4.1. Appendix FM of the Immigration Rules (UK).
1090 Home Office, *Securing the UK Border: Our vision and strategy for the future* (2007) p 4.
1091 Home Office, *Marriage Visas: The Way Forward* p 8.
1092 Home Office, *Earning the Right to Stay: A New Points Test for Citizenship* (2009) p 23.

Minister responsible for immigration announced in parliament that the language proficiency requirement would be introduced in November 2010.[1093]

The level of English required in the language proficiency requirement is set at level A1 of the CEFR, with the note that the applicants must pass a speaking and listening test; written English is not required. The provider of the test must be approved by the UK Border Agency. A list of approved tests and providers is published on the website of the UK Border Agency.[1094] The UK government does not organise any courses, nor does it make any preparation materials available.

Not all applicants for family unification need comply with the language proficiency requirement. The requirement is only imposed on those persons who are within the scope of the Immigration Rules. The third-country family members of EU citizens are therefore not obliged to pass the language exam in the country of origin. Furthermore, for those persons within the scope of the Immigration Rules, some exceptions are made. Firstly, all persons who are the national of a majority English speaking country are exempted from the requirement.[1095] Secondly, all persons who have obtained an academic qualification which was taught in English are exempted from the language proficiency requirement.[1096] Thirdly, persons aged 65 and over, persons who have a disability preventing them from meeting the language proficiency requirement or persons who are prevented from meeting the language proficiency requirement due to exceptional circumstances are exempted from the requirement.[1097]

Since the language proficiency requirement has been introduced relatively recently, there have not yet been any reports on the effects of the requirement.

Interim conclusion

In all of the selected member states, there are forms of integration requirements within the context of family unification policy. Germany and the Netherlands, where the FRD is applicable, require applicants for family unification to comply with a pre-entry integration requirement in the form of an integration exam that must be passed in the country of origin. In the United Kingdom, applicants for family unification must pass a language proficiency test. Denmark dis-

1093 Announcement by Immigration Minister Damian Green, written statement, *House of Commons Debates*, 26 July 2010, cols 66-67WS (UK).

1094 See http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/new-approved-english-tests.pdf .

1095 E-ECP.4.1.(a) Appendix FM of the Immigration Rules (UK); the listed countries are Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, and the USA.

1096 E-ECP.4.1.(c) Appendix FM of the Immigration Rules (UK).

1097 E-ECP.4.2. Appendix FM of the Immigration Rules (UK).

cussed the possibility to introduce pre-entry integration measures, but finally did not implement these because it was deemed too costly. Therefore Denmark is the only selected member state which does not apply pre-entry integration measures. Looking at the content of the pre-entry integration measures, the Netherlands is the only one of the selected member states which includes a civic integration element in the pre-entry integration exam. All of the selected member states have post-entry integration measures. Of those member states, the Netherlands and the United Kingdom have a civic integration element in the post-entry integration measures. Denmark abolished the civic element in the post-entry integration measures in 2012. The required level of the language requirement is the same for all the member states which operate pre-entry integration requirements. For the post entry-integration requirement the required level of language proficiency is different across the member states.

	Pre-entry integration measures		
	Civic	Language	level
Denmark	x	x	
Germany	x	✓	A1
Netherlands	✓	✓	A1
United Kingdom	x	✓	A1

Table 7.5. Type of pre-entry integration measures in the selected member states

7.3.6 Other substantive requirements

As Denmark and the United Kingdom are not bound by the FRD, they have the competence to impose requirements which are not listed in the FRD. The United Kingdom does not operate any other substantive requirement. *Denmark* has two additional requirements: the attachment requirement and the collateral requirement.

According to the attachment requirement, the collective bond of the sponsor and the applicant with Denmark should be bigger than the bond with the country of origin of the applicant. The attachment requirement is waived if the sponsor is a Danish national and has resided in Denmark for a period of at least 26 years or was born and raised in Denmark or arrived there at a very young age and has resided lawfully there for more than 26 years. If the requirement is not waived, meeting the attachment requirement depends on the applicant's and the sponsor's bond with Denmark. For the applicant, the requirement is deemed to be met when the applicant has visited Denmark at least once with a short-term visa or within a visa-free period, or has had prior lawful residence in Denmark. For the sponsor, the attachment requirement is deemed to be met if the sponsor has lawfully resided in Denmark for a period of 12 years and has made an effort to become integrated into Danish

society, for example through education or employment. The period of twelve years can be reduced if the sponsor has held a regular job in Denmark for 7-8 years. If the employment can be characterised as advancing integration, for example because it involves a considerable degree of contact and communication with Danish co-workers and customers, the 12-year period can be reduced after 4-5 years of employment, Lastly, the 12-year period can in certain cases be reduced if the sponsor has completed a vocational training programme in Denmark and since then has been employed for a considerable period of time within the field of studies.

Furthermore, the sponsor should post a collateral of 50,800 DKK (approximately 6,816 EUR) in the form of a bank guarantee. In case the applicant receives public assistance, this amount will be covered by the collateral. The guarantee must be issued by a Danish financial institution. The collateral requirement can be waived if special reasons apply, for example where the sponsor has received international protection, has children under the age of 18 or is seriously ill. The level of the collateral was lowered from 100,000 DKK (approximately 13,418 EUR) in 2012.

7.4 Conclusion

7.4.1 Comparison of the CD and the FRD

Under both the CD and the FRD the right to family unification is not absolute, but subject to compliance with substantive requirements. Looking at the content of these requirements, it must be concluded that the requirements allowed under the FRD are stricter than those under the CD. This means that the right to family unification is wider under the CD than under the FRD.

	CD	FRD
Accommodation	x	✓
Sickness Insurance	x	✓
Maintenance	✓	✓
Integration measures	x	✓

Table 7.6. Substantive requirements in the CD and the FRD.

For maintenance requirements, the allowed requirements under the FRD are much broader than under the CD. Under the FRD the member states are allowed to require stable, regular and sufficient resources. This implies that the member states may require sponsors to have a certain income. In the *Chakroun* ruling, the CJEU held that the competence of the member states to impose income

requirements must be interpreted strictly.[1098] Under the CD, it is sufficient for the EU national sponsor to have the right to reside in the other member state. For the sponsor's right to reside in another member state to exist, the sponsor must either be a worker, self-employed person or student, or must have sufficient resources to not become a burden on the social assistance system of the member state concerned. The case law of the CJEU shows that these categories are broadly defined. For example, a part-time worker can easily qualify as a worker, and third-party support is accepted in establishing whether a person has sufficient funds to not become a burden on the social assistance system of the member state concerned.

Unlike the FRD, the CD does not allow the member states to impose requirements relating to the age of the spouse, sickness insurance, accommodation and integration. The requirements allowed under the FRD are therefore prohibited under the CD. The consequence of this difference is that the legal protection of applicants for family unification is higher within the scope of the CD than within the scope of the FRD.

7.4.2 Comparison of the implementation of the CD and the FRD by the member states

Looking at the implementation of the CD, it is striking that a similar pattern is visible in the implementation of this directive by the member states. The member states generally comply with the obligations arising from the CD. Furthermore, the structure of the CD and the case law of the CJEU plays an important role in the system of implementation of all selected member states. This is most visible in Germany, where the CD and its case law have not been extensively codified in lower regulation, but where instead the case law of the CJEU is consulted directly for the interpretation of the legislative act implementing the CD.[1099] Denmark has a similar system of implementation, however due to the legislative act not being applicable to Danish nationals who are within the scope of the CD, a guidance document was released in which the implementation of the CD is further outlined. Both the Netherlands and the United Kingdom have chosen to implement the CD and its case law extensively in lower regulations. The result is however similar. The rules and principles of the CD and the case law are closely reflected in the lower regulations of these member states. It can therefore be concluded that even though the member states may not always be satisfied about the status quo in which almost no requirements can be imposed on family unification within the scope of the CD, this does not result in a lack of compliance.

1098 *Chakroun* (n 392).

1099 The Administrative Guidelines for the Free Movement Act do however give policy guidance on the interpretation of the CD and the case law of the CJEU.

	Denmark	Germany	Netherlands	United Kingdom
Accommodation	✓	✓	x	✓
Insurance	x	✓	x	x
Income	✓	✓	✓	✓
Integration (pre-entry)	x	✓	✓	✓
Integration (post-entry)	✓	✓	✓	✓
Other	✓	x	x	x

Table 7.7. Implementation of substantive requirements

Among the selected member states, the FRD is only applicable in Germany and the Netherlands. The Netherlands has chosen to have the same legal regime for family unification for third-country national sponsors and Dutch national sponsors. This means that the implementation of the FRD also applies to Dutch national sponsors. This is not the case in Germany, where some requirements are only imposed on third-country national sponsors. For example, the income requirement principally only applies to third-country national sponsors, and only in specific cases also to German national sponsors. Where Germany has a different treatment based on the nationality of the sponsor, the German national sponsor is always in a beneficial position. Looking at the implementation of the FRD in Germany and the Netherlands, a mixed image appears. In the Netherlands, the requirements are extensively specified in lower regulations. This is not the case in Germany. Looking at the implementation of the separate substantive requirements, it is striking that both member states have a similar implementation of integration measures. Both member states require applicants for family unification to pass an integration exam in the country of origin. In both the Netherlands and Germany district courts have submitted questions for preliminary ruling to the CJEU, and in all those cases the referred preliminary questions did not result in a ruling because the governments had issued a residence or entry permit before the CJEU ruled on the issue. Therefore, it is unclear what the position of the CJEU will be. Considering the guiding principles the Court developed in *Chakroun*, it is to be expected that the Court will be critical about the compatibility of mandatory pre-entry integration exams with Article 7(2) FRD. With regard to the maintenance requirement, the policy of both member states has been altered after judicial review. In the *Chakroun* case, the CJEU held that the Dutch implementation went beyond the requirement allowed by the FRD.[1100] In the German context, the Federal Administrative Court held that no reference amount may be set in regulations.

1100 Ibid (n 392).

The FRD is not applicable in Denmark and the United Kingdom. Therefore these member states are not restricted by the FRD in imposing substantive requirements for family unification. Looking at maintenance requirements, the United Kingdom requires a relatively high income compared to the other member states. The maintenance requirement imposed by Denmark is similar to the income requirement of Germany and the Netherlands. In terms of integration requirements, the United Kingdom does have a language proficiency requirement. Denmark did investigate the possibility of imposing an integration requirement, but has not done so because of the costs associated with such a requirement. Instead, the Danish authorities have a post-entry language proficiency requirement. The United Kingdom does not operate any substantive requirement besides the requirements also listed in the FRD. Denmark does have additional requirements, namely the attachment requirement and the collateral requirement.

Both Denmark and the United Kingdom have substantive requirements which are not in conformity with the FRD and therefore would not be possible if those member states were covered by the FRD. Germany and the Netherlands approach, or arguably breach, the minimum standards of the FRD. This justifies the conclusion that the FRD has proven to be a valuable safeguard of the right to family unification. Without the FRD, it would have been possible for Germany and the Netherlands to have stricter substantive requirements, a competence they would most likely have used considering the discussion of the income requirement and integration measures in both Germany and the Netherlands.

The research question addressed in this chapter was what substantive requirements the member states impose on applicants for family unification and how these requirements relate to EU law. It was shown that the right to family unification is indeed not absolute, but subject to the fulfilment of substantive requirements. It was furthermore established that the two different directives, the CD and the FRD, have a different set of requirements, in which the CD is more favourable for the right to family unification than the FRD.

When the member states impose substantive requirements, this can mean that the right to family unification becomes unattainable for certain groups who are not able to meet the requirements, like illiterate persons or persons with learning difficulties. In fact, this is exactly what the member states intend when formulating such requirements. It depends on the international legal framework whether the member states have the competence to impose such requirements. In Chapter 3 it was shown that the member states are restricted by Article 8 ECHR in pursuing their family unification policy. In Chapter 4 the restrictions posed by EU law, further specified in this chapter, were analysed. In the absence of international obligations, the member states are only bound by their own constitutional protection in their domestic family unification policy. It is for that reason that in this chapter it became apparent that the

United Kingdom is allowed to impose a relatively high maintenance requirement, but that Germany and the Netherlands are perhaps infringing EU law when they require applicants for family unification to pass a pre-entry integration exam.

8 Procedural requirements for family unification

8.1 INTRODUCTION

In chapter 7 the substantive requirements to the right to family unification were discussed. In this chapter, the procedural requirements are analysed. The research question addressed in this chapter is which procedural requirements the member state impose on applicants for family unification and their sponsors and how these procedural requirements relate to EU law. Procedural requirements can refer to any requirement relating to the procedure for family unification.

The chapter is structured as follows. First, procedural requirements in the context of the Citizenship Directive are discussed. Second, procedural requirements in the context of the Family Reunification Directive are investigated. The topics of visa, administrative fees and the issue of residence documents are analysed in the case of both directives.

8.2 FREE MOVEMENT OF PERSONS DIRECTIVE

8.2.1 Visa

EU law

Whether the member states may require an applicant for family unification within the context of the CD to obtain an entry visa depends on the nationality of the applicant. The member states may not require applicants for family unification who are themselves EU citizens to obtain an entry visa.[1101] However, third-country national applicants are required to have an entry visa in accordance with Regulation (EC) No 539/2001 or with national law.[1102] The regulation referred to contains lists of countries whose nationals do or do not need an entry visa to cross the external borders of the EU. Possession of a residence card exempts family members from the visa requirement. It is not relevant whether the residence card is issued by a member state other than

1101 Art 5(1) CD.
1102 Art 5(2) CD.

the member state of destination.[1103] The member states must facilitate the applicant in obtaining an entry visa. The member states may not require the family member to obtain a visa for long-term residence or a visa for family unification.[1104] Those visas should be free of charge and must be issued as soon as possible in an accelerated procedure. The European Commission considers that a delay of more than four weeks is not reasonable.[1105] The member states may use the services of an external company to set up appointments to obtain a visa, but must offer direct access to the consulate to third-country national family members.[1106]

However, when a third-country national family member who falls under the visa requirement requests a residence card as a family member of an EU citizen from an irregular residency status, the application may not be rejected based on failure to comply with the visa requirement. In *BRAX* the CJEU was asked by the Belgian Council of State whether the member states may refuse: a family member of an EU citizen to enter that member state at the border for not complying with the visa requirement; an application where the family member has entered the member state unlawfully; an application where the family member has entered the member state lawfully but whose visa has expired and; an application where the family member was issued an expulsion order.[1107] The CJEU held that the right to reside in the member state depends on the family relationship with the sponsor as such, and therefore arises as a matter of law from the secondary free movement of persons law.[1108] Based on this, when a third-country national family member of an EU citizen within the scope of the CD seeks to enter the EU member state of destination, that member state may not refuse entry solely for the reason of non-compliance with the visa requirement. When an application for a residence card is made in a situation of irregular residence, that application may not be rejected solely based on the irregular residence status as this would impair the substance of the right of residence which already exists as a matter of law. This impairment would be disproportionate to the gravity of the infringement of not obtaining an entry visa.[1109] Similar reasoning applies if the third-country national family member has overstayed a visa.[1110] The CJEU reiterated that the only reason to refuse residence rights to a third-country national family member of an EU citizen would be in the case of a risk to requirements concerning public policy, public security or public health.[1111]

1103 COM(2009) 313 final (n 463), p 7.
1104 Ibid p 6.
1105 Ibid.
1106 Ibid.
1107 Case C-459/99 *MRAX* [2002] ECR I-6591 para 37.
1108 At the time of the *BRAX* ruling, the CD as such did not exist yet.
1109 *MRAX* (n 1107) para 78.
1110 Ibid para 90.
1111 Ibid paras 61 and 79.

With its ruling in M*RAX*, the CJEU has created a situation in which the member states may in principle not refuse entry or residence to a third-country national family member of an EU citizen within the scope of the CD. This ruling has been transposed in Article 5(4) CD, which prescribes that where an EU citizen or family member does not have the required documents or visas, the member states concerned shall give such persons every reasonable opportunity to obtain the required documents or to prove by other means that they are covered by the right to free movement and residence. Neither the ruling of the CJEU nor the transposing provision in the CD lay down which other means may be used to prove that the situation is within the scope of the CD.

Domestic law

In *Denmark,* third-country national family members of an EU citizen within the scope of the CD require a visa to enter the country.[1112] The Aliens Act states that the responsible minister will lay down rules for exemptions from this visa requirement in accordance with EU law.[1113] The EU Residence Order does not contain any further specification of the visa requirement. Therefore in the legislation there is no provision which exempts holders of a residence card from the visa requirement. Article 5(4) CD, which obliges the member states to give the third-country national the opportunity to obtain the missing documents or to prove by other means that a residence right is conferred by the CD, is not transposed in Danish legislation. Third-country national family members must apply for a short-term visa at a Danish embassy or consulate. The visa application is free of charge and is processed in an accelerated procedure which only in exceptional circumstances may take longer than 15 days. Furthermore, third-country national family members do not have to provide documents relating to traveller's health insurance and relating to the availability of sufficient funds required for the stay in Denmark. With these provisions Denmark implements the obligation to facilitate third-country nationals in obtaining an entry visa.

In *Germany* third-country national family members of an EU citizen within the scope of the CD require a visa to enter Germany according to the provisions for foreigners for whom the Residence Act applies.[1114] The Residence Act further specifies that a visa or other residence title is required as long as this is not contrary to EU law.[1115] In practice this means that third-country national family members must apply for a Schengen visa. Holders of a residence card of another member state are exempted from the visa obligation.[1116]

1112 Art 2(2) Aliens Act (DK).
1113 Art 2(4) Aliens Act (DK).
1114 Art 2(4) Free Movement Act (GER).
1115 Art 4 Residence Act (GER).
1116 Art 3 Free Movement Act (GER).

This provision further specifies that the visa exemption for residence card holders is pursuant to Article 5(2) CD. Therefore Article 3 Free Movement Act must be interpreted as also applying to third-country national family members with a residence card issued by Germany. Any other reading of that provision would not be in accordance with the CD. When a family member is not able to produce a visa at the border, Article 5(4) CD obliges the member states to not reject an application solely on this basis. This provision is not transposed in German legislation or regulations. The 2008 compliance study reports that the federal policy already provides this opportunity in practice, but correctly notes that it is insufficiently implemented as it is not included in any regulation.[1117] As for the requirement of the facilitation of visa applications, a 2008 compliance study reports that the Visa Guidance Book ('*Visumhandbuch*') states that embassies and consulates should grant third-country national family members every facility to obtain the required visas and necessary documents and that, in the context of the local conditions, such visa applications should be immediately accepted, verified and a decision taken.[1118] However, the Visa Guidance Book is an internal document that is not disclosed by the Ministry of Foreign Affairs. The website of this ministry does state that visa applications of the third-country national family members of EU citizens within the scope of the CD are free of charge.[1119]

In the *Netherlands* third-country national family members of an EU citizen within the scope of the CD are required to obtain an entry visa, but there is no specific legal regime for this. Instead, those third-country nationals must apply for a Schengen visa, in accordance with Regulation (EC) No 539/2001. Access to the territory of the Netherlands is only refused if the third-country national poses a threat to public policy, security or health.[1120] When a family member does not have the required documents to cross the border (passport and visa), entry and/or residence can only be refused after the foreigner has been given the opportunity to obtain the required documents or show in another way that he has the right of free movement and residence, by demonstrating the family relationship with the eligible sponsor.[1121] Persons who possess a residence card are exempted from the visa requirement.[1122] As for the requirement that the member states must facilitate the visa application process of third-country national family members, the policy rules prescribe that the visa application is free of charge and is processed in an accelerated

1117 Milieu Ltd (n 712) p 28.
1118 Ibid p 27.
1119 Auswaertiges Amt, 'Visa fees' <http://www.auswaertiges-amt.de/cae/servlet/contentblob/480896/publicationFile/150773/Gebuehrenmerkblatt.pdf> accessed 23 November 2014 .
1120 Art 8.8(1) Foreigners Decree (NL).
1121 Art 8.8(4) Foreigners Decree (NL).
1122 Art 8.9 Foreigners Decree (NL).

procedure.[1123] It would be more appropriate if this was included in the Foreigners Decree rather than in the Foreigners Circular.

In the *United Kingdom*, third-country national family members of an EU national within the scope of the CD must apply for an 'EEA family permit', which is a type of entry clearance, before entering the United Kingdom.[1124] Nationals from states whose nationals need a visa to enter the UK and persons who intend to come to the UK to live with the EU citizen sponsor permanently or on a long-term basis, must get an EEA family permit before entering the UK. An EEA family permit, a residence card or a permanent residence card is required to enter the UK as a third-country national family member of an EU citizen within the scope of the CD.[1125] The United Kingdom does not recognise residence cards issued by another member state.[1126] The European Commission issued a reasoned opinion against this practice in 2012.[1127] Before an immigration officer may refuse admission to the UK because a person does not have an EEA family permit or a residence card, the officer must give the applicant the opportunity to obtain the document or to prove by other means that he is a family member of an EU citizen.[1128] It is unclear in which way the obligation to allow the applicant to prove by other means that he is a family member within the scope of the CD is guaranteed. An EEA family permit is free of charge and should be applied for online and at a visa application centre. In some states these centres are located at the embassy or consulate, in other countries there are visa centres operated by an external commercial party. There are no indications that in countries where commercial parties are used in the visa process, applications for an EEA family permit can also be made at the consulate or embassy. This is not in accordance with the communication by the European Commission. On 18 December 2014 the CJEU held in the *McCarthy* ruling that the requirement that family members of British citizens who make use of their freedom of movement must obtain an EEA family permit is not in accordance with EU law.[1129] The Court held that the possession of a valid passport is the only requirement that may be imposed on family members and that the prevention of fraud does not justify the imposition of a blanket visa requirement.

A compliance study conducted in 2008 showed that the UK does not implement the obligation to facilitate third-country national family members in

1123 Art B10/2.2 Foreigners Circular (NL).
1124 Art 2(1) and 12(1) Immigration (European Economic Area) Regulations 2006 (UK).
1125 Art 11(2) Immigration (European Economic Area) Regulations 2006 (UK).
1126 A. Valcke, 'Five years of the Citizens Directive in the UK – Part 1' (2011) 25 Journal of Immigration Asylum and Nationality Law p 229.
1127 European Commission, *Free movement: Commission asks the UK to uphold citizens' rights* (2012) .
1128 Art 11(4) Immigration (European Economic Area) Regulations 2006 (UK).
1129 Case C-202/13 McCarthy [2014] not yet published.

obtaining a visa.[1130] There is no indication that the concerns voiced in this study, relating to supporting documents and waiting times, have since been solved.

Interim conclusion

All of the selected member states have implemented the visa requirement for third-country national family members of EU citizens within the scope of the CD. Denmark is the only one of the selected member states which did not implement the obligation to exempt holders of a residence card from the visa requirement. This is an infringement of the CD. In the United Kingdom, residence cards issued by another member state are not recognised. The Commission has taken the first step of an infringement proceeding to remedy this non-compliance. In all the member states, it is laid down in the regulations that upon entry without a valid entry visa the applicant must be allowed to acquire the required document or to prove by other means that he or she is a family member within the context of the CD. However, it is difficult to establish how this obligation is implemented in practice. All of the selected member states except the UK have implemented the obligation to facilitate the acquisition of an entry visa within the context of the CD. There are no indications that the UK in any way facilitates the process of applying for an entry visa in the form of an EEA family permit.

	Denmark	Germany	Netherlands	United Kingdom
Visa requirement	✓	✓	✓	✓
Residence card exemption	x	✓	✓	x
Prove by other means	✓	✓	✓	✓
Facilitation requirement	✓	✓	✓	x

Table 8.1. Implementation of the visa requirement in the selected member states

8.2.2 Registration certificates and Residence cards

EU law

The CD defines separate procedures for the registration of the residence of EU nationals and of third-country national family members. The member states may oblige EU nationals to register with the relevant authorities within three

1130 Milieu Ltd., *Conformity Study for the United Kingdom: Directive 2004/38/EC on the right to citizens of the Union and their family members to move and reside freely within the territory of the Member States* (2008) p 28-29.

months after arrival.[1131] The member states may not require EU national family members to apply for a residence card. The member states are obliged to issue a registration certificate immediately.[1132] For family members of an EU citizen who are themselves EU citizens, the member states may require the following documents to be presented:

- A valid identity card or passport;
- a document attesting to the existence of a family relationship or of a registered partnership;
- where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;
- documentary evidence that requirements for direct descendants and dependant direct relatives in the ascending line are met;
- for other family members falling under the facilitation requirement of Article 3(2)(a) CD, a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
- for unmarried partners falling under the facilitation requirement of Article 3(2)(b) CD, proof of existence of a durable relationship with the Union citizen.[1133]

Within the scope of the CD, the member states must issue a residence card to third-country national family members of EU citizens.[1134] The member states may require such family members to apply for a residence card within three months after arrival.[1135] Because the member states may not place a stamp in the passport when the family member enters the member state, in practice it is difficult to establish whether this norm is complied with.[1136] The member states may impose proportionate and non-discriminatory sanctions if the residence card application requirement is not complied with.[1137] The CJEU ruled that deportation and imprisonment are disproportionate sanctions in this respect.[1138] The member states must issue the residence card within six months after the application was made.[1139] According to the European Commission, the member states may only make full use of this six-month period when examination of the application involves public policy considera-

1131 Art 8(1) CD.
1132 Art 8(2) CD.
1133 Art 8(5) CD.
1134 Art 9(1) CD.
1135 Art 9(2) CD.
1136 Art 5(3) CD.
1137 Art 9(3) CD; Art 5(5) CD.
1138 Case 157/79 *Pieck* [1980] ECR 2171 paras 18-19.
1139 Art 10(1) CD.

tions.[1140] At time of the application, the member states must issue a registration certificate stating that the application has been submitted.[1141] The list of documents which the member states may require the applicant to present is the same as the list in Article 8(5) CD shown above, with the exception that in Article 10(2)(a) only a valid passport is allowed, while under Article 8(5) a valid identity card is also allowed. The residence card is valid for a period of five years, or for the envisioned period of residence of the EU citizen sponsor.[1142]

Domestic law

In *Germany*, EU nationals who seek to reside in Germany as a family member of a sponsor who is within the scope of the CD have to register in Germany pursuant the implementation of Article 5(5) CD.[1143] This is the same registration as for EU citizens who seek to reside in Germany for a period shorter than three months. Article 8(1) CD on the requirement to register residence for a period longer than three months was not further implemented. Instead a certificate attesting to the right to reside in Germany is issued by operation of law.[1144] No separate application is required. There is also no separate implementation provision on proportionate and non-discriminatory sanctions, as the implementation of Article 5(5) CD is also used for this.
Third-country national family members of a sponsor who is within the scope of the CD and who seek to reside in Germany for a period longer than three months have to apply for a residence card.[1145] This application must be made within three months after entry.[1146] The residence card has to be issued within six months.[1147] The applicant should receive a certificate attesting that the application for a residence card has been made.[1148] There is no specific implementation provision relating to sanctions.[1149] The implementation provision specifies that the residence card should be issued for five years.[1150] However as the right to reside in Germany is dependent on the sponsor, this provision must be understood in a way that a shorter period of validity is possible.[1151]

1140 COM(2009)313 final (n 463) p 7.
1141 Art 10(1) CD.
1142 Art 11(1) Free Movement Act (GER).
1143 Art 11(1) Free Movement Act (GER).
1144 Art 5(1) Free Movement Act (GER).
1145 Art 5(2)(1) Free Movement Act (GER).
1146 Art 5(3)(1) Free Movement Act (GER).
1147 Ibid.
1148 Art 5(2)(2) Free Movement Act (GER).
1149 B. Huber, *AufenthG: Kommentar* (Beck 2010) art 5 Free Movement Act para 10.
1150 Art 5(2)(1) Free Movement Act (GER).
1151 Huber (n 1149) para 8.

The required documents are the same for EU citizens and third-country national family members. The required documents are:

- documentary evidence of the family relationship; in the case of dependent family members, also including documentary evidence of dependency;[1152]
- the registration certificate of the sponsor;[1153]
- where appropriate, evidence attesting to the existence of a life partnership.[1154]

In *Denmark* EU national family members of a sponsor who is within the scope of the CD seeking to reside in Denmark for a period longer than three months, must apply for a registration certificate within three months after entering the country.[1155] The registration certificate is issued for an unspecified period.[1156] Nationals of Finland, Iceland, Norway and Sweden are free to reside in Denmark pursuant to domestic immigration law.[1157] The registration requirement does not apply to nationals of these states.

Third-country national family members of an EU national within the scope of the CD have to apply for a residence card within three months after entry.[1158] The residence card is issued for a period of five years, or shorter depending on the envisioned period of residence.

The required documents are the same for EU citizens and third-country national family members. The required documents are an ID card or passport, a registration certificate or residence card of the spouse residing in Denmark and evidence attesting to the existence of a family relationship.[1159] Furthermore, if the family relationship is a marriage, registered partnership or cohabitation, the family member and the sponsor are required to declare that the purpose of contracting the family relationship was not solely to obtain a residence entitlement in Denmark.[1160] The sponsor has to declare that he has established genuine and effective residence in Denmark. If the authorities have cause to suspect an abuse of rights, the applicant must submit evidence that the sponsor has established genuine and effective residence in Denmark. The EU Residence Order further prescribes that it may be required from the sponsor that he declares that he has sufficient income or other means at his disposal so that the family will not become a burden on the public authorities.[1161] The requirements in which the sponsor and family member have

1152 Art 5a(2)(1) Free Movement Act (GER).
1153 Art 5a(2)(2) Free Movement Act (GER).
1154 Art 5a(2)(3) Free Movement Act (GER).
1155 Art 21 EU Residence Order (DK).
1156 Ibid .
1157 Art 17 EU Residence Order (DK).
1158 Art 25 EU Residence Order (DK).
1159 Art 23(1) and 26(2) EU Residence Order (DK).
1160 Ibid.
1161 Art 23(3) and 26(4) EU Residence Order (DK).

to make additional declarations are not listed in the CD and are therefore not in accordance with EU law.

In *Denmark*, the return of Danish nationals who return from another member state with a third-country national family member fall under a different regime than other EU citizens. Where all other EU citizens can apply for a registration certificate and residence card at the regional state administrations, returning Danish nationals must apply directly at the Immigration Service using an application form. On this application form they have to make the required declarations and also answer several questions relating to the family relationship. For example, the applicant should answer whether both partners were present when the marriage was contracted, as a marriage without both partners present is not valid under Danish law. The fact that Danish nationals have to follow a different procedure is not included in the CD and is for that reason not in accordance with this Directive. It was already concluded above that the additionally required declarations are also not in accordance with the CD.

In the *Netherlands* family members of an EU citizen within the scope of the CD who are themselves EU citizens and seek to reside in the Netherlands for a period longer than three months, may register with the immigration authorities if he or she has remained in the Netherlands for more than three months or intend to do so.[1162] Family members of an EU citizen within the scope of the CD who are third-country nationals have to apply for a residence card within one month after the initial three-month period has passed.[1163] The registration process is the same as described above. First, the applicant must register with the local municipality and afterwards an appointment must be made with the Immigration and Naturalisation Service to make the application for a residence card. When the registration is made, the administrative authority issues a certificate attesting that the application has been made.[1164] The administrative authority has to decide on the application within six months.[1165] A residence card is valid for the period of residence of the sponsor or otherwise for five years.[1166]

The required documents for EU national family members are not listed in a regulation.[1167] For third-country national family members the required documents are listed.[1168] The required documents are:

- a valid passport;
- the registration of the sponsor in the Netherlands;
- evidence attesting to the existence of a family relationship;

1162 Art 8.12(4) Foreigners Decree (NL).
1163 Art 8.13(2) Foreigners Decree (NL).
1164 Art 8.13(4) Foreigners Decree (NL).
1165 Art 8.13(5) Foreigners Decree (NL).
1166 Art 8.13(6) Foreigners Decree (NL).
1167 Art 8.12(5) Foreigners Decree (NL).
1168 Art 8.13(3) Foreigners Decree (NL).

- for dependents: a declaration from the competent authorities in the country of origin of the family member stating that the family member is dependent on the sponsor;
- for family members who move to the host member state for health reasons: distinctive evidence of serious health impairments for which personal care of the family member residing in the Netherlands is required;
- for unmarried partners: a declaration of partnership;
- for children of the unmarried partner, but not of the sponsor: evidence that the ordinary family unification requirements (outside the scope of the CD implementation) are complied with.

As was already concluded in Chapter 6, the Netherlands has extended the application of the CD regime to unmarried partners. However for the family unification of the children of unmarried partners, the ordinary family unification legislation needs to be complied with. It is unclear whether this practice is in accordance with the CD.

In the *United Kingdom*, EU nationals do not have to register when they intend to reside in the UK for more than three months. This also applies to EU national family members. However EU nationals can apply for a registration certificate.[1169] This is necessary for example when an EU national moves to the UK and has third-country national family members who seek to join him. In the legislation it is laid down that a registration certificate is issued immediately.[1170] However, in practice the registration certificate is not issued immediately. Applicants for a registration certificate should submit an application form by post or in person.[1171] This practice is not in accordance with the CD.

If a third-country national has a right to reside in the UK based on the CD, he is not under the obligation to apply for a residence card. Third-country national family members can apply for a residence card.[1172] For practical reasons it is advantageous for third-country nationals to apply for a residence card, as a residence card can be used to re-enter the UK and can be used to prove lawful residence in the UK. The implementing regulation prescribes that applicants for a residence card shall be issued a certificate attesting that an application for a residence card was made immediately and that the residence card must be issued within six months after the application was made.[1173] Applicants for a residence card must complete an application form which should be sent to the administrative authority by post.[1174] As it is not possible to make an application for a residence card in person, no certificate attest-

1169 Art 16 Immigration (European Economic Area) Regulations 2006 (UK).
1170 Art 16(3) Immigration (European Economic Area) Regulations 2006 (UK).
1171 See http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/eea111.pdf.
1172 Art 17(1)&(2) Immigration (European Economic Area) Regulations 2006 (UK).
1173 Art 17(3) Immigration (European Economic Area) Regulations 2006 (UK).
1174 See http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/eea211.pdf.

ing that the application is made is issued. This is not in accordance with the CD.

Regulations prescribe for both EU national and third-country national family members that a valid ID or passport must be produced and evidence that the applicant is an eligible family member.[1175] This rather vague formulation is clarified further by the Home Office. Applicants for a registration certificate or residence card must complete an application form. On the application form, the applicant is asked to substantiate the residence rights in the UK of the sponsor. This is not in accordance with the CD, as the right to reside in the member state depends on the family relationship with the sponsor, not on the eligibility of the sponsor.

Interim conclusion

All the member states have implemented the obligation to issue registration certificates and residence cards. However, several difficulties in the implementation have been identified. No compliance issues were identified for the German implementation. In Denmark, there are two main systemic issues relating to the implementation of the CD. Firstly, Danish nationals and other EU citizens are treated differently when both are equally covered by the CD. There are different application procedures. Danish nationals have to apply at the Immigration Service, using an application form, while other EU citizens can apply directly to the Regional Authorities. The discrimination of beneficiaries of the CD goes against the text and spirit of this Directive. Secondly, Denmark requires applicants to make certain declarations regarding the purpose of contracting a marriage and the ability to maintain the family without recourse to public assistance. As these declarations are not listed in the CD, this is not in accordance with this Directive. In the Netherlands, the only possible compliance issue that was found was that the children of unmarried partners (and not of the sponsor) are covered by ordinary family unification policy instead of the special regime for free movement. As unmarried partners fall under the facilitation regime, it is unclear whether this implementation clearly infringes the CD. However, placing the children of the unmarried partners under another legal regime than applying to unmarried partners themselves seems to be at odds with the requirement that member states should facilitate entry and residence of unmarried partners. The United Kingdom is the only one of the selected member states in which EU national and third-country national family members are not obliged to apply for a registration certificate and residence card. This is allowed under the CD. There are several points in which implementation is insufficient. Even though the domestic implementation measure states that registration certificates shall be issued immediately, in practice this is not the case. When applying for a

1175 Art 16(3) & 17(1)&(2) Immigration (European Economic Area) Regulations 2006 (UK).

residence card, third-country national family members do not receive a certificate attesting that a residence card application has been made. When applying for a residence card, family members must substantiate extensively that their sponsor fulfils the requirements for making use of the free movement of persons, for example by proving an employment relationship. These issues are not in accordance with the CD.

Generally speaking, it can be held that the implementation in Germany and the Netherlands is more in accordance with the CD than in Denmark and the UK. The lacking implementation in the latter member states can be explained by the reluctance of those member states to defer competence in the field of immigration control to the level of the EU. Denmark and the UK have negotiated opt-outs from EU immigration law, and seem to use procedural requirements relating to issuing registration certificates and residence cards to limit the potential effect the free movement of persons has on the immigration of third-country national family members.

8.2.3 Administrative fees

EU law

Third-country national family members of an EU citizen within the scope of the CD have to apply for an entry visa. This visa should be free of charge.[1176] EU national family members of EU citizens have to register in the host member state. Third-country national family members of an EU citizen within the scope of the CD have to apply for a residence card. For both applications the member states may require applicants to pay an administrative fee which may not be higher than the administrative fee charged to own nationals for issuing a similar document.[1177]

Domestic law

In *Denmark*, no administrative fee is charged for applications for an entry visa, registration certificate or residence card.

In *Germany*, an entry visa for third-country national family members is free of charge. Applications for a registration certificate are also free of charge. For applications for a residence card, applicants need to pay an administrative fee of 10 Euro.

In the *Netherlands*, applications for a Schengen visa, which is required for entry as a family member within the scope of the CD, are free of charge. Applications for a registration certificate are free of charge as well. For applica-

1176 Art 5(2) CD.
1177 Art 25(2) CD.

tions for a residence card, an administrative fee of 42 Euro, equal to the amount which Dutch nationals need to pay for an ID card, needs to be paid.

In the *United Kingdom*, applications for an EEA family permit, which is the entry visa for third-country national family members, are free of charge. In July 2013 an administrative fee of 55 GBP was introduced for applications for a registration certificate. Applications for a residence card are also subject to the payment of a fee of 55 GBP.

Interim conclusion

The level of the administrative fees varies across the selected member states. Denmark does not levy any administrative fees. Germany only levies a relatively low administrative fee on applications for a residence card. In the Netherlands the same fee is more than four times higher. In the United Kingdom, the entry visa is free of charge, but for a registration certificate and for a residence permit a relatively high fee is required. It should be noted that in the UK family members are not required to apply for a registration certificate or residence card.

	Entry	Registration	Residence card
Denmark	-	-	-
Germany	-	-	€10
Netherlands	-	-	€42
United Kingdom	-	£55	£55

Table 8.2. Level of administrative fees in the free movement context

8.2.4 Interim conclusion

Some patterns on the implementation of the procedural requirements of the CD can be identified. Firstly, the member states generally implement the procedural obligations rather well. However, major issues have been found mostly regarding the United Kingdom and Denmark. In Denmark a different regime is applied to Danish nationals and other EU citizens even though both are covered by the same CD. This is a systemic issue because the implementing regulation in Denmark simply does not cover Danish nationals (see Chapter 7). Also, Denmark requires sponsors and family members to make a declaration regarding the purpose of the marriage and income, which is not allowed under the CD. The most flagrant infringement of the CD by the UK is that it does not recognise residence cards issued by other member states. Furthermore, the UK has some issues with the issue of registration certificates immediately upon application and certificates of application. In the Netherlands the only possible infringement relates to the children of unmarried partners, who fall under

ordinary family unification law and not under the CD implementation regulation. No compliance issues have been identified for Germany. Secondly, based on these issues it must be concluded that Denmark and the UK have a worse implementation record than Germany and the Netherlands. This is possibly caused by the reluctance of these member states to confer competence in the field of migration control to the EU. It is for the European Commission to address these issues; so far the Commission has not started any infringement proceedings concerning these issues.

8.3 Family Reunification Directive

8.3.1 Visa

EU law

The FRD prescribes that the application for family unification shall be submitted and examined when the family members are residing outside the territory of the member state in which the sponsor resides.[1178] The member states may allow applications which are made within the territory of the member states in which the sponsor resides by way of derogation.[1179] This provision is meant to prevent the entry and stay of applicants who do not fulfil the requirements. By requiring applicants to apply outside the country, member states are not faced with the established fact that the applicant already resides in the member state. The competence of the member states to derogate from this requirement is formulated broadly and this may be done in appropriate circumstances. In the initial proposal on the FRD by the European Commission it was stated that the member states must accept in-country applications in 'exceptional circumstances or on humanitarian grounds'.[1180] This provision was changed considerably. The obligatory character of the provision was changed to become a discretion for the member states to allow in-country applications. Furthermore, the 'exceptional circumstances or on humanitarian grounds' criterion was changed to 'in appropriate circumstances'. This indicates that the current wording of the provision is much more flexible for the member states. The main category for which a derogation is made by most member states is the family unification of family members who are nationals from states who are exempted from the visa requirement.

It is questionable whether the member states can still be under the obligation to allow an in-country application in certain circumstances. Article 17 FRD prescribes that the member states should take due account of the nature

1178 Art 5(3) FRD.
1179 Ibid.
1180 COM(1999)638 final (n 350) p 27.

and solidity of the person's family relationship and the duration of his residence in the member states and of the existence of family, cultural and social ties with the country of origin. Furthermore, Article 5(5) FRD obliges the member states to have due regard for the best interests of children. Hailbronner argues that, based on this, member states in certain circumstances are obliged to allow an in-country obligation on human rights grounds.[1181]

Domestic law

In *Denmark* in principle applicants for family unification have to apply for a residence permit in their country of origin or country of permanent stay.[1182] The residence permit also serves as the entry visa to enter Denmark. After entry to Denmark, the residence permit remains valid. The application for a residence permit needs to be made at a Danish representation in the country of origin or the country of permanent stay. There are several exemptions to the requirement that the residence permit should be applied for abroad. Firstly, holders of a Schengen visa, holders of a valid residence permit in Denmark and nationals of a state whose nationals do require a visa to enter Denmark can make an application for family unification in Denmark.[1183] Furthermore, applicants may make their application for family unification in Denmark if this is required by international obligations.[1184] Before the amendment the text of the provision read that applications may be made in Denmark when 'particular circumstances make it appropriate'. This wording was changed in 2010 to the new formulation. This has restricted the application of the exemption clause to only situations where the expulsion of the applicant would be a violation of the international obligations of Denmark.

In *Germany* applicants for family unification must apply for a long-term entry visa at a German representation in the country of origin.[1185] The German representation has to consult the local Foreigners Authority of the district in which the family migrant seeks to settle before granting the visa. The long-term entry visa has the same status as a residence permit. After entry the applicant does not have to apply for a separate residence permit. When the long-term entry visa expires the applicant must apply for a prolongation, which is issued in the form of a residence permit. There are several situations in which an applicant does not have to obtain a long-term entry visa before entering Germany. Persons who already have a residence permit in Germany and want to change the purpose of their residence to family unification do not have to travel to the country of origin to apply for the provisional entry

1181 Hailbronner and Carlitz (n 762) p 213.
1182 Art 9(21) Aliens Act (DK).
1183 Ibid.
1184 Ibid .
1185 Art 5(2)(1) Residence Act (GER).

visa.[1186] Furthermore, nationals of the EU and EEA and nationals of certain states are exempted from the long-term visa requirement.[1187] When a person has a Schengen visa, or is exempted from the Schengen visa requirement and has an entitlement to a residence permit in Germany, the applicant is exempted from the long-term entry visa requirement.[1188] Lastly, when specific circumstances in an individual case make a subsequent visa procedure unreasonable the long-term entry visa requirement can be waived.[1189]
In the *Netherlands* applicants for family unification must apply for a provisional entry visa in the country of origin or the country of permanent residence. After entry the applicant can collect his residence permit at an office of the Immigration and Naturalisation Service. Applications for a residence permit based on family unification may be rejected if no provisional entry visa has been obtained.[1190] There are several grounds on which the provisional entry visa requirement is waived. Among other reasons, the provisional entry visa requirement can be waived if:

- the applicant is a national of a state which is exempted from the visa requirement;[1191]
- the applicant is not able to travel for health reasons and can therefore not be expected to travel to his country of origin to obtain a residence permit;[1192]
- the applicant has a residence permit for a different purpose and applies for a change in the purpose of the residence permit on time.[1193]

There are many more grounds listed in the legislation and regulations where the provisional entry requirement is waived.[1194] As a hardship clause, it is laid down that the provisional entry visa requirement is waived where the responsible minister believes that the application of the requirement would be unfair and unreasonable.[1195] The practical implication of this latter category is that the provisional entry requirement is not imposed if termination of residence would result in a violation of Article 8 ECHR.

1186 Art 39(1) Residence Regulation (GER).
1187 Art 41 Residence Regulation (GER) These states are Australia, Israel, Japan, Canada, South Korea, New Zealand and the Unites States.
1188 Art 39(3) Residence Regulation (GER) This is also laid down in the last line of Art 5(2)(1) Residence Act (GER).
1189 Art 5(2)(1) Foreigners Act (NL).
1190 Art 16(1)(a) Foreigners Act (NL).
1191 Art 17(1)(a) Foreigners Act (NL) These states are all member states of the EU and the EEA, Australia, Canada, Japan, Monaco, New Zealand, Vatican City, United States, South Korea and Switzerland.
1192 Art 17(1)(c) Foreigners Act.
1193 Art 17(1)(e)&(f) Foreigners Act.
1194 See Art 17 Foreigners Act (NL); Art 3.71(2) Foreigners Decree (NL).
1195 Art 3.71(4) Foreigners Decree (NL).

The Netherlands applies the provisional entry visa obligation strictly. This is illustrated by many judgments of the ECtHR on this issue. In *Benamar v. the Netherlands*, the Netherlands rejected the application of a residence permit of four minor Moroccan children who applied for a residence permit to stay in the Netherlands with their Moroccan mother who had a permanent residence permit in the Netherlands.[1196] The children had entered the Netherlands without obtaining the required provisional entry visa, and for that reason their application had been rejected. The ECtHR held that the refusal of the Netherlands to give the children a residence permit did not amount to a violation of Article 8 ECHR.[1197] In *Benamar v. the Netherlands* the application for a residence permit was made soon after the children arrived in the Netherlands. In other cases the applicant had lived in the Netherlands for several years before an application for a residence permit was made. For example in *Rodrigues da Silva & Hoogkamer v. the Netherlands*, the applicant had lived in the Netherlands for more than three years before the application for a residence permit was made.[1198] In that period a child was born, who acquired Dutch nationality because of the Dutch nationality of the father. In that case the ECtHR found that the expulsion of the applicant would constitute a violation of Article 8 ECHR.[1199] In *Arvelo Aponte v. the Netherlands*, the applicant successfully applied for a provisional entry visa.[1200] However, when she arrived in the Netherlands her application for a residence permit was rejected because she had been convicted in Germany for a drugs-related offence five years earlier. The ECtHR ruled by four votes to three that the expulsion of the applicant would not amount to a violation of Article 8 ECHR.[1201]

This short overview of ECtHR case law illustrates the importance the Dutch authorities attach to the provisional entry visa requirement. Applications for a residence permit are rejected for the sole reason of not having a provisional entry visa, without testing whether the requirements for the provisional entry visa were complied with.

In the *United Kingdom* applicants for family unification have to apply for entry clearance at a British representation in the country of origin.[1202] An entry clearance is an entry visa for long-term residence. The entry clearance requirement applies to visa nationals and to persons who are exempted from the visa requirement but who seek to reside in the UK for more than six months.[1203] The entry clearance has the form of a visa for visa nationals and

1196 *Benamar v the Netherlands (dec.)* (n 187).
1197 Ibid.
1198 *Rodrigues da Silva and Hoogkamer v Netherlands* (n 203) paras 9-13.
1199 Ibid para 44.
1200 *Arvelo Aponte v Netherlands* (n 221) para 7.
1201 Ibid para 61.
1202 Art 28 Immigration Rules (UK).
1203 Art 24 Immigration Rules (UK).

of an entry certificate for non-visa nationals.[1204] After entry to the UK, the applicant does not have to apply for a separate residence permit. The entry clearance remains valid until it expires. When the entry clearance expires, the applicant has to apply for leave to remain, which is a residence permit. There is an exemption to the entry clearance requirement in case a person has a valid leave to remain in the UK and seeks to change the purpose of residence to family life. The requirement is that the applicant must not be in the UK as a visitor, have leave to remain valid shorter than 6 months or be on temporary admission.[1205] There is no specific hardship clause for the entry clearance requirement. When an applicant is already in the UK without a valid residence permit, the applicant can claim the right to reside in the UK based on Article 8 ECHR. This is further discussed in Chapter 10.

Interim conclusion

The analysis of the use of the visa requirement has shown that all of the selected member states require a special type of visa from applicants for family unification. The FRD prescribes that applications for family unification should be made and examined when the applicant is outside the territory of the member state concerned.

In Germany, where the FRD is applicable, the visa requirement is implemented. However, nationals of certain states and holders of a valid residence permit are exempted from this requirement. Furthermore, as a hardship clause, it is laid down that non-compliance with the visa requirement will not result in a rejection for the application of a residence permit if it would be unfair and unreasonable to require the applicant to go through another visa procedure abroad. In the Netherlands, where the FRD is applicable as well, the visa requirement is strictly implemented. Even though there are exemptions for nationals of certain countries and for persons with a valid residence permit as well as a hardship clause, many cases in which an application for family unification was rejected for non-compliance with the visa requirement have reached the ECtHR. In *Rodrigues da Silva & Hoogkamer v. Netherlands* the Court held that the Dutch application of the provisional entry visa requirement in the particular circumstances of that case amounted to excessive formalism.[1206] In Denmark, where the FRD is not applicable, applicants for family unification must make the application for their residence permit in their country of origin. Persons who have the right to reside in Denmark, because they have a valid visa, residence permit or are exempted from visa requirements, may make

1204 Art 25 Immigration Rules (UK).

1205 This is a requirement in the section on partners (E-LTRP.2.1. Appendix FM of the Immigration Rules (UK)) and parents (E-LTRDT.3.1. Appendix FM of the Immigration Rules (UK)).

1206 *Rodrigues da Silva and Hoogkamer v Netherlands* (n 203) para 44.

the application for family unification in Denmark. As a hardship clause, applications may be made in Denmark where refusal would result in a violation of Denmark's international obligations, most notably under Article 8 ECHR. In the United Kingdom, applicants for family unification must obtain entry clearance. This requirement also applies to nationals of states who are exempted from the visa requirement. The only exemption laid down in the Immigration Rules is for persons with a valid residence permit valid for more than six months who seek to change the purpose of their residence. There is no specific hardship clause, but applicants may claim a right to reside in the UK based on Article 8 ECHR.

8.3.2 Administrative fees

EU law

The FRD does not contain any explicit provisions on administrative fees. However, this does not mean that the FRD does not limit the member states in their competence to set the level of administrative fees at all. Firstly, in *Chakroun*, the CJEU held that all requirements listed in the FRD should be interpreted strictly.[1207] In line with that reasoning it can be held that the obligation to pay administrative fees can be construed as a requirement in this sense. Secondly, Directive 2003/109/EC on long-term residents does also not contain any provisions on the level of administrative fees. Still, the European Commission started an infringement procedure against the Netherlands for the excessive level of administrative fees. At the time of the infringement proceedings the Netherlands charged an administrative fee of € 830 for an application for family unification where the sponsor is a long-term resident. The CJEU acknowledged that because that directive did not have any provision on the level of administrative fees, the member states do have a margin of discretion. However, it held that this may not result in administrative fees which are liable to jeopardise the achievement of the objectives pursued by the directive.[1208] Administrative fees which have a significant financial impact on applicants could prevent them claiming the rights inferred from the Directive.[1209] The charged administrative fees must be proportionate for achieving the objectives of a directive.[1210] The CJEU concluded that by the high level of administrative fees the Netherlands infringed the Directive.[1211] A parallel can be made between Directive 2003/109 and the FRD. Even though the

1207 *Chakroun* (n 392).
1208 *Commission v Netherlands* (n 418) para 65.
1209 Ibid para 70.
1210 Ibid para 75.
1211 Ibid para 79.

personal scope of both directives is different, both directives confer a residence right on third-country nationals and both directives have the integration of those third-country nationals in the host member state as an objective. Therefore it can be held that the reasoning of the CJEU also applies to the FRD.[1212]

For those reasons, in charging administrative fees in applications for family unification member states are bound by the requirement of proportionality when they are implementing the FRD. It should be noted that this obligation flows from the FRD; member states which are not bound by the FRD are therefore not bound by the proportionality principle in levying administrative fees.

Domestic law

In *Denmark* no administrative fees are required for applications for family unification. This applies to the initial application for a residence permit in the country of origin, to the prolongation of this permit and to the application for a permanent residence permit. This is the result of political developments in 2012. The newly elected government decided to reform immigration policy and the abolishment of fees for family unification was one of the reforms.[1213]

In *Germany* the administrative fee for an application for a visa for the purpose of family unification is € 60.[1214] The fee for a residence permit is € 100 if the residence permit is valid for one year or less and € 110 when the residence permit is valid for more than a year.[1215] For the application of a permanent residence permit an administrative fee of € 135 is charged.[1216]

In the *Netherlands* the administrative fee for a visa for the purpose of family unification is € 225. The fee for an application for a residence permit where no entry visa is required is also € 225 . The fee for prolongation of a residence permit is also € 225. It should be noted that in principle a residence permit is awarded for the period of five years, unless the validity of the residence permit of the sponsor is shorter. This means that the fee for a prolongation of a permit only needs to be paid when this applies. When the applicant applies for a residence permit for permanent stay, an administrative fee of € 150 is imposed.

These fees are a direct result of the ruling by the CJEU in *Commission v. Netherlands* (see para. 2.2.1.) and the subsequent ruling by the Council of State

1212 This was confirmed in Council of State (09-10-2012) 201008782/1/V1 (NL).
1213 See news item on https://www.nyidanmark.dk/en-us/news/news/danish_immigration_service/2012/maj/new_rules_for_family_reunification.htm.
1214 Art 46(1) Residence Regulation (GER).
1215 Art 45(1) Residence Regulation (GER).
1216 Art 44(3) Residence Regulation (GER).

on the compatibility of administrative fees for family unification with the FRD.[1217] The Council of State held that the level of the Dutch administrative fee, which at that time had been increased to € 1,250, was incompatible with the FRD. Subsequently, the responsible minister lowered the administrative fees to € 225.

In the *United Kingdom* the administrative fee for an entry clearance depends on the category of the family member. Partners, children and parents of minor children have to pay a fee of £851. Other parents, grandparents and other dependent relatives have to pay a fee of £1,906. When applying without entry clearance, by switching to another residence purpose, the fee is £578 (£953 if the application is made in person) for the main applicant and £433 (£808 if the application is made in person) for each minor child when the child applies at the same time as the main applicant. When a child applies separately, the fee is the same as the fee for adults. When the applicant is eligible for settlement, an administrative fee of £1,051 (£1,426 when the application is made in person) is charged. For each child included in the application of the main applicant £788 (£1,163 when the application is made in person) is charged. When a child applies separately, the fee is the same as the fee for adults.

Interim conclusion

The administrative fees charged for an application for family unification vary greatly among the selected member states. In the member states where the FRD is applicable, the required fees are € 60 in Germany and € 225 in the Netherlands. The difference between those amounts is significant and raises the question of whether lowering the fee to € 225 is sufficient to guarantee compliance with the FRD. Especially in cases of family unification of a parent with several children, the administrative fee of € 225 per person could become a high burden on the family which could prevent the family from making use of the rights conferred by the FRD. In such circumstances the Dutch level of administrative fees would in my opinion be incompatible with the FRD. If the levying of fees were more flexible than at present, the risk of infringements of the FRD would be diminished. In the member states where the FRD is not applicable, the fee in the United Kingdom of £851 is in great contrast to the complete lack of administrative fees in Denmark. The political situation in Denmark contributed to the abolishment of fees. As the UK is not bound by the FRD, it is not limited by the FRD in requiring administrative fees. However, the higher the level of the administrative fees, the higher the chance that the levying of fees leads to a violation of Article 8 ECHR. In *G.R. v. Netherlands*

1217 Council of State (09-10-2012) 201008782/1/V1 ibid ibidCouncil of State (09-10-2012) 201008782/1/V1 ibid ibidCouncil of State (09-10-2012) 201008782/1/V1 ibid ibidCouncil of State (09-10-2012) 201008782/1/V1 ibid ibidCouncil of State (09-10-2012) 201008782/1/V1 ibid ibidCouncil of State (09-10-2012) 201008782/1/V1 (NL) .

the ECtHR found a violation of Article 13 ECHR concerning the levying of administrative fees.[1218] That there is not a lot of case law on this issue can be explained by the fact that it is often more efficient to comply with the administrative fees rather than to contest them, because of the lengthy proceedings during which the family unification is postponed.

	Visa	Permit	Settlement
Denmark	n.a.	0	0
Germany	€60	€60	€135
Netherlands	€225	€225	€150
United Kingdom	£851	£578	£1,051

Table 8.3. Administrative fees for applications for family unification

8.3.3 Residence document

EU law

The FRD prescribes that upon the moment an application for family unification is granted, the member state should authorise the entry of the family member and shall grant the applicant every facility for obtaining the required visa.[1219] The member states should grant applicants a residence permit for the duration of at least one year, which should be renewable.[1220] The residence permit of the family member may in principle not be valid longer than the residence permit of the sponsor.[1221]

This gives the member states a large margin of appreciation on what type of residence should be issued at what moment. Member states are allowed to provide a permanent residence permit immediately or a residence permit which is valid for only one year, and everything else in between.

Domestic law

In *Denmark* applicants make an application for a residence permit in their country of origin or in Denmark. This residence permit is temporary and can be prolonged. At the time of the prolongation of a permit, the authorities check whether the requirements are still complied with. After five years of residence, provided that the applicant still meets the requirements, the applicant qualifies for a permanent residence permit.

1218 *G.R. v Netherlands* (n 284).
1219 Art 13(1) FRD.
1220 Art 13(2) FRD.
1221 Art 13(3) FRD.

In *Germany* the required visa for family unification serves as a residence permit until the visa expires. When the visa expires a prolongation can be applied for at the local Foreigners Authority. The prolongation is issued in the form of a residence permit. After five years of legal residence, the applicant qualifies for a permanent residence permit, provided that all other requirements have been complied with as well.

In the *Netherlands*, after an applicant has entered the country with a provisional entry visa, he or she must register with the municipality and make an appointment with the local office of the Immigration and Naturalisation Service to pick up the residence permit. The residence permit is issued in principle for a period of five years, unless the residence permit of the sponsor is valid shorter than five years. In that case the residence permit is issued for the period that the residence permit of the sponsor is valid. This system replaces the old system in which after arrival in the Netherlands the applicant had to apply for a residence permit even though at the time of the application for a provisional entry visa compliance with the requirements had already been checked. In that system the applicant had to make multiple applications. In the new system the administrative lead for the applicant is limited to one application before entering the Netherlands. After five years of residence, the applicant applies for a permanent residence permit.

In the *United Kingdom* an applicant enters the UK with an entry clearance in the form of a visa or an entry certificate. The entry clearance serves as proof of legal residence until it expires. Usually the entry clearance is initially valid for two and a half years. It then depends on the scheme under which the applicant entered the UK. If the applicant falls under the 5-year family route, after two and a half years the applicant must apply for a prolongation of another two and a half years. After that the applicant can apply for settlement. If the applicant falls under the 10-year family route, the leave to remain needs to be extended three times until after ten years of lawful residence when the applicant can apply for settlement. Essentially, the 10-year family route is applicable if leave to remain was granted even though the requirements were not complied with but where removal would result in a violation of Article 8 ECHR.

Interim conclusion

The FRD gives the member states broad discretion in the type of residence permit which is granted to applicants. The only requirement is that it should be valid for one year. In the Netherlands, after entry with a valid provisional entry visa, an applicant can pick up his residence permit which is valid in principle for five years. In Germany, after expiry of the visa, an applicant must apply for a prolongation and will receive a residence permit. Both these systems are compatible with the FRD. In the UK an applicant receives an entry clearance valid for two and a half years after which he can apply for a resid-

ence permit for the following two and a half years. In Denmark an applicant receives a residence permit in the country of origin which can be prolonged when it expires.

8.3.4 Interim conclusion

All the member states have implemented a procedure in which an application for family unification must be made in the country of origin. There are, however, variations on how these procedures are applied. Denmark is the most lenient country in the sense that everyone who resides lawfully in Denmark is allowed to make an in-country application. In the other selected member states a change in residence purpose may only be made if the sponsor has a residence permit which is valid for a longer term. The UK is the strictest of the selected member states in the sense that all foreign nationals who need leave to remain need to apply for an entry clearance. The other selected member states exempt nationals of non-visa countries from the visa requirement. Looking at the level of the fees, Denmark does not require any administrative fee, while the United Kingdom requires the highest administrative fees by far. The difference between the Netherlands and Germany is smaller in this respect, although it must be noted that the fees in the Netherlands are still almost four times as high as in Germany. This makes it questionable whether the Dutch administrative fees are in accordance with the FRD. The analysis shows that there is no clear pattern among the selected member states.

8.4 Conclusion

In this chapter the procedural requirements member states impose on applicants for family unification were analysed. The research question addressed in this chapter was which procedural requirements do the member states impose on applicants for family unification and their sponsors and how do these procedural requirements relate to EU law. Comparing the procedural requirements imposed in the context of the CD and in the context of the FRD and domestic immigration law, it is striking that within the context of the CD the requirements are more lenient. In ordinary immigration law, in two of the selected member states within the context of the FRD, the applicant must apply in the country of origin. This can place a high burden on applicants, for example where the family members for some reason already reside in the host member state. As the member states are generally restrictive in allowing in-country applications when the residence in the host member state is not lawful, family members have to travel to their country of origin with all the inconvenience associated with this. For example, unlawful stay can be a barrier to returning to the host member state and during the application process the

family might become separated. For that reason the incentive can be strong for such persons to make use of the free movement of persons in order to fall within the more lenient regime. This issue will be further analysed in Chapter 11. Also with respect to administrative fees, table 8.4. shows the large discrepancy between the implementation of the CD and the implementation of the FRD and domestic family unification law.

	CD	FRD/Domestic		
	Res. Card	Visa	Permit	Settlement
Denmark	0	n.a.	0	0
Germany	€10	€60	€60	€135
Netherlands	€42	€225	€225	€150
United Kingdom	£55	£851	£578	£1,051

Table 8.4. Administrative fees

9 Domestic application of article 8 ECHR

9.1 INTRODUCTION

In this chapter the domestic application of Article 8 ECHR in family unification cases is examined. The research question addressed in this chapter is how do the selected member states implement the obligations arising from Article 8 ECHR in their domestic jurisdiction. How Article 8 ECHR operates in family unification law was analysed in Chapter 3 of this dissertation. The analysis in Chapter 3 resulted in several conclusions which will be used as the starting point for the analysis of the domestic case law.

Firstly, the case law of the ECtHR on Article 8 ECHR is incoherent with respect to establishing an interference in the right to respect for family life. This results in an unclear conceptualization of positive and negative obligations. This is relevant because the legal framework for negative and positive obligations differs. When an interference in the right to respect for family life is found, the justification test of Article 8(2) ECHR is triggered, the outcome of which shows whether the interference is justified and whether the state is under the negative obligation to refrain from deportation. If no interference in the right to respect for family life is found, a fair balance should be found between the individual and the state interests in order to find out whether the state is under the positive obligation to allow for the residence of the applicant. In several cases the ECtHR has refrained from making a distinction between negative and positive obligations, motivating this by stating that in any case a fair balance needs to be struck between the interests of the individual and the interests of the state. This, however, provides member states with little guidance on how to apply Article 8 ECHR in their domestic legal system.

Secondly, time plays an important role in applications for family unification and therefore in the interpretation of Article 8 ECHR. From the perspective of an applicant, the long duration of an application, possibly including judicial review, can mean that families can be separated for long periods of time, with all the implications that this may have. From a legal point of view, it is relevant to determine at which moment in time the judicial review should take place. In *Nunez v. Norway* one of the decisive factors in finding a violation was the long duration of the proceedings and therefore the pending expulsion. This case is illustrative for the approach of the ECtHR, in the sense that the ECtHR takes the developments which take place during judicial review into account.

For that reason, in Chapter 3 it was argued that Article 8 ECHR requires a full *ex nunc* scrutiny of administrative decisions on family unification.

Thirdly, the best interests of the child concept has an increasingly important role in the case law of the ECtHR. The best interests of the child concept is enshrined in Article 3 of the UN Convention on the Rights of the Child, which in turn inspires the interpretation of Article 8 ECHR by the ECtHR. In fact, the cases in which the ECtHR has held that the state is under a positive obligation to admit an immigrant have all concerned children. The assessment of the best interests of the child has become more specific regarding the interests of children, although the case law is not completely coherent on this issue.

Fourthly, some aspects of family reunification policy are relevant in the context of domestic family reunification policy, but are less significant in the context of the assessment of Article 8 ECHR. A good example of this is the requirement which many states impose that an application for family unification should be made in the country of origin of the applicant. In the context of Article 8 ECHR, the relevant question is whether there has been prior lawful residence, but not whether a domestic requirement on the place where the application is made is complied with. It should be noted that the ECtHR has previously held that in principle the member states may impose such requirements, but this does not exclude the possibility that a formalistic application of this requirement leads to a violation of Article 8 ECHR. In fact, in *Rodrigues da Silva & Hoogkamer v. the Netherlands* the ECtHR held that such a formal approach by the Netherlands should be characterised as excessive formalism.

Those four conclusions of Chapter 3 are used for the case law analysis in this chapter. Where necessary, references will be made to the previous chapters of this dissertation.

9.2 METHODOLOGY

The research question addressed in this chapter is: how is Article 8 ECHR applied in the selected member states? This research question is split into two sub-questions, namely:

1) What is the policy on Article 8 ECHR in the selected member states?
2) How is Article 8 ECHR applied in the (national) case law in the selected member states?

Each of the sub-questions has its own methodological constraints. For the first sub-question on the implementation of Article 8 ECHR in domestic policy, domestic legislation, regulations and case worker instructions are analysed. One general problem is that the case worker instructions are not equally publicly available for the selected member states. For example, detailed case worker instructions are available for the UK, but not for the other selected

member states.[1222] For the second sub-question, the domestic case law on Article 8 ECHR is analysed. In doing so, choices have to be made regarding the selection of the case law. As was explained in Chapter 6, the selected member states have very different legal traditions which results in diverging practices regarding for example access to court and rights of appeal. This makes it a challenge to select comparable cases. To solve this problem, from each of the member states the rulings of the court of highest instance have been selected. Table 9.1. shows which courts qualify as courts of highest instance for the purpose of this research. It also shows the number of cases that have been selected for each member state. The selection of the case law is based on publication in domestic case law reports. The time frame during which the rulings were selected is 2007 until 2013. The source of the collection is indicated in the fourth column of Table 9.1. It may be necessary to also discuss the domestic case law of lower courts in three circumstances, namely where a ruling of a court of highest instance is used as a precedent, where it is important in order to understand the ruling by the court of highest instance to also look at the lower instance rulings and finally where a certain issue has not yet been dealt with by the court of highest instance because it has not reached that court (yet). Where these situations apply, rulings of courts of lower instance have been included in the analysis

The selected case law also includes some public order cases, even though these cases are strictly outside the scope of this research. The public order cases which are included in the analysis are only used with regard to the procedure of applying Article 8 ECHR in the domestic legal order, and are not substantively analysed.

	Court	*Nr cases*	*Source*
Denmark	High Court	17	Selection on family unification in legal database '*Karnov*'
Germany	Federal Administrative Court & Federal Constitutional Court	21	Selection of all Article 8 ECHR relevant cases in periodical '*Zeitschrift für Ausländerrecht*'
Netherlands	Council of State	78	Selection of all Article 8 ECHR relevant cases in periodical '*Jurisprudentie Vreemdelingenrecht*'
United Kingdom	Supreme Court	10	All Supreme court family unification cases

Table 9.1. Selection of domestic case law of the courts of highest instance in the period 2007-2013

1222 In the Netherlands the Foreigners Circular does include some guidance (Art B7/.

One general problem with the selection of case law is that case law only exists when the administration decides to reject an application. Therefore, the only publicly available cases are rejected cases, creating the risk that the authorities may accept many applications on the basis of Article 8 ECHR which are not publicised. As a result, the selection of cases is not well-balanced.

One further aspect which needs to be mentioned in this context is the mechanism of friendly settlements at the stage of the proceedings before the ECtHR. When an applicant submits a complaint to the ECtHR, the Court may ask the parties to come to a friendly settlement. In the context of family unification the friendly settlement often consists of an entry visa or residence permit. By offering a residence permit to a person who has been rejected in the entire domestic procedure, a state may avert case law of the ECtHR. In fact, the entire point of the friendly settlement is to prevent case law. The practice of friendly settlements may, however, lead to window dressing in the sense that the contracting parties may make up for deficiencies in the domestic procedure by settling in most of the cases, without solving the underlying problems.

9.3 DENMARK

From the outset it must be stated that where the case law in the other member states selected for this research is abundant, this is not the case for Denmark. For reasons elaborated upon in Chapter 6 of this dissertation, there is a lot less case law in Denmark than exists in the other selected member states. Therefore the analysis of the application of Article 8 ECHR in the Danish legal system is less specific than for the other member states. However, this does not mean that nothing can be said about the application of Article 8 ECHR in Denmark. Even though the case law is limited, some does exist. Additionally, case law exists in which Article 8 ECHR does not play a role (of any significance), but which still shows characteristics of the Danish legal system which might be relevant within the context of Article 8 ECHR. In Denmark, the Ombudsman plays a relevant role in family unification cases. For that reason, the decisions of the Ombudsman are included in the analysis of the application of Article 8 ECHR in Denmark.

9.3.1 Policy

Looking at Danish immigration policy, it seems that Article 8 ECHR plays an important role in the legislation. In the different hardship clauses, Article 8 ECHR is used as a criterion under which the domestic hardship clause should be applied. For example, in principle an application for family unification

should be made in the country of origin.[1223] However, when a refusal would result in a breach of Denmark's international obligations, the application may be made in Denmark. The general hardship clause in the Aliens Act prescribes that a residence permit may be issued if exceptional reasons make this appropriate.[1224] From the legislative history of this provision it can be inferred that this is the case when a refusal of a residence permit would lead to a breach of Denmark's international obligations.[1225]

Considering that Article 8 ECHR has a prominent role in the legislation, it is striking that there are no guidelines on the interpretation of Article 8 ECHR. Therefore, the only instrument used for the interpretation of Article 8 ECHR that can be used by the authorities is the case law of the ECtHR and the case law of the Danish courts concerning Article 8 ECHR.

9.3.2 Case law

Interferences and justifications

The most striking finding in the analysis of Danish case law concerning Article 8 ECHR is that in none of the selected cases does the Supreme Court find that the disputed administrative decision would result in a violation of Article 8 ECHR. Even more remarkable is the observation that the Supreme Court does not motivate in any way how it comes to the conclusion that Article 8 ECHR has not been violated. Instead, the judicial review of the Supreme Court largely focusses on issues which are specific for Danish immigration law practice. This can best be illustrated with a few examples.

In Ufr. 2007.1115.H the Supreme Court considers the refusal of family unification of a couple who are considered to be first degree cousins. In Danish immigration law, it is assumed that in such a case the marriage is not contracted according to the wishes of the married partners. In its judicial review, the Supreme Court focuses on the legitimate intentions the legislature has in assuming that a marriage between cousins is not contracted at the wishes of the partners. In its ruling the High Court does mention Article 8 ECHR. It states that Art 8 ECHR does not impose a general obligation for the state to respect the choice of domicile and that the couple can exercise family life in Turkey. However, in no way does the High Court show any balancing of interests between the individual and the interests of the state. The question of whether it is permissible under Article 8 ECHR to assume that a marriage was not

1223 See paragraph 8.3.1. for the specific rules on where an application for a residence permit should be made.
1224 Art 9c(1) Aliens Act (DK).
1225 See section 8.3.1.

contracted at the wishes of the parties is not addressed. The Supreme Court does not say anything at all about Article 8 ECHR.

Relevant moment in time for judicial review

In Danish case law it is clear that the relevant moment in time for the purpose of judicial review of an administrative decision in the field of family unification, is the time of the initial administrative decision. This is apparent in two of the selected cases for this research.

The first case concerns the family unification of a young Thai woman with her Danish partner.[1226] In 2000 a Thai woman moves to Denmark to reunite with her Danish husband. She brings her daughter, who at that time is 17 years old. In 2001 the daughter receives a residence permit to stay with her mother. In 2003 she applies for an autonomous residence permit based on her working at a childcare facility. In 2003 her mother also divorces her husband and remarries a man who already has a son. The daughter falls in love with the son of her mother's new husband, in 2004 they move in together and in 2005 they have a child. Her application for an autonomous residence permit is rejected. On appeal, the court of first instance finds that this decision is erroneous because refusing to renew the residence permit would be particularly stressful for the applicant. The authorities appeal this decision to the High Court, which quashes the ruling of the court of first instance stating that the developments after the moment of the application for the residence permit, such as the applicant entering into a relationship, having a child and further integrating into Denmark, may not be taken into account, as the moment of the initial administrative decision is the moment relevant for judicial review. The applicant appeals this decision to the Supreme Court, but as this does not have suspensive effect, she finds herself obliged to return to Thailand in 2006. The Supreme Court later upholds the ruling of the High Court, with the same argumentation as regards the relevant moment in time for judicial review. The Supreme Court furthermore states that the initial administrative decision cannot be regarded as being contrary to Article 8 ECHR. A factor which plays a silent role in this case is the age requirement for family unification, which is set at 24 years old. Because of this reason alone, the applicant was not eligible for family unification during the proceedings. After she complied with this requirement, the applicant married her Danish partner and moved back to Denmark.

The second case concerns a Turkish national who moves to Denmark in 1998 and receives a residence permit for the purpose of family unification with his Danish wife.[1227] In 2002 they divorce, and the Turkish national marries his former Turkish wife with whom he had already had a child in 1995. In

1226 Højesteret (26-02-2007) Ufr 2007 1336 H (DK).
1227 Højesteret (14-08-2008) Ufr 2008 2516H (DK).

2004 they apply for family unification in Denmark. The application is rejected because they do not comply with the attachment requirement. They appeal this rejection ultimately to the Supreme Court. At the moment of the proceedings before the Supreme Court, the couple complies with the attachment requirement. The reason for this is that the attachment requirement is based among other things on the employment record of the sponsor. It is therefore possible that an applicant for family unification does not comply with the attachment requirement at the moment of the initial administrative decision, but does comply with it at the time of the final judicial decision. According to the Supreme Court, the relevant moment for judicial review is the moment of the initial administrative decision. Therefore in this case the Supreme Court upholds the rejection of the residence permit.

These two examples illustrate the rigid application of procedural appeal requirements.

Best interests of the child

In the selected case law the best interests of the child concept is mentioned a few times, but it is never discussed in concrete terms. Also, it is not raised in the context of the Article 8 ECHR assessment. In provisions in the Aliens Act which specifically deal with children, the best interests concept is not mentioned at all.

One instance in which the best interests of the child concept could be very relevant, is in the context of the provision requiring that for the family unification of a minor child where there is a parent in the country of origin, there should be a basis for the successful integration of the child in Denmark.[1228] In that provision, it is stated that it should not be applied if exceptional reasons make it inappropriate, including regard for family unity.[1229] There is no mention of the best interests concept in this provision. From legislative history it can be inferred that the intention of the legislator was that the best interests of the child concept should be taken into account.[1230] The administration sought to clarify the interpretation of this provision in a publicly available memorandum.[1231] In this memorandum, several elements which should be involved by the authorities in exercising broad discretion to determine whether

1228 Art 9(13) Aliens Act (DK).

1229 See section 6.3.4. for more information on this requirement.

1230 Bemærkninger til lovforslaget, 2003-04 – L 171 (som fremsat): Forslag til lov om ændring af udlændingeloven og integrationsloven. (Ændring af reglerne om familiesammenføring med børn, skærpelse af betingelserne for opholdstilladelse til udenlandske religiøse, available via http://webarkiv.ft.dk/?/samling/20031/udvbilag/uui/l171_bilag48.htm?SearchID=b7a9491d-e5cb-4cf1-ae4d-cd276c4a624e&DocID=2639885&Position=3&_internal=false.

1231 Available via: http://www.nyidanmark.dk/NR/rdonlyres/F3AA7EBD-48AB-4762-BAB1-65DFBD38D4CC/0/notat_om_praksis_udlaendingelovens_9stk13.pdf.

a child has the potential to successfully integrate in Danish society are listed. Furthermore, the memorandum states that it can be implied from the UN Convention on the Rights of the Child that it may be that family unification should be allowed regardless of whether the integration potential requirement is complied with. The inability of the parent in the country of origin to take care of the child due to serious illness or severe disability and the forcible removal of the child from the parental authority of the parent in the country of origin are provided as examples of such situations in the memorandum. It can therefore be concluded that although the best interests concept was not explicitly included in the legislation, it was the intention that the provision should be interpreted in conformity with the best interests concept. Furthermore, it is referred to in the memorandum on the implementation of the provision.

There have been cases before the Supreme Court relating to the integration potential requirement.[1232] The first case discussed here concerns the family unification of two minor Turkish children with their father who legally resides in Denmark.[1233] In 1997 the father of the children divorces their mother and moves to Denmark to marry another woman. He receives a residence permit on the basis of family unification and in 2000 he acquires permanent residence. In 2001 he divorces his new wife and he subsequently remarries his old wife in Turkey. In 2006 his wife and children make a short visit to Denmark and in 2007 they come back and make an application for family unification. Since then they have received procedural stay awaiting the final decision. In the period between 1997 and 2006 the father did not work due to a disability. After that, he was employed as a pizza baker. He does not speak Danish. The children have been enrolled in a Danish school and speak Danish.

The second case discussed here concerns the family unification of a minor Chinese girl with her Chinese father who legally resides in Denmark.[1234] In 1998 her parents divorce and she has lived with her paternal grandparents since then. In 2001 her father marries a Danish national and on the basis of this marriage he receives a residence permit in Denmark in 2002. He then moves to Denmark together with her minor brother, leaving her behind in China. In 2008 the daughter moves to Denmark. Her application for a residence permit is refused because she does not comply with the integration potential requirement. Since then the girl is awaiting the final decision on appeal in Denmark.

The third case discussed here concerns the family unification of three minor Turkish children with their father who legally resides in Denmark.[1235] In

1232 Højesteret (19-03-2010) Ufr 2010 1590 H; Højesteret (19-03-2010) Ufr 2010 1599 H; Højesteret (19-03-2010) Ufr 2010 1608 H (DK).
1233 Højesteret (19-03-2010) Ufr 2010 1590 H.
1234 Højesteret (19-03-2010) Ufr 2010 1599 H.
1235 Højesteret (19-03-2010) Ufr 2010 1608 H.

1997 the father travels to Denmark and marries a Danish national. On this basis he receives a residence permit in 1998. In 2001 he divorces his Danish wife and marries his old partner with whom he already had three children. In 2005 the children travel to Denmark. Their application for family unification is rejected because they do not comply with the integration potential requirement.

In its rulings, the High Court lists all the relevant sources of law, including Article 3 CRC, and specifically addresses the obligation of the state to address applications for family unification in a humane and expeditious manner. However, in the ruling itself neither the High Court nor the Supreme Court substantially goes into the best interests of the children in the different cases. Firstly, the degree of integration in Danish society is not taken into account, as the relevant moment of assessment is the moment at which the initial administrative decision was taken. The fact that the children went to school in Denmark and had learned the language was therefore not taken into account by the judiciary, even though they had the right to stay in Denmark pending the procedure. Secondly, the fact that the father in all three cases had waited with filing the application for more than two years after they had obtained legal residence is held heavily against the applicants. The best interests of the children themselves do not play any role in this. Thirdly, the Supreme Court did not go into the exceptional circumstances put forward by the applicants, such as the fact that in the second case the girl had no contact with her mother.

In all three rulings, the Supreme Court focused on the reasonability of the integration potential requirement. The Supreme Court did not link this requirement to the concept of the best interests of the child in any way. These cases illustrate the manner in which the Supreme Court applies the obligations from the CRC. Instead of looking at the best interests of the child, the court focuses on the reasonability of the domestic requirement.

In-country applications

Denmark has a liberal regime on in-country applications compared to the other member states selected for this dissertation. All applicants who have a right to reside in Denmark may make an application for family unification in Denmark itself. This includes persons with a short stay visa. However, there are still applicants who arrive in Denmark without such authorisation. In one of the cases selected for this research the claim to family unification was refused because the application should have been made in the country of origin.

9.3.3 Interim conclusion

In Denmark Article 8 ECHR plays an important role in the Aliens Act. Legislative history shows that several hardship clauses are intended to be applied only where refusal of residence would lead to a violation of Denmark's international obligations, most notably Art 8icle ECHR. However, there is no further guidance for the authorities on how to apply Article 8 ECHR. Danish case law does not offer much more assistance. The Danish courts show restraint in scrutinising the exercise of discretionary competence by the authorities. Most case law concerns domestic immigration law issues, and does not follow the structure of the case law of the ECtHR. In the selected cases, the Supreme Court merely mentions in one line that Article 8 ECHR is not violated. From the rulings it is unclear how the Supreme Court came to this conclusion. With regard to the four conclusions that were the starting point for the analysis of the case law in this chapter, it can be stated that the Supreme Court does not go into the question of positive or negative obligations. Instead, it suffices to say that Article 8 ECHR is not violated. The relevant moment in time for judicial review is the moment of the initial administrative decision. The best interests of the child concept is mentioned in the legislative history, but is not used in concrete terms by the Supreme Court. Denmark has a relatively liberal regime on in-country applications. The one case of the selected cases which was related to this issue concerned an asylum seeker who later claimed residence based on family ties. Generally, it can be held that the totality of policy and case law does not form a legal framework which is aimed at preventing violations of Article 8 ECHR in the domestic procedure.

9.4 GERMANY

Article 8 ECHR plays a marginal role in German family unification policy and case law. This is caused by the structure of German immigration law, in which, compared to the other member states selected for analysis in this dissertation, the protection of the right to family unification and the right to respect for family life is protected by domestic law rather than by references in domestic law to Article 8 ECHR. If the domestic protection of a human right is stronger, recourse to the protection of that right to international law is often not necessary. For that reason, the analysis of the role of Article 8 ECHR in the German legal system is different to the analysis in the three other selected member states. In the following section on the role of Article 8 ECHR in German policy, the alternatives to recourse to Article 8 ECHR are discussed. For the analysis of German case law, it is analysed in which way Article 8 ECHR plays a role in the selected cases.

9.4.1 Policy

In Germany, Article 8 ECHR cannot be seen in isolation from Article 6 Basic Law.[1236] As the constitutional protection of the right to respect for family life is relatively strong in Germany, less recourse to the international protection of this right is required. The totality of Article 6 Basic Law and Article 8 ECHR has inspired German family unification legislation and the guidelines on the interpretation of this legislation.

There is an explicit reference to Article 6 Basic Law in Article 27(2) Residence Act. Furthermore, there are many explicit references to Article 6 Basic Law and Article 8 ECHR in the Administrative Regulations. In the Residence Act there are, however, provisions which illustrate the indirect way in which Article 8 ECHR is implemented in German family unification policy. These are hardship clauses which offer the possibility that a requirement is waived or that family unification is allowed for family members outside the nuclear family. These hardship clauses have already been analysed in their specific contexts in the preceding chapters, but are further listed here to illustrate how domestic hardship clauses can function in guaranteeing that Article 8 ECHR is complied with.

The family unification of family members outside the nuclear family is possible if refusal of residence would lead to extraordinary hardship (‘*auâergewöhnliche Härte*’).[1237] It is striking that in this provision of the Residence Act Article 8 ECHR is not mentioned. This illustrates that this hardship clause is motivated from the domestic protection of the right to family unification and the right to respect for family life as enshrined in Article 6 Basic Law. Examples of categories of family members outside the nuclear family which are covered by Article 6 Basic Law which are provided in the Administrative Regulations are adoptive, foster and stepchildren.[1238] Family members who are within the scope of this provision must prove that refusal of residence would lead to extraordinary hardship. The extraordinary hardship concept is rather vague. Additional guidance on its interpretation is, however, provided in the administrative guidelines. It is specified that only individual circumstances can be relevant factors in determining whether there is extraordinary hardship – such as illness, disability, the need for long-term care or psychological distress – and that general characteristics on, for example, the standard conditions of life in the country of origin cannot play a role in the assessment of a case.[1239] Whether the application of these guidelines in individual cases is in accordance with Article 8 ECHR is beyond the scope of analysis here.

1236 See section 5.4.2.
1237 Art 36 Residence Act (GER); see section 6.3.7.
1238 Art 36.2.1.2. Administrative Guidelines (GER).
1239 Art 36.2.2.3. Administrative Guidelines (GER).

With respect to the maintenance requirement, it is laid down that the maintenance requirement does not apply to the family unification of minor children and the parents of a minor child where the sponsor is a German national, and normally does not apply for the family unification of the spouse of a German national sponsor.[1240] The Administrative Regulations further specify that the maintenance requirement must be waived if Article 8 ECHR requires that a residence permit is granted, and further specifies that this can be the case if exercising family life in the country of origin is not possible.[1241]

With respect to the family unification of a minor child where the sponsor is a foreigner, the Residence Act lays down certain requirements, and that in cases where the requirements are not complied with family unification may be allowed to prevent particular hardship.[1242] In the Administrative Guidelines the example of a child who needs the care of a parent due to illness or an accident is provided as an example of when this hardship clause may apply.[1243]

The fact that the structure of German family unification policy does allow for these hardship clauses does not necessarily imply that these clauses are applied by the administrative authorities in such a way that compliance with Article 8 ECHR is guaranteed. However, the presence of a hardship clause facilitates compliance with Article 8 ECHR. In individual cases this may still lead to a situation in which Article 8 ECHR is violated.

9.4.2 Case law

Interferences and justifications

From the outset it should be mentioned that, as was described in the section above, the domestic protection of the right to respect for family life in Germany is rather strong, both in the constitutional context and in the implementation of the domestic legislation in lower regulation. However, this does not mean that Article 8 ECHR does not play an independent role in German case law.

The German interpretation of the role of Article 8 ECHR entails a two-fold test: first it needs to be established whether the administrative decision is in accordance with the provisions in German law (which may very well include aspects of Article 8 ECHR through for example a hardship clause) and afterwards it must be assessed separately whether Article 8 ECHR as such would be violated.[1244]

1240 Art 28(1) Residence Act (GER).
1241 Art 5.1.1.2. Administrative Guidelines (GER).
1242 Art 32(4) Residence Act (GER).
1243 Art 32.4.3.3. Administrative Guidelines GER).
1244 BVerfG (10-05-2007) 2 BvR 304/07 (GER).

In the selected case law there are no cases where the judiciary ruled that the administrative authority is under the positive obligation to admit the applicant in light of the right to respect for family life. Article 8 ECHR is however mentioned in entry cases. In one of the cases which concerned the income requirement, the Federal Administrative Court considered whether there was an obligation arising from the right to respect for family life, as enshrined in both Article 6 Constitution and Article 8 ECHR, to admit the applicant. The Court found that this was not the case. It motivated this not by presenting a balancing act of the competing interests, but instead stated that there were no special circumstances, and that the applicant could be expected to exercise family life in the country of origin.[1245] With regards to the integration abroad requirement, the Federal Administrative Court held that Article 8 ECHR requires the balancing of all interests in each individual case.[1246]

Relevant moment in time for judicial review

The relevant moment in time for judicial review is the moment of the last oral examination of the case in court.[1247] However this is not the case if, for procedural reasons, it would not be beneficial for the applicant. To illustrate this point, if for a certain application the requirement is that a child is a minor, and the child was a minor at the moment of application but not at the moment of the last oral examination of the case, the moment in time which should be taken as relevant for the judicial review is the moment of the application. Therefore, circumstances which have occurred after the moment of application or after the moment of the initial administrative decision may be taken into account, but this does not apply to requirements relating to age in which the circumstances of the case may change over time. Any other reading could give the authorities the incentive to postpone an administrative decision in order to affect the eligibility of an application.

Best interests of the child

The best interests of the child concept can be found in numerous places in the administrative guidelines. It is also frequently invoked in the case law. In the selected case law the best interests of the child concept is not invoked in the context of Article 8 ECHR.[1248] Instead, it is used in the interpretation of domestic German provisions which do not have a direct bearing on the

1245 BVerwG (26-08-2008) 1 C 32/07 (GER) .
1246 BVerwG (04-09-2012) 10 C 12 12 (GER); BVerwG (30-03-2010) 1 C 8 09 (GER) .
1247 BVerwG (26-08-2008) 1 C 32/07 (GER).
1248 BVerwG (11-01-2011) 1 C 1 10 (GER); BVerwG (18-04-2013) 10 C 9 12 (GER); BVerwG (29-11-2012) G 10 C 11 12.

assessment in the context of Article 8 ECHR. For that reason, it is not further discussed here.

In-country applications

In Germany, when specific circumstances make a subsequent visa procedure unreasonable, the application for a residence permit may be made in Germany.[1249] In the administrative guidelines this is implemented further. When an applicant meets the requirements for a residence permit and this has already been established, the Foreigners Authority must waive the requirement in order to prevent formalism.[1250] Furthermore, the requirement may be waived in individual circumstances: if there are family members who are dependent on the care of the applicant; the applicant cannot be expected to travel due to sickness, pregnancy, disability or old age; when there are no regular means of travelling to the country of origin; when the applicant is not allowed to travel through third countries on the way to the country of origin or there is no German representation in the country of origin.[1251]

The fact that the long-term residence visa requirement should not lead to excessive formalism is also reflected in the selected case law. In one of the cases it is established that the requirement may not be a goal in itself.[1252]

9.4.3 Interim conclusion

A general finding concerning the German implementation of Article 8 ECHR is that the presence of numerous hardship clauses in German legislation and the subsequent implementation of these clauses in the administrative guidelines creates a legal framework in which reliance on Article 8 ECHR is not the most important mechanism in safeguarding the right to respect for family life. However, Article 8 ECHR, read closely in conjunction with the German constitutional protection of the right to respect for family life, still plays an important role in the German legal system, as it is used as a criterion in applying domestic hardship clauses.

One striking conclusion from the selected case law is that there are no decisions in which a positive obligation for the state to admit the applicant is found. Instead, most of the case law concerns specific aspects of German immigration law, like the application of the income requirement and the pre-entry integration requirement. When Article 8 ECHR is discussed in these cases, the reference to Article 8 ECHR itself and the case law of the ECtHR is limited.

1249 Art 5(2)(1) Residence Act.
1250 Art 5.2.2.1. Administrative Guidelines (GER).
1251 Art 5.2.3. Administrative Guidelines (GER).
1252 Administrative Appeal Court Lüneburg (11-07-2007) 10 ME 130/07, ZAR 2007, 366.

It is often said that Article 8 ECHR does not contain a general obligation for a state to admit an applicant for family unification. Furthermore there is a focus on the possibility of enjoying family life elsewhere.

9.5 NETHERLANDS

9.5.1 Policy

Dutch legislation does not contain many references to Article 8 ECHR in domestic immigration legislation and regulations. That, however, does not mean that it does not play an important role in Dutch family unification policy. In the Foreigners Act, Article 8 ECHR is not mentioned once. In the Foreigners Decree, Article 8 ECHR is mentioned four times: once as grounds for an exemption for the provisional entry visa,[1253] twice as a reason not to reject an application for a prolongation[1254] and once as a reason not repeal a residence permit.[1255] Besides the explicit reference to Article 8 ECHR, it plays an important role in the various hardship clauses included in the Foreigners Decree. There is one general hardship clause, which states that the responsible minister may issue a residence permit for family unification when the rules do not provide for this.[1256] The minister can, for example, use this clause if the application for family unification concerns a category of family members which is not mentioned in the Foreigners Decree, like for example family members in the ascending line.

Guidance on the application of Article 8 ECHR is specifically provided in the Foreigners Circular. These guidelines state which family members qualify under the Dutch implementation of Article 8 ECHR, what constitutes an interference and provides some guidance on the balancing of interests.[1257] The policy rules are formulated to prescribe which course of action the immigration service will take. Family life will always be recognised between spouses in a lawful and genuine marriage, partners in a genuine relationship equivalent to a marriage and between parents and children born from a genuine relationship or marriage. Furthermore, family life can exist, but is not automatically assumed, between someone who legally recognises a child and the child of the relationship between the two has sufficient practical effect, the biological father and a child in the case of additional circumstances like the relationship between the father and the mother or factual contacts in the form of cohabitation and care and shelter of the child, adoptive parents and a child where the

1253 Art 3.71(2)(f) Foreigners Decree (NL).
1254 Art 3.86 and 3.89d Foreigners Decree (NL).
1255 Art 3.91e Foreigners Decree (NL).
1256 Art 3.13(2) Foreigners Decree (NL).
1257 See Chapter B7/3.8 Foreigners Circular (NL).

relationship has sufficient practical effect, foster parents and a child where the relationship has sufficient practical effect and other close relatives where more than normal emotional ties exist.[1258] The policy rules also contain specific guidance on what constitutes an interference for the purpose of Article 8 ECHR. An interference is assumed when an entry ban is issued, when it is declared that it is undesirable that a foreign national resides in the Netherlands or has ever possessed a residence permit.[1259] Lastly, the policy rules contain a description of the balancing of interests which needs to take place in the context of Article 8 ECHR. It is stated that the immigration service must take all relevant facts and individual circumstances into account when balancing interests. The policy rules state that which interests need to be involved depends on the concrete case. Furthermore it is stated that the immigration service has a certain margin of appreciation. The position of a foreign national is stronger when the foreign national has held a residence permit before. On the other hand, the fact that a foreign national has never had lawful residence is a factor which weakens the position of the foreign national. Lastly it is stated that when there has been no interference, the immigration service must also balance the interests of the state and of the foreign national.[1260]

The formulation of these policy rules is the result of accumulating case law from the ECtHR and domestic practice. However, it does not mean that the authorities are only bound by the policy rules, as Article 8 ECHR and its case law are directly applicable in the Dutch legal order without domestic implementation. The policy rules are therefore a mere indication of how the Immigration Service should deal with an application in which Article 8 ECHR is invoked. It is however indicative for Dutch practice that the policy rules do provide for the fair balance test, but that the justification test enshrined in Article 8(2) ECHR is not even mentioned. Instead, it is stated that the Dutch authorities must strike a fair balance between the interests of the state and the interests of the applicant. This is reminiscent of the 'fair balance test' doctrine of the ECtHR, which is applied when there is no interference and so the question is whether the state has a positive obligation, or when the ECtHR feels it is not necessary to make the distinction between positive and negative obligations.[1261] This approach in the policy rules is even more striking considering that the definition of an interference in the right to respect for family life is defined rather broadly and includes situations where an entry ban is issued or when it is declared undesirable that a foreign national resides in the Netherlands. However, foreign nationals can be given an entry ban or be declared undesirable even in situations which would not be recognised

1258 Art B7/3.8.1. Foreigners Circular (NL) The formulation more than normal emotional ties is directly taken from the case law of the ECtHR. See section 3.3.1.
1259 Art B7/3.8.2. Foreigners Circular (NL).
1260 Art B7/3.8.3. Foreigners Circular (NL).
1261 See section 3.3.5.

as interferences by the ECtHR. For example, a rejected asylum seeker is issued with an entry ban, but his situation would most likely not qualify as an interference in the right to respect for family life if he were to claim family life in the Netherlands as he had never had a right to reside in the Netherlands. Practice shows that the Dutch administration does not in fact apply this provision in this way, illustrating that the formulation in the policy rules is more a formal reference to the Article 8 ECHR test rather than actual applicable guidance for case workers.[1262]

Besides the Foreigners Circular there are no official guidelines on the application of Article 8 ECHR in the Netherlands which are available in the public domain.

9.5.2 Case law

One general comment which must be made is that in the Netherlands the Council of State is not obliged to motivate its rulings if it deems that this is not necessary for the development of law.[1263] For this reason the case selection does not include any of the cases in which this happened.

Interferences and justifications

The Dutch Council of State makes a strict distinction between positive obligations to admit a person and negative obligations not to expel a person. Where it is concluded that there is not an interference with the right to respect for family life, the Council of State holds that a fair balance needs to be struck between the interests of the individual and those of the state. Therefore, the justification test of Article 8(2) ECHR is not invoked. The application of the distinction between positive and negative obligations by the Council of State is rather rigid. This can be best illustrated with a few examples.

The Council of State ruling of 23 March 2007 concerns an applicant who was in possession of a residence permit which was granted because she was the victim of human trafficking. When she applied for a prolongation of her temporary residence permit, this application was rejected. During her lawful residence in the Netherlands, the applicant had married a Dutch national. In the proceedings following the rejected application, the applicant argued that the rejection of her application was an interference in her right to respect for family life and that this interference was not justified. In appeal the District

1262 See for instance College voor de Rechten van de Mens, *Gezinnen Gezien: Onderzoek naar Nederlandse regelgeving en uitvoeringspraktijk in het licht van de Europese Gezinsherenigingsrichtlijn* (2014).

1263 Art 91 Foreigners Act (NL).

Court agreed with this interpretation of Article 8 ECHR. The Council of State did not accept this interpretation.

In a ruling dated 26 April 2012, the Council of State had to consider a case which concerned an applicant who had been granted temporary legal residence on the basis of pregnancy. The Council of State established that this was not a sufficient level of lawful residence in order for the refusal to qualify as an interference in the right to respect for family life.[1264]

The ECtHR holds that, in cases where it is difficult to make a sharp distinction between positive and negative obligations, it is not necessary to determine the nature of the obligation because in both cases a fair balance must be found. In the Dutch context, it seems that if it is ruled that there is no interference in the right to respect for family life, the fair balance test must be followed, which almost always leads to the finding that there is no positive obligation to admit the applicant. The only exceptions found in the selected Dutch case law relate to procedural issues, in which the Council of State orders the administrative authority to make a new decision considering that some aspects of the case were not taken into account.[1265]

Relevant moment in time for judicial review

In a case dated 18 February 2010, the Council of State decided that circumstances arising after the administrative decision has been taken cannot be taken into account during the appeals procedures.[1266] The case concerns the withdrawal of a residence permit following a criminal conviction. The new fact which was presented after the administrative decision had been taken was that the applicant had started cohabitation with his partner and child. The district court had emphasised that the applicant would be prevented from a judicial review of his Article 8 ECHR claim if the new family circumstances were not taken into account. The Council of State, however, relied on procedural provisions of the Foreigners Act stating that new facts arising after the moment of the administrative procedure may not be taken into account.[1267] Based on this, the Council of State quashed the judgment of the district court. This approach of the Council of State also occurs in applications for family unification itself. In a ruling of 25 January 2013 by the Council of State, nine applicants for family unification within the context of asylum sought to rely on a perceived change in the policy.[1268] The Council of State however agreed with the administrative authority that considering that the perceived change

1264 Council of State (26-04-2012) 201011982/1/V4 JV 2012/290 (NL).
1265 Council of State (10-02-2012) 2010053222/1/V2, JV 2012/154 (NL).
1266 Council of State (18-02-2010) 200902148/1/V1, JV 2010/140 (NL).
1267 In the context of asylum regulatory developments have made it possible that new facts are taken into account pursuant to Art 83 Foreign Nationals Act. This provision is however not applicable outside the context of asylum law.
1268 Council of State (25-01-2013) 201207206/1/V4 (NL).

of policy had occurred after the moment of the contested administrative decision, it could not be relied on by the applicants.

Even though the contention that the applicant may make a renewed application to have the new circumstances taken into account is formally correct, this approach is not in accordance with the case law of the ECtHR. The ECtHR itself is not always consistent about which moment in time is relevant in scrutinising the compliance of the government with the provisions of the ECHR, but it definitely does not base its judgments on the moment of the administrative decision. For example in *Nunez v. Norway*, the ECtHR considered the long time the case had been pending before the domestic authorities as an element which favoured the applicants. This illustrates that the ECtHR takes the developments after the initial administrative decision into account. Therefore adopting such a strict approach, which may be required by Dutch legislation, means that the test applied by the Council of State is different than the test by the ECtHR and therefore the risk exists that for procedural reasons alone the ECtHR will come to a different conclusion than that of the Council of State concerning the application of Article 8 ECHR in the same case.

Best interests of the child

On 22 February 2011 the Council of State dismissed the appeal in a case in which the Egyptian parents of three minor Egyptian children applied for a residence permit on the basis of family unification. The application was rejected based on the fact that the provisional entry visa requirement had not been complied with. In the course of the proceedings, it was discussed whether the best interests of the child, as enshrined in Article 3 CRC, were taken into account by the administrative authority. The Council of State established that the administrative authority must take the interests of the children into account. The Council, however, limited its assessment to the question whether the administrative authority involved the interests of the children in its judgment, and did scrutinise the manner in which this had been done. The Council of State is consistent in applying this approach. The administrative authority must take the interests of the child into consideration, but there is no judicial scrutiny on the substantive manner how this is done. Following a ruling dated 16 April 2013 the administrative authority must show that the best interests of the child are taken into account, but the Council of State still does not scrutinise the manner in which this takes place.[1269]

This approach by the Dutch judiciary is problematic in the context of the case law of the ECtHR on Article 8 ECHR in cases concerning children. In the cases *Nunez v. Norway* and *Antwi v. Norway* the ECtHR interpreted the best interests of the child concept in the context of the Article 8 ECHR assessment.

1269 Council of State (16-04-2013) 201211554/1/V4, JV 2013/229 (NL).

In both rulings the ECtHR did not look so much at the question of *whether* the Norwegian administrative authority had involved the interests of the child in their assessment, but rather focussed on *how* the domestic judiciary had done so. Subsequently, they came to the conclusion that in *Nunez v. Norway*, the domestic judiciary had applied the principle incorrectly and in *Antwi v. Norway* it had done so correctly. This shows that in the context of the Article 8 ECHR test, so not considering the interpretation and legal status of Article 3 CRC, the ECtHR scrutinises the domestic judiciary on the application of the best interests principle. The ECtHR looks at the administrative decisions of the authorities in combination with the judicial review by the judiciary. The Council of State limits itself to a test on whether the administrative authority has taken the interests of the child into consideration. The Council of State is therefore procedurally bound by Article 8 ECHR to not only look at whether the administrative authority has taken into account the bests interests of the child, but must also scrutinise how this was done. The reasoning developed by the Council of State in a ruling dated 7 February 2013 in which it was held that Article 3 CRC is directly applicable in the Netherlands but that it is an open norm which is not open to judicial scrutiny, does not hold in the context of Article 8 ECHR.[1270] The best interests of the child are a central element in the reasoning of the ECtHR in Article 8 ECHR cases, and therefore as such it should be fully scrutinised. Formal reasoning on the status of the CRC is irrelevant in the context of applying Article 8 ECHR.

In *Jeunesse v Netherlands*, the ECtHR held that it was not convinced that the Dutch authorities had assessed actual evidence relating to circumstances pertaining to the best interests of the child. This played a role in finding a violation of Article 8 ECHR. The fact that the Court is not convinced that the best interests of the child was sufficiently assessed by the Dutch authorities is illustrative of the manner in which this principle is implemented in the domestic application of Article 8 ECHR.

In-country applications

On 9 November 2007 the Council of State ruled that the application of the exemption grounds, where an applicant can be exempted from the requirement of a provisional entry visa when applying for a residence permit for the purpose of family unification if a refusal would lead to a violation of Article 8 ECHR, does not imply that the judiciary should test whether a refusal would lead to a violation of Article 8 ECHR.[1271] The case concerns an application for a residence permit for family unification made in the Netherlands without a provisional entry visa. The Council of State was of the opinion that the refusal of a residence permit for failure to comply with the provisional entry

1270 Council of State (07-02-2012) 201103064/1/V2.
1271 Council of State (09-11-2007) 200702675/1, JV 2008/14.

visa requirement was only temporary as the applicant could apply for a provisional entry visa in the country of origin. In the course of this application, compliance with Article 8 ECHR would be tested and therefore, according to the Council of State, it was not necessary to scrutinise the non-application of the exemption on Article 8 ECHR grounds. This conclusion is problematic as the result of the refusal is that the applicant must leave the country. For that reason, there is an Article 8 ECHR claim and it is unlikely that the ECtHR would find that an applicant had failed to exhaust domestic remedies based on the fact that he did not go back to the country of origin to apply for a provisional entry visa. The Council of State amended its approach in a ruling of 27 October 2010.[1272] In that case it was decided that when applying the exemption clauses, compliance with Article 8 ECHR should be fully scrutinised by the courts. This change in the approach of the Council of State is motivated by the fact that the legislature had changed the legislation to this end, by officially waiving the provisional entry visa requirement if the denial of a residence permit would lead to a violation of Article 8 ECHR.[1273] However, in this specific case the full Article 8 ECHR test applied by the Council of State did not lead to a positive conclusion for the applicant.

The initial approach by the Council of State was illustrative for the Council's approach to Article 8 ECHR: even when the Foreigners Decree expressly mentioned Article 8 ECHR the Council still found a way not to apply it by arguing that compliance with Article 8 ECHR would be tested in a subsequent procedure. Under the pressure of a number of violations of Article 8 ECHR found by the ECtHR in for example *Rodrigues da Silva & Hoogkamer v. the Netherlands* and *Tuquabo-Tekle v. the Netherlands*, the legislature amended the Foreigners Decree after which the Council of State changed its approach. Now applications for a provisional entry visa and exemptions from this visa are subjected to a full Article 8 ECHR test.[1274]

Country-specific aspects

One of the aspects which is specific for the Dutch context is the strong separation of asylum-related grounds and family unification, meaning that asylum-related grounds may not play any role in an application for family unification. In a ruling of 19 October 2010, the Council of State considered the applicability of Article 8 ECHR in a case concerning an application for family unification where the sponsor was issued an asylum permit.[1275] The case concerns an application for a provisional entry visa of the brother and sister of a Somali national who was issued a residence permit on asylum grounds in the Nether-

1272 Council of State (27-10-2010) 201004896/1/V2, JV 2010/480 (NL).
1273 Ibid para 2.3.2 See furthermore Art 3.71(2)(l) Foreigners Decree (NL).
1274 Ibid.
1275 Council of State (19-10-2010) 201001188/1/V1, JV 2010/471 (NL).

lands. The applicants applied for a provisional entry visa in their country of origin, however their application was rejected because according to the administrative authority the brother and sister had not been a member of the family of the brother who received a residence permit in the Netherlands. The administrative authority was of the opinion that the applicants still belonged to the family of their parents and did not believe the statements that the father had died and the mother was missing. The applicants planned to apply for a residence permit based on the asylum permit of their brother. In this context they relied on the protection of Article 8 ECHR. The Council of State, however, held that the legal framework on family unification within the context of asylum is outside of the regular family unification law and that, based on the separation of regular family unification law and asylum-related family unification law, Article 8 ECHR can only be invoked in the regular family unification procedure. Consequently, according to the Council of State, Article 8 ECHR cannot be relied on in the family unification law relating to asylum. If the applicant seeks to rely on Article 8 ECHR, a new application should be made on the basis of family unification law outside the framework of asylum.

Even though this last consideration might be correct as the applicants are formally not prevented from making a renewed application, there are still considerable problems with this approach. Firstly, a renewed application is not only time consuming, but also other requirements need to be complied with, relating to income and integration for example. Secondly, the strict separation between family unification law and asylum law also works the other way round: any point which could be labelled an asylum-related issue cannot be invoked in the ordinary family unification procedure, even when Article 8 ECHR is invoked. The main systematic problem is that similar reasoning is not present in the case law of the ECtHR. The formal grounds for not applying Article 8 ECHR which is applied in the reasoning of the Council of State is not visible in the case law of the ECtHR. No reason not to apply Article 8 ECHR in the context of asylum can be implied from the case law of the ECtHR.

9.5.3 Interim conclusion

With respect to Dutch legislation and regulations, it must be noted that there is hardly any mention of Article 8 ECHR. This is not problematic in principle, as the ECHR can be directly applied in the Dutch legal order. But for reasons of transparency and legal certainty it would be preferable if a special hardship clause were included in the Foreigners Decree stating that a residence permit may be issued based on Article 8 ECHR. Furthermore, it is good that the Foreigners Circular contains specific guidance on the application of Article 8 ECHR. However, if it is included in the policy rules, it should mirror Article 8 ECHR itself and the interpretation of the ECtHR. Otherwise it is incomplete and therewith ineffective. As noted above, all three categories now included in

the policy rules are grossly insufficient. The scope of family life does not reflect the interpretation of the ECtHR. The definition of interference is arguably too broad and the paragraph on the balancing of interests does not even mention the justification test of Article 8(2) ECHR.

With respect to the case law of the Council of State and the ECtHR, it can be stated that it is hardly surprising that the Netherlands has far more Article 8 ECHR family unification cases than any other contracting party, considering that the Dutch case law follows a fundamentally different approach than the ECtHR. This causes the situation where for merely procedural reasons, complaints regarding Dutch family unification law can lead to violations of Article 8 ECHR. From the perspective of legal certainty for both the applicant and the administrative authority, it would be preferable if the Dutch legislature and judiciary would amend their approach to bring it more in line with the case law of the ECtHR. The *Antwi v. Norway* case is in my opinion a good example of how a well-motivated domestic decision can bring the ECtHR to find no violation in certain complaints.[1276]

9.6 UNITED KINGDOM

9.6.1 Policy

The application of Article 8 ECHR in UK immigration legislation and regulations has undergone a fundamental restructuring in since 2012.

As described in section 5.3.4., the ECHR is implemented in the UK through the Human Rights Act. Until 9 July 2012, there was no reference in the Immigration Rules to Article 8 ECHR. Section 2 of the Immigration Rules, however, laid down that all primary decision makers must carry out their duty in compliance with the Human Rights Act. In practice, this meant that in the application of the Immigration Rules, the Human Rights Act had to be complied with. Section 6 of the Human Rights Act lays down that it is unlawful for a public authority to act in a way which is incompatible with a right protected by the ECHR. Furthermore, section 2 of the Human Rights Act prescribes that courts and tribunals must take into account all judgments and decisions of the ECtHR.

However, in July 2012 an amendment of the Immigration Rules took place incorporating Article 8 ECHR within the Immigration Rules. The Statement of Intent, published by the Home Office just before the amendment of the rules, stated the following:

> *"The new rules will fully reflect the factors which can weigh for or against an Art 8 claim. They will set proportionate requirements that reflect, as a matter of public policy, the*

1276 *Antwi v Norway* (n 213).

Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals."[1277]

This passage neatly shows what the government sought to achieve with the amendment of the rules. Where before the assessment of Article 8 ECHR was done outside the Immigration Rules, it was now to be incorporated in those rules. The reason that it was deemed important to incorporate the Article 8 ECHR assessment is that it was believed that the courts should show more judicial constraints in applying Article 8 ECHR but that they are impeded from doing so because there is no proportionality assessment enshrined in the Immigration Rules.[1278] The premise underlying the amendment is that if the Immigration Rules themselves are proportionate, decisions taken in accordance with these rules will automatically also be proportionate.[1279]

Looking at the reformed Immigration Rules laid down in Appendix FM to the rules, it is striking that the government did not choose to incorporate an Article 8 ECHR test directly in the rules, by codifying Article 8 ECHR itself and the case law of the ECtHR, but instead is of the opinion that the specific rules on family unification in itself are in accordance with Article 8 ECHR. The reasoning behind this is that if a person does not qualify for family unification under the rules, there can be no violation of Article 8 ECHR as the rules themselves in conformity with Article 8 ECHR. For this reason exemption clauses in cases of exceptional circumstances have been included in Appendix FM. For example, in exceptional circumstances an applicant may be waived from the English language requirement.[1280] However, such an exemption clause is not included in all requirements: the income requirement does not include an exemption provision based on exceptional circumstances.

According to the government, the courts must refrain from a separate Article 8 ECHR test, considering that Article 8 ECHR is already adequately reflected in the Immigration Rules.

The fact that the Immigration Rules were amended in an attempt to limit the courts' scrutiny of administrative decisions based on Article 8 ECHR does not mean that the courts will stop applying Article 8 ECHR outside the framework of the Immigration Rules. In *MF Nigeria* the Upper Tribunal (Immigration and Asylum Chamber) held that the two-phase test, meaning first testing whether the applicant qualifies under the Immigration Rules and afterwards whether the applicant qualifies under Article 8 ECHR, would be maintained.[1281] The case concerns a Nigerian national who appeals his expulsion

1277 Home Office, *Statement of Intent: Family Migration* (2012).
1278 Home Office, *Statement by the Home Office: Grounds of Compatibility with Article 8 of the European Convention on Human Rights* (2012).
1279 Ibid para 20.
1280 s. E-LTRP.4.2. Appendix FM of the Immigration Rules (UK).
1281 *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC).

decision which was issued as a result of a criminal conviction. The Upper Tribunal summarises the changes to the Immigration Rules and the implications it believes this will have. Subsequently the Upper Tribunal holds that the position defended by the government cannot be maintained for a number of reasons. Most importantly, the amendment of the Immigration Rules does not change the fact that primary decision makers and judges have the obligation to act in compliance with Article 8 ECHR.[1282] Furthermore, the Upper Tribunal finds that the incorporation of Article 8 ECHR in the Immigration Rules is incomplete as not all Article 8 ECHR claims are covered by the rules and the rules do not accommodate all types of family life.[1283] In accordance with the Immigration Rules and the Human Rights Act, the courts must first test whether the administrative decision is lawful under the rules, which includes the Article 8 ECHR assessment as laid down in those rules, and afterwards separately whether the administrative decision is in compliance with Article 8 ECHR. This approach was consistently adopted by the Upper Tribunal and was not altered by higher courts.[1284]

Seen from the perspective of compliance with the ECHR, the approach of the Upper Tribunal is most likely to promote compliance with the ECHR in a more structured manner than the approach envisioned by the UK government. The ECHR does not include guidance on the manner in which it must be implemented in the contracting parties; Article 1 ECHR states that the contracting parties shall secure to everyone the rights and freedoms of the Convention. Therefore, if the UK authorities found a way in which Article 8 ECHR would always be respected, as it claims the amended Immigration Rules do, there is nothing in the text of the ECHR or in the case law of the ECtHR which would go against this approach. However, the question is whether the assessment of the authorities is correct. Therefore the two distinct arguments by the Upper Tribunal are both most relevant. The first argument presented above considering compliance with the Human Rights Act, I would consider to be a domestic constitutional argument why the courts should test whether Article 8 ECHR is complied with outside the framework of the Immigration Rules. The second argument presented above, considering the incompleteness of the Immigration Rules, I would consider to be most relevant from the perspective of compliance with the ECHR. The amended Immigration Rules are not only incomplete in the sense that not all Article 8 ECHR claims are covered and do not accommodate all forms of family life, but are also incomplete in a more procedural sense. The amended rules do not provide for an Article 8 ECHR test as prescribed by Article 8 ECHR itself and the case law of the ECtHR. The entire test of Article 8 ECHR itself is absent in the Immigration Rules. This is not a problem if in practice the test is applied anyway, by the Home Office and by the

1282 Ibid para 25.
1283 Ibid para 23.
1284 *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC) (UK).

judiciary. However, the intention of the government was that the Immigration Rules adequately reflect the Article 8 ECHR test and that therefore it is not necessary to separately test compliance of administrative decisions made based on the Immigration Rules to Article 8 ECHR. The approach by the Upper Tribunal indeed corrects this approach by the authorities.

9.6.2 Case law

Interferences and justifications

In applying Article 8 ECHR, an important element is whether a certain administrative decision can be referred to as an interference and how the justification test is implemented. The ruling of the UK Supreme Court in *Bibi and Quila* is a good illustration of how the UK judiciary approaches these issues.[1285] The case concerns the application of the age requirement for family unification in two concrete cases. Both in *Bibi* and in *Quila*, the applicants applied for residence in the UK based on the relationship with the spouse. However the applications were rejected on the basis of not complying with the age requirement.[1286] The legal question to be answered by the Supreme Court relevant for this section is whether the refusal of the administrative authority to allow for residence amounts to an interference in the right to respect for family life. In *Bibi*, the applicant applied for entry clearance in the country of origin. In *Quila*, the applicant was initially in the UK, but moved back to his home country Ecuador together with his spouse after his application was rejected. One year later, the couple moved to Ireland as the spouse of the applicant pursued a course of study there and the applicant was allowed to accompany her based on EU free movement law. The Supreme Court took account of all the relevant case law of the ECtHR on the admission of immigrants. Specifically based on *Tuquabo-Tekle v. Netherlands* the Supreme Court established that the relevant test is whether the interference with the right to respect for family life is justified. In doing so, the Supreme Court accepted that there is an interference, which yields the application of Article 8(2) ECHR. However it is questionable whether an interference in fact occurred. In *Tuquabo-Tekle v. the Netherlands* the ECtHR had held that it was not necessary to rule on the issue whether there was a question of a positive or negative obligation considering that in both cases a fair balance had to be struck between the interests of the individual and the interests of the state. Subsequently, the ECtHR did not follow the test prescribed by Article 8(2) ECHR, but instead formulated criteria which must be considered within the framework of the fair balance test.[1287] Similar-

1285 *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* (n 1010).
1286 See section 7.3.1.
1287 See section 3.3.4.

ly, in *Bibi and Quila* the question is whether there is an interference and which justification test should be applied. The Supreme Court established that there was an interference and subsequently applied the Article 8(2) ECHR test in which it considered the legitimate aim of the age requirement and the proportionality of the measure in the light of pursuing this legitimate aim. The characteristics of the Article 8(2) ECHR test were in my opinion an important instrument in the reasoning of the Supreme Court. In the fair balance test conducted by the ECtHR in *Tuquabo-Tekle v. the Netherlands*, the rights of the child played an important role.[1288] In fact, in all cases involving the fair balance test in which the ECtHR found a violation of Article 8 ECHR, the interests of children was an important factor. The approach adopted by the Supreme Court in *Bibi and Quila* therefore arguably goes further than the requirements of the case law of the ECtHR.

The Supreme Court ruling in the case of *Bibi and Quila* is invoked by other courts as a precedent on how an interference should be established and how the justification test should be structured. In *MM* the High Court held that it was established in *Bibi and Quila* that "*a rule restricting admission of a spouse is an interference with family life itself.*"[1289] Subsequently, the High Court followed the test of Article 8(2) to determine whether the interference was justified.[1290] In *Chapti and others*, concerning the English language requirement, the High Court also followed *Bibi and Quila* in determining that there was an interference with the right to respect for private and family life.[1291]

The *Bibi and Quila* ruling of the Supreme Court and the subsequent case law concerning other substantive requirements shows that in the UK the interpretation of Article 8 ECHR might go further than what would be required under Article 8 ECHR. From the perspective of compliance with the ECHR this is not at all problematic. The ECHR sets minimum standards on the protection of fundamental rights which must be respected by the parties. Considering that in the fair balance the ECtHR only in a limited number of cases finds a violation of Article 8 ECHR by granting a wide margin of appreciation to the state, the UK judiciary uses the procedural standards of the ECHR to come to a higher level of substantive protection.

Relevant moment in time for judicial review

From the selected case law it is apparent that the moment in time for judicial review does not play a major role in the Article 8 ECHR assessment. In *Bibi*

1288 *Tuquabo-Tekle v Netherlands* (n 150).

1289 *MM, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWHC 1900 (UK).

1290 See section 7.3.5.

1291 *Chapti & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2011] EWHC 3370 (UK).

and Quila, the developments which took place after the moment of the application and the initial administrative decision are taken into account, although this arguably does not play a major role in the reasoning of the Supreme Court.[1292] Specifically with regard to delays in the decision-making process, the Supreme Court remarked that the longer the period of the delay, the more the applicant's claim under Article 8 will be strengthened.[1293]

Best interests of the child

The best interests of the child play an important role in the case law on Article 8 ECHR. This is also reflected in UK case law. In *ZH (Tanzania)* the Supreme Court interpreted the best interests of the child concept within the context of the Article 8 ECHR assessment.[1294] The facts of this case are as follows. ZH is a Tanzanian woman who arrived in the UK as an asylum seeker but had her asylum request rejected. She attempted to apply twice using a false identity, but was never successful. Two years after she entered the UK she married a British national with whom she had two children, who acquired British nationality. The applicant never received a residence permit on the basis of her family relationships. Subsequently, the applicant and her husband separated. Her former husband was diagnosed as being infected with HIV and lives on a disability allowance with his mother. It is reported that he has alcohol problems. The mother seeks residence in the UK based on the lawful residence of her two children. In the assessment of the Article 8 ECHR claim, the Supreme Court reiterated the relevant case law of the ECtHR and within this context takes account of the principle of the best interests of the child as enshrined in Article 3 CRC. The Supreme Courts held that taking the best interests of the child as a primary consideration involves an assessment of the question whether it is reasonable to expect the child to live in another country.[1295] In this assessment, nationality is a factor of particular importance, considering Article 7 CRC on the right of every child to be registered and acquire a nationality and Article 8 CRC on the right of every child to preserve his or her identity, including nationality. The reasoning behind including nationality as a factor is that it might not be expected for UK nationals to leave the UK for the country of origin of the parent while it might be expected of a non-UK national. These factors must play a role in making the proportionality assessment under Article 8 ECHR.[1296] Here it should once again be noted that the Supreme Court employs the proportionality test, as required by Article 8(2) ECHR, even though it would have been in line with

1292 *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* (n 1010).
1293 *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 .
1294 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.
1295 Ibid para 29.
1296 Ibid para 33.

the case law of the ECtHR in this case to opt instead for the fair balance test, which does not require an explicit proportionality assessment. The Supreme Court holds that in making the proportionality assessment under Article 8 ECHR, the best interests of the child must be a primary consideration. This, according to the Supreme Court, must mean that the interests of the child should be considered first, but may be outweighed by the cumulative effect of other considerations. The Supreme Court went on to state all the considerations that weighed against the applicant in this case, namely the need to maintain a firm and fair immigration policy, the applicant's appalling immigration record and the precarious nature of the residence status of the mother at the time when family life was created. However, the Supreme Court found that the children cannot be blamed for these facts. As Lady Hale states in the Supreme Court ruling: *"It would be wrong in principle to devalue what was in their best interest by something for which they could in no way be held responsible."*[1297] Added to this, the Supreme Court found that the inevitable result of removing the primary carer of the children would mean that the children would be forced to leave with her.

The Supreme Court ruling is in line with the spirit of the ECtHR ruling in *Nunez v. Norway*. However, one element that plays a marginal role in the case law of the ECtHR, has a more prominent role in *ZH (Tanzania)*. The logic behind this lies in the fact the ECtHR looks at the question of whether the child can be expected to join the family members in the country of origin of the parent. In *ZH (Tanzania)*, the Supreme Court found the nationality of the applicant of 'particular importance'. The importance of citizenship may not be played down, according the Supreme Court, as the citizen child has rights which they will be not able to exercise if they move to another country.[1298] Also, the fact that the Supreme Court is explicit about the issue that the children cannot be blamed for the behaviour of their parents does not play a major role in the case law of the ECtHR.[1299] Both in *Nunez* and in *Antwi* the parents of the applicants had a bad immigration record, in both cases the applicants had committed serious immigration fraud, however in neither case did the ECtHR hold that the children could not be blamed for the behaviour of their parents. The reason that a violation was found in *Nunez* and not in *Antwi* instead lies in the exceptional circumstances concerning the children, such as the length of the proceedings and the psychological problems of the children. As a conclusion it may therefore be held that with regards to the best interests of the child, the Supreme Court goes beyond the case law of the ECtHR on the

1297 Ibid para 44 See also Art 2(2) CRC.

1298 Ibid para 32 The reasoning of the Supreme Court is similar to the reasoning developed by the CJEU in *Ruiz Zambrano* (n 39). See section 4.5.3. and chapter 11.

1299 Art 2 CRC contains a prohibition of discrimination based on the behaviour of the parents. See section 2.7.

issues of the role of nationality in the balance of interests and the question whether children can be blamed for the conduct of their parents.

9.6.3 Interim conclusion

The UK is struggling with the position of Article 8 ECHR in its jurisdiction. Policy makers from one end of the political spectrum try to oppose the increasing grip the ECHR has on maintaining a domestic family unification policy. In this context, the Immigration Rules have been amended to attempt to push the judiciary to show more judicial constraint in the Article 8 ECHR test. The judiciary on the other hand takes the protection of Article 8 ECHR very seriously and scrutinises the authorities tightly with regards to age requirements, income requirements and language proficiency requirements for example. On all these issues it cannot be held that the approach of the judiciary goes against the spirit and wording of Article 8 ECHR. Actually the opposite is true. The ECHR contains minimum norms to which the contracting parties are bound, and if a contracting party seeks to set its own domestic level of protection higher, that it perfectly acceptable from the perspective of the ECHR. Furthermore, in its approach the British judiciary adequately protects the right to family unification, which is under pressure as a result of the recent amendments to the Immigration Rules. It however creates a climate in which the legitimacy of the judiciary is at stake, which may result in more drastic measures by the legislature and the government in an attempt to limit the implications of Article 8 ECHR.

9.7 Conclusion

This chapter had shown that the selected member states do not follow the same line in their implementation of Article 8 ECHR, in neither their policies nor their case law.

9.7.1 Policy

The selected member states have a fundamentally different policy framework on the implementation of Article 8 ECHR.

In Denmark, Article 8 ECHR is not explicitly mentioned in the Aliens Act. However, the Aliens Act includes a few provisions which state that substantive requirements should be waived if a refusal of the application would lead to a violation of Denmark's international obligations. A more general hardship clause furthermore prescribes that a residence permit for family unification should be granted if exceptional reasons make this appropriate. From the

legislative history it can be inferred that this is the case when refusal would lead to a breach of Denmark's international obligations, most notably under Article 8 ECHR. There are no further guidelines on the interpretation of Article 8 ECHR.

Because Germany has a strong domestic protection of the right to respect for family life, Article 8 ECHR is implemented in the context of the constitutional protection of family life. Despite there being no explicit references to Article 8 ECHR or the equivalent provision from the German Constitution in the Residence Act, this act does contain a few hardship clauses which pertain to both the definition of the family as well as compliance with substantive and procedural requirements. Guidance on the interpretation of the provisions of the Residence Act is provided in the Administrative Guidelines. The guidelines for the interpretation of the hardship clauses contain reference to the right to respect for family life as enshrined in both the German Constitution as well as in Article 8 ECHR. The totality of the hardship clauses and the guidelines on their interpretation creates a framework which provides legal certainty in most cases.

In the Netherlands Article 8 ECHR is not explicitly mentioned in the Foreign Nationals Act nor in the Foreign Nationals Regulations. Dutch family unification policy only allows for family unification of family members belonging to the nuclear family and is conditioned by several requirements. All other family members, as well as those family members who do not comply with the requirements, fall under one general hardship clause which allows the authorities to permit family unification. From the legislative history it can be inferred that the authorities only intend to use discretionary competence to allow for the family unification of such family members in case rejection would lead to a violation of Article 8 ECHR. In this indirect way Article 8 ECHR is implemented in Dutch legislation and regulations. The Foreigners Circular, which provides guidelines on the interpretation and application of the legislation and regulations, contain more specific guidelines on how to apply Article 8 ECHR in individual cases. However, the content of these guidelines is ill-structured and incomplete.

In the United Kingdom, the legislature is struggling with Article 8 ECHR. To combat the perception that the judiciary applies Article 8 ECHR too widely, the government has amended the Immigration Rules in such a way that the judiciary is expected to no longer test whether the administrative decision in an individual case is in compliance with Article 8 ECHR, but rather whether the totality of the legal framework provided for in the Immigration Rules is in compliance with Article 8 ECHR. This is based on the assertion that proportionate regulations cannot lead to disproportionate individual decisions. The judiciary, however, does not accept this line of reasoning and has developed a two-fold test in which the proportionality of the regulation is first addressed, as is required by the Immigration Rules, and afterwards the compatibility of the administrative decision with Article 8 ECHR is tested. In turn,

the authorities seem to seek to limit the possibilities for applicants to seek judicial review. This entire development is taking place against a highly politicised background.

Of the selected member states, Germany has the most well-structured legal framework implementing Article 8 ECHR. This, however, does not mean that compliance with Article 8 ECHR is guaranteed in all individual cases. In Denmark and the Netherlands it seems that the authorities are seeking to limit the right to respect for family life to the absolute minimum of what is required under Article 8 ECHR. This is illustrated by the fact that in both member states the legislative history shows that hardship clauses are only intended to be applied when refusing a residence permit would lead to a violation of Article 8 ECHR. Both in Denmark and in the Netherlands there is a lack of guidance on how the obligations from Article 8 ECHR should be applied by the administrative authorities. In the United Kingdom the highly politicised climate has created a regulatory framework which is being rejected by the judiciary. It remains to be seen in which way the government will further attempt to limit the application of Article 8 ECHR.

9.7.2 Case law

The selected member states differ greatly in the manner in which Article 8 ECHR is implemented in domestic case law.

In Denmark and Germany, the selected domestic case law does not follow the structure of the case law of the ECtHR. Instead, the case law often focusses on issues which are especially relevant in the domestic context, like for example the attachment requirement. In the selected case law for this research, no instances were found where the domestic court of highest instance found a positive obligation to admit a family migrant. In this sense these member states are similar. However, as in Germany the right to respect for family life is more routed in the Constitution as well as in the legislation and administrative guidelines, this leads to a more adequate protection than in Denmark.

In the Netherlands the Council of State traditionally shows restraint in implementing Article 8 ECHR. A good example of this was the manner in which the long-term residence visa requirement was applied for a long time. The Council of State initially held that the rejection of an application for a residence permit for the reason that the application should have been made in the country of origin should not be tested for compliance with Article 8 ECHR if the separation of the family, which would be the result of the rejection of an application on this basis, would only be temporary. It was only after the legislature amended its legislation, responding to case law of the ECtHR against the Netherlands, that the Council of State amended its approach to this issue. This trend can also be seen for example in the approach of the Council of State in finding an interference in the right to respect for family life.

From the selected member states, the judiciary in the United Kingdom goes furthest in the implementation of Article 8 ECHR in the domestic case law. This has resulted in rulings in which the age requirement of 21 years, the income requirement and the language proficiency requirement were deemed incompatible with Article 8 ECHR as in individual cases the interferences in the right to respect for family life could not be justified under Article 8(2) ECHR. Arguably, the approach adopted by the Supreme Court in establishing that there was an interference in the right to respect for family life, which triggers the justification test of Article 8(2) ECHR, goes beyond the requirements that can be distilled from the case law of the ECtHR.

The fact that the domestic courts do not follow the case law of the ECtHR with regard to the procedure to establish whether there is a violation of Article 8 ECHR has partly something to do with the domestic structure of the implementation of international human rights law, but on the other hand the inconsistency of the ECtHR is not helpful. If the ECtHR had a uniform test to determine whether Article 8 ECHR had been violated, the domestic courts could copy this test in their domestic legal system. However, Chapter 3 has shown that the ECtHR is inconsistent in the procedure which it uses. If the ECtHR followed a consistent procedure, the precondition would be present for the member states to implement their obligations under Article 8 ECHR in a matter which is in accordance with the case law of the ECtHR. However, since this is not the case, it is often unclear to domestic courts which procedure should be followed.

10 Domestic implementation of the *Ruiz Zambrano* ruling

10.1 INTRODUCTION

One of the grounds on which a residence permit based on family unification can be obtained is through the Union citizenship of the sponsor. This is only possible, however, if the sponsor would be forced to leave the territory of the EU if his family member was denied residence. This principle was discussed in section 4.5.4.[1300] The further implications of this case law for domestic law is analysed in this chapter. The research question addressed in this chapter is how the member states implement the obligations arising from the *Ruiz Zambrano* ruling in their domestic jurisdiction.

In the *Ruiz Zambrano* ruling, the CJEU for the first time derived a right to family unification directly from Article 20 TFEU without any cross-border element being present in the case.[1301] The case concerned the Colombian parents of two minor Belgian citizens who sought to regularise their stay in Belgium. The CJEU held that the minor Belgian citizens would be deprived of the enjoyment of the substance of the rights associated with their status of EU citizen. As the children would be forced to accompany their parents, they would also be forced to leave the territory of the EU as a whole. In subsequent cases the CJEU confirmed the reasoning that EU citizens should not be forced to leave the territory of the EU.[1302] In the subsequent case law, the CJEU follows the line that it is up to the domestic courts to determine whether an EU citizen would in fact be forced to leave the territory of the EU.

In this chapter, the domestic regulatory response to the *Ruiz Zambrano* case and the subsequent case law of the CJEU is analysed.

10.2 DENMARK

In Denmark the Ministry for Refugees, Immigration and Integration responded to the *Ruiz Zambrano* ruling with a ministerial note outlining the implications

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1300 An extensive discussion of the *Ruiz Zambrano* ruling and the subsequent case law of the CJEU is found in section 4.5.4. As in that section the case law and the commentaries thereto are discussed, this is not repeated in this section.

1301 *Ruiz Zambrano* (n 39).

1302 See section 4.5.3.

of the ruling for Danish immigration law practice.[1303] In this note the Ministry expressed the expectation that the *Ruiz Zambrano* ruling would only have implications in a few cases, as children only qualify for Danish nationality if one of the parents is also a Danish national.[1304] Later the same Ministry published another note on the retroactive effect of the *Ruiz Zambrano* ruling, which, according to the note, should be interpreted as having effect from the moment of introduction of EU citizenship in 1993.[1305] The first note has been amended each time a new development in the case law of the CJEU has occurred. The abovementioned Ministry now no longer exists; its tasks have been taken over by the Ministry for Justice. The latest amendment of the note was on 15 July 2013, implementing the *O, S & L* ruling of the ECJ in the note.[1306] The note specifies the criteria under which a right to reside based on the *Ruiz Zambrano* ruling exists:

- residence rights based on EU citizenship can only be attributed to the parent of a minor EU national child; and further
- the parent must be a third-country national;
- the child must be dependent on the parent;
- the parent must reside in the member state in which the child resides;
- the limitation of the right to reside of the parent in Denmark must have the effect that the minor child is deprived of the genuine enjoyment of the substance of EU citizenship, meaning that the child would be forced to leave the territory of the EU. This may be the case if there is not another parent residing in Denmark with whom the child can stay.[1307]

The note furthermore states that after a concrete assessment of the facts of the individual case, a residence permit could be granted under Article 20 TFEU, even though the above-mentioned criteria have not been fulfilled.[1308]

Initially the website of the Immigration Service listed four anonymized decisions on administrative appeals against refused applications for a residence permit based on the *Ruiz Zambrano* ruling.[1309] The first and the fourth of the published decisions concerns the application of a residence permit of a

1303 Ministeriet for Flygtninge Invandrere og Integration, *Juridisk fortolkningsnotat om Zambrano-dommen (sag C-34/09)* (2011).

1304 Ibid p 4.

1305 Ministeriet for Flygtninge Invandrere og Integration, *Notat om muligheden for genopagelse af genoptagelse af afgjorte sage refter EU-domstolens dom I Zambrano-sagen (sag C-34/09)* (2011).

1306 Justitsministeriet, *Juridisk fortolkningsnotat om Zambrano-dommen (sag C-34/09) med indarbejdede præciseringer som følge af senere dome* (2013).

1307 Ibid p 7.

1308 Ibid.

1309 See http://www.nyidanmark.dk/da-dk/publikationer/SearchPublications.htm?searchtype=publications. The mentioned documents have been removed from the website and can no longer be accessed. As the identification numbers were removed from the cases, the authors will use the document name of the original documents that were available on the abovementioned website. It is unclear why those rulings were selected.

third-country national parent where the other parent and the child(ren) were Danish nationals. The Ministry rejected these appeals because the Danish minors were not forced to leave the territory of the EU because they could live with their Danish parents in Denmark.[1310] The second published decision concerns the right to reside in Denmark of a third-country national parent of a Danish national child in the circumstance that the other parent, who was a Danish national, had died. In this case, the Ministry decided that the minor Danish national would be forced to leave the territory of the EU if the third-country national parent were not allowed to reside in Denmark. For that reason, the Ministry referred the case back to the Immigration Service for a new decision and ruled that the client had the right to reside in Denmark.[1311] The third published decision has a similar factual background. This case also concerned the right to reside of a third-country national parent of a Danish minor national where the other (Danish) parent had died. The Ministry in this case, however, ruled that the third-country national parent could rely on section 9c paragraph 1 of the Aliens Act in order to get a residence permit, so that the child would not be obliged to leave the territory of the EU, but that such permit could only be granted if the basic conditions for obtaining a residence permit in Denmark were complied with.[1312]

These cases illustrate that the Danish administration does not follow a clear line in the implementation of the *Ruiz Zambrano* ruling.

10.3 GERMANY

10.3.1 Policy

In Germany, the parents of a minor German national are eligible for family unification.[1313] This provision is rooted in the constitutional protection of the family offered by Article 6 Basic Law. The reasoning behind granting the right to family unification to the parents of a German national is that a German minor cannot be expected to exercise family life in another country. According to the German legislature, a German national should be free to move and reside within Germany and for this reason German nationals enjoy special protection for the purpose of family unification.[1314] One requirement for the exercise of this right is that the parent should have custodial rights over the German child and the parent should actually take care of the child. If the

1310 Document name: EU067_afgorolse.pdf and EU070_afgorolse.pdf.
1311 Document name: EU068_afgorelse.pdf.
1312 Document name: EU069_afgorelse.pdf.
1313 Art 28(1)(3) Residence Act (GER).
1314 Deutscher Bundestag, *Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)* .

parent does not have custodial rights over the child, a right to family unification may still exist, depending on the question whether the child is dependent on the parent without custodial rights for its development.[1315]

Besides this general requirement relating to the custody of the child, the other general substantive requirements should be fulfilled. This means that in practice the accommodation and income requirements need to be complied with. This can be a high burden for applicants. It is therefore questionable whether Article 28 Residence Act as such complies with the ruling. Therefore the central question relating to the implementation of the *Ruiz Zambrano* ruling in Germany is whether the possibility for the family unification of a third-country national parent to a German child is sufficiently covered by Article 28 Residence Act in order to comply with the *Ruiz Zambrano* doctrine of the CJEU.

10.3.2 Case law

German courts have dealt with the issue of derived residence rights based on the *Ruiz Zambrano* doctrine. There is only limited case law available from the federal courts. For that reason, case law of lower instance courts is also included in this analysis.

One of the first cases in which the Federal Administrative Court dealt with the *Ruiz Zambrano* doctrine concerned the application for a residence permit of a failed asylum seeker from Togo.[1316] After his asylum request was rejected the applicant married a German national, had a child with her and moved to Belgium, where he unsuccessfully re-applied for asylum. At the German consulate in Brussels the applicant applied for his residence permit to join his spouse and child in Germany. The application was rejected, among other reasons because he did not comply with the language proficiency requirement. The Federal Administrative Court held that there was no derived residence right based on the *Ruiz Zambrano* ruling because the German national child would not be forced to leave the territory of the EU, as the child could stay with his mother in Germany. Furthermore the Federal Administrative Court held that the CJEU did not follow up on the argument of the Advocate General in *Ruiz Zambrano* who proposed a more far-reaching solution to partially end the practice of reversed discrimination.

One of the cases concerns the withdrawal of a residence permit after non-compliance with the obligation to attend an integration course.[1317] The Turkish applicant in this case failed to participate in such an integration course and for this reason alone was facing expulsion from Germany. The applicant

1315 Art 28.1.5 Administrative Guidelines (GER).
1316 BVerwG (22-06-2011) 1 C 11 10.
1317 Administrative Appeal Court Münster (29-04-2011) 18 B 377/11.

argued that the withdrawal of his residence permit was not in accordance with the *Ruiz Zambrano* ruling of the CJEU. The higher administrative court of the Münster region held that it was not the intention of the CJEU to extend the scope of the *Ruiz Zambrano* doctrine beyond the specific case at hand.[1318] For that reason the court ruled that there was no derived residence right based on the *Ruiz Zambrano* doctrine.

Another case concerns the expulsion of a Kirgizian father of two German national children after he had been sentenced to nine-years imprisonment for manslaughter.[1319] This case was decided by the administrative court of the Mannheim region. The court did not go into the question whether the applicant was within the personal scope of Article 20 CJEU, in other words whether he could rely on the *Ruiz Zambrano* ruling considering the fact that the mother was available to take care of the child. Instead, the court looked at the question whether an interference in the derived residence rights, as well as under Article 8 ECHR, was permissible. In deciding on the permissibility of the interference, the court in analogy applied the rules of the CD. In the end, the court held that the interference was permissible considering the danger of repeated offences.

A case which raises the issue of the right to reside based on the residence rights of an EU national sibling was raised before the administrative court of Berlin.[1320] The case concerns the application for family unification of a minor child from Gambia to be reunited with the Gambian parents lawfully residing in Germany. The reason that the application was rejected by the administration in the first instance is that the parents did not comply with the income requirement. While in Germany, the parents had two more children, who acquired German nationality. The *Ruiz Zambrano* related issue here is whether the two German national siblings would be forced to leave the territory of the EU if their sibling residing in Gambia was not be allowed to join them in Germany. The administrative court answered this question in the affirmative. It held that it cannot be expected of the German children to follow their parents to Gambia, despite the fact that the children also hold Gambian nationality, as this would effectively mean that the German minor national children would be forced to leave the territory of the EU as a whole.

However, in another case of the Federal Administrative Court of the Berlin-Brandenburg region, another approach was chosen. The case concerns the application for family unification of a Vietnamese child with her Vietnamese mother lawfully residing in Germany.[1321] The Vietnamese mother has another child, a German national son, who lives with her in Germany. The application for family unification was rejected because the mother did not comply with

1318 Ibid.
1319 Administrative Appeal Court Mannheim (04-05-2011) 11 S 207/11.
1320 VG Berlin (16-06-2011) VG 1 K 08 11 V.
1321 Administrative Appeal Court Berlin-Brandenburg (15-02-2013) OVG 7 N 54 13.

the income requirement. The *Ruiz Zambrano* related question is whether the German national half-brother would be forced to leave the territory of Germany if his half-sister were not allowed to join him. The court held that this would not be the case, as his mother holds a valid residence permit. For that reason, as the mother is not forced to leave the territory of Germany, the son is not either. The fact that this would mean that there could be no family life with the child residing in Vietnam is only considered relevant to such extent that the court notes that because the reason for refusal is non-compliance with the income requirement, there is a prospect for family unification when the mother does comply with that requirement.

The German courts have dealt with different issues concerning the *Ruiz Zambrano* doctrine. The fact that the possibility for family unification of the parent of a German national child exists in German legislation ensures a certain level of protection. However, because of the admission requirements which are imposed, the *Ruiz Zambrano* doctrine remains relevant in the German context.

10.4 NETHERLANDS

10.4.1 Policy

On the side of the legislature, the initial response was that the *Ruiz Zambrano* ruling would only have implications for cases in similar circumstances, meaning children who have acquired Dutch nationality to avoid statelessness and who have parents who are third-country nationals.[1322] However, the district courts did rule that the *Ruiz Zambrano* ruling of the CJEU had implications for other cases in which a Dutch national would be forced to leave the territory of the EU.[1323] Nothing regarding the *Ruiz Zambrano* ruling has been published since then. The Immigration and Naturalisation Service, however, did include the possibility to derive a right to reside in the Netherlands based on the *Ruiz Zambrano* ruling on the application form which needs to be used when applying for a residence permit for the purpose of family unification. However, the Foreigners Circular, which contains instructions for case workers, provides no guidance on the interpretation of the *Ruiz Zambrano* ruling and the subsequent case law of the CJEU.

1322 Parliamentary Documents II 2010/11, 19 637 nr 1408 (NL).

1323 See G. Lodder, 'Het recht van kinderen op een gezinsleven' in G. Lodder and P. Rodrigues (eds), *Het kind in het immigratierecht* (SDU 2012) p 112.

10.4.2 Case law

In the Netherlands, many cases have arisen in the district courts and before the Council of State concerning the right of third-country national parents to reside with their children who are Dutch nationals.

The Dutch Council of State takes a restrictive stand towards derivative residence rights based on the *Ruiz Zambrano* case law of the CJEU. In numerous rulings it has established a line of case law which raises many questions, without referring preliminary questions to the CJEU. The first four rulings of the Council of State concerning the *Ruiz Zambrano* case law originate from 7 March 2012. In those rulings, the Council of State laid down a line of case law to be followed in subsequent cases. For that reason these four cases are discussed below.

The first case concerns a Nigerian woman who met a Dutchman in Spain.[1324] They had two children together, who acquired Dutch citizenship through their father. The father subsequently leaves his family and finds another partner. His place of residence is unknown. The Nigerian mother, who has a brother who lawfully resides in Spain, seeks to reside in the Netherlands based on the Dutch citizenship of her children. The Council of State accepted that in this situation there is a derivative right to reside in the Netherlands for the Nigerian mother of the two Dutch children. This is based on the fact that the place of residence of the father is unknown and that he does not support his children in any way. The Council of State further took the young age of the children into account.

The second case concerns an Indonesian woman who lives in Indonesia with her Dutch spouse and her two children who hold double Indonesian-Dutch citizenship.[1325] When her Dutch spouse dies, the mother seeks to take her children to the Netherlands. The Dutch legislator contended that the children could live in the Netherlands with their parental grandparents. The Council of State observed that in the *Ruiz Zambrano* ruling the CJEU held that EU national children would be forced to leave the territory of the EU if their parents were expelled; for that reason it cannot be held that the children can reside in the Netherlands with their grandparents. Furthermore this case established that a derived right to reside in the Netherlands can also exist when the non-EU citizen parent is currently still residing outside the Netherlands, because the children would not be able to effectively enjoy the substance of the rights associated with their status as EU citizens if their mother were not allowed to join them in the Netherlands.[1326] Concluding, also in this case the Council of State accepted that a derivative right to reside in the Netherlands exists.

1324 Council of State (07-03-2012) 201102780/1/V1 (NL).
1325 Council of State (07-03-2012) 201105729/1/V1 (NL).
1326 Ibid para 2.7.9.

The third case concerns a Moroccan man who is married to a Dutch national.[1327] Together they have a child who has double Moroccan-Dutch citizenship. The Dutch mother has a psychiatric condition which makes it impossible for her to raise her child without support. The Council of State held that the father had not substantiated that the children would be obliged to follow him to Morocco because their mother is not able to take care of them alone. Firstly, this was not properly motivated in the application and during the litigation phase. Secondly, and more principally, the Council of State expected that the mother take recourse to public assistance if she was not able to take care of her children herself. The reasoning is that if the mother can take care of the children with public support, the children would not be obliged to leave the territory of the EU when the father was expelled because they can stay with their mother.

The fourth case is similar to the third case. It concerns a Guinean man who is married to a Dutch woman.[1328] Together they have a child, who acquired Dutch citizenship. The mother is under constant psychiatric treatment. Due to the mental illness of his mother and the unstable residence status of his father, the child also suffers from psychological complaints, for which he is receiving counselling. The mother is unable to take care of her child without the support of the father. Also in this case the Council of State held that it had not been substantiated that the mother could take care of the child by herself with public support. Therefore also in this case the Council of State held that no derived right of residence existed for the father.

The line of case law laid down by the Council of State can be summarised as follows. A derived right to reside in the Netherlands only exists when an EU national child would not be able to reside in the EU if his or her non-EU citizen parent were refused residence. This is not the case when one parent does have a right of residence and is able to take care of the child. The parent with the right of residence is expected to accept public support in taking care of the child. It is up to the applicant to substantiate that the Dutch national parent is not able to take of the child, even with the help of public support. The Council of State adopted this approach without referring questions for preliminary ruling to the Court of Justice.

This approach by the Council of State was tested by several cases which followed afterwards. One of the first cases after the four rulings of 7 March 2012 was about a Ghanaian woman whose asylum claim had been rejected but who had met a Dutchman with whom she had a child who acquired Dutch citizenship.[1329] The relationship, however, does not hold and the father does not take an active role in the upbringing of his child. The Dutch national father moves to the United Kingdom. The Ghanaian mother has sole custody of the

1327 Council of State (07-03-2012) 201108763/1/V2 (NL).
1328 Council of State (20-03-2012) 201103155/1/V1 (NL).
1329 Council of State (02-05-2012) 201200988/1/V3 (NL).

child. The Council of State holds that it was not substantiated by the mother that the father was unable to take care of the child and that the child cannot live with him. The fact that the father does not have custody of the child is deemed irrelevant by the Council of State, as it was not substantiated that the father could not get custody of the child.

Another case concerns a Nigerian woman who marries a Dutch national.[1330] Together they have a child, who acquires Dutch citizenship. The Dutch national is convicted for a crime, for which he serves a seven-year jail sentence. The expected date of release of the father is 13 February 2013. At the time the Council of State delivers its ruling the father is serving in a rehabilitation programme, which is aimed at preparing him to return to society. Because the father of the child is in jail, the Council of State holds that the mother has substantiated the fact that her partner is not able to take care of the child. Supposedly this shifts the burden of proof, as the Council of State holds that the administrative authority fails to substantiate that the father is able to take care of his child from the rehabilitation centre. The Council of State held that a derived right of residence exists for the mother.

In the case of a Canadian woman who divorced her Dutch citizen husband with whom she had a child who holds double Canadian-Dutch citizenship, the family court awarded custody to the mother.[1331] The Dutch father of the child does not have the financial means to support his child in any way. The family court established that the father was only allowed to see his child for one and a half hours every Saturday, in the presence of a common acquaintance of both parents. This illustrates that the family court has serious doubts about the father's ability to take care of the child. The Council of State held that the mother had not substantiated that the child would be forced to leave the territory of the EU if the mother was expelled. According to the Council of State, the mother can be expected to attempt to persuade the father to be in contact with the child. Because the Council of State ruled that the child was able to stay with the father and is therefore not obliged to leave the territory of the EU if the mother was expelled, there is no derived right of residence for the mother.

In a similar case, a Ghanaian woman seeks a derived right of residence in the Netherlands based on the Dutch nationality of her thirteen-year-old Dutch citizen child.[1332] The Dutch father of the child does not have any contact with his child. A public youth care institution has pointed out to the father that he is obliged to contribute to the upbringing of his child, but did not receive any reply. The Council of State points out that during the initial application the applicant had stated that the father had contact with his child once a month and that the father pays a financial contribution to the mother

1330 Council of State (10-07-2012) 201103973/1/V1 (NL).
1331 Council of State (28-06-2013) 201204124/1/V1 (NL).
1332 Council of State (27-06-2013) 201201347/1/V1 (NL).

for the upbringing of the child. This was more than three years before the ruling of the Council of State. However, according to the Council of State, this proves that the applicant has not substantiated that the child is in such a manner dependent on his mother that he would be forced to leave the territory of the EU if the mother was expelled. Therefore, the Council of State did not grant a derived right of residence to the Ghanaian mother.

These cases raise a number of important questions. Firstly, it is questionable what degree of involvement in the life of the second parent is sufficient to rule that the child would not be forced to leave the territory of the EU if the non-resident parent was expelled. Currently the Council of State is very reluctant in holding that the degree of dependence on the non-resident parent is so high that a derived right of residence exists. Even when the other parent is completely out of the picture, the Council of State expects the child to live with that parent. In making this assessment, the Council of State seems to look only at the legal relationship between the resident parent and the child. Whether in reality the child will be forced to leave the territory of the EU, simply because there is no practical possibility for the mother to leave the child with the father, is in no way being taken into account by the Council of State.

A second question is how long the derived right of residence exists. In the case of the Dutch national father who was serving jail time at the time of the ruling of the Council of State it is true that if the mother was expelled, the child would be forced to leave the territory of the EU. But at the moment the father is fully released from jail, the increased dependency on the mother of the child to remain within the territory of the EU falls away. When the father is released the child can stay with the father again. Equally, when a child reaches the age of majority, or arguably even before that, the derived right to reside in the EU may no longer exist.

Considering these important questions, which have far-reaching consequences for the applicants in the above-mentioned cases, I believe that the Council of State is in violation of EU law in not referring questions for preliminary ruling to the CJEU. According to well-established case law by the CJEU, courts of highest instance like the Council of State may only refrain from referring questions concerning the interpretation of EU law to the CJEU if the matter has already been dealt with by that court or when the interpretation of EU law is clear. In my opinion, this is not the case here.

10.5 United Kingdom

10.5.1 Policy

The United Kingdom does provide for family unification of a parent with a child already residing in the United Kingdom. In principle it is allowed to make an application for family unification for a parent to join a child already

residing in the United Kingdom both from abroad as well as when already present in the United Kingdom. When applying from inside the UK, the applicant may not have residence in the United Kingdom on a short-term visa, with a residence permit which is valid for less than six months, on a temporary residence permit or in breach of immigration law.[1333] The right to family unification for a parent to join a child is not unconditional. Firstly, an application is refused if the applicant is not considered 'suitable' to enter the United Kingdom. This can, for example, be the case if the applicant has been imprisoned following a criminal conviction. Secondly, the applicant parent must be eighteen years old or older and the child should be younger than eighteen years old. Furthermore the child must be living in the United Kingdom and be either a British citizen or settled in the United Kingdom.[1334] This implies that in the United Kingdom family unification of a parent to a child is also possible if the child is not a citizen of the United Kingdom. As regards the relationship between the parent and the child, the applicant parent must have sole custody of the child or the parent or carer with whom the child normally lives must not be a British citizen or settled in the United Kingdom and not be the partner of the applicant parent so that the applicant must not be eligible to apply for family unification as a partner.[1335] This latter rule is aimed at preventing the situation where applicants for family unification of a parent to a child circumvent the rules for the family unification of partners. Furthermore, the applicant parent must substantiate that he is able to maintain himself and all dependents without public assistance.[1336] This maintenance requirement is normally deemed to be met if financial means are available at the level of the Income Support Level for a family of a similar size.[1337] The applicant must also substantiate that he has a certain level of fluency in the English language.[1338]

Because the right to family unification is subject to these requirements, the *Ruiz Zambrano* ruling did have implications for family unification law in the United Kingdom. All applications which do not comply with the requirements may still be eligible for a derived right of residence pursuant to the *Ruiz Zambrano* ruling. Therefore the United Kingdom courts have dealt with a range of *Ruiz Zambrano* applications already. This also led to a regulatory response from the government.

The government chose to implement the derived residence rights in the Immigration (European Economic Area) Regulations. In this way, the derived residence rights have been incorporated in the legislation that implements the

1333 E/LTRPT.3.1. Appendix FM of the Immigration Rules (UK).
1334 E-ECPT.2.2. Appendix FM of the Immigration Rules (UK).
1335 E-ECPT.2.3. Appendix FM of the Immigration Rules (UK).
1336 E-CPT.3.1. Appendix FM of the Immigration Rules (UK).
1337 UK Visas and Immigration (Home Office), *Guidance Maintenance and Accommocation* (2013).
1338 E-ECPT.4.1. Appendix FM of the Immigration Rules (UK). See section 7.3.5.

free movement of persons. This is a choice which can be defended. The derived residence rights based on the *Ruiz Zambrano* ruling are clearly a matter of EU law; it is directly inspired by a ruling of the CJEU. However, the doctrine only pertains to the effects of the legal framework on family unification of parents to a resident child who is an EU national, and not on the procedure. It would therefore also have been possible to broaden the scope of the 'regular' policy on the family unification of parents to a resident child as outlined above.

The derived residence right based on the *Ruiz Zambrano* ruling is laid down in section 15A(4A) of the Immigration (European Economic Area) Regulations. It states that if an applicant is the primary carer of a British citizen, if that British citizen is residing in the United Kingdom and if that British citizen would be unable to reside in the United Kingdom or in another EEA state if the applicant was required to leave, that applicant is entitled to a derivative right to reside in the United Kingdom.[1339]

This attempt by the legislature to implement the *Ruiz Zambrano* ruling is problematic for a number of reasons. Firstly, it is not established in *Ruiz Zambrano* nor in any of the subsequent rulings of the CJEU that the derived residence rights may only apply in cases where the applicant is the primary carer of an EU national. There has not been any case law on this, but it cannot be excluded that in particular circumstances a spouse could also be forced to leave the territory of the EU if his partner were not allowed to join him. This could for example be the case if the EU national spouse does not have the right to free movement because he does not fulfil the requirements of being a worker, self-employed person or has no sufficient resources. Secondly, in the second requirement the territory of the EU is equated with the territory of the European Economic Area. If for arguments sake one assumed that the *Ruiz Zambrano* children would have been admitted to live in Switzerland with their parents, this would still mean that if Belgium or any other member state would not admit them as a family they would be forced to leave the territory of the EU, in this hypothetical case to move to Switzerland. Therefore, in my opinion the *Ruiz Zambrano* doctrine cannot be held to apply for the entire European Economic Area. Thirdly, the formulation of this provision assumes that the child who is a British citizen is already residing in the United Kingdom. Even though that is the same as in the *Ruiz Zambrano* ruling, where the children already resided in Belgium at the time of the application, that does not mean that it is not possible that an application is made while the children reside outside the United Kingdom. It has been recognised in case law that the derivative residence right can also apply in entry cases.[1340] The regulatory implementation in the United Kingdom does not allow for such situations, and is therefore incomplete.

1339 Art 15A(4A) Immigration (European Economic Area) Regulations 2006 (UK).
1340 Council of State (07-03-2012) (n 1325).

However, placing the derived residence rights based on the *Ruiz Zambrano* ruling has its advantages as well. Applicants for a derived right of residence based on the *Ruiz Zambrano* ruling can make use of the EEA2 form for an application for a residence card. The administrative fee charged for this application is 55 GBP, which when compared to the fee of more than 600 GBP charged for 'regular' family unification applications, is relatively little.

10.5.2 Case law

When it comes to case law, there has been one ruling by the Court of Appeal and several rulings by the Upper Tribunal on the Zambrano doctrine. As of yet, there has been no case law from the Supreme Court. The ruling of the Court of Appeal is discussed below, as well as the most relevant case law of the Upper Tribunal.

The case of the Court of Appeal concerns two separate appeals which have been joined.[1341] Below the facts of the case are presented after which the ruling of the Court is analysed. The first of the joined cases concerns a Moroccan man who initially arrived in the United Kingdom in 1991 based on his marriage to a British citizen.[1342] After his marriage was dissolved and he was convicted for sexual assault, the applicant was deported to Morocco. He returned however illegally to the United Kingdom where he subsequently married a British national with whom he had two children, who acquired British citizenship. After the two children were born, the applicant was arrested after a domestic incident. He was placed in immigration detention for approximately one year pending his deportation. Since that time the applicant has been attempting to regularise his residence in the United Kingdom on several grounds, one of which is the derived residence right based on *Ruiz Zambrano*. The second of the joined cases concerns a Jamaican national who entered the United Kingdom on a short-term visa which he overstayed.[1343] He married a British citizen, with whom he had two children, who acquired British citizenship. Based on his family ties, the applicant acquired a permanent residence permit. However, he was arrested for drugs trade and the possession of a weapon, for which he was sentenced to seven years' imprisonment. After he had served his time in prison, the applicant faced deportation. The applicant attempted to regularise his residence status by claiming asylum. When this did not succeed, he relied on Article 8 ECHR and the derived residence right based on *Ruiz Zambrano*.

The Court of Appeal notes that in this case there is nothing to suggest that the British citizen children would be forced to leave the territory of the EU

1341 *Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736 (UK).
1342 Ibid paras 32-45.
1343 Ibid paras 46-54.

if their parent was deported.[1344] They could live in the United Kingdom with their mothers. The Court of Appeal emphasises that it was held in *Dereci* that adverse effects on the right to family life and the desirability of the presence of the non-EU citizen parent for economic reasons are in itself no factors which determine whether a derived right of residence exists.[1345] Accordingly, the Court of Appeal concluded that there is no derived right to reside in the United Kingdom based on the *Ruiz Zambrano* ruling. The Court of Appeal expressly stated that it is of the opinion that the interpretation of EU law in this situation is clear (*acte clair*), for which reason it is not necessary to refer questions for preliminary ruling to the CJEU.[1346] The applicants in this case additionally relied on Article 8 ECHR. The Court of Appeal concluded that the deportation of the applicants would not be in breach of Article 8 ECHR.

This ruling of the Court of Appeal clearly triggers the question of whether the derived residence right is absolute, or whether derogations on the derived residence rights are permissible, for example for public safety reasons. The Court of Appeal does not have to deal with this question, as it rules that there is no derived residence right in any way. But assuming that there would be a derived residence right, it would be interesting to see if the public order motivation which triggered the legislator to seek expulsion, the applicants in both cases had been criminally convicted for serious crimes, the public order question would be relevant in the context of the derived residence right based on *Ruiz Zambrano*. An argument can be made for both positions. On the one hand it could be argued that the right to reside within the territory of the EU has the same status as the right of free movement, as they are both based on Article 21 TFEU. If this reasoning is followed, it could be argued that in analogy the rules on deportation laid down in Directive 2004/38/EC should be followed, which makes it possible under certain conditions to expel an EU citizen. On the other hand, the argument can be made that the right (of a minor) to reside within the territory of the EU is more fundamental than the right to free movement, as it concerns not only the right to reside in another member state than the member state of which citizenship is held, but actually the right to reside in any member state. To force a minor EU citizen to leave the territory of the EU has more adverse effects on that minor, who cannot in any way be held responsible for the actions of the parents, than it would have for an EU citizen who would merely be limited in the right to exercise the free movement of persons. I would argue that the latter interpretation would do more justice to the enjoyment of the rights associated with the citizenship of the Union than the first. However, this remains an open question which is ultimately for the CJEU to decide.

1344 Ibid para 63.
1345 Ibid para 68.
1346 Ibid para 70.

Three cases of the Upper Tribunal are discussed below. The first case is a joined case of three appeals.[1347] In the appeal of *Sanade*, the Indian citizen father faces deportation after being sentenced to twelve months' imprisonment for indecent assault on a patient. He has a wife and two children who are all British citizens. The appeal of *Harrison* was discussed above in the Court of Appeal case.[1348] In the appeal of *Walker*, the applicant is a Jamaican national who is married to a British national with whom he has four children, three of which are still minor. He has never held a valid residence permit and was sentenced to five years' imprisonment for the possession of cocaine with the intention to sell it. The Upper Tribunal notes that in all cases the removal of the father would have a detrimental impact on the families, but would not have the effect that either the mother or the children would be required to leave with him.[1349] The British national children are not dependent on their father for their exercise of the genuine enjoyment of the rights associated with their status as EU citizens.[1350] In this particular case, the Upper Tribunal found that the deportation of the applicant in *Sanade* would amount to a violation of Article 8 ECHR, but that this was not the case in *Harrison* and *Walker*.[1351]

The second case discussed here concerns the Jamaican father of a British national child who seeks to enter to join the United Kingdom to live with his daughter.[1352] The applicant resided in the United Kingdom before when he overstayed his visa. He was sentenced to seven months' imprisonment after being arrested for the use of a false identity card. Subsequently he had to leave the United Kingdom. This case concerns his appeal against a refusal of his application to re-enter the United Kingdom. The Upper Tribunal notes that in principle the derived right to reside based on *Ruiz Zambrano* can also exist in entry cases. However, it rules that there is no derived right to reside in the United Kingdom in this case. The mother is able to take care of her children. Therefore the children would not be forced to leave the territory of the EU if their father was not allowed to enter.[1353] The fact that the mother had to give up her job in order to take care of the children might be detrimental, but is not sufficient to trigger the derived residence right.[1354]

The third Upper Tribunal case discussed here is a joined case of an Iranian mother and a Thai mother of British citizen children who are denied entry

1347 *Sanade and others (British children – Zambrano – Dereci) India* [2012] UKUT 48 (IAC) (UK) .
1348 *Harrison (Jamaica) v Secretary of State for the Home Department* (n 1341).
1349 *Sanade and others (British children – Zambrano – Dereci) India* (n 1347) para 89 .
1350 Ibid para 91.
1351 Ibid para 128.
1352 *Campbell (exclusion; Zambrano) Jamaica* [2013] UKUT 147 (IAC) (UK) .
1353 Ibid para 31.
1354 Ibid para 32.

to the United Kingdom.[1355] The first applicant is an Iranian citizen who is residing with a valid residence permit in Turkey. Her husband is a British citizen of Iranian origin who had been naturalised after receiving refugee status in the United Kingdom. Together they have a child, who obtained British citizenship. The child lives with her mother in Turkey, where the mother works as a qualified English translator. The husband visits his wife in Turkey regularly. He furthermore suffers from PTSD as a result of his experiences for which he was granted refugee status. This is confirmed by a United Kingdom based psychiatrist.

The second applicant is a Thai national who seeks entry to the United Kingdom to join her British citizen husband. The couple has two sons, who are both British citizens. The eldest lives with his father in the United Kingdom, the youngest lives with his mother in Thailand. The father is dependent on public funds for his income. He partly sends those benefits to Thailand, to support his family there. The father is a qualified electrician, but claims that he cannot find employment because he has to take care of his son and is therefore only available during the hours when his son is at school.

As to the first applicant, the Upper Tribunal accepted that the British citizen child would be deprived of the genuine enjoyment of the substance of the rights associated with his status as an EU citizen.[1356] It motivated this by the inability of the father to take care of the child without the support of the mother due to his psychiatric condition.[1357] Furthermore the Upper Tribunal ruled that the refusal of entry to the mother is in violation of Article 8 ECHR, because it is not in accordance with the law and the interference is not proportionate.[1358] As to the second appeal, the Upper Tribunal found that the father is able to take care of both sons in the United Kingdom, as he already takes care of one child.[1359] Therefore, there is no derived right to reside in the United Kingdom for the mother, as her British citizen children are not denied the enjoyment of the substance of the rights associated with their EU citizenship. However, on Article 8 ECHR grounds, the Upper Tribunal did grant a right of residence in the United Kingdom to the mother, as there is a compelling need for the family to be reunited in the best interests of the children.[1360]

These examples of the case law show that the judiciary in the United Kingdom does not extend what was established in *Ruiz Zambrano* and the subsequent case law of the CJEU. It does, however, take a realistic stance towards the question whether a British national child would be forced to leave the territory of the EU. In the case of the father suffering from PTSD, the Upper

1355 *MA and SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 380 (UK) .
1356 Ibid para 51.
1357 Ibid para 49.
1358 Ibid para 52 .
1359 Ibid para 56.
1360 Ibid para 76.

Tribunal accepted that he was not able to take care of his child. In this assessment it took the opinion of a medical specialist into account. A general point to be made about the United Kingdom case law on this issue is that if other instruments of family unification law are applied in a way which is protective of family ties, the relevance of the derived residence right based on *Ruiz Zambrano* diminishes. In other words, the more the legislator and judiciary make use of the ordinary family unification rules and the more applications are granted within the framework of Article 8 ECHR, the fewer the amount of children who would face the situation of being forced to leave the territory of the EU if a parent was forced to leave.

10.6 Analysis and conclusions

The implementation of the *Ruiz Zambrano* ruling and the subsequent case law of the CJEU varies greatly among the selected member states of this research. The main reason for this lies in the domestic legal frameworks on family unification. This dissertation has shown that there are fundamental differences between the family unification policies of the selected member states, both in the substantive protection of the right to family unification and in the way EU law is implemented. Furthermore there are huge differences in the legal culture relating to the relationship between applicant, legislature and judiciary. All these differences play a key role in the implementation of the derived right of residence based on *Ruiz Zambrano* and the subsequent case law of the CJEU.

One general conclusion is rather obvious: if a member state does not seek the expulsion of a parent of an own national, the derived residence right based on the *Ruiz Zambrano* ruling is never triggered and therefore not relevant.

A good example of this, to a certain extent, is Germany. In Germany, a right to family unification exists for a third-country national parent to join his German national child residing in Germany, even though this right is subject to admission requirements such as the income requirement. The possibility for family unification for the parents of a German child is based on the constitutional protection of the German national child, who should not be forced to leave the territory of Germany. Here lies an analogy with the *Ruiz Zambrano* doctrine, which is based on the same premise. A German national child should not be forced to leave Germany. This could be the case if a parent was denied residence. The *Ruiz Zambrano* doctrine works in exactly the same way for the EU territory.

The essential difference lies in the fact that in the derived residence right based on *Ruiz Zambrano* ruling, the presence of one parent is deemed sufficient to conclude that the child would not be forced to leave the territory of the EU as a whole. Within this very assessment lies the normative choice that a child can live without one of its parents. This reasoning is not present in the German example, and is, in my view, open to criticism. A central question

for me is why the CJEU would seek to limit the implications of *Ruiz Zambrano* and the subsequent case law in such a way that it would have the effect of still separating families.

The most probable answer is that the CJEU sought to limit the impact of its own case law. However in doing so, the CJEU in my view makes two fundamental errors of law. Firstly, it establishes that fundamental rights, such as the right to respect for family life, only plays a role after it is established that a child is forced to leave the territory of the EU. The Charter of Fundamental Rights is, according to the CJEU, only triggered upon the moment that it is established that an EU citizen would be forced to leave the territory of the EU in the event his family member was removed. This is, in my opinion, not in accordance with EU law. The assessment of whether a child would be forced to leave the territory of the EU is in itself a matter of EU law. Any other conclusion would be illogical: how could it be concluded that the assessment of whether a child would be forced to leave the territory of the EU, which is only relevant from the perspective of EU law, be a matter of domestic law? The overview of the cases analysed in this chapter has shown that the question of whether a child would be forced to leave the territory of the EU is not always crystal clear. In fact, it can be debated whether a child of a single parent would be forced to leave the territory of the EU if a grandparent, other family member, or even a public official would be able to take care of the child. Excluding fundamental rights from this assessment creates more legal questions than it answers, and can only be explained by the CJEU seeking political legitimacy for its rulings. Secondly, Article 3(1) of the UN Convention on Children's Rights and Article 24(2) Charter lay down that the best interests of the child should be a primary consideration in every action concerning children by, among others, courts of law and administrative authorities.[1361] In my opinion, when a domestic court is to evaluate whether a child would be forced to leave the territory of the EU as a whole, the best interests of the child must be a primary consideration. As the present domestic case law stands, the domestic courts do not take the best interests of the child into account in establishing whether a child would be forced to leave the territory of the EU.

An issue which was raised in Germany and the United Kingdom is how to deal with public order cases in which the third-country national parent of an own national minor child is facing expulsion after a criminal conviction or because compliance with the admission requirements has ceased. It must be concluded at this moment that the CJEU has never ruled on the protection against expulsion of persons who have a derived right of residence. An analogy with the protection against expulsion within the context of the CD could be made. However it is also feasible that domestic law on protection against expulsion should apply. In my opinion, considering that the derived residence

1361 See section 2.7.

right is partly based on the direct effect of Article 21 TFEU and that this is also the legal basis for the CD itself, protection against expulsion within the context of the derived residence rights should in fact be based on the CD. Any other reading would place holders of a derived residence right in a situation where there is less legal protection against expulsion than applicants within the scope of the CD. As the CJEU held that the right to reside within the territory of the EU is at the core of the rights associated with EU citizenship, such discrimination would not be justifiable.

A last point which should be mentioned here is that the domestic courts of the selected member states are reluctant to refer questions for a preliminary ruling to the CJEU. Within the context of this specific issue, in which there is a lack of clarity regarding the question when a child would in fact be forced to leave the territory of the EU, it is surprising that no questions on this specific issue have found their way to the CJEU from the member states selected for this research. The questions which were referred, in *McCarthy* and in *Iida*, concerned issues which are only slightly related to the core of the reasoning of the CJEU in *Ruiz Zambrano*.

PART III

Synthesis

11 Does a human right to family unification exist?

11.1 INTRODUCTION

The main research question addressed in this dissertation is whether a right to family unification exists and, if so, which elements does it comprise considering that the different legal systems involved have an affect each other. In order to address this question, the analysis has focused on international law, European law originating from the Council of Europe and from the European Union, and the domestic law of four selected member states. In each of the preceding chapters, a specific jurisdiction or a specific issue was addressed. The aim of this chapter is to bring together the findings of the various chapters in order to attempt to answer the research question.

This chapter is structured as follows. Firstly, based on the findings in part I of this dissertation, the question is answered whether a right to family unification exists in international and European law and what the sources and characteristics of this right are. Secondly, based on the findings in Part II of this dissertation, the manner in which obligations from international and European law are implemented in the domestic legal systems of the selected member states is summarised. Thirdly, three constitutive elements of the right to family unification which are common to the different legal systems analysed in this dissertation are identified. These three elements together form the core of the right to family unification as part of the more general right to respect for family life in the absence of an international instrument solely devoted to family unification and encompassing the different situations of family unification. The three elements are the principle of proportionality, the prohibition of discrimination and the rights of children. At the end of the chapter, attention is paid to the manner in which the different legal systems affect each other in order to demonstrate that even in the highly fragmented legal framework on family unification, a right to family unification does exist and is here to stay.

11.2 IS THERE A RIGHT TO FAMILY UNIFICATION IN INTERNATIONAL AND EUROPEAN LAW?

None of the investigated sources of international law contain an explicit right to family unification. However, this does not mean that international legal

instruments have no bearing on national family unification law and policy. This is mostly achieved through provisions which protect the family as such, without a specific focus on the transnational family. In the Universal Declaration of Human Rights, which is not a binding instrument of international law, the family is identified as the natural and fundamental group unit of society which is entitled to protection by society and the state. The Universal Declaration also contains a prohibition of arbitrary interferences in the right to respect for family life. The provisions relating to the family are repeated in the binding International Covenant on Civil and Political Rights (ICCPR) in a similar formulation. The Committee on Human Rights (HRC) oversees the implementation of the ICCPR and in both concluding observations as well as in individual decisions the HRC has commented on family unification cases. It has held in concluding observations that states must respect the principle of non-discrimination in their admission policies and that expulsions are an interference in the right to respect for family life which requires an objective justification. However, it has not as such attached a positive obligation to the right to respect for family life to admit foreign nationals for the purpose of family unification. Therefore, it can be held that the ICCPR does not contain a right to family unification as such. Neither do any of the other investigated sources of international law. In the more recent treaties, family unification is referred to explicitly. The Convention on the Rights of the Child (CRC) provides that states should process applications for family unification concerning children in a humane and expeditious manner.[1362] This provision is directed at the application procedure, and does not have any bearing on admission policies.[1363] Similarly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW) provides that states should facilitate family unification, but does not pose concrete obligations for admission policies. None of the member states of the EU, and therefore also none of the states selected for this research, are party to the ICPMW. As a conclusion it can be held that none of the analysed sources of international law contain a right to family unification, but they do place limitations on states when family unification policy is established.

The European Convention on Human Rights (ECHR) does, in particular circumstances, provide for a positive obligation for states to admit foreign nationals for the purpose of family unification. This is apparent from the analysis of the case law of the European Court of Human Rights (ECtHR). However, the ECtHR leaves the states a large margin of appreciation in their immigration policy. In fact, the ECtHR in each and every ruling concerning the admission of (family) migrants emphasises that the state has the right to control the entry of foreign nationals into its territory as this is a matter of

1362 Art 10 CRC.

1363 In section 11.5.3. the best interest of the child concept, as laid down in the CRC, is further discussed.

well-established international law. The only cases in which the ECtHR has held that the state is under a positive obligation to admit a foreign national for the purpose of family unification are cases which involve children. There are no cases of spousal family unification that have led to a violation of Article 8 ECHR, not even on procedural grounds. There has been case law which provides that the member states must respect the principle of equal treatment between men and women in their admission policy.[1364] However, the ECtHR did not apply this to discrimination based on the nationality of the foreign family member[1365] or of the sponsor.[1366] The case law of the ECtHR lacks consistency regarding the nature of the Article 8 ECHR test and regarding the weight which is given to the different elements in the balancing of interests. This is largely problematic and concerns the subsidiary role the ECtHR plays in protecting the rights laid down in the ECHR. This lack of consistency and coherence in the case law of the ECtHR makes it difficult for the national courts to apply the case law of the ECtHR in their domestic legal orders.

The law of the European Union provides for the most concrete rights to family unification of all the investigated sources of international law in this research. However, the right to family unification in EU law can be characterised as fragmented. Within EU law there are different legal regimes depending on the nationality of the sponsor. Initially, a right to family unification only existed within the context of the free movement of persons. This right to family unification was developed within the context of the internal market. The starting point was not fundamental rights, but rather that a denial of the right to family unification could deter the EU national sponsor from making use of his free movement of persons right. The Court of Justice of the European Union (CJEU) does refer to Article 8 ECHR in its case law relating to family unification within the context of the free movement of persons, but does not do so consistently. In the 1990s the EU acquired competence in the field third-country national immigration. This resulted in the adoption of Directive 2003/86/EC concerning the right to family unification (FRD). The FRD explicitly provides for a right to family unification for third-country national family members of third-country nationals who reside lawfully in a member state of the EU. This right is not absolute, but is limited to the conditions specified in the Directive. During the negotiations on the Directive, its scope was severely limited, for example in the sense that in the original Commission proposal immobile EU nationals were also included within the scope of the FRD. In the FRD there is a reference to the best interests of the child concept. In the (limited) case law of the CJEU on the FRD, the court consistently refers to Article 8 ECHR and Article 7 Charter. The EU family unification landscape is further fragmented by the fact that the FRD is not applicable in Denmark and the United

1364 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143).
1365 *Moustaquim v Belgium* (n 153).
1366 *Jeunesse v Netherlands (dec)* (n 333).

Kingdom. As home nationals are outside the scope of the FRD, the question arises whether the states may impose stricter requirements on their own nationals than on third-country nationals. So far, the CJEU has held that such reverse discrimination falls outside the scope of EU law. However, recently the CJEU has attached a right to family unification to the status of EU citizenship. It has held that the denial of residence rights to a family member of an EU citizen may not have the effect that the EU citizen will be forced to leave the territory of the EU as a whole. In assessing whether this is the case, the CJEU does not make any reference to human rights in general and to the best interests of the child concept in particular. The case law of the CJEU in this regard is problematic as it does not provide the legislatures and judiciaries in the member states with sufficient guidance on how the case law should be applied. This has resulted in several preliminary references, so far without the effect that more clarity is provided. The existence of different legal frameworks on family unification applying to different categories of sponsors creates a fragmented policy which causes and encourages applicants to make use of their free movement of persons right in order to fall under a different regime. Simply by moving to another member state a sponsor may circumvent stricter domestic family unification policies, thus circumventing the legitimate objectives these domestic policies may have. Similarly, within the context of EU citizenship and family unification, it may be beneficial to be part of a broken family in which the parents of an EU national have divorced rather than to be part of a family which is intact. This may create an unintended stimulus to break up the family in order to increase the chances of residence rights.

11.3 The implementation of international and European law in the selected member states

It is the task of the member state to implement all their obligations arising from international and European human rights law and EU law in their domestic legal systems. This task is being made even more difficult considering the political climate which is not favourable to immigration in general and family unification in particular. Therefore, national legislatures are balancing on a thin rope. On the one hand they may favour a strict family unification policy, for various reasons. On the other hand, they have to comply with international legal obligations. This creates tension which leads to diverging implementation patterns. A few trends are outlined here.

Firstly, the positive obligations arising from Article 8 ECHR seem to trigger a race to the bottom in some of the investigated member states (Denmark and the Netherlands) as the member states are implementing the minimum level of protection of Article 8 ECHR in their domestic legal system as the standard, while providing for a judicial counterbalance to strict legislative measures in the United Kingdom. In Denmark and the Netherlands, it is specifically out-

lined in legislation and regulations that family unification outside the core family is only allowed when a refusal would lead to a violation of Article 8 ECHR. As a result, these states explicitly seek to position their policy on the boundaries of what is allowed under international human rights obligations. The implicit message behind this seems to be that the legislatures in these states have the policy preference to go even further, but are limited in doing so by human rights obligations. In Germany this is not the case as the family unification policy there is framed within the domestic constitutional protection of family life. In the United Kingdom, the legislature seems to not only attempt to approach the boundaries of what is allowed under human rights law, but to actually cross these boundaries by laying down in legislation that no individual assessment is needed on whether a particular decision complies with human rights if the legislation as such does so. However, the judiciary has not accepted this reasoning. In the UK the judiciary arguably goes beyond what is required by Article 8 ECHR in scrutinising the actions of the legislature.

Secondly, in the implementation of the fragmented EU law on family unification, the member states legislatures attempt to restrict the scope of the EU rights. This is most apparent in the context of the free movement of persons. The United Kingdom for example does not recognise residence cards issued in other member states, effectively forcing third-country national family members to apply for an entry visa despite this not being allowed under EU law.[1367] The Netherlands does not automatically accept that an EU national sponsor has made use of his free movement of persons, even if another member state has issued a residence certificate. Instead, upon return to the Netherlands, the Dutch authorities independently investigate whether there has been a genuine and effective exercise of the free movement of persons. In Germany, there is the issue of marriages concluded in Denmark which do not constitute a sufficient link with EU law in order to fall within the scope of the free movement of persons. Denmark has precise administrative guidelines on what constitutes residence in another member state. Denmark was also one of the member states which implemented the prior lawful residence rule which was initially made possible by the CJEU but was later revoked by the same court.

In the context of the FRD, the fact that two of the selected member states have negotiated an opt-out of the FRD illustrates the politically sensitive context in which the FRD was negotiated. Furthermore, the FRD contains specific clauses enabling Germany to maintain some restrictive elements in its family unification law, which was a precondition for Germany to vote in favour of adopting the FRD. In the Netherlands, the legislature is actively attempting to approach the boundaries of what is allowed under the FRD. Together with Germany, the Netherlands still maintains a pre-entry integration exam, despite the many indications that such an exam is not in fact permissible under the FRD. The recent introduction of the one year waiting period is a clear indication that

1367 The CJEU ruled that this is incompatible with the CD in Case C-202/13 Sean McCarthy.

the Dutch legislature is using all options allowed under the FRD to make Dutch family unification policy more restrictive. This amendment was introduced even though the effect of the measure is minimal. One boundary the Dutch legislature is reluctant to cross, is the reverse discrimination of its own nationals. This issue is further elaborated upon in section 4 of this Chapter.

It is striking, though perhaps not surprising, that the fragmented nature of international family unification law results in fragmented national law. The structure of EU law is copied in the domestic legal systems, creating a two-tiered legal framework in which the appropriate legal norm depends on the nationality and migration history of the sponsor. Furthermore, the minimum level of protection provided for by Article 8 ECHR adds a third layer to the domestic legal framework.

The multi-layered domestic family unification legal framework is problematic from the perspective of individual applicants. Because of the intricate web of domestic and international law on family unification, it is difficult for applicants to fully grasp what their rights are and which procedures need to be followed. This makes it necessary for applicants in a non-standard application to consult expert legal advice before making an application. In the process of applying for family unification, many choices need to be made. A first complication is the factor of time. Applications for family unification can take a long time in all of the selected member states. A delay of a few months during which time a family cannot live together may already be a heavy burden for applicants. If the administrative authority rejects the application, legal remedies against refusals are often costly and lengthy. This makes it difficult for applicants to litigate against refusals. A good example of this is the age requirement on spousal unification imposed in all of the selected member states. When legal proceedings are started against a refusal of family unification based on non-compliance with the age requirement, the proceedings themselves may take so long that the age requirement is complied with before the end of the proceedings. This may explain why the ECtHR has never dealt with this issue until now. Another illustrative example is the family unification of dependent relatives in the ascending line. All of the selected member states have a very restrictive admission policy for this category. However, considering the difficult circumstances the applicants in these cases are in, it is often practically impossible to litigate against administrative refusals. In this way, the member states can avoid legal obligations by imposing procedural requirements which make it difficult for applicants to reach a fair outcome.

11.4 Elements of the right to family unification

The analysis has shown that the right to family unification as a part of the more general right to respect for family life has a highly fragmented nature involving multiple legal systems. However, there are a few elements which

are identified in this dissertation that apply to all the legal systems involved. Three elements have been identified which are a common theme in all the different jurisdictions which have been investigated. The first of these elements is the principle of proportionality. As the right to respect for family life, and thus also the right to family unification, is not an absolute right but subject to interferences and derogations, a balance must be found between the interests and policy objectives of states and the individual human right to family unification. In each of the different legal systems which have been investigated in the context of this dissertation, the principle of proportionality plays a central role in making this balance. The second element is the prohibition of discrimination. Even though immigration law is all about treating people according to their citizenship, states are required to respect different prohibitions of discrimination on various grounds and on different levels. The prohibition of discrimination plays an important role in each of the legal systems investigated and shapes the content of the right to family unification. The third element identified in this dissertation is the rights of children. Children often play an important role in applications for family unification as these often involve children in one way or another. The protection of the rights of the child plays a role in each of the investigated legal systems to some extent, whether it is explicit or implicit. These three elements are identified as being at the core of the human right to family unification and are analysed below.

11.4.1 The principle of proportionality

One of the central aspects of family unification law is that a balance should be struck between the individual interest of family unification and the general interest of pursuing an immigration policy. The maintenance of immigration control is all about selection. By imposing admission requirements, the member states select those persons who are eligible for family unification. When a requirement is not complied with, there is no right to family unification. The FRD prescribes that the member states should always take individual circumstances into account when making an administrative decision in an individual case.[1368] Furthermore, the principle of proportionality is a general principle of EU law that is expressly laid down in primary EU law.[1369]

In the *Chakroun* ruling, the CJEU held that in the implementation of the income requirement the member states may not use a reference amount below which all applications would be rejected.[1370] In *O., S. & L.*, the CJEU suggested that the non-compliance with the income requirement could not be decisive

1368 Art 17 FRD.
1369 Art 5 TEU.
1370 *Chakroun* (n 392).

for the final decision. Furthermore, the European Commission emphasises in its guidelines that a rejection of an application may not follow automatically from non-compliance with one of the requirements, as all individual circumstances must be considered.[1371] It considers this applicable to all requirements.

The principle of proportionality also plays an important role in the case law of the ECtHR. However, as was shown in Chapter 3, in admission cases the Court often uses the 'fair balance' test which does not contain an explicit proportionality test. Still, in determining whether a fair balance has been struck between the competing interests involved, implicitly the application of the proportionality principle is unavoidable. In the *Berrehab v. Netherlands* case, for example, the proportionality test played a crucial role. The Court considered that since the only reason the lawful residence of the applicant had ended was that he had got divorced, the expulsion of the applicant would be disproportionate to the legitimate aim pursued. In *Biao v. Denmark* the Court made reservations as to the proportionality of the attachment requirement in general, though it still held that in the individual circumstances of the case there was no violation of Article 14 in conjunction with Article 8 ECHR. The interesting thing about the assessment of the Court in this case is that it first looked at the proportionality of the general policy after which it applied this to the individual case at hand. In this way it made clear that although there is no violation in the particular case, the Danish attachment requirement does raise issues under Article 8 ECHR. The case has been referred to the Grand Chamber of the Court where a decision is currently pending.

A general problem for the member states is that the application of the proportionality principle is essentially a normative exercise. There is often a thin line between what is considered to be proportionate and what is considered to be disproportionate. The member states may impose requirements, but the application of the requirements may not have a disproportionate effect on the applicant. This creates a situation where the lawfulness of the administrative decision that is based on a general domestic policy that in turn is based on supranational legal norms depends on the effects the decision shall have on the applicant. This creates a circle which requires a lot of flexibility on the side of the domestic administrations. For the proper working of requirements for family unification, the working of these requirements should be laid down in domestic regulations. For example, the use of an income requirement makes it necessary to determine what level of income is required. The case law of the CJEU shows that it is not allowed to set a level of income under which applications would automatically be rejected. Instead, the member states may set a reference amount, as long as this does not imply that non-compliance

1371 COM(2014) 210 final (n 374).

with the reference amount means that an application would be automatically rejected.

In the context of the implementation of Article 8 ECHR, the proportionality principle plays an important role in the case law in the United Kingdom. In the other selected member states, the implementation of Article 8 ECHR is less explicit and the proportionality principle seems only to play a role in the background. In the United Kingdom, individual admission requirements, like the age requirements, are scrutinised by the judiciary making use of the proportionality principle enshrined in Article 8 ECHR. A measure interfering in the right to respect for private and family life must pursue a legitimate aim and the measure should be proportionate to the legitimate aim. In *Bibi & Quila*, the UK Supreme Court held that the age requirement of 21 years did not pursue the legitimate aim of the prevention of forced marriages as it was not substantiated that this was an effective measure to achieve this aim.[1372] The same reasoning has been applied to the income requirement.[1373]

This approach by the judiciary in the United Kingdom illustrates a complementary way in which the member states can implement their obligations under the proportionality principle. The proportionality test does not only consider circumstances of hardship in the situation of the applicant, but also the relationship between the proportionality of the measure and the legitimate aim. If the legitimate aim of a measure is to prevent forced marriages, then it must be established that imposing an age requirement is an effective measure to pursue this legitimate aim. If this is not the case, then any individual rejection of an application of family unification in which there is no forced marriage is not proportionate to the legitimate aim pursued. This is at the core of the *Bibi & Quila* ruling of the UK Supreme Court and also the reasoning behind the opinion of the European Commission that the age requirement should be applied in such a way that derogations can be made where it is evident that there is no forced marriage.[1374]

Proportionality refers to the assessment of whether a measure is necessary and effective in attaining a legitimate aim. The more general this aim is formulated, the more difficult it is to assess the proportionality of a measure which aims to contribute to the legitimate aim. Furthermore, as the proportionality principle occurs in different jurisdictions, the required test differs as well. This makes it difficult to formulate a uniform test to determine whether a particular measure is proportionate to the legitimate aim pursued. Measures denying the right to family unification in particular cases have a direct impact on the right to respect for the family life of an applicant. In both the context of the ECHR and, if applicable, EU law, it should be determined whether such a measure is proportionate to the legitimate aim pursued. In this proportionality

1372 *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* .
1373 *MM, R (On the Application Of) v The Secretary of State for the Home Department* .
1374 .

assessment, it is essential that the individual circumstances of the case are considered.

11.4.2 The prohibition of discrimination

Immigration law is by nature a field in which discrimination is inherent. Without discrimination based on citizenship, citizens of all states would be free to reside wherever they wanted. This is not the reality of the modern system of immigration law in which states are allowed to determine which foreign citizens are allowed entry and residence. However, when implementing this sovereign right, states are bound by international and European (human rights) law. The prohibition of discrimination is firmly rooted in international and European law. There are several international treaties which exclusively concern discrimination. In Chapter 2, the implications of the Convention on the Elimination of Discrimination against Women (CEDAW) and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) for the field of family unification law were investigated. It was found that although these Conventions do not impose a general obligation on states to allow for family unification, they do oblige states to refrain from discrimination in their domestic family unification policy. Although both of these conventions are of high authority, in European family unification practice there are regional treaties including a prohibition of discrimination which are of higher practical relevance.

Article 14 ECHR prohibits discrimination in the exercise of the rights protected by the ECHR. Article 14 ECHR has no meaning on its own; it must always be invoked in combination with another provision.[1375] In family unification cases, Article 14 is invoked in combination with Article 8. There is not much case law by the ECtHR on Article 14 in family unification cases. In the few cases that do exist, the Court is not consistent in the manner in which it determines whether the discrimination is justified. In *Abdulaziz, Cabales and Balkandali v. United Kingdom* the Court for the first time found a violation of Article 14 in combination with Article 8.[1376] The case concerned family unification rules in the United Kingdom which did provide for the family unification of foreign wives with husbands settled in the United Kingdom, but not for foreign husbands with wives settled in the United Kingdom. The ECtHR held that this form of discrimination on the grounds of sex was not justified. The Court did not find that the preferential treatment of some nationals amounted to indirect discrimination on the grounds of race. In later cases, the ECtHR found a violation of Article 14 in combination with Article 8 in cases concerning discrimina-

1375 Protocol 12 to the ECHR does provide for a self-standing prohibition of discrimination, but has yet been of little practical relevance. See section 3.5.

1376 *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 143).

tion on the grounds of being infected with Aids-HIV[1377] and immigration status.[1378] The Court did not find a violation in a case which concerned exemptions to an attachment requirement.[1379] In that case, the ECtHR seems to evade the conclusion that there is discrimination based on race or ethnic origin, as this would have meant a different justification test. An issue which in my opinion was not dealt with by the ECtHR in a satisfactory manner is discrimination resulting from the application of EU law. In *Moustaquim v. Belgium* the Moroccan applicant claimed he was discriminated on the grounds of citizenship because EU citizens in similar circumstances would not be expelled from Belgium while he was. The ECtHR justified this discriminatory treatment by holding that the EU is a special legal order. The Court did not consider the legitimate aim and proportionality of the discriminatory treatment. This approach of the Court is understandable to some extent. In *Abdulaziz, Cabales and Balkandali v. United Kingdom* the Court had already established that contracting parties may have preferential policies for certain nationals. The cooperation of different states in the context of the EU is in a way also a manner of granting preferential treatment to the citizens of certain states. In my opinion, however, the special legal order argument as a justification for discrimination is not open ended. The less proportional discrimination becomes, the more questionable the special legal order argument becomes. What if a member state decided not to allow for family unification anymore, except in the context of the free movement of persons? Would this influence the manner in which the ECtHR scrutinises the problem of discrimination originating from the preferential treatment within the context of EU law?

Turning to EU law itself, the prohibition of discrimination is a general principle of EU law and has a strong basis in both primary and secondary EU law. The prohibition is laid down in Article 21 Charter. The first paragraph of this provision prohibits discrimination on various grounds, mirroring Article 14 ECHR, while the second paragraph states that within the scope of EU law, any discrimination based on citizenship shall be prohibited. The latter provision specifically limits the scope of the absolute prohibition of discrimination on the grounds of citizenship to situations which are within the scope of EU law. Following the case law of the CJEU, this excludes discrimination based on citizenship in which there is no link with EU law. This means that EU law does not prevent member states from discriminating based on citizenship outside the scope of EU law. If a situation can be characterised as a purely internal matter, EU law does not apply and therefore the prohibition of discrimination on the grounds of citizenship in EU law cannot be invoked. This creates the problem which is referred to as reverse discrimination: home citizens residing in their home member state are discriminated against compared to other EU

1377 *Kiyutin v Russia* (n 309).
1378 *Hode and Abdi v United Kingdom* (n 317).
1379 *Biao v Denmark* (n 198).

citizens living in that member state.[1380] According to the CJEU, as this is not a matter of EU law, the prohibition of discrimination within EU law is not applicable and therefore applicants must have recourse to the prohibition of discrimination in domestic law. The present research has shown that reverse discrimination occurs in all four selected member states. In none of the selected member states did the judiciary held that the discrimination of home citizens compared to other EU citizens is not in accordance with the law. The bigger the difference between family unification law within and outside the scope of the free movement of persons becomes, the more questionable the reverse discrimination is, as the assessment of the proportionality of the discrimination depends on the degree of differential treatment.

The recent case law of the CJEU does not make the already complicated legal framework any clearer. In *Ruiz Zambrano* the CJEU has partly broken[1381] with the traditional purely internal situation approach, by attaching a right to family unification to the status of EU citizenship under the precondition that such derived right only exists if the consequence of refusal would be that an EU citizen would be forced to leave the territory of the EU.[1382] This is based on Article 21 TFEU, which states that EU citizens have the right to move and reside freely within the territory of the EU. The derived right of residence based on the *Ruiz Zambrano* ruling creates discrimination – not so much on the grounds of citizenship – but more on the grounds of being forced to leave the territory of the EU. Indirectly, however, this questions the purely internal situations approach in general. A central question is how it is determined whether a person is forced to leave the territory of the EU. The assessment whether this is the case is, in my opinion, a matter of EU law, as it is the right of the immobile EU citizen to move and reside freely within the territory of the EU on which the derived right of residence of third-country national family members is based. This, in turn, is a factor linking the situation with EU law, making the Charter applicable in the assessment of whether a person would be forced to leave the territory of the EU. In this situation, it cannot be maintained that there is no factor linking the situation with EU law. As the conclusion which follows is that the situation where the question is whether an EU citizen would be forced to leave the territory of the EU is within the scope of EU law, the prohibition of discrimination is applicable as well.

Somewhat similarly, in *S&G* the CJEU held that frontier workers who reside in their member state of citizenship but work in another member state fall within the scope of Article 45 TFEU and thus within the scope of EU law. Furthermore, also persons who reside and work in their member state of citizenship but who, in the course of their work, are involved in activities which involve travelling to and working in another member state are within

1380 Walter (n 761).
1381 .
1382 *Ruiz Zambrano* (n 39).

the scope of Article 45 TFEU. The proceedings concerned the question whether a third-country national family member has a derived right of residence based on the EU citizen who exercises free movement rights. According to the CJEU, the conclusion that the situations are within the scope of Article 45 TFEU does not automatically mean that a derived right of residence for the third-country national family member exists. For this to be the case, the EU citizen must be deterred in exercising the free movement rights if the family member is denied the right of residence. Although the CJEU left the determination of whether this is the case to the referring court, it hinted that this was not the case. However, in my opinion the fact that the CJEU rules that the situations are within the scope of Article 45 TFEU means that the prohibition of discrimination of Article 18 TFEU and Article 21(2) Charter are fully applicable. Therefore, the discrimination of such home citizens who fall within the scope of Article 45 TFEU as compared to other EU citizens residing in the member state concerned is not in accordance with the prohibition of discrimination in EU law.

These two examples are illustrative for the convulsive manner in which the CJEU deals with the issue of reverse discrimination. In an attempt to limit the implications of its own case law, the CJEU creates constructions which are open ended in the sense that they create more questions than they answer. The principle of the purely internal situations approach creates reverse discrimination where the member states do not hesitate to discriminate against their own citizens. The U-turn construction made possible by the CJEU in *Surinder Singh* and confirmed in *Metock* and *O & B* creates discrimination between home citizens who have made use of their free movement of persons and those who have not done so, and makes it possible to evade domestic family unification law by making use of the free movement of persons. The *Ruiz Zambrano* and *S & G* rulings challenge the main assumptions of the purely internal situations rule and, as shown above, raise questions on the applicability of EU law and therewith the prohibition of discrimination within EU law.

All these issues would not occur if the CJEU were willing to tackle reverse discrimination by itself. Admittedly, this would have profound implications. It would ultimately mean that home citizens may not be treated worse than EU citizens within the scope of the free movement of persons. For reasons relating to the legitimacy of the CJEU, it is understandable that the Court is unwilling to do so. On the other hand the CJEU does seek for solutions for situations which it deems undesirable, namely the non-applicability of free movement rights when returning to the home member state and minor children being forced to leave the territory of the EU if the parents are not granted the right of residence. In the *Ruiz Zambrano* case, AG Sharpston proposed a nuanced approach to limit reverse discrimination. Sharpston advocated a system in which reverse discrimination is not in accordance with EU law if the denial of residence rights would lead to a violation of fundamental rights. Fundamentally, this is mere patchwork which does not solve any theoretical problems. In any case, the member states are already bound by Article 8 ECHR,

creating the situation that there would never be a discussion of reverse discrimination. To illustrate this, if the *Ruiz Zambrano* parents would have a right of residence based on fundamental rights, in this case Article 8 ECHR, they would have such right without the consideration of the reversed discrimination. However, on the other hand, the proposal of Sharpston should get credit for attempting to deal with the core of the problem of reverse discrimination. The more serious the consequences of the reverse discrimination become, the less likely it would be that the discrimination is proportionate to the legitimate aim pursued. Therefore, by holding that EU law goes against reversed discrimination which has the effect that there is a violation of fundamental rights, it becomes less likely that in other situations, which would not result in a violation of fundamental rights, there would be a discrimination which is not proportionate to the legitimate aim pursued. Both the approach of the CJEU in *Ruiz Zambrano* and the proposal of Sharpston seem to look for a manner to deal with reverse discrimination without creating too large a precedent. Both solutions therefore do not systematically deal with the issue of reverse discrimination. It remains to be seen how the CJEU will deal with the implications of the *Ruiz Zambrano* and *S & G* rulings in the future. In my view, the proposal of Sharpston does more justice to the principle point that reverse discrimination is a problem than the solution of the CJEU in *Ruiz Zambrano*. But why not open the discussion of reverse discrimination more fundamentally? This can be done by either making sure that the protection of the right to family unification of EU citizens in their country of origin is at an equally high level as the protection of EU citizens who made use of their free movement of persons right, or by significantly lowering the protection provided to EU citizens who made use of their free movement rights. It must be clear that from the perspective of the human right to family unification, the first option is to be preferred over the latter.

Another issue is the preferential treatment of certain third-country nationals within the context of the FRD. All the member states operate the requirement that an application for family unification must be made in the country of origin. The Netherlands and Germany do exempt the citizens of certain states from this requirement. The United Kingdom also does so, but it is not bound by the FRD and the issue is therefore outside the scope of EU law. For the Netherlands and Germany, it must be noted that the issue concerning which place an application for family unification is made is harmonised by the FRD and is therefore within the scope of EU law. The question which arises is whether this discrimination is in accordance with Article 21(1) and Article 21(2) Charter.

There are two forms of discrimination which must be discussed. The first is direct discrimination on the grounds of citizenship. If the citizens of certain states are exempted from the application of the application abroad requirement while the citizens of other states are not, this constitutes direct discrimination based on citizenship. Discrimination on the grounds of citizenship is prohibited

under Article 21(2) Charter. The Explanations to the Charter provisions state that Article 21(2) Charter mirrors Article 19(2) TFEU and the Charter provision should be applied in compliance with the TFEU provision.[1383] There is much debate on whether Article 18 TFEU and therefore also Article 21(2) Charter are applicable to third-country nationals.[1384] The classic interpretation is that it is not. However it is argued that this issue deserves more attention.[1385] Furthermore the case law of the CJEU does not yet answer the question whether the prohibition of discrimination also applies to third-country nationals.[1386] Without further guidance of the CJEU it cannot be held whether the discrimination based on citizenship that is caused by the preferential admission schemes by the member states is in accordance with Article 18 TFEU and Article 21(2) Charter.

The second form of discrimination is indirect discrimination based on race or ethnicity. If the application abroad requirement affects more people of a certain racial or ethnic background this constitutes indirect discrimination on this ground. In *Abdulaziz, Cabales and Balkandali v. United Kingdom* the ECtHR held that the differential treatment did not indirectly discriminate based on race.[1387] However this ruling stems from 1985. Since then, the case law on indirect discrimination has developed significantly. There has been no case of the ECtHR specifically dealing with indirect discrimination based on race in the context of preferential admission policies. However, in other contexts the ECtHR has developed a strict approach to justifications for indirect discrimination based on race.[1388] It therefore remains to be seen how the ECtHR would deal with preferential treatment like was the case in *Abdulaziz, Cabales and Balkandali v. United Kingdom* considering the more recent case law on indirect discrimination based on race. In *Biao v. Denmark*, the ECtHR avoided having to deal with this issue. However that case has been referred to the Grand Chamber. It is yet unclear whether and how the Grand Chamber will deal with the complaint relating to indirect discrimination on the ground of race.

1383 Explanations Relating to the Charter of Fundamental Rights, *OJ 2007 C 303/02*.

1384 See C. Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009) 15 ELJ; Wiesbrock (n 27) p 167.

1385 K. Groenendijk, 'Citizens and third country nationals: differential treatment or discrimination?' in J. Carlier and E. Guild (eds), *The Future of Free Movement of Persons in the EU* (Bruylant 2006) p 84.

1386 This was argued in 2006 by Guild and Peers. Since then, no significant developments in this regard have taken place. See for discussion E. Guild and S. Peers, 'Out of the Ghetto? The personal scope of EU law' in S. Peers and N. Rogers (eds), *EU Immigration and asylum law* (Martinus Nijhoff Publishers 2006) p 110.

1387 *Abdulaziz, Cabales and Balkandali v United Kingdom* para 84-85.

1388 See for example *DH and others v Czech Republic* para 196.

11.4.3 The rights of children

Recently children's rights have become more and more relevant in the context of family unification law. The primary source for children's rights is the UN Convention on the Rights of the Child (CRC). The CRC does not contain an explicit right to family unification. However several of its provisions are directly relevant for family unification law. Article 10(1) CRC prescribes that member states should deal with applications for family unification involving children in a positive, humane and expeditious manner. Furthermore, Article 3(1) CRC lays down that the best interests of the child shall be a primary consideration. Several other provisions can be highlighted which could potentially be relevant for family unification law, including Article 2(2) which protects children from discrimination on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, Article 8(1) protecting the right to respect for identity including nationality and Article 9(1) obliging states to ensure that a child is not separated from its parents against its will. Even though the CRC nowadays does contain an individual complaint mechanism, the relevance of the CRC in the context of family unification law lies mostly in other jurisdictions becoming inspired by the CRC.

An important source of the right to family unification in which the CRC plays an increasingly important role is the case law of the ECtHR on Article 8 ECHR. Throughout the development of the case law on Article 8 and family unification, the interests of children played an important role. In fact all cases in which the ECtHR has held that a state is under a positive obligation to allow for the entry and residence of a foreign national concerned children. In the past decade, the best interests of the child concept has become more visible in the case law of the Court. In the *Neulinger and Shuruk v Switzerland* case, the Court explicitly referred to the best interests of the child concept as derived from Article 3(1) CRC in a case concerning the wrongful removal of a child. In *Nunez v. Norway* the ECtHR held that even though the offences committed by the applicant were very serious, considering the exceptional circumstances of the case the best interests of the child still opposed the deportation of the applicant by the Norwegian authorities. Even though since the *Nunez* judgment the Court has not been consistent in the manner in which it applied the best interests of the child concept, in *Jeunesse v. the Netherlands* the grand chamber of the ECtHR once again made the best interests of the child concept a central element in its finding of a violation of Article 8 in that case. It was shown in Chapter 3 that the procedure followed by the ECtHR in determining whether there has been a violation is not consistent. The ECtHR does not use a single method of including the best interests of the child in the Article 8 assessment. In *Rodrigues da Silva & Hoogkamer v. Netherlands* the ECtHR seems to place the best interests concept as an ordinary element in the fair balance test. However in *Nunez v. Norway* the Court uses the best interests concept after the ordinary assessment, when it determines whether exceptional circumstances occur. This

approach was also followed in *Antwi v. Norway* and *Kaplan v. Norway*. Lastly, in *Jeunesse v. Netherlands*, the ECtHR uses a different approach in which the best interests of the child is one of the four rather case-specific arguments why the Court, in the exceptional circumstances of the case, finds a violation of Article 8.

The inconsistency of the ECtHR in the Article 8 procedure in general and the manner in which the best interests of the child are taken into account in particular is problematic considering the subsidiary role the ECtHR plays in the protection of the rights laid down in the ECHR. Primarily, the contracting parties themselves must make sure the ECHR is respected in its own jurisdiction. When the ECtHR does not provide sufficiently clear guidance on the interpretation of Article 8 in family unification cases, it is difficult for the contracting parties to ensure sufficient implementation in domestic legislation, administrative practice and case law. This, together with the distinct domestic legal tradition with respect to the implementation of international (human rights) law, explains the widely differing implementation practices in the selected member states. In Germany, the domestic constitutional protection of the right to respect for family life is relatively strong, creating a situation in which it is not necessary to invoke ECHR rights. In the case law, reference is often made to the ECHR and other human rights instruments, but the case is dealt with on the basis of the domestic protection of fundamental rights. A good example of this is the principle that it cannot be expected of German national children to follow their family members to their country of origin. Based on this, the third-country national parent(s) of a German citizen child are eligible for family unification to Germany. This is different in the other member states. Denmark does operate a special system of judicial review for cases involving children, in which the domestic courts have more competences to scrutinise administrative decisions. Substantively however, children's rights play a marginal role in domestic case law. Especially with regard to the denial of the right to family unification of children aged fifteen and younger, the Danish policy on family unification is at odds with children's rights. Article 2 CRC lays down that the state parties to the Convention should respect and ensure the CRC without discrimination of any kind. Article 1 specifies that all persons below the age of eighteen are considered to be children. Besides the fact that the denial of family unification of children aged fifteen and older constitutes direct discrimination on the grounds of age, the denial of the right to family unification of this group does not comply with the obligation to deal with an application for family unification in a positive, humane and expeditious manner.[1389] In the *Osman v. Denmark* case this age requirement in fact resulted in a violation of Article 8 ECHR.[1390] In the Netherlands, children's rights play a marginal role in family unification law. The Council of State holds that the best

1389 Art 10(1) CRC.
1390 *Osman v Denmark* (n 250).

interests of the child concept should be taken into account by the administrative authority, but does not specify what weight should be attached to the best interests concept. This creates a situation in which in theory the best interests of the child concept is taken into account, but in practice the judicial scrutiny of this provision is so marginal that it does not play a major role in Dutch administrative case law. This is problematic, especially considering that the ECtHR has frequently found a violation of Article 8 ECHR.[1391] These cases illustrate the systematic shortcomings of Dutch family unification policy with regard to children's rights.

Admittedly, it is difficult to establish what is in fact in the child's best interests. At least Article 3(1) CRC requires states to determine in one way or another what the child's best interests are. A practice like in the Netherlands, in which it is unclear what role children's rights play, is hard to reconciliate with the best interests concept. In the United Kingdom, the Supreme Court has held that the best interests of the child implies that in the Article 8 ECHR balancing exercise no factor may in itself carry more weight than the bests interests of the child. This means that the best interests concept is not absolute, but that the state must have multiple arguments why deportation, although not in the child's best interests, is still justified. In ruling whether this is the case, the Supreme Court makes use of other CRC provisions. The Supreme Court holds that the best interests of the child concept should be interpreted using the right of the child to preserve his identity, including his nationality.[1392] According to the Supreme Court, the right of a British child to live in the United Kingdom should be taken into account when determining the child's best interests in the context of the balancing of interests in Article 8 ECHR.

Children's rights also play a role in EU family unification law, although this role is more difficult to grasp than in the context of Article 8 ECHR. The best interests of the child concept is enshrined in Article 24(1) Charter. Furthermore, Article 5(5) FRD lays down that the best interests of the child must be taken into account in applications for family unification. Unlike in the context of Article 8 ECHR, there is no possibility for individuals to directly litigate their case in front of the CJEU. Instead, national judges may, and in some instances must, refer questions for preliminary ruling to the CJEU. These questions concern the interpretation of EU law, and not so much the individual circumstances of the case. This makes it more difficult for applicants to challenge administrative authorities when they implement the best interests of the child concept in the context of family unification.

The *Ruiz Zambrano* case concerned the residence right of the third-country national parents of two Belgian children. The CJEU held that the denial of the

1391 *Sen v Netherlands* (n 189), *Rodrigues da Silva and Hoogkamer v Netherlands* (n 203), *Tuquabo-Tekle v Netherlands* (n 150), *Jeunesse v Netherlands* (n 240) .

1392 Art 8(1) CRC.

right of residence of the third-country national parents may not have the effect that the children are forced to leave the territory of the EU as a whole. It is, however, the status of EU citizens which was the decisive factor in this case, not so much the status of a child as a child. Children's rights in general and the best interests of the child concept in particular are not even mentioned by the CJEU. It seems that the CJEU wants to deal with the issue by invoking EU citizenship rights solely, keeping the fundamental and children's rights issues outside the equation. This position, as argued above, cannot be maintained in the long run. One of the basic assumptions under the *Ruiz Zambrano* doctrine is that children should stay with their parents. Otherwise, the *Ruiz Zambrano* children could have remained in Belgium in an alternative care facility. The CJEU clearly established that the children would be forced to leave the territory of the EU if their parents were denied the right of residence. This is a normative statement which goes beyond the notion of EU citizenship. In fact, it resembles the idea that children should not be separated from their parents against their will. This is laid down in Article 9(1) CRC. If the CJEU would take children's rights seriously it would accept that the *Ruiz Zambrano* doctrine relies on fundamental rights and that therefore fundamental rights, including children's rights, are fully applicable in the determination of whether a child is forced to leave the territory of the EU.

Another case in which the CJEU evaded dealing with children's rights was *Parliament v. Council*.[1393] In this case, the European Parliament challenged certain provisions in the FRD, one of which was the competence of member states to require children above the age of fifteen to comply with integration measures. The CJEU held that the provision did not oblige the member states to require this and therefore any fundamental rights issue which could occur would only happen through action of the member states. Therefore, according to the CJEU, the contested provision in the FRD was not in violation of fundamental rights. Although this reasoning is strictly correct, another approach would have been to argue that under children's rights, specifically Article 2(1) CRC, the member states may not make a distinction based on age for those children who fall within the personal scope of Article 1 CRC. The CJEU chose not to do so. With this, they missed the chance to concretise the role of children's rights in EU law.

One of the problems with the best interests of the child concept as enshrined in Article 5(5) FRD is that it is a horizontal clause which makes it difficult to derive concrete obligations for the member states from this provision, as the provision states that member states should have 'due regard' for the best interests of the child, without further specifying this obligation. In its interpretative guidelines, the European Commission has attempted to make the provision more concrete by giving examples on how the horizontal clause

1393 *Parliament v Council* (n 360).

could be implemented.[1394] The Commission for example encourages the member states to refrain from imposing administrative charges for an application for family unification of a child. Still, it remains difficult for the member states to know to what extent Article 5(5) FRD imposes any obligations.

The interpretation of Article 3(1) CRC in EU law, the case law of the ECtHR and in domestic law is largely incomplete. Only in the domestic context of the United Kingdom did the Supreme Court involve other provisions of the CRC in the assessment of the best interests of the child. Within EU law, there are different situations in which the best interests concept plays a role. It is remarkable to see that within the context that children's rights seem the most relevant, namely in the context of determining whether a child is forced to leave the territory of the EU, the best interests of the child concept does not play any role. The implementation of the best interests concept in the case law of the ECtHR can be characterised as procedurally inconsistent. In the case law of the ECtHR, different approaches to incorporating the best interests concept with the balancing exercise of Article 8 ECHR are used. In none of these approaches does the ECtHR refer to other provisions of the CRC. It must therefore be concluded that the incorporation of children's rights in family unification law across the different jurisdictions investigated in this research is chaotic. There is no uniform approach, which weakens the potential of children's rights in family unification law.

11.5 THE EXISTENCE OF THE HUMAN RIGHT TO FAMILY UNIFICATION IN A FRAGMENTED LEGAL FRAMEWORK

The right to family unification, as part of the more general right to respect for family life, does not have the solid basis of an international instrument which is solely devoted to it. Instead, it is shaped by different norms arising from different legal systems which together form the human right to family unification. As a result, the right to family unification has a complicated and fragmented legal framework, which lacks in legal certainty for applicants and states alike. The different legal systems which are involved at different hierarchical levels affect each other to a great extent, together shaping the right to family unification. This happens at different levels.

Firstly, norms from international law are invoked in the context of the ECHR and EU law. There is however no systematic use of international law in EU law and the ECHR. One of the most relevant international treaties in both EU law and the ECHR is the CRC. It was shown that the CRC is used in both EU law and the case law on Article 8 ECHR. It is however not used systematically. Even though it is acknowledged by the Committee on the Rights of the Child

1394 COM(2014) 210 final.

that Article 3 CRC on the best interests of the child should be interpreted in relation with the other provisions of the CRC, in both the context of EU law and the ECHR only Article 3 CRC is invoked, without any reference to the other provisions of the CRC. Instead, the ECtHR and the CJEU have their own interpretation of the best interests concept, without reference to the other provisions of the CRC. This shows that the manner in which the CRC is implemented in EU law and the ECHR is incomplete from the perspective of the CRC.

Secondly, norms from international law trickle down directly to domestic law. The analysis of the domestic law of the selected member states has shown that generally the member states are reluctant to invoke norms from international law in their domestic legal system. If again the example of the CRC is used, it was observed that in Denmark, Germany and the Netherlands the CRC plays a marginal role. There are different reasons for this, ranging from an adequate domestic protection to lacking implementation. In the United Kingdom the CRC does play an important role in case law. It was held by the UK Supreme Court that the best interests of the child, which is derived from Article 3 CRC in combination with another provision of the CRC, can lead to a situation in which a parent has the right to stay in the United Kingdom to reside with his child.

Thirdly, international and European human rights law affect the development of the right to family unification in EU law. The CJEU often refers to Article 8 ECHR in its rulings on family unification. It usually does so by making a reference to Article 8, without specifying how much weight is attached to it in the interpretation of EU law. It must, however, be noted that recently the CJEU seems to refrain from referring to Article 8 ECHR in a number of recent decisions. A good illustration of this is the ruling in *Ruiz Zambrano* and subsequent case law. In those cases the CJEU lays down that the essential question in EU law is whether an EU citizen is forced to leave the territory of the EU as a whole, and that outside the context of EU law the member state must ensure that fundamental rights obligations, like Article 8 ECHR are respected. In this manner, the CJEU seems to make a separation between EU and fundamental rights. This separation seems rather forced and is in my opinion only made to limit the potential implications of the case law. Also, in other recent rulings the CJEU did not refer to Article 8 ECHR, where this would have been possible. In *Noorzia*, on the question whether the age requirement for family unification should be complied with at the time of application or at the time the administrative decision, the CJEU held that the age requirement should be complied with at the time of application, without making any reservation with regards to Article 8 ECHR.

Fourthly and perhaps most prominently, EU law and the ECHR are implemented in the domestic legal systems. On the implementation of EU law in domestic law, most discussion focusses on the conditions placed on family unification. In the context of the FRD, one of the questions which arises is how much margin of appreciation the member states have in formulating substant-

ive requirements, such as income requirements, and what exactly integration measures may entail. However, the discussion on the existence of the right to family unification as such is not widely debated. Regarding the ECHR, the ECtHR grants the contracting parties a wide margin of appreciation. The procedure in which the ECtHR determines whether the state is under a positive obligation to allow for entry and residence is however unclear and inconsistent. This results in diverging implementation practices across the member states, partly the result of the inconsistence of the ECtHR, but partly also because of the specific characteristics of the member states concerning the implementation of international and European law in their domestic legal systems. The result of this is that the ECtHR is relatively frequently asked to rule on the compatibility of the refusal of family unification with Article 8 ECHR, and regularly finds violations. The analysis has shown that the state which has the strongest domestic protection of the right to respect for family life, Germany, is least involved in litigation before the ECtHR.

Fifthly, the right to family unification in the domestic legal systems is affected by policies and other developments in other domestic legal systems. There are a number of examples of this. Concerning integration measures, Germany was the first member state which imposed a language requirement in the context of immigration. Later the Netherlands followed and introduced it as a requirement for family unification. Germany also expanded the role of the integration abroad requirement to family unification policy. In Denmark, based on the Dutch and German example, the legislature first introduced such requirement in domestic law, but later scrapped it after it proved to be too expensive to implement. Also the United Kingdom has introduced language requirements which must be complied with prior to entry. Another example of how domestic legal systems influence each other is the age requirement, which was increased in all the selected member states except Germany. In all the member states which increased the age requirement, the argument that a higher age requirement is instrumental in fighting forced marriages is used, without providing any evidence for the effectiveness of this measure to this end. An explanation for this could be that the FRD expressly gives the member states the competence to do so with the objective of preventing forced marriages and promoting integration. These developments that a tightening of family unification policy in one member state may trigger the tightening of family unification policies in other member states, causing a potential race to the bottom as member states adopt their policies towards the minimum level of protection provided for by the ECtHR in its case law. In the member states in which the FRD is applicable, this serves as a minimum standard. The member states which are not bound by the FRD are not limited in setting substantive requirements and do go below what is required by the FRD.

The human right to family unification exists. Even though there is no general obligation in international law obliging member states to offer the possibility of family unification, all of the selected member states do so. The

right to family unification as a part of the more general right to respect for family life, is however under siege. The selected member states are actively exploring how they can limit the right to family unification within the boundaries of existing international, European and domestic law, instead of embracing the fundamental nature of this human right and actively protecting it. This trend is visible in all of the selected member states. In doing so, member states in some instances overstep their competence to regulate, limiting the right to family unification even if international, European or domestic law is violated. This creates violations of the human right to family unification, which puts family unification law under pressure. This is best visible in the case law of the European courts, which on the one hand shows restraint in its approach of scrutinising the immigration policies of the member states, but on the other hand identifies the minimum norms which should be respected by states. Even now when policy makers and legislators at the national level are attempting to limit the right to family unification, the existence of the right to family unification remains undisputed. The right to family unification is here to stay. The topic of legislative and judicial debate has become the conditions under which this right can be exercised. Unfortunately it is on the basis of specific characteristics in family unification policy that families are and remain separated. The human face of family unification should not be overshadowed by general immigration and integration policy considerations. The objective of family unification law should be to enable families to be together, not separated.

Samenvatting (Dutch summary)

HET RECHT OP GEZINSHERENIGING: TUSSEN MIGRATIEBEHEERSING EN MENSENRECHTEN

Dit onderzoek gaat over het recht op gezinshereniging. Om te onderzoeken of er een mensenrecht op gezinshereniging bestaat, wordt gekeken naar verschillende rechtsbronnen binnen het internationale recht. Daarnaast wordt in een rechtsvergelijking van de nationale regelgeving en jurisprudentie in vier lidstaten van de Europese Unie (EU) – Denemarken, Duitsland, Nederland en het Verenigd Koninkrijk – geanalyseerd of en hoe de internationale standaarden in het nationale recht worden geïmplementeerd. In deze studie wordt de Engelse term '*the right to family unification*' gehanteerd. Dit behelst zowel het recht op gezinshereniging van gezinsleden met wie de gezinsband al bestond in het land van herkomst van de gezinsmigrant, als gezinsvorming met gezinsleden met wie in het land van herkomst van de gezinsmigrant nog geen band bestond. In deze samenvatting zal telkens de term 'gezinshereniging' worden gebruikt. Hiermee wordt zowel 'gezinshereniging' als 'gezinsvorming' zoals hierboven beschreven bedoeld.

Inleiding

Hoofdstuk 1 is de inleiding tot de studie. Ten eerste wordt de aanleiding van de studie weergegeven. Het recht op eerbiediging van gezinsleven is een verworven mensenrecht. Het wordt als zodanig erkend in een aantal rechtsbronnen binnen het internationale recht en speelt het een belangrijke rol in de grondwettelijke tradities van de bestudeerde lidstaten. Er is echter geen internationaal verdrag over het recht op gezinshereniging. In plaats daarvan wordt in dit onderzoek het recht op gezinshereniging gezien als een aspect van het bredere recht op eerbiediging van gezinsleven. Het recht op gezinshereniging is een aspect van het recht op eerbiediging van gezinsleven dat specifiek gaat over migratie. Het doel van de studie is om een recht op gezinsherenging te construeren uit verschillende bronnen van internationaal, Europees en nationaal recht. Er is al veel onderzoek gedaan op het gebied van gezinshereniging. Het bestaande onderzoek beslaat verschillende afzonderlijke aspecten van het gezinsherenigingsrecht, zoals integratiemaatregelen als toelatingsvoorwaarde binnen het EU-recht. In dit onderzoek is de onderzoeksvraag of er een recht op gezinshereniging bestaat in het internationale en

Europese recht en het nationale recht van de voor dit onderzoek geselecteerde lidstaten. Daarnaast wordt bekeken uit welke elementen dit recht bestaat, omdat de verschillende rechtsstelsels waar het recht op gezinshereniging uit bestaat invloed op elkaar hebben. Het onderzoeksdomein is beperkt tot toelatingszaken. Hieronder wordt verstaan dat alleen situaties die gaan over de toelating van een vreemdeling als gezinsmigrant binnen de reikwijdte van het onderzoek vallen. Dit betekent echter niet dat alle zaken waarin een vreemdeling al aanwezig is buiten het onderzoek vallen; situaties en zaken die gaan over uitzetting, maar die gezien de omstandigheden feitelijk gaan over toelating – bijvoorbeeld zaken die gaan over de uitzetting van een vreemdeling die nooit een verblijfsrecht heeft gehad en daarom eigenlijk gaan over eerste toelating, worden als zogenaamde quasi-toelatingszaken toch bij het onderzoek betrokken. In deze studie wordt de functionele vergelijkingsmethode gehanteerd. Daarbij wordt gekeken naar de functie die de verschillende bepalingen en instrumenten van internationaal, Europees en nationaal recht hebben. Omdat het recht op gezinshereniging erg gefragmenteerd is – het bestaat uit verschillende instrumenten uit verscheidene rechtssystemen op verschillende hiërarchische niveaus – hebben sommige instrumenten die relevant zijn voor het recht op gezinshereniging niet als expliciet doel om een recht op gezinshereniging te creëren. Een goed voorbeeld hiervan is het recht op gezinshereniging dat is gekoppeld aan het vrij verkeer van personen. Het doel hiervan is om het vrij verkeer van EU-burgers te bevorderen. Het resultaat is echter dat het vrij verkeer van personen een belangrijke bron is voor het recht op gezinshereniging binnen het EU-recht. Aldus wordt in deze studie de functie van het recht op gezinshereniging dat is gekoppeld aan het vrij verkeer van personen bestudeerd. De rechtsvergelijking in deze studie kent verschillende dimensies. In Deel I worden verschillende instrumenten uit internationale en Europese mensenrechtenverdragen en het EU-recht onderzocht en met elkaar vergeleken. In Deel II richt de rechtsvergelijking zich op de manier waarop de mensenrechtennormen en EU-recht in de geselecteerde lidstaten is geïmplementeerd. De uitkomsten van deze verschillende rechtsvergelijkingen komen samen in Deel III, waarin de hoofdvraag over het bestaan van het recht op gezinshereniging en uit welke elementen dit bestaat wordt beantwoord. De studie beoogt niet om een uitgebreid onderzoek te doen naar de naleving van het nationale recht in de geselecteerde lidstaten. Dat wordt zijdelings besproken voor zover dit relevant is voor de vraag naar het bestaan en inhoud van het recht op gezinshereniging. De studie is om redenen van haalbaarheid beperkt tot vier lidstaten: Denemarken, Duitsland, Nederland en het Verenigd Koninkrijk. Aan de ene kant hebben deze lidstaten gemeen dat het gezinsherenigingsrecht in deze landen in ontwikkeling is waarbij de grenzen van het internationale en Europese recht worden opgezocht. Aan de andere verschillen de lidstaten van elkaar omdat in twee van de lidstaten de Gezinsherenigingsrichtlijn wel van toepassing is (Duitsland en Nederland), terwijl dit in de andere twee lidstaten niet zo is (Denemarken en het Verenigd Koninkrijk). De lidstaten worden

tegenover elkaar gezet om te bezien in hoeverre de Gezinsherenigingsrichtlijn relevant is voor het recht op gezinshereniging. De gezinsherenging van vluchtelingen ligt buiten het bereik van dit onderzoek.

Gezinshereniging binnen het internationale recht

Er is geen verdrag dat enkel gezinshereniging beslaat. In plaats daarvan zijn er een aantal verdragen die relevant zijn voor het recht op gezinsherenging, in meer of mindere mate. Deze verdragen worden besproken in Hoofdstuk 2 van de studie. In de niet bindende Verklaring van de Rechten van de Mens wordt het gezin als de meest natuurlijke en fundamentele groepseenheid in de samenleving geportretteerd. De Verklaring kent geen bepalingen die specifiek zien op gezinshereniging. Dit is ook zo voor het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten. Dit Verdrag is wel bindend en kent een bepaling die gaat over het recht op eerbiediging van gezinsleven. Deze bepaling is niet absoluut; inperkingen van dit recht van de staat zijn, mits gerechtvaardigd, geoorloofd. Het Mensenrechtencomité, dat toeziet op de naleving van het Verdrag, heeft al verschillende malen geoordeeld dat er sprake was van een schending van het Verdrag in zaken waarbij het is gegaan om de uitzetting van vreemdelingen met gezinsleven in de gaststaat. Het Comité is echter terughoudend met het aannemen van schendingen als het gaat om de uitzetting van vreemdelingen en heeft nog nooit een positieve verplichting tot toelating vastgesteld. Van de andere in dit hoofdstuk onderzochte verdragen is het Verdrag inzake de Rechten van het Kind het meest relevant voor het recht op gezinshereniging. Ook dit Verdrag kent geen bepaling waar een recht op gezinshereniging kan worden afgeleid. Wel verplicht het Verdrag de staten die partij zijn om aanvragen tot gezinshereniging met welwillendheid, menselijkheid en spoed te behandelen. Een ander belangrijk artikel in het Verdrag is de paraplubepaling die staten verplicht om bij alle maatregelen betreffende kinderen de belangen van het kind de eerste overweging te laten zijn. Ondanks het ontbreken van consensus is over de implicaties is het toch een belangrijke bepaling voor het recht op gezinshereniging. Het speelt bijvoorbeeld een voorname rol in de jurisprudentie over artikel 8 EVRM, die hieronder wordt besproken. De conclusie van het hoofdstuk is dat er weliswaar geen recht op gezinshereniging kan worden afgeleid uit de bestudeerde bronnen van internationaal recht, maar dat de verschillende verdragen op hun eigen manier relevant zijn voor het recht op gezinshereniging. Sommige verdragen bevatten een recht op eerbiediging van gezinsleven en hebben daarom een meer algemene werking, terwijl andere verdragen, zoals het Kinderrechtenverdrag en de anti-discriminatie-verdragen, een veel specifieker doel hebbenen daarom op een andere manier relevant zijn voor het recht op gezinshereniging.

Europees Verdrag voor de Rechten van de Mens

Een belangrijke bron voor het recht op gezinshereniging is artikel 8 EVRM, dat wordt besproken in hoofdstuk 3 van de studie. Al in de vroegste jurisprudentie van het Hof – het gaat dan enkel om ontvankelijkheidsbeslissingen – neemt het Hof het standpunt in dat het recht op eerbiediging van gezinsleven geen keuzevrijheid inhoudt over waar dit recht moet worden uitgeoefend. Uit artikel 8 EVRM kan daarom geen algemeen geldend recht op gezinshereniging worden afgeleid. Altijd moet worden beoordeeld of gezinsleven elders, bijvoorbeeld in het land van herkomst van de vreemdeling, mogelijk is. Als dat het geval is, is er geen sprake van een schending van artikel 8. In de afgelopen twintig jaar is deze standaardbenadering van het Hof steeds vaker onder druk komen te staan. Het Hof is niet consistent in haar manier van toetsing. Omdat het recht op eerbiediging van gezinsleven geen absoluut recht is, mogen staten dit inperken. Een inmenging in het recht op eerbiediging van gezinsleven is echter alleen toegestaan als dit gerechtvaardigd is. Artikel 8 lid 2 EVRM voorziet in een rechtvaardigingstoets. Volgens de jurisprudentie van het Hof is deze toets enkel van toepassing op het moment dat er een inmenging is in het recht op gezinsleven. Dit is het geval wanneer het bestaande verblijfsrecht van een vreemdeling wordt beëindigd. Als het niet gaat om verblijfsbeëindiging maar om toelating, neemt het Hof niet aan dat er een inmenging is. In plaats daarvan is het in die situatie de vraag of de staat onder een positieve verplichting is om een vreemdeling toe te laten. Bij de toetsing of er daadwerkelijk een positieve verplichting bestaat maakt het Hof geen gebruik van de toets van artikel 8 lid 2 EVRM, maar hanteert het de '*fair balance*'-toets. Deze toetst behelst dat er een balans moet worden gevonden tussen het belang van de staat en het belang van de vreemdeling. De staat heeft hierbij een ruime beoordelingsmarge. Echter is het onderscheid tussen inmengingen en positieve verplichtingen moeilijk te maken. Is het bij de uitzetting van een persoon die al gedurende lange tijd in de staat verblijft zonder verblijfsrecht nou de vraag of er sprake is van een inmenging, of dat er sprake is van een positieve verplichting? Het Hof kiest voor het laatste, waarbij het aantekent dat het niet veel uitmaakt omdat er in beide gevallen toch een belangenafweging plaats moet vinden. Dit is op zich wel waar, maar uit de jurisprudentie blijkt dat er uit de *fair balance*-toets slechts in een zeer beperkt aantal gevallen een schending van artikel 8 wordt geconstateerd. Het beschermingsniveau ligt bij positieve verplichtingen dan ook aanzienlijk lager dan bij inmengingen. Tot voor kort heeft het Hof nooit een schending gevonden in een situatie dat gezinsleven ook mogelijk was in het land van herkomst van de vreemdeling. Dat deed het Hof wel in de recente uitspraak in *Jeunesse t. Nederland*. In die uitspraak is ook een andere tendens zichtbaar. In de afgelopen jaren heeft het Hof steeds vaker en explicieter verwezen naar het belang van het kind als een onderdeel van de belangenafweging onder artikel 8 EVRM. In de uitspraak in *Nunez t. Noorwegen* was het belang van de kinderen zelfs zo zwaarwegend dat het heeft

opgewogen tegen de migratiefraude gepleegd door de moeder van de kinderen. In de studie wordt gepleit voor meer consistentie in de artikel 8 toets. Dit is van belang omdat artikel 8 EVRM in de het nationale recht van de staten die partij zijn bij het Verdrag moet worden geïmplementeerd. Onduidelijkheid in de interpretatie van artikel 8 door het Hof bemoeilijkt deze implementatie. Een mogelijke oplossing zou kunnen zijn om ook in de context van toelatingszaken en wat daarvoor doorgaat de rechtvaardigingstoets toe te passen. Betoogd wordt dat dit niet zozeer tot een hoger beschermingsniveau hoeft te leiden – een factor als illegaal verblijf kan immers zwaar meewegen in de test en de beoordelingsvrijheid die aan de lidstaten wordt gehouden kan afhankelijk zijn van de omstandigheden van de zaak – maar dat dit er wel toe zou leiden dat er meer duidelijkheid komt over de manier waarop in toelatingszaken aan artikel 8 wordt getoetst.

Een andere relevante bepaling uit het EVRM voor het recht op gezinshereniging is artikel 14 EVRM, dat discriminatie in de uitoefening van de rechten vastgelegd in het EVRM verbiedt. Uit verschillende uitspraken blijkt dat artikel 14 staten beperkt in het voeren van een gezinsmigratiebeleid. Zo moest het Verenigd Koninkrijk eind jaren '80 ook de gezinshereniging van de echtgenoten van vrouwen gevestigd in het Verenigd Koninkrijk toestaan en mocht het geen zwaardere eisen stellen aan de gezinshereniging van vluchtelingen dan het stelde voor de gezinshereniging van andere categorieën migranten.

EU-recht

Het EU-recht op gezinshereniging is gefragmenteerd. Er zijn verschillende regimes binnen het EU-recht die van toepassing zijn in verschillende situaties.

Het instrument binnen het EU-recht dat is gericht op de gezinshereniging van derdelanders naar derdelanders die al rechtmatig verblijf hebben in een lidstaat is de Gezinsherenigingsrichtlijn. Deze Richtlijn is niet van toepassing op EU-burgers die in hun eigen lidstaat verblijven. De Richtlijn voorziet in een recht op gezinshereniging waar aanspraak op kan worden gemaakt als aan de voorwaarden gesteld in de Richtlijn is voldaan. Dit maakt de Gezinsherenigingsrichtlijn het enige internationale instrument waar direct een recht op gezinshereniging uit kan worden afgeleid. De onderhandelingen van de Gezinsherenigingsrichtlijn zijn een moeilijk proces geweest waarin de Europese Commissie verder wilde gaan dan de lidstaten. Het resultaat is een Richtlijn waarin aan de wensen van de lidstaten tegemoet is gekomen. Mede om die reden is de Richtlijn niet van toepassing op EU-burgers die in hun eigen lidstaat wonen. Het Hof van Justitie van de EU heeft in een aantal uitspraken nadere invulling gegeven aan de Richtlijn. In de uitspraak in de zaak *Chakroun* oordeelde het Hof dat de Nederlandse inkomenseis voor gezinshereniging te hoog was. Het stelde dat gezien het doel van de Richtlijn, namelijk de bevordering van gezinshereniging, alle voorwaarden die de lidstaten mogen stellen aan dit recht restrictief moeten worden geïnterpreteerd. De Europese Commissie

heeft in 2012 Richtsnoeren uitgevaardigd over de uitleg van de Gezinsherenigingsrichtlijn.

Buiten de Gezinsherenigingsrichtlijn is er ook een recht op gezinshereniging verbonden aan het vrij verkeer van personen. Geboren uit de redenering dat een EU-burger niet mag worden belemmerd in zijn vrijheid om zich in een andere lidstaat te vestigen strekt het recht op vrij verkeer van personen zich ook uit tot de gezinsleden van de EU-burger, ook als die zelf geen EU-burger maar derdelander zijn. Dit is vastgelegd in de Burgerschapsrichtlijn. In deze Richtlijn zijn de voorwaarden voor de uitoefening van het recht op vrij verkeer van personen opgenomen. Deze voorwaarden slaan op de EU-burger en niet op zijn gezinsleden. De EU-burger die gebruik wil maken van zijn vrij verkeer van personen moet in de lidstaat waar hij wil verblijven werknemer dan wel zelfstandige zijn, voldoende bestaansmiddelen hebben om geen beroep te hoeven doen op het stelsel van sociale bijstand van de gastlidstaat of student zijn. Op het moment dat de EU-burger aan deze voorwaarde voldoet, bestaat het verblijfsrecht ook voor zijn gezinsleden, ongeacht hun nationaliteit. Op het moment dat de EU-burger, nadat hij gebruik heeft gemaakt van het recht op vrij verkeer en zich in een andere lidstaat heeft gevestigd met zijn gezinsleden, terugkeert naar zijn eigen lidstaat, krijgen zijn gezinsleden ook verblijfsrecht in die lidstaat. Dit staat niet in de Burgerschapsrichtlijn, maar wordt door het Hof rechtstreeks afgeleid uit het EU-Werkingsverdrag.

Ook in een aantal andere gevallen kan er uit het EU-Werkingsverdrag een recht op gezinshereniging worden afgeleid. Volgens het Hof in *Ruiz Zambrano* mag een EU-burger niet worden gedwongen om het grondgebied van de EU te verlaten. Dit is het geval wanneer de ouder(s) van een minderjarige EU-burger uit de EU worden gezet. Het EU-burgerschap van het kind verzet zich hiertegen. Het is onduidelijk hoe precies moet worden vastgesteld onder welke omstandigheden een minderjarige EU-burger precies wordt gedwongen om de EU te verlaten als zijn ouder(s) het verblijfsrecht wordt ontzegd, zeker als er één ouder is die derdelander is terwijl de andere ouder net als het kind een EU-burger is. Het Unierecht is, buiten de laatst genoemde *Ruiz Zambrano*-situaties, niet van toepassing op EU-burgers die in hun eigen lidstaat wonen en die niet eerder gebruik hebben gemaakt van het recht op vrij verkeer. Zij bevinden zich in een zogenaamde puur interne situatie waarin enkel het nationale gezinsherenigingsrecht op van toepassing is. Wel kunnen zij, door gebruik te maken van het recht op vrij verkeer, naar een andere lidstaat verhuizen waardoor ze onder een ander, vaak minder streng, regime komen te vallen. Dit fenomeen wordt ook wel de Europa-route genoemd.

Uit dit overzicht blijkt dat er verschillende vormen van EU-recht zijn waarin een recht op gezinshereniging bestaat. Welk rechtsregime precies van toepassing is hangt af van de nationaliteiten van de betrokkenen en de andere omstandigheden van het geval. Het gefragmenteerde karakter van het EU-gezinsherenigingsrecht zorgt voor een onduidelijk en slecht-inzichtelijk juridisch landschap, waardoor het voor vreemdelingen moeilijk kan zijn om een

goed overzicht te krijgen van de voorwaarden en procedures van de verschillende regimes.

Structuur van het nationale gezinsherenigingsrecht

Nadat in de voorgaande hoofdstukken verschillende rechtsbronnen uit het internationale en Europese recht zijn besproken, begint in Deel II van de studie de rechtsvergelijking van het nationale recht van de geselecteerde lidstaten. In Hoofdstuk 5 wordt de structuur van het nationale gezinsherenigingsrecht besproken met als doel om inzichtelijk te maken op welke manier de structuur van het nationale recht van invloed is op het recht op gezinshereniging. Er wordt hierbij voor elk van de geselecteerde lidstaten gekeken naar het systeem van het immigratierecht, de status van het internationale en Europese recht in het nationale recht van de lidstaten, de positie van gezinshereniging binnen het immigratierecht en de aanvraagprocedure. De geselecteerde lidstaten hebben verschillende rechtstradities en kennen verschillende manieren waarop het recht op gezinshereniging in het nationale recht is gecodificeerd. Een aantal zaken vallen op in de rechtsvergelijking. In alle geselecteerde lidstaten bestaat een recht op gezinshereniging. In Denemarken en Nederland wordt het weliswaar geformuleerd als een discretionaire bevoegdheid van de verantwoordelijke bewindspersoon, maar in de praktijk moet deze gezinshereniging toestaan als aan de voorwaarden gesteld in het nationale recht wordt voldaan. Het feit dat Denemarken en het Verenigd Koninkrijk niet gebonden zijn aan de Gezinsherenigingsrichtlijn betekent geenszins dat er geen recht op gezinshereniging bestaat in deze lidstaten. Van alle geselecteerde lidstaten is de grondwettelijke bescherming van gezinsleven in Duitsland het sterkst.

De definitie van het gezin

In Hoofdstuk 6 van de studie wordt de definitie van het gezin in de verschillende lidstaten en onder de verschillende EU-rechtelijke regimes besproken. Eerst wordt ingegaan op de definitie van het gezin in de context van het vrij verkeer van personen en daarna wordt gekeken naar de definitie van het gezin in de context van de Gezinsherenigingsrecht. Bij deze laatste worden ook de nationaalrechtelijke regels in Denemarken en het Verenigd Koninkrijk besproken, als is de Gezinsherenigingsrichtlijn daar niet op van toepassing. Telkens wordt ook het relevante EU-recht kort besproken. De Burgerschapsrichtlijn definieert het gezin als de echtgenoot en de geregistreerde partner indien in de lidstaat een geregistreerd partnerschap eenzelfde status heeft als een huwelijk, kinderen van zowel de referent als de gezinsmigrant die jonger zijn dan 21 jaar, afhankelijke gezinsleden in opgaande lijn. Daarnaast bestaat de verplichting om gezinshereniging van ongehuwde partners en andere afhankelijke gezinsleden als gezinslid te faciliteren, als is het onduidelijk wat deze verplichting precies inhoudt. Voor wat betreft de implementatie van de definitie van

het gezin in de geselecteerde lidstaten blijkt dat de lidstaten zich grotendeels houden aan in de Richtlijn neergelegde normen. Duitsland beschouwt dat in het nationale recht geregistreerde partnerschappen geen gelijkwaardige status hebben in vergelijking met een huwelijk, maar laat toch gezinsherenging van ongehuwde partner binnen de Burgerschapsrichtlijn toe waardoor het effect van deze gebrekkige implementatie gering blijft. In Denemarken worden ongehuwde partners gelijkgesteld aan gehuwde partners, waarmee Denemarken verder gaat dan de Richtlijn gebied.

De definitie van het gezin wordt is ruimer in de Burgerschapsrichtlijn dan in de Gezinsherenigingsrichtlijn. Zowel referent als gezinsmigrant moeten derdelander zijn om binnen het bereik van de Richtlijn te vallen. Het gezin bestaat volgens de Gezinsherenigingsrichtlijn uit echtgenoten en kinderen van de referent en de gezinsmigrant die jonger zijn dan 18 jaar. Andere gezinsleden, namelijk ongehuwde partners, afhankelijke kinderen van de referent en de gezinsmigrant die ouder zijn dan 18 jaar en afhankelijke gezinsleden in opgaande lijn worden wel in de Richtlijn genoemd, maar vallen onder het facultair regime, wat wil zeggen dat de lidstaten wel gezinshereniging toe mogen staan aan deze categorieën van gezinsleden, maar niet de verplichting hebben om dit te doen. De lidstaten waar de Gezinshereniging van toepassing is, volgen de verplichtende bepalingen uit de Richtlijn. Hierbij laat Nederland ook gezinshereniging toe aan ongehuwde partners, waar Duitsland dit niet doet. In de lidstaten waar de Richtlijn niet van toepassing is valt op dat het Verenigd Koninkrijk de eis stelt dat gehuwde partners elkaar moeten hebben ontmoet voordat ze in aanmerking kunnen komen voor gezinshereniging. In zowel Denemarken als het Verenigd Koninkrijk bestaat een recht op gezinshereniging voor ongehuwde partners, waarmee deze lidstaten verder gaan dan de Gezinsherenigingsrichtlijn, die niet op hen van toepassing is. Alle lidstaten hebben in hun nationale recht een bepaalde hardheidsclausule waardoor gezinshereniging toch mogelijk is ook al valt het betreffende gezinslid buiten de reguliere definitie van het gezin. Wat opvalt is dat in Duitsland deze hardheidsclausule voornamelijk is gebaseerd op het nationale recht, waar dit in Denemarken en Nederland sterk leunt op internationale verplichtingen zoals artikel 8 EVRM.

Er zijn binnen het EU-recht derhalve twee verschillende definities van het gezin die van toepassing zijn op verschillende situaties. De definitie van het gezin binnen de Burgerschapsrichtlijn is veel ruimer dan die in de Gezinsherenigingsrichtlijn. Omdat de definitie van het gezin in zowel Nederland als in Duitsland voor Nederlandse respectievelijk Duitse referenten grotendeels gelijk is getrokken aan de implementatie van de Gezinsherenigingsrichtlijn die enkel van toepassing is op derdelanders, kan het voor eigen onderdanen lonen om gebruik te maken van het vrij verkeer van personen om zodoende onder de ruimere definitie te vallen en bijvoorbeeld gezinshereniging mogelijk te maken van kinderen tussen de 18 en 21 jaar en afhankelijke gezinsleden in opgaande lijn.

Substantieve voorwaarden voor gezinshereniging

Naast de definitie van het gezin wordt in de studie ook gekeken naar de voorwaarden waaronder een recht op gezinshereniging bestaat. Dit gebeurt in Hoofdstuk 7. Eerst worden de voorwaarden uit de Burgerschapsrichtlijn met de nationale implementatie daarvan besproken, daarna volgt hetzelfde voor de Gezinsherenigingsrichtlijn.

Bij de Burgerschapsrichtlijn valt op dat de voorwaarden betrekking hebben op de referent, die een recht heeft op verblijf van langer dan drie maanden in een andere lidstaat als hij werknemer of zelfstandige is, voldoende bestaansmiddelen heeft om geen beroep te hoeven doen op het stelsel van sociale bijstand of student is. Op het moment dat de referent aan één van deze voorwaarden voldoet bestaat er een afgeleid verblijfsrecht voor zijn gezinsleden ongeacht hun nationaliteit. De lidstaten mogen geen nadere voorwaarden stellen aan gezinshereniging. Daarbij komt ook dat het Hof van Justitie van de EU de bovenstaande voorwaarden voor de referent erg ruim uitlegt. Een persoon wordt bijvoorbeeld al geacht werknemer te zijn in de zin van de Burgerschapsrichtlijn als hij een parttime baan heeft. Ook al laten de lidstaten zich bij tijd en wijle sceptisch uit over de gevolgen van het vrij verkeer van personen – vooral Nederland en het Verenigd Koninkrijk laten op dit vlak regelmatig van zich horen, toch worden de verplichtingen grotendeels nageleefd en worden er geen nadere voorwaarden gesteld.

Hoe anders is het gesteld met de Gezinsherenigingsrichtlijn. In deze Richtlijn hebben de lidstaten de bevoegdheid om voorwaarden te stellen op het gebied van leeftijd, huisvesting, ziektekosten en inkomen en mogen ze integratiemaatregelen opleggen aan de gezinsmigrant. Uit hoofde van de Richtlijn mag een lidstaat eisen dat zowel de referent als de gezinsmigrant de leeftijd van 21 jaar hebben bereikt. In Nederland wordt dit leeftijdsvereiste ook daadwerkelijk gesteld. In Duitsland ligt de leeftijdseis op 18 jaar. In Denemarken, waar de Richtlijn niet van toepassing is, wordt een leeftijdseis van 24 jaar gehanteerd. Het Verenigd Koninkrijk heeft ook een periode een leeftijdseis van 21 jaar gehanteerd, maar is teruggefloten door haar eigen hoogste rechter die dit strijdig met artikel 8 EVRM achtte. Ook op het gebied van het inkomensvereiste lopen de lidstaten erg uiteen. De Richtlijn laat een inkomensvereiste toe dat ervoor zorgt dat de referent en de gezinsmigrant geen beroep hoeven te doen op het stelsel van sociale bijstand. Nederland is in de *Chakroun* uitspraak van het Hof van Justitie van de EU teruggefloten toen het een te hoog inkomensvereiste hanteerde. Het hoogste inkomensvereiste bestaat momenteel in het Verenigd Koninkrijk, waar na een herziening van het gezinsmigratiebeleid het inkomensvereiste drastisch is verhoogd. Het Verenigd Koninkrijk kan dit doen omdat het niet geboden is aan de Gezinsherenigingsrichtlijn. Een laatste veel bediscussieerde toegangsvoorwaarde zijn integratiemaatregelen. Nederland en Duitsland hanteren het vereiste dat een gezinsmigrant in het land van herkomst een inburgeringsexamen af moet leggen. Toekomstige

jurisprudentie van het Hof moet uitwijzen of dit in overeenstemming is met de Richtlijn. Naast deze toelatingsvoorwaarden stelt Denemarken ook de eis dat de gezamenlijke band van de referent en de gezinsmigrant met Denemarken groter moet zijn dan de gezamenlijke band met het land van herkomst van de gezinsmigrant. Deze eis kan het stellen omdat het niet geboden is aan de Gezinsherenigingsrichtlijn, maar omdat dit vereiste niet van toepassing is op personen die al meer dan 28 jaar de Deense nationaliteit hebben moet nog blijken of het bindingsvereiste in overeenstemming is met artikel 14 EVRM.

In het kader van de Gezinsherenigingsrichtlijn mogen de lidstaten veel meer voorwaarden stellen aan gezinshereniging dan in het kader van de Burgerschapsrichtlijn. De lidstaten die helemaal niet geboden zijn aan de gezinsherenigingsrichtlijn zijn vrij om strengere en andere voorwaarden te stellen dan in de Richtlijn is toegestaan. Dit alles maakt het voor EU-burgers in hun eigen land aantrekkelijk om, indien zij niet kunnen voldoen aan de nationale voorwaarden voor gezinshereniging, gebruik te maken van het vrij verkeer van personen om op die manier onder het minder strenge regime te vallen. Op deze manier kunnen de toegangsvoorwaarden worden omzeild. Dit is een doorn in het oog van de lidstaten, die bepaalde beleidsdoelstellingen hebben bij het stellen van toelatingsvoorwaarden. Als de voorwaarden tamelijk gemakkelijk kunnen worden omzeild komen deze beleidsdoelstellingen in het gevaar. Aan de andere kant biedt het personen die om bepaalde redenen niet kunnen voldoen aan de toelatingsvoorwaarden toch de mogelijkheid om in aanmerking te komen voor gezinsherenging. Hiermee is de Burgerschapsrichtlijn, al is deze niet specifiek gericht op het recht op gezinshereniging, toch een belangrijke bron voor dit recht.

Procedurele voorwaarden voor gezinshereniging

Naast substantieve voorwaarden stelt de Gezinsherenigingsrichtlijn de lidstaten ook in staat om bepaalde procedure voorwaarden te stellen. Deze voorwaarden worden besproken in hoofdstuk 8 van de studie.

Hetgeen geldt voor de substantieve voorwaarden besproken in hoofdstuk 7 geldt ook voor de procedurele voorwaarden: de Burgerschapsrichtlijn laat veel minder procedurele voorwaarden toe dan de Gezinsherenigingsrichtlijn. De Burgerschapsrichtlijn bepaalt dat er geen apart visavereiste mag worden opgelegd aan gezinsleden die geen EU-burger zijn. Wel mag van hen worden gevraagd om een Schengenvisum aan te vragen, welke aanvraag door de lidstaat moet worden gefaciliteerd en waar geen kosten aan verbonden mogen zijn. Derdelander gezinsleden moeten na aankomst in de lidstaat een verblijfskaart aanvragen. De leges die de lidstaat hiervoor mogen heffen mogen niet hoger zijn dan worden vereist voor een vergelijkbare aanvraag van een eigen onderdaan. Bij de implementatie van de procedurele voorwaarden van de lidstaten valt op dat het Verenigd Koninkrijk een speciaal inreisvisum verlangt

van derdelander gezinsleden. Dit visumvereiste is niet in overeenstemming met de Burgerschapsrichtlijn.

De Gezinsherenigingsrichtlijn laat de lidstaten zogezegd iets meer ruimte in het stellen van procedurele voorwaarden. Zo moet een aanvraag in beginsel worden ingediend als de gezinsmigrant in zijn land van herkomst verblijft. Alle lidstaten hanteren dit vereiste, al hebben de lidstaten hierop ook uitzonderingen gemaakt. Zo zijn de onderdanen van sommige landen soms uitgezonderd van het vereiste om de aanvraag in het land van herkomst in te dienen. Van de geselecteerde lidstaten gaat Denemarken het soepelst om met aanvragen tot gezinshereniging ingediend terwijl de gezinsmigrant al in het gastland is. Als een vreemdeling met een geldig visum is ingereisd kan hij in Denemarken zijn aanvraag tot gezinshereniging indienen. In de Gezinsherenigingsrichtlijn staan geen nadere bepalingen over legesheffing. Toch kan gesteld worden dan er bij legesheffing het proportionaliteitsbeginsel in acht genomen moet worden en dat het niet het gevolg mag hebben dan gezinshereniging onnodig moeilijk wordt gemaakt. In Denemarken worden helemaal geen leges geheven bij aanvragen om gezinshereniging. In het Verenigd Koninkrijk daarentegen zijn de leges het hoogst van alle bestudeerde lidstaten. Nederland heeft recentelijk haar leges verlaagd nadat het hier door de rechter toe was opgedragen.

Met name het vereiste dat gezinshereniging moet worden aangevraagd in het land van herkomst en dat daar de uitkomst van de aanvraag moet worden afgewacht kan een behoorlijke drempel zijn voor gezinsmigranten. Het betekent ten slot van rekening dat de familie gedurende een bepaalde tijd gescheiden moet blijven leven.

Artikel 8 EVRM in het nationale recht

In hoofdstuk 3 van de studie is uitgebreid ingegaan op de relevantie van artikel 8 EVRM voor het recht op gezinsherenging. In hoofdstuk 9 wordt bekeken hoe de verplichtingen voortkomend uit artikel 8 EVRM in het nationale recht worden geïmplementeerd. Hiervoor is gekeken naar de nationale wet- en regelgeving en naar de uitspraken van de nationale hoogste rechters in de periode van 2007 tot 2013.

In Denemarken speelt artikel 8 EVRM een belangrijke rol in het nationale gezinsherenigingsrecht. Op verschillende plekken wordt gesteld dat gezinshereniging enkel wordt toegestaan als internationale verplichtingen, waar in de praktijk artikel 8 EVRM mee wordt bedoeld, daartoe nopen. Wat wel opvalt, is dat de rechterlijke toetsing terughoudend is. Dat kan worden verklaard door de positie van het internationale en Europese recht in het Deense recht in het algemeen. In Duitsland is de invloed van artikel 8 EVRM relatief gering. Dit komt met name door de sterke grondwettelijke bescherming van het recht op gezinsleven. Hierdoor is een beroep op artikel 8 EVRM vaak niet nodig, omdat een beroep kan worden gedaan op nationale grondwettelijke bescherming of op hardheidsclausules in de wet- en regelgeving die hierop zijn gebaseerd.

In de nationale jurisprudentie wordt artikel 8 EVRM wel regelmatig genoemd, maar hier wordt in het algemeen niet specifiek op ingegaan. Dit is anders in Nederland, waar de wetgever en de nationale wet- en regelgeving een belangrijke positie heeft gegeven aan artikel 8 EVRM. Zo wordt gezinshereniging buiten het kerngezin alleen toegestaan als internationale verplichtingen, lees artikel 8 EVRM, dit vereisen. In de nationale jurisprudentie wordt veelvuldig verwezen naar artikel 8 EVRM en hier wordt bovendien uitgebreid op ingegaan. Wel kan gesteld worden dat de Nederlandse hoogste rechter restrictief is als het gaat om de toepassing van artikel 8 EVRM. Er zijn slechts enkele voorbeelden van zaken waarin de nationale hoogste rechten vond dat er sprake zou zijn van een schending van artikel 8 EVRM bij uitzetting of niet-toelating. De rol van artikel 8 EVRM is het grootst in de nationale jurisprudentie in het Verenigd Koninkrijk. Hierin wordt indringend getoetst of er sprake is van een schending van artikel 8 EVRM, waarbij de Britse rechter soms zelfs verder gaat dan de jurisprudentie van het Europese Hof voor de Rechten van de Mens vereist. Zo heeft het de leeftijdseis van 21 jaar niet verenigbaar met artikel 8 EVRM geacht; een leeftijdseis die onder de Gezinsherenigingsrichtlijn uitdrukkelijk wel is toegestaan.

Er zit dus een groot verschil in de toepassing van artikel 8 EVRM in de lidstaten. Dit komt met name door verschillen in de rechtssystemen van de lidstaten. Hoe sterker de nationale bescherming van het recht op eerbiediging van gezinsleven is, hoe kleiner de kans dat een lidstaat door het Europees Hof voor de Rechten van de Mens wordt veroordeeld.

Ruiz Zambrano in het nationale recht

Waar in het vorige hoofdstuk werd ingegaan op de nationale implementatie van artikel 8 EVRM, gaat hoofdstuk 10 over de nationale toepassing van het *Ruiz Zambrano*-criterium dat is ontwikkeld door het Hof van Justitie van de EU. Dit is eerder besproken in hoofdstuk 4 van deze studie.

Wat hierbij opvalt is dat sommige lidstaten, waaronder Duitsland en in mindere mate ook het Verenigd Koninkrijk, de mogelijkheid bieden van gezinshereniging waarbij een kind de referent is voor de gezinshereniging van zijn ouder(s). Dit is precies de situatie waar het *Ruiz Zambrano*-arrest over gaat. Hierdoor gaan de discussies over *Ruiz Zambrano* in deze lidstaten over andere situaties dan bijvoorbeeld in Nederland. In Nederland bestaat er geen mogelijkheid voor gezinsherenging van een ouder bij een kind, behalve als dit door artikel 8 EVRM vereist is. Daarom speelt het *Ruiz Zambrano* arrest een relatief grote rol in het Nederlandse vreemdelingenrecht. Hierbij is het de tot op heden onbeantwoorde vraag onder welke omstandigheden een kind precies gedwongen wordt om het grondgebied van de EU als geheel te verlaten, zeker als er ook een Nederlandse ouder in beeld is. Recentelijk zijn precies hierover prejudiciële vragen gesteld aan het Hof van Justitie van de EU. In Duitsland en het Verenigd Koninkrijk richt de juridische discussie omtrent het *Ruiz Zam-*

brano-arrest zich veel meer op verblijfsbeëindiging, waarbij de eveneens onbeantwoorde vraag speelt wat het juridisch kader is bij verblijfsbeëindiging op het moment dat er een afgeleid verblijfsrecht gebaseerd op *Ruiz Zambrano* bestaat.

Bestaat er een recht op gezinshereniging?

Aan het eind van de studie wordt in hoofdstuk 11 de hoofdvraag van de studie beantwoord. Bestaat er een recht op gezinshereniging en uit welke elementen bestaat dit recht.

Uit de analyse van het internationale recht blijkt dat er geen instrument is waaruit rechtstreeks een recht op gezinshereniging kan worden afgeleid. Het recht op gezinshereniging moet worden gezien als aspect van het algemenere recht op eerbiediging van gezinsleven. Verschillende bronnen van internationaal recht zijn relevant voor dit recht op gezinsherenging, en deze bronnen – zoals bijvoorbeeld de anti-discriminatieverdragen en het Kinderrechtenverdrag – spelen hierbij allemaal hun eigen rol. Van groot belang voor het recht op gezinshereniging is ook artikel 8 EVRM. Al is het Hof in het algemeen terughoudend in het aannemen van positieve verplichtingen, toch is er een trend waarneembaar waarbij er steeds vaker een schending van artikel 8 EVRM wordt geconstateerd. Wel is de jurisprudentie van het Europees Hof voor de Rechten van de Mens vaak inconsistent en is niet altijd helder welke toets er precies wordt gehanteerd. Dit is een probleem voor de nationale rechters die artikel 8 EVRM moeten toepassen in hun eigen rechtsstelsel. De meest expliciete bron voor het recht op gezinshereniging is het EU-recht. Zowel uit de Burgerschapsrichtlijn als uit de Gezinsherenigingsrichtlijn kan een voorwaardelijk recht op gezinshereniging worden afgeleid.

Bij een gebrek aan een duidelijker internationaalrechtelijk kader en een gefragmenteerd EU-gezinsherenigingsrecht worden in deze studie drie elementen van het recht op gezinshereniging uitgelicht die relevant zijn voor (bijna) alle aanvragen voor gezinshereniging. Het eerste element is het proportionaliteitsbeginsel. De ruime beoordelingsmarge die staten in mensenrechtenverdragen hebben bij het beheersen van migratie wordt begrenst door het mensenrecht op eerbiediging van gezinsleven. Bij de beoordeling van een weigering tot toelating of een uitzetting moet de staat een afweging maken of er bij toelatingsweigering of uitzetting sprake is van een proportionele maatregel. Ook in het EU-recht speelt het proportionaliteitsbeginsel een belangrijke rol als algemeen beginsel van het EU-recht. Bovendien wordt in de Gezinsherengingsrichtlijn specifiek genoemd dat de lidstaten moeten kijken naar de individuele omstandigheden van het geval. Het tweede element van het recht op gezinshereniging dat in deze studie is geformuleerd is het discriminatieverbod. Lidstaten zijn dan wel in vergaande mate vrij om een migratiebeleid te voeren – al wordt deze vrijheid door het internationale en Europese recht op verschillende manieren ingeperkt – maar ze moeten hierbij wel verschillende discriminatie-

verboden in acht nemen. Op verschillende gebieden in het gezinsherenigingsrecht bestaat spanning met het verbod op discriminatie. Zo is er nog altijd het onopgeloste probleem van de omgekeerde discriminatie van EU-burgers in hun eigen land die op het gebied van gezinsherenging een slechtere rechtspositie hebben dan andere EU-burgers woonachtig in de lidstaat. Ook is het twijfelachtig of de manier waarop lidstaten de onderdanen van bepaalde landen vrijstellen van bepaalde toelatingsvoorwaarden wel altijd in overeenstemming is met de verschillende discriminatieverboden. Het laatste element van het recht op gezinshereniging dat in deze studie wordt benadrukt zijn de rechten van kinderen. Staten zijn uit hoofde van het Kinderrechtenverdrag verplicht om het belang van het kind in alle besluiten betreffende kinderen de eerste overweging te laten zijn. Daarom moet bij elke beslissing op een aanvraag tot gezinsherenging waar kinderen bij betrokken zijn worden gekeken naar wat in het belang van het kind is. Op verschillende plekken binnen het gezinsherengingsrecht is dit nog onvoldoende het geval. Zo speelt het belang van het kind momenteel geen enkele rol in de *Ruiz Zambrano*-toets.

Er bestaat een recht op gezinshereniging. Ook bij de absentie van een algemeen verdrag waarin een dergelijk recht is neergelegd bestaat een recht op gezinsherenging in alle bestudeerde lidstaten. Het recht op gezinshereniging, als onderdeel van het algemenere mensenrecht op eerbiediging van gezinsleven, wordt echter op verschillende manieren en in toenemende mate ingeperkt. De verhitte politieke discussies gaan echter vooral over toelatingsvoorwaarden, en niet over het bestaan van een recht op gezinsherenging zelf. Het menselijke oogpunt moet bij deze discussies niet worden vergeten. Het doel van het gezinsherengingsbeleid zou moeten zijn om families samen te brengen, niet om ze te scheiden.

Russian summary

Право на воссоединение семьи: между миграционными правилами и правами человека

Воссоединение семьи подразумевает миграцию одного члена семьи к другому члену семьи, проживающему в другой стране. В качестве примера можно привести воссоединение бабушки и ее внучки, проживающей за границей. Для выяснения того, возможен ли переезд в другую страну для проживания с другим членом семьи, необходимо тщательно рассмотреть действующие правила. Эти правила различны в разных странах, а в некоторых случаях играет роль и законодательство Евросоюза. Может оказаться также, что национальное законодательство не предоставляет права на воссоединение семьи, однако с точки зрения прав человека право проживать со своей семьей в другой стране все же существует.

Данное правовое исследование касается права на воссоединение семьи. Для выяснения того, существует ли право человека на воссоединение семьи, рассматриваются различные правовые источники в рамках международного и европейского законодательства. Наряду с этим в ходе правового сравнения национальных законодательств и юридических норм в четырех странах-членах Евросоюза – Дании, Германии, Нидерландах и Великобритании – анализируется, имплементируются ли международные нормы в национальное законодательство и каким образом.

Результаты исследования показывают, что несмотря на отсутствие международной конвенции о воссоединении семьи, семейное воссоединение является фундаментальным правом человека. Право на воссоединение семьи существует во всех рассмотренных странах-членах ЕС. Однако, являясь частью более общего права человека на уважение к семейной жизни, оно все больше ограничивается самыми различными способами. Жаркие политические дискуссии ведутся, в основном, об условиях для получения разрешения на въезд, а не о существовании самого права на воссоединение семьи. В ходе этих обсуждений нельзя упускать из виду человеческий аспект. Цель политики в области воссоединения семьи должна заключаться в объединении семей, а не в их разделении.

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Curriculum vitae

Mark Klaassen was born in Helmond, the Netherlands in 1983. In 2004 he started his undergraduate studies at University College Roosevelt, a liberal arts and sciences college affiliated to Utrecht University. Majoring in political science and sociology, Klaassen graduated in 2007 with a *cum laude* distinction. After his graduation, Klaassen enrolled in the Master of Arts programme 'Politics' at the Politics and International Studies department at Warwick University. He graduated from this programme – in which he followed courses on comparative politics, research methodology and Eastern-European and Russian politics – in 2008. Having a specific interest in the law and politics of migration, that same year Klaassen started studying in the LL.M programme European Law at Leiden University. Besides the courses of the LL.M programme, Klaassen also attended the lectures on immigration law organised by the staff of the Institute for Immigration Law. Klaassen obtained his *cum laude* LL.M degree in 2009. At the end of 2008, Klaassen started working as an intern at the Advisory Committee of Migration Affairs; an independent advisory organ to the Dutch government on migration issues. After the completion of his internship, Klaassen was appointed as a policy advisor at the Committee. In 2011, Klaassen gladly accepted the offer of the Institute for Immigration Law of Leiden University to pursue a PhD degree. During his appointment as a PhD candidate, Klaassen has actively participated as a lecturer in the various courses offered by the Institute. Since the beginning of 2015, Klaassen has been appointed as an assistant-professor at the Institute for Immigration Law.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2013, 2014 and 2015

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