



## COMMISSION EUROPÉENNE

SERVICE JURIDIQUE

Bruxelles, le 15 janvier 2014

*Avis du Service Juridique<sup>1</sup>*

**NOTE À L'ATTENTION DE M. MANSERVISI, DIRECTEUR GENERAL, DG HOME**

**Objet: Communication on the Guidelines on the Right to Family Reunification.**

Réf.: votre CISNET du 4.12.2013 nr. 3627529.

1. Le SJ peut donner son accord au texte de la Communication sous réserve de prise en compte des commentaires suivants :

**a) En ce qui concerne le chapitre 2.1 intitulé regroupant ( the sponsor).**

2. La directive 2003/86/CE, à son article 1<sup>er</sup>, définit les conditions à remplir par le ressortissant de pays tiers afin de pouvoir exercer son droit au regroupement familial.
3. Pour pouvoir être regroupant, il doit remplir trois conditions : résider légalement dans un Etat membre, être titulaire d'un titre de séjour d'une durée de validité au moins égale à un an et avoir une perspective fondée d'obtenir un droit de séjour permanent.

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4. La communication préconise une interprétation de la troisième condition qui tend à créer un droit au regroupement familial dès que le ressortissant de pays tiers a obtenu un contrat de travail d'un an renouvelable, ce qui conduirait à un droit au regroupement dès son arrivée. Cette orientation ne correspond pas à la volonté du législateur et ne peut pas se faire par la voie de communication de la Commission.
5. En effet, l'existence d'un contrat d'un an renouvelable ne permet pas en soi de déduire quasi automatiquement que la personne a une perspective fondée d'obtenir un droit de séjour permanent.
6. Cette évaluation nécessite la prise en compte de l'ensemble de circonstances propres à la situation individuelle, à la nature de l'emploi, à la situation économique du secteur d'activité concernée, et ne doit pas être réduite à la présentation d'un contrat dont la durée est potentiellement renouvelable.
7. En particulier, dans le cas du 1<sup>er</sup> exemple mentionné (fashion designer) qui concerne un contrat d'emploi dans un secteur en pleine crise, l'entreprise pourrait décider de supprimer certains emplois ou même ne pas être satisfaite des prestations de la personne. C'est donc au cas par cas et sur la base d'un ensemble d'informations que l'autorité nationale appréciera l'existence d'une perspective fondée de séjour permanent.
8. C'est pour cette raison que la directive laisse une grande marge d'appréciation à l'État membre concernant l'évaluation de la situation individuelle permettant de conclure qu'il y a une perspective fondée d'obtenir un droit de séjour permanent et ne la limite pas à la nature du contrat.

**b) En ce qui concerne le chapitre 2.2, relatif aux membres de la famille.**

9. Le chapitre 2.2. de la Communication vise à clarifier les notions de droit de garde, de garde partagée pour les enfants mineurs, prévues par l'art. 4(1) (c) et (d) de la directive, ainsi que celle de la prise en charge des ascendants prévue par l'art. 4, paragr. 2 de la directive.
10. Il s'agit de situations différentes pour lesquelles les finalités poursuivies et les notions employées ne sont pas les mêmes et qui doivent être clairement distinguées.

11. En ce qui concerne le regroupement de mineurs, les articles 4(1) (c) et (d) visent la situation des enfants de parents séparés. La définition des notions du droit de garde partagé (custody, dependency, shared custody) n'est pas couverte par la jurisprudence concernant la directive 2004/38/CE. Ces notions sont indiquées au règlement 2201/2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale.
12. Bien que ce règlement ne concerne pas les situations de regroupement familial, les notions indiquées dans son article 2, point 9 (right of custody) et point 11(b), (shared custody), visent des situations matrimoniales similaires. Elles peuvent donc être utilisées par les Etats membres pour apprécier les cas mentionnés par l'art. 4, paragr. 1 lettre (c) et d).
13. En ce qui concerne, l'art. 4, paragr. 2 de la directive, il faut préciser qu'il s'agit d'une disposition facultative, qui n'autorise le regroupement que si les membres de famille en question (les ascendants et les enfants majeurs), remplissent les conditions qui y sont prévues à savoir être à sa charge et être privés de soutien familial nécessaire.
14. Les conditions prévues pour cette catégorie de personnes ne sont pas les mêmes que celles prévues par la directive 2004/38/CE. En effet, il y a une différence entre les finalités poursuivies par la directive 2004/38/CE et celles de la directive 2003/86/CE qui se reflètent à la rédaction de leurs dispositions.
15. La directive 2004/38/CE à son article 2 inclut dans la définition de membres de famille les ascendants directs, ce qui n'est pas le cas de la directive 2003/86/CE. Par ailleurs, l'article 3 paragr. 2 de la directive 2004/38/CE, impose aux États membres de favoriser l'entrée et le séjour de tout autre membre de la famille qui n'est pas couvert par la définition et qui sont à sa charge et les oblige de motiver tout refus d'entrée ou de séjour visant ces personnes, alors que la directive 2003/86/CE ne crée aucune obligation similaire et n'autorise le regroupement que si les conditions qui y sont mentionnées sont remplies.
16. Il s'ensuit que la notion de dépendance telle qu'interprétée par la CJ dans la jurisprudence concernant l'interprétation de la directive 2004/38/CE ne constitue pas une notion automatiquement transposable dans le cas de regroupement prévu par la directive 2003/86/CE et ne crée pas d'obligation pour les EM d'appliquer l'ensemble de critères qui y sont mentionnés.

17. Le Service juridique n'a pas d'objection à ce qu'il soit fait référence à cette jurisprudence pour aider les EM à établir les critères permettant d'apprécier la nature et la durée de la dépendance de la personne concernée mais certaines adaptations sont nécessaires pour tenir compte de ces différences.

**c) En ce qui concerne le chapitre 3.1 (submission of the application).**

18. L'article 5, paragr. 3 de la directive établit la règle générale suivant laquelle la demande de regroupement est introduite et examinée alors que les membres de la famille résident à l'extérieur du territoire de l'Etat membre dans lequel le regroupant réside.
19. L'acceptation des demandes introduites alors que les membres de la famille se trouvent déjà sur son territoire, constitue une dérogation, qui sur la base des principes généraux, doit être interprétée de manière restrictive.
20. En effet, il faut distinguer une disposition telle que celle de l'article 7, paragr. 1 qui a fait l'objet de la jurisprudence Chakroun, d'une disposition telle que celle de l'article 5, paragr.1. La première permet aux EM d'imposer certaines conditions préalables au regroupement, alors que celle prévue par l'art 5, paragr. 1, constitue une règle générale imposée aux EM à laquelle ils ne peuvent pas déroger que dans des cas qu'ils considèrent appropriés. Par ailleurs, la directive respecte les droits fondamentaux et de ce fait la règle générale prévue par cette disposition est conforme avec le droit à la vie familiale et n'empêche pas le regroupement. Il s'ensuit qu'il ne faut pas créer une incertitude quant à une obligation des EM de ne pas appliquer la règle générale afin de respecter les droits fondamentaux.
21. La communication devrait donc se limiter à encourager les États membres à permettre l'examen de ces demandes notamment pour des raisons humanitaires en citant certains exemples sans créer de doutes concernant la légalité de l'application de la règle générale. A cet égard, les exemples mentionnés pour justifier une obligation d'examiner la demande alors que les personnes se trouvent sur le territoire de l'EM, visent de situations similaires à celles de réfugiés pour lesquels l'art 5 par 3, ne s'applique pas.

**d) En ce qui concerne les bénéficiaires de la protection subsidiaire.**

22. Cette catégorie de personnes n'entre pas dans le champ d'application de la directive. De ce fait la communication devrait se limiter à indiquer que c'est le droit national qui s'applique et que la Commission encourage les États membres à accorder le même traitement que celui prévu par la directive pour les réfugiés.



cc. :







Brussels, **XXX**  
[...](2013) **XXX** draft

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL**

**on guidance for application of Directive 2003/86/EC of 22 September 2003 on the right  
to family reunification**

# COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

## on guidance for application of Directive 2003/86/EC on the right to family reunification

### 1. INTRODUCTION

The report on the implementation of the Directive, adopted in October 2008<sup>1</sup> concluded that there were a number of cross-cutting issues of incorrect transposition or misapplication of the Directive and that its impact on harmonisation in the field of family reunification remained limited.

In 2011, the Commission published a Green Paper on the right to family reunification<sup>2</sup> to collect opinions on how to have more effective rules at EU level and factual information and data on the application of the Directive. In answer to the Green Paper 120 contributions were received, including from 24 Member States (MSs), international organisations, social partners, NGOs and individuals.<sup>3</sup> On 31 May-1 June 2012, the Commission held a public hearing in the framework of the European Integration Forum.<sup>4</sup> The overall consensus of the public consultation was that the Directive should not be re-opened, but that the Commission should ensure the full implementation of the existing rules, open infringement procedures where necessary and produce guidelines on the identified issues of the Directive.

Hence, this Communication provides guidance to MSs on how to apply Directive 2003/86/EC. These guidelines reflect the current views of the Commission and are without prejudice to the case-law of the Court of Justice of the EU (“CJEU”) and its further development. Changes in views may occur in the future and, as a consequence, this is an evolving document and an open-ended process.

The Directive recognises the right to family reunification and determines the conditions for the exercise of this right. On the one hand, the CJEU confirmed that Article 4(1) ‘imposes precise positive obligations, with corresponding clearly defined individual rights, on the MSs, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation’.<sup>5</sup>

On the other hand, MSs are recognised as having a certain margin of appreciation. They may decide to extend the right to family reunification to other family members than the spouse and minor children. Where the Directive allows it, MS may make the exercise of the right to family reunification subject to compliance with certain requirements. They preserve a certain margin of appreciation to verify whether these requirements determined by the Directive are met and for weighing, in each factual situation, the competing interests of the individual and

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting\\_0023\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0023_en.htm)

<sup>4</sup> Seventh meeting of the European Integration Forum: Public Hearing on the Right to Family Reunification of Third-Country Nationals living in the EU, Brussels, 31 May – 1 June 2012, see <http://ec.europa.eu/ewsi/en/policy/legal.cfm#>; Summary Report, see: [http://ec.europa.eu/ewsi/UDRW/images/items/static\\_38\\_597214446.pdf](http://ec.europa.eu/ewsi/UDRW/images/items/static_38_597214446.pdf)

<sup>5</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 60.

the community as a whole.<sup>6</sup> However, since the authorisation of family reunification is the general rule, derogations must be interpreted strictly and the margin of manoeuvre which the MSs are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.<sup>7</sup> At the same time, the right to family reunification is not unlimited; it carries with it the obligation on the part of its beneficiaries to obey the laws of their host country. In the case of abuse and fraud it is in the interest of both the community and of genuine applicants that MSs take firm action as provided for by the Directive.

Finally, the Directive must be interpreted and applied in accordance with fundamental rights and, in particular, the right to respect of private and family life,<sup>8</sup> the principle of non-discrimination, the rights of the child and the right to an effective remedy as enshrined in the European Convention of Human Rights (“ECHR”) and the EU Charter of Fundamental Rights (“the Charter”).

## **2. SCOPE OF APPLICATION OF THE DIRECTIVE**

This Directive applies only to third-country national sponsors, which means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty on the Functioning of the EU, who is residing lawfully in a MS, and who applies or whose family members apply for family reunification (“the sponsor”), and to their third-country national family members who join the sponsor in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry.<sup>9</sup>

### **2.1. The sponsor**

In accordance with Article 3(1), as from the moment the sponsor holds a residence permit with a minimum validity of one year and has reasonable prospects of obtaining the right to permanent residence, an application for family reunification may be submitted. A residence permit is defined as any authorisation issued by the authorities of a MS allowing a third-country national to stay legally on its territory, with the exception of (i) visas; (ii) permits issued pending examination of a request for asylum, an application for a residence permit or an application for its extension; (iia) permits issued in exceptional circumstances with a view to an extension of the authorised stay with a maximum duration of one month; (iii) authorisations issued for a stay of a duration not exceeding six months by MSs not applying the provisions of Article 21 of the Convention implementing the Schengen Agreement.<sup>10</sup>

The condition of having ‘reasonable prospects of obtaining the right of permanent residence’ devrait être examinée en tenant compte de l'ensemble des circonstances individuelles, liées à la nature du contrat de travail, la pratique administrative et celle de l'entreprise concernée concernant le renouvellement d'un contrat, ainsi que de l'attitude de la personne permettant à considérer qu'il y a une forte probabilité d'obtenir un droit de séjour permanent. ‘Reasonable prospects’ does not require the fulfilment of all the conditions needed to renew the permit. Consequently, the length of the permit is not relevant as long as the permit has a validity of

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<sup>6</sup> By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 54, 59, 61-62.

<sup>7</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 43.

<sup>8</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 44.

<sup>9</sup> Article 2 (a)-(d).

<sup>10</sup> Article 2(e) of the Directive and Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, as amended by Council Regulation (EC) No 380/2008 of 18 April 2008.

minimum one year and offers the option for renewal. (le seul fait que le permis est renouvelable ne suffit pas pour considerer que la personne a une perspective raisonnable de rester sur le territoire de manière permanente. MSs determine what kind of residence permit they accept as sufficient to consider that the reasonable prospects exist.(de quel type de permis de séjour s'agit il?)

*X. is a fashion designer with a residence permit for work purposes with a validity of 1 year in a MS. As long as X. fulfils the conditions for this residence permit,(comment l'em peut l'apprécier sur base de quels critères?),it may be renewed indefinitely and after 5 years X. will be entitled to permanent residence.*

*X. would like to be joined by her spouse. Under normal circumstances (en quoi consiste la normalité?)X. will be able to continue to work in fashion so it can be assumed that the conditions for this type of residence permit will continue to be fulfilled and that X. can renew her residence permit indefinitely in accordance with the administrative practice and national laws in the MS (il ne suffit pas que la loi permette le renouvellement d'un contrat pour conclure que l'entreprise renouvellera le contrat de la personne concernée .Tout depend de la situation individuelle, sa performance ,son integration dans l'entreprise ,la durée des besoins de l'entreprise dans le secteur concerné) Hence, X. has reasonable prospects of obtaining the right to permanent residence so the Directive is applicable.*

However, holders of residence permits issued for a specific purpose with a limited validity and that are not renewable cannot, in principle, be considered to have a reasonable prospect of obtaining the right of permanent residence and are thus excluded from the scope of the Directive. A residence permit with a validity of less than one year is not sufficient; this excludes forms of temporary stay such as those of temporary or seasonal workers.

*Z. is an au pair with a residence permit with a validity of 24 months that cannot be renewed. Therefore, Z. has no reasonable prospect of permanent residence so the Directive is not applicable.*

*W. is a seasonal worker with a residence permit with a validity of 9 months. Hence, W. does not have a residence permit with the required validity of one year or more so the Directive is not applicable.*

## **2.2. Family members**

Article 4(1) prescribes that the members of the nuclear family, i.e. the spouse and the minor children, are in any case entitled to family reunification. This Article imposes precise positive obligations, with corresponding clearly defined individual rights, on the MSs, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.<sup>11</sup> Minor children including adopted children of either the sponsor or the spouse are also entitled to family reunification on the condition that the sponsor or the spouse, respectively, has custody and the children are dependent on him/her.

(Article 4(2) and (3) contain *optional* provisions allowing MSs to authorise the entry and residence of other family members, such as first-degree ascendants of the sponsor or the spouse, adult unmarried children, unmarried partners in a long-term relationship, and registered partners. When a MS has opted to authorise the family reunification of any of the family members listed in these Articles, then the Directive is fully applicable. (Ce paragraphe devrait précéder celui concernant le concept de dépendance.)

<sup>11</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 60.

In line with Recital 5, the Directive must be applied in accordance with the non-discrimination principle enshrined in particular in Article 21 of the Charter.(oui mais à quel type de discrimination on se réfère?)

According to Article 4(1) (c) and (d) second sentence, in the case of children under **shared custody** the MS may only authorise the reunification provided that the other party sharing the custody has given his or her prior agreement. The concept of ‘custody’ can be understood as a set of rights and duties relating to the care of a person of a child, and in particular the right to determine the child's place of residence.<sup>12</sup> In general, the custody arrangement between the parents must be proven and the required agreement should be given in line with the MSs’ family law and, if necessary, private international law. However, if a particular situation leads to an unresolvable blockage,<sup>13</sup> it is up to MSs to determine how to deal with such situations. Nevertheless, a decision should be taken in line with the best interest of the child of Article 5(5)<sup>14</sup> and on a case-by-case basis taking into account the reasons for not being able to get the agreement and other specific circumstances of the case.

Indiquer les articles concernés à savoir l'article 4 paragr 2(a) et indiquer le contexte législatif à savoir qu'il s'agit d'une disposition facultative qui n'autorise le regroupement des ascendants en ligne direct que si les conditions indiquées au paragr 2(a) sont réunis à savoir (are dependent and non enjoy proper family support).

The concept of ‘**dependency**’ has been held to have an autonomous meaning under EU law. While the CJEU came to this conclusion in its case-law on the Free Movement Directive,<sup>15</sup> the language employed by the CJEU does not indicate that its findings were limited to that Directive. Même si le contexte et les finalités de ces deux directives ne sont pas les mêmes les critères utilisés par la Cour pour apprécier la dépendance peuvent s'appliquer également dans le cadre de la situation prévue par l'art 4 par 2 (a)..(la jurisprudence citée concerne plutôt le regroupement de la famille nucléaire (époux et enfants) . Les finalités et les dispositions de la directive 2004/38 ne sont pas les mêmes que celles de la directive 2004/86) Dans le cadre de la direct 2004/38 les EM ont l'obligation de favoriser le regroupement avec les ascendants alors que dans le cadre de la direct 2004/86 ce regroupement constitue une dérogation qui n'est autorisé que si certaines conditions sont remplies.

The CJEU has held that the status of ‘dependent’ family member is the result of a factual situation characterised by the fact that legal, financial, emotional or material support for that family member is provided by the sponsor or by his/her spouse/partner.<sup>16</sup> The competent authority, when undertaking that examination of the applicant's personal circumstances, must take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the

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<sup>12</sup> See Article 2, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>13</sup> For instance, when a sponsor or his/her spouse does not have sole custody and the person sharing custody refuses to give agreement or cannot be found.

<sup>14</sup> See Council doc. no. 6504/00, p.5, note 7.

<sup>15</sup> See in the context of the Free Movement Directive: Case 327/82, *Ekro*, 18 January 1984, para 11; Case C-316/85, *Lebon*, 18 June 1987, para 21; Case C-98/07, *Nordania Finans and BG Factoring*, 6 March 2008, para 17; and Case C-523/07, *A*, April 2009, para 34; Case C-83/11, *Rahman and Others*, 5 September 2012, paras 24.

<sup>16</sup> By analogy with Case C-316/85, *Lebon*, 18 June 1987, para 21-22; Case C-200/02, *Zhu and Chen*, 9 October 2004, para 43; C-1/05, *Jia*, 9 January 2007, paras 36-37; and Case C-83/11, *Rahman and Others*, 5 September 2012, paras 18-45; Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 56.

sponsor and the family member.<sup>17</sup> Consequently, ‘dependency’ may differ according to the situation and the particular family member concerned;.Ce raisonnement ne s'applique pas puisque l'art 4.2 concerne que les ascendants ou les enfants majeurs.

In order to determine whether family members are dependent, the MS must assess in the individual case whether, having regard to their financial and social conditions, they need material support to meet their essential needs in their country of origin or the country from which they came at the time when they applied to join the sponsor.<sup>18</sup> There is neither a requirement as to the amount of material support provided nor any level of standard of living for determining the need for financial support by the sponsor.<sup>19</sup> The status of dependent family members does not presuppose a right to maintenance.<sup>20</sup> MSs may impose particular requirements as to the nature or duration of dependence, in order to satisfy themselves that the dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in its territory.<sup>21</sup>

The concept of ‘**proper family support**’ for a first-degree relative in ascending line in Article 4(2)(a) should not be regarded as exclusively material and leaves a margin of discretion to the MS as to what level is considered proper support. The requirement is fulfilled if no other family members in the country of origin are by law or de facto supporting the person, i.e. no one could replace the sponsor or his/her spouse with regard to the day-to-day care duties. The situation should be assessed in light of the circumstances of the case in question.

### 2.3. Minimum age of spouse

Article 4(5) allows MSs to require the sponsor and his/her spouse to be of a minimum age of maximum 21 years before the spouse is able to join him/her, on the condition that this faculty is used in order to ensure better integration and to prevent forced marriages. Consequently, MSs may only require a minimum age for this purpose and not in any manner which would undermine the objective of the Directive and the effectiveness thereof.<sup>22</sup>

Articles 5(5) and 17 oblige MSs to have due regard to the best interests of minor children and to conduct an individual examination of an application for family reunification. If a MS requires a minimum age, it must still assess all the relevant circumstances of the individual application. The minimum age may act as a reference but may not be used as an overall threshold below which all applications will be refused, irrespective of an actual examination of the situation of each applicant.<sup>23</sup> Not complying with the minimum age requirement cannot therefore automatically lead to the rejection of an application; it is only one of the factors which must be taken into account by the MSs when considering an application.<sup>24</sup> If the individual assessment shows that the justification for Article 4(5), i.e. ensuring better integration and preventing forced marriages, is not applicable then MSs should allow for family reunification also in cases in which the minimum age requirement is not fulfilled. For instance, when it is clear from the individual assessment that there is no abuse, e.g. in the case

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<sup>17</sup> By analogy with Case C-83/11, *Rahman and Others*, 5 September 2012, paras 23.

<sup>18</sup> By analogy with Case C-1/05, *Jia*, 9 January 2007, para 37.

<sup>19</sup> The test of dependency should primarily be whether, in the light of their personal circumstances, the financial means of the family members permit them to live at the minimum level of subsistence in the country of their normal residence (AG Geelhoed in case C-1/05, *Jia*, 9 January 2007, para 96).

<sup>20</sup> By analogy with Case C-316/85, *Lebon*, 18 June 1987, para 21-22.

<sup>21</sup> By analogy with Case C-83/11, *Rahman and Others*, 5 September 2012, paras 36-40.

<sup>22</sup> By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 43.

<sup>23</sup> By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 48.

<sup>24</sup> By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 99-101.

of a common child, or that the sponsor or his/her spouse have a good potential for integration.(comment on l'apprécie ?)

*Y. a 30 year old third-country national sponsor who wants to reunite with his 19 year old spouse with whom he married two years ago and their two common children. The MS has an age requirement of 21.*

*In this case the minimum age may only serve as a reference so it is only one of the factors to take into account in the individual assessment of the situation. The two common children of Y. and his spouse are an indication that a forced marriage is unlikely and the interest of the children should also be taken into account.*

The wording of Articles 4, 7 and 8 clearly indicates at which point in time the requirements should be complied with by the applicant or the sponsor. While Article 7 is introduced by the words ‘when the application for family reunification is submitted’, Articles 4 and 8 state ‘before the spouse is able to join him/her’ and ‘before having his/her family members join him/her’. Therefore, the minimum age requirement needs to be fulfilled at the moment of the effective family reunion and not when the application is submitted. Applications should therefore be allowed to be submitted and examined before the minimum age requirement is fulfilled, especially in view of the potential processing time of up to nine months, yet MSs may postpone the effective family reunification until the moment the minimum age is reached.

### **3. SUBMISSION AND EXAMINATION OF THE APPLICATION**

#### **3.1. Submission of the application**

Article 5(1) prescribes that MSs must determine whether the application for entry and residence has to be submitted either by the sponsor or by the family member or members. Article 5(3) establishes the general rule that applications are to be submitted and examined when the family members are residing outside of the territory of the MS in which the sponsor resides.

L'examen d'une demande de regroupement introduite alors que les membres de la famille sont sur le territoire d'un EM constitue une dérogation à la règle générale et doit être interprétée en respectant cette finalité à savoir exceptionnellement lorsque c'est nécessaire dans de cas appropriés. Il ne faut pas renverser les règles ni créer de confusion concernant les droits et obligations des EM et de personnes concernées. Seul le législateur peut modifier cette disposition.Par ailleurs une telle obligation n'est pas incompatible avec le CEDH et n'empêche pas le regroupement . Je propose de supprimer les deux paragraphes qui suivent qui donnent comme exemple de situations similaires à celles de membres de famille de réfugiés pour lesquels cette disposition ne s'applique pas et qui de ce fait peuvent créer une certaine confusion concernant les obligations des EM pour examiner les demandes de regroupement et un risque de contentieux . However, in some cases these provisions may lead to disproportionate obstacles and risks, or it may be practically impossible to apply due to inaccessibility of certain areas or security risks in the country of origin. Especially in the case of minor children and female family members in countries with high security risks, this may expose them to disproportionate risks or effectively impede them to submit their application.(l'exemple donnée concerne les réfugiés pour lesquels l'art 5.3 ne s'applique pas.)

While it is the MSs right to make policy choices in these matters,(il ne s'agit pas d'une faculté mais d'une obligation d'appliquer la règle avec possibilité de dérogation) the Directive must

be interpreted in the light of fundamental rights and not in a manner which would undermine its objective and the effectiveness.<sup>25</sup> (la règle prévue par l'art 5.3 est contraignante, son application n'est pas incompatible avec la CEDH )Therefore, in cases where this would lead to a disproportional risk or obstacle, MSs are encouraged to allow both the sponsor and the family member(s) to apply either in the country of origin or in the MS of residence of the sponsor.

In fact, Article 5(3) second subparagraph and recital 7 explicitly allow MSs to derogate from the general rule of the first subparagraph and thus apply the Directive to situations where the unity of the family can be preserved from the beginning of the sponsor's stay.<sup>26</sup> Hence, in appropriate circumstances, MSs may accept applications when family members are already in its territory. These may be any kind of circumstances or humanitarian reasons such as a single parent arriving with a young child, or cases in which a person is already legally staying in the territory of a MS ( ) (ces exemples ne sont pas bons ;Il ne suffit pas de venir comme touriste pour pouvoir bénéficier de la dérogation )and for exceptional reasons (e.g. health, security,...) it is not reasonable to demand that the person goes back to the country of origin to submit an application. These examples of circumstances are not exhaustive and always depend on the particular situation of a person in question.

MSs are allowed to require reasonable and proportional administrative fees for an application for family reunification and they enjoy a limited margin of discretion in fixing the amount of those charges, as long as these do not jeopardise the achievement of the objectives and the effectiveness of the Directive.<sup>27</sup> The level at which fees are set must not have either the object or the effect of creating an obstacle to the exercise of the right to family reunification. Fees which have a significant financial impact on third-country nationals who satisfy the conditions laid down by the Directive could prevent them from exercising the rights conferred by the Directive and would therefore be *per se* excessive and disproportionate.<sup>28</sup> The fees levied on third-country nationals and their family members under Directive 2003/86 could be compared to those levied on own nationals for the issue of similar documents, to illustrate their disproportionate nature due to a large variation between those fees, taking into account that these persons are not are not in identical situations.<sup>29</sup>

### 3.2. Accompanying evidence

In accordance with Article 5(2), an application for family reunification shall be accompanied by (a) documentary evidence to prove the family relationship and (b) the compliance with the conditions of Article 4 and 6 and, where applicable, 7 and 8, and by (c) certified copies of the family member(s)' travel documents.

MSs have a certain margin of appreciation in deciding whether it is appropriate and necessary to verify the evidence of the family relationship through interviews or other investigations, including DNA testing. The appropriateness and necessity criteria imply that such investigations are inadmissible if there are other suitable and less restrictive means to establish the existence of a family relationship. Every application, its accompanying

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<sup>25</sup> Case C-578/08, *Chakroun*, 4 March 2010, paras 43-44.

<sup>26</sup> Article 3(5) explicitly foresees that MSs have the possibility to adopt or maintain more favourable conditions.

<sup>27</sup> By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 62, 64-65.

<sup>28</sup> By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 69-70, 74 and 79.

<sup>29</sup> By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, para 77.

documentary evidence and the appropriateness and necessity of interviews and other investigations, need to be assessed on a case-by-case basis.

Besides factors such as a common child, previous cohabitation and registration of the partnership, the family relationship between unmarried partners can be proven through any reliable means of proof to show the stable and long-term character of their relationship; for instance, correspondence, joint bills, bank accounts or ownership of real estate, etc.

### **3.3. Length of procedures**

Article 5(4) imposes an obligation on MSs to give a written notification of the decision on an application as soon as possible. Recital 13 specifies that the procedure for examination of applications should be effective and manageable, taking account of the normal workload of the MSs' administrations. Therefore, as a *general rule*, a standard application under normal workload circumstances should be processed promptly without unnecessary delay. In case of an exceptional workload that exceeds the administrative capacity or when the application necessitates further examination, the *maximum time limit of nine months* may be justified. The nine month period starts from the date on which the application has been first submitted, not at the moment of notification of receipt of the application by the MS.

The exception foreseen in Article 5(4) second subparagraph of an extension beyond the nine month deadline is only justified in *exceptional circumstances* linked to the complexity of the examination of a specific application. This derogation should be interpreted strictly<sup>30</sup> and on a case-by-case basis. A MSs' administration which wants to make use of this possibility must justify this extension by demonstrating the exceptional complexity of the particular case which thus amounts to exceptional circumstances. Administrative capacity issues cannot justify such an exceptional extension and any extension should be kept to the strict minimum necessary to reach a decision. Exceptional circumstances linked to the complexity of the particular case could be, for instance, the need to assess the family relationship within the context of multiple family units, a severe crisis in the country of origin impeding access to administrative records, difficulties in organising hearings of family members in the country of origin due to the security situation or the difficult access to diplomatic missions, or determining the right to legal custody when the parents are separated.

Article 5(4) prescribes that the notification of the decision must be done in writing and that, in case of a negative decision, legal and factual reasons should be given to allow the applicant to effectively exercise the right to mount a legal challenge.<sup>31</sup>

## **4. REQUIREMENTS FOR THE EXERCISE OF THE RIGHT TO FAMILY REUNIFICATION**

### **4.1. Public policy, public security and public health**

Article 6(1) and (2) allow MSs to reject an application, or withdraw or refuse to renew a family member's residence permit, on grounds of public policy, public security or public health. Recital 14 gives some indications of what these notions entail: a person who wishes to be granted family reunification should not constitute a *threat* to public policy and public security. Public policy may cover a conviction for committing a serious crime. Public policy and security cover cases in which a third-country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.

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<sup>30</sup> By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 43.

<sup>31</sup> See Article 18

Besides the above, the definition of these notions is largely left to the discretion of the MSs, subject to relevant case law of the European Court for Human Rights and, although the relevant case law of the CJEU is not related directly with regards to third-country residents, it may *mutatis mutandis* serve as a background when defining the notions in question by analogy.

MSs should apply the principle of proportionality when assessing a particular application. Article 6(2) second subparagraph prescribes that MSs, when taking a decision, are obliged to consider the particular circumstances of the individual case (Article 17) and the severity or type of offence against public policy or public security, or the dangers emanating from the applicant. Recital 14 also states that family reunification may only be refused on duly justified grounds.

The *public* health requirement may only be invoked when there is a threat to the general public that cannot be easily prevented by protective health measures. Similar provisions in the Long-Term Residents Directive may help define public health in the context of family reunification since these provisions apply to similar situations, also concern third-country nationals and serve the same purpose.<sup>32</sup> As such, the only diseases that may be considered a threat to public health are the diseases as defined by the relevant applicable instruments of the World Health Organisation's and such other infectious or contagious parasite-based diseases as are the subject of protective provisions in relation to nationals in the host country. MS may require a medical examination in order to certify that family members do not suffer from any of these diseases. Such medical examinations shall not be performed on a systematic basis.

#### **4.2. Accommodation requirement**

As provided for by Article 7(1), MSs may require evidence that the sponsor has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the MS concerned. The evaluation of this accommodation is left to the discretion of the MS but the criteria adopted may not be discriminatory and this provision defines the upper limit of what may be required. The criteria as to size, hygiene and safety may not be stricter than for accommodation occupied by a comparable family (in terms of number of members and social status) living in the same region. The 'same region' should be understood as geographical units between which differences in standards may exist, for instance, at municipal or regional level. The criteria adopted by the MS should be transparent and clearly specified in the national legislation.

Since the purpose of this provision is to ensure adequate accommodation for the sponsor and his/her family members, the fulfilment of this requirement may be judged on either the situation of the sponsor at the moment of the application or on a reasonable prognosis of the accommodation that can be expected to be available at the moment the sponsor will be joined by his/her family member(s). A rental or purchase agreement may, for instance, serve as evidence. A rental agreement of limited duration may be deemed insufficient. In case of lengthy waiting periods and processing times it may be disproportionate and undermine the objective and the effectiveness of the Directive to require the fulfilment of this requirement at the moment of application given the potential considerable additional financial and administrative burden on the sponsor. In such specific circumstances the Commission encourages a certain flexibility from the MSs, for instance, by accepting as evidence a conditional rental agreement which enters into force upon the granting of the family reunification and the effective entry of the family members.

<sup>32</sup>

Article 18 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

#### 4.3. Sickness insurance requirement

According to Article 7(1)(b), MSs may require evidence that the sponsor has sickness insurance in respect of all risks normally covered for its own nationals in the MS concerned for himself/herself and the members of his/her family.

If the MS concerned has compulsory universal health insurance, which is also available to and mandatory for third-country national residents, the fulfilment of this requirement must be assumed. The Commission considers that requiring an additional private health insurance would impose an unnecessary burden and undermine the objective and the effectiveness of the Directive. In case the MS has a voluntary contribution-based scheme, this requirement can be fulfilled through (a) a system of conditional health insurance granted upon the acceptance of an application for family reunification of a family member or (b) a private health insurance that covers the risks that are normally covered by a health insurance for MS nationals.

#### 4.4. Sufficient resources requirement

According to Article 7(1)(c), MSs may require evidence that the sponsor has 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 MS concerned. In the *Chakroun* case the CJEU has held that, since authorisation of family reunification is the general rule, this faculty must be interpreted strictly. The margin which the MSs are recognised as having must therefore not be used by them in a manner which would undermine the objective and the effectiveness of the directive.<sup>33</sup> The CJEU also specified that this faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter, which require the MSs to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life.<sup>34</sup>

The evaluation of the **stability** and **regularity** of the resources must necessarily be based on a prognosis that the resources can reasonably be expected to be available in the foreseeable future so that the applicant will not need to seek recourse to the social assistance system. For this purpose the applicant may provide evidence that resources of a certain level are available and are expected to remain available on a regular basis. In general, an unlimited employment contract should therefore be considered as sufficient proof. MSs are encouraged to take the realities of the labour market into account as unlimited employment contracts may be increasingly unusual, especially at the beginning of an employment relationship. If an applicant submits proof of another type of employment contract, for instance, a temporary contract that can be prolonged, MSs are encouraged not to automatically reject the application based solely on the nature of the contract. In such cases, an assessment of all the relevant circumstances of the individual case is necessary. In certain sectors temporary contractual work may be standard practice, for instance, in some IT, media or creative sectors, yet resources may still be stable and regularly available. Other relevant elements for making a prognosis of the availability of resources may be, for example, qualifications and skills of the sponsor, structural vacancies in the field of the sponsor, or the labour market situation of the MS. The availability of resources of a certain amount for a certain period in the past may certainly constitute an element of proof, yet such a period in the past may not be required as such since this could introduce an additional condition and a waiting period not foreseen by the Directive, especially if the sponsor is in the beginning of his/her career.

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<sup>33</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 43; Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 74.

<sup>34</sup> Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 82.

With regards the **nature** of the resources these may consist of income from employment activities, but also of other means such as income from self-employed activities, private means available to the sponsor, payments based on entitlements built up by previous contributions made by the sponsor or family member (for instance, retirement or invalidity payments).

Furthermore, for the evaluation of the **sufficient** character of the resources ‘sufficient, stable and regular resources’ contrasted with ‘**without recourse to the social assistance system**’ indicates that the latter is a key criterion for assessing the fulfilment of the resources requirement. ‘Social assistance’ refers to assistance granted by the public authorities, whether at national, regional or local level, which can be claimed by an individual, in this case the sponsor, who does not have stable and regular resources which are sufficient to maintain himself and the members of his family and who, by reason of that fact, is likely to become a burden on the social assistance system of the host MS during his period of residence.<sup>35</sup> It is a concept which has its own independent meaning in EU law and cannot be defined by reference to concepts of national law.<sup>36</sup> The CJEU has held that this concept must be interpreted as referring to general assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to special assistance which enables exceptional or unforeseen needs to be addressed.<sup>37</sup> Therefore, the expression ‘recourse to the social assistance system’ does not allow a MS to refuse family reunification to a sponsor who proves that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income support measures.<sup>38</sup>

MSs are allowed to take into account the **level of minimum national wages and pensions** as well as the **number of family members** when evaluating the sponsor's resources and determining the social assistance level. In the Chakroun case the CJEU has underlined that this faculty must be interpreted strictly and exercised in a manner which avoids undermining the objective and the effectiveness of the Directive.<sup>39</sup> Consequently, these minimum national wages should be seen as the upper limit of what MSs may require, except if MSs choose to take into account the number of family members.

Moreover, MSs are allowed to indicate a certain sum as a **reference amount** but, since needs can vary greatly depending on the individuals, they may not impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant in accordance with Article 17.<sup>40</sup> Therefore, an application may not be rejected for the sole reason that the applicant's resources do not reach the reference amount; yet an individual assessment of all elements of the particular case is required before reaching a decision on the application.

The CJEU has held that, *in principle*, it is the resources of the sponsor that are the subject of the individual examination of applications for reunification required by the Directive, not the

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<sup>35</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 46; See by analogy Case C-140/12, *Brey*, 19 September 2013, para 61.

<sup>36</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 45.

<sup>37</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 49.

<sup>38</sup> Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 73; Case C-578/08, *Chakroun*, 4 March 2010, para 52.

<sup>39</sup> Case C-578/08, *Chakroun*, 4 March 2010, paras 43 and 47.

<sup>40</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 48.

resources of the third-country national for whom a right of residence is sought on the basis of family reunification.<sup>41</sup> At the same time, by using the term 'in principle', the CJEU suggests that MSs may choose to take the resources of family members into account or that exceptions from this rule may be granted in individual cases justified by particular circumstances.<sup>42</sup>

Finally, the CJEU has also held that national legislation applying this requirement is not allowed to distinguish between family relationships that arose before or after the sponsor entered the territory of the MS since the capacity of a sponsor to have regular resources which are sufficient to maintain himself and the members of his family cannot in any way depend on the point in time at which he constitutes his family.<sup>43</sup>

#### 4.5. Integration measures

The Commission recognises the margin of appreciation MSs have to decide whether or not to require third-country nationals to comply with integration measures and to develop the most appropriate measures in their own national context.<sup>44</sup> However, the Commission recalls that the objective of such measures is to facilitate the integration of family members. Their admissibility depends on whether they serve this purpose and whether they respect the principle of proportionality. Therefore, their admissibility depends on the accessibility, design and organisation of these measures and whether such measures or their impact serve purposes other than integration. In case integration measures are effectively used to limit family reunification this would amount to an additional requirement for family reunification thus undermining the objective of the directive, which is to promote family reunification, and the effectiveness thereof.<sup>45</sup>

Therefore, MSs may impose on the family members to comply with integration measures under article 7(2) but these may not amount to an absolute condition upon which the right to family reunification is dependent. The nature of the **integration measures** of Article 7(2) is different from the conditions foreseen in Articles 4(1) and 7(1). Firstly, Article 4(1) - as a stand-still clause only<sup>46</sup> - allows MSs to verify for children over 12 years arriving independently of the rest of their families whether they meet a **condition for integration before authorizing** entry and residence.<sup>47</sup> Secondly, under Article 7(1) MSs may require evidence that these requirements are fulfilled or fulfillable based on a reasonable prognosis. These can therefore be considered as *pre-conditions* which MSs may demand from the sponsor to be achieved *before authorizing* entry and residence of family members.

In contrast, Article 7(2) allows MSs to require third-country nationals to comply with **integration measures**. This allows MSs to require family members to make a certain effort to demonstrate their willingness to integrate, for instance by requiring participation in language

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<sup>41</sup> Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 72.

<sup>42</sup> In contrast, at the moment of renewal of the residence permit Article 16(1)(a) imposes an obligation on the MS to take into account the contributions of the family members to the household income if the sponsor does not have sufficient resources without recourse to the social assistance system. Since there is no explicit provision forbidding this MSs may also take the contributions of the family members into account at the moment of application for the first residence permit.

<sup>43</sup> Case C-578/08, *Chakroun*, 4 March 2010, paras 64-66.

<sup>44</sup> For a definition of integration see the Common Basic Principles for Immigrant Integration Policy in the European Union, Council of the European Union, 2618th Council Meeting, Justice and Home Affairs, of 19 November 2004, 14615/04 (Presse 321).

<sup>45</sup> Case C-578/08, *Chakroun*, 4 March 2010, para 43.

<sup>46</sup> The purpose of this stand-still clause is to reflect the children's capacity for integration at early ages (recital 12).

<sup>47</sup> The legality of such distinction between different categories of people was confirmed in Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 75.

or integration courses, prior to or after arrival. Since these measures are meant to help facilitate this integration process, this also implies that the way in which MSs conceive this possibility cannot be unlimited.

Article 7(2) comes down to the possibility to ask from an immigrant to make the necessary efforts to be able to live his/her day-to-day life in the society in which he/she has to integrate him/herself and to the possibility for the MS to verify whether this person displays the required willingness to integrate in this sense in his/her new environment. The verification of the willingness to integrate may take the form of an examination on basic skills deemed necessary for this purpose. This would not be the case, for example, if the level of difficulty of the exam, the cost to participate, the accessibility of the teaching material necessary to prepare for such an examination, or the accessibility of the examination itself are, in fact, barriers that complicate the achievement of this purpose.<sup>48</sup> In other words, the integration measures that a MS may require cannot result in a performance obligation of such a nature that they are in fact a measure that limits the possibility of family reunification. They must, on the contrary, contribute to the success of the family reunification.

Furthermore, integration measures must be proportionate and applied with the necessary flexibility to ensure that, on a case-by-case basis and in view of specific circumstances, family reunification may be granted even where integration requirements are not met.<sup>49</sup> MSs should therefore foresee the effective possibility of an exemption, a deferral or another form of integration measures in case of certain specific issues or personal circumstances of the immigrant in question. Specific individual circumstances that may be taken into account are, for instance, cognitive abilities, the vulnerable position of the person in question, special cases of inaccessibility of teaching or testing facilities, or other situations of exceptional hardship. Therefore, MSs may not refuse entry and stay on its territory of a family member referred to in Article 4(1) on the sole ground that this family member, while still abroad, did not succeed in the integration examination foreseen in the legislation of that MS.<sup>50</sup>

The Commission considers that MSs should provide the necessary integration measures for family members to learn about their new country of residence and acquire language skills that can facilitate the integration process. Therefore, the Commission considers that language and integration courses should be offered in an accessible way (available in several locations), free or at least affordable, and tailored to individual needs. While pre-departure integration measures may help prepare migrants for their new life in the host country by providing information and training before migration takes place, integration measures may often be more effective when performed in the host country.

#### **4.6. Waiting period**

Article 8 preserves a limited margin of appreciation for MSs under which they have the option to require a maximum of two years' lawful residence before a sponsor may be joined by his/her family members. If a MS chooses to exercise this option it may not impose a general blanket waiting period applied in the same way to all applicants without regard to the particular circumstances of specific cases and the best interests of minor children.<sup>51</sup> The CJEU has underlined that duration of residence in the MS is only one of the factors which must be

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<sup>48</sup> Statistics and qualitative policy impact evaluations may constitute indications that certain measures constitute factual barriers to family reunification.

<sup>49</sup> The automatic refusal of family reunification as a result of a failed integration examination could amount to a violation of Article 17, Article 5(5) and Article 8 ECHR.

<sup>50</sup> The only situation in which integration problems may result in a refusal is found in Article 4(1) last subparagraph in case the MS has verified that a condition for integration has not been met.

<sup>51</sup> Article 17 and Article 5(5).

taken into account by the MS when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.<sup>52</sup>

The purpose of this provision is to permit MSs to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration.<sup>53</sup> The admissibility under the Directive of a waiting period and its length depends on whether this requirement serves this purpose and respects the principle of proportionality.

(Je propose de supprimer l'exemple parce que le raisonnement développé peut s'appliquer à tout délai d'attente imposé par la loi et créer l'impression d'un droit du regroupant dès son arrivée et donc d'un contentieux.) . In order not to affect the family life in a disproportionate way, the Commission encourage les EM keep waiting periods as short as strictly necessary, for achieving the purpose of the provision, especially in cases when minor children are involved.

In view of the Commission, in order to determine the duration of the 'lawful stay' of a sponsor any period of time during which he/she has resided on the territory in accordance with the national law of the MS in question should be taken into account, starting from the first day. This may be residence on the basis of a residence permit or any other title legally allowing the stay. Excluded, however, should be irregular stay or periods of toleration (for instance, non-returnable). MSs may require that the lawful stay is continuous given the purpose of the provision of reaching a certain level of stability and integration. However, interruptions which do not jeopardise this purpose may be allowed; for instance, temporary absences (such as business trips, holidays or visits to family in the country of origin...) or short periods of unlawful residence (e.g. expiration of a residence card due to a late application for prolongation or delay in processing). Periods of lawful stay of a sponsor before he/she acquires a residence permit with a validity of minimum one year, as required by Article 3(1), should also qualify to calculate the duration of the lawful stay.

*X. is a third-country national who has been lawfully staying in a MS for a continuous period of nine months. Today X. received a residence permit with a validity of one year which can be renewed indefinitely. X. wants to be joined by his third-country spouse and submits an application for family reunification and wonders when his spouse can join him.*

*The MS has opted for requiring a waiting period and, in X.'s case, considers the maximum length of two years lawful stay proportional to allow that the family reunification will take place in favourable conditions. In this case, X.'s spouse can join him/her at the end of the remaining waiting period of 15 months.*

In the Commission's opinion, the waiting period does not include the period required for MSs to examine the application in accordance with Article 5(4).<sup>54</sup> Both periods may start and end at different times, and may or may not overlap, according to the individual case. The Commission considers that an application may be submitted as from the moment the sponsor holds a residence permit with a validity of one year or more and has reasonable prospects of obtaining the right of permanent residence,<sup>55</sup> but MSs may delay granting family reunification

<sup>52</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 99-101.

<sup>53</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 97-98.

<sup>54</sup> The 'waiting period' is an optional requirement for exercising the right to family reunification, while the 'examination period' is a timeframe foreseen to allow MSs to process and examine applications.

<sup>55</sup> Article 3(1)

(‘before having his/her family members join him/her’) until the waiting period foreseen in their legislation has been fulfilled.

*Y. is a third-country national who has just arrived in a MS and immediately receives a renewable residence permit with a validity of two years that has been granted to her. Y. would like her spouse and her two minor children to join her and submits an application for family reunification.*

*In Y.’s case, the MS considers that Y. and her spouse have already displayed a high level of integration and in the interest of the children the MS decides that no waiting period is required. However, due to administrative constraints there is a backlog in the processing of the applications and the MS only reaches this decision after 9 months. In Y’s case, she can be reunited with her spouse and children as from the moment she receives notification of the decision.*

The CJEU has held that the rules contained in the Directive, with the exception of Article 9(2), apply both to a marriage that has been concluded before as to one that has been concluded after the sponsor has taken up residence in the MS,<sup>56</sup> therefore no distinction may be made between both situations as regards the waiting period. While the Commission shares the MSs’ concern about possible misuse of the right to family reunification, the option to require of a waiting period may not be used for the sole purpose of preventing misuse. The sole purpose of Article 8 is to require a certain amount of stable residence and integration to make sure that family reunification will take place in favourable conditions. More suitable means are available, for example through individual assessment of the case, to prevent marriages of convenience.

*Z. is a third-country national who has been lawfully staying in a MS for four years during her studies. After graduation Z. takes up a job offer and receives a new residence permit for one year that may be renewed indefinitely. In the meanwhile, Z. meets D., a third-country national, and starts a relationship. 13 months later they get married and apply for family reunification so that D. can join her.*

*In Z’s case, the potentially required waiting period of maximum two years lawful stay has already been fulfilled so D. can join her as soon as she receives notification of the decision.*

## **5. ENTRY AND RESIDENCE OF FAMILY MEMBERS**

### **5.1. Entry, long-stay visas and residence permits**

Article 13(1) requires that, as soon as the application for family reunification has been accepted, the MS is obliged to grant family members every facility for obtaining the requisite visas. This implies that when an application is accepted MSs should ensure a speedy visa procedure, reduce additional administrative burdens to a minimum and avoid double-checks on the fulfilment of the requirements for family reunification. Since the purpose of stay of family reunification is long-term, the issued visa should not be a short-stay visa.

In cases where the access to travel documents and visas is particularly difficult or dangerous and thus may constitute a disproportional risk or a practical obstacle to the effective exercise of the right to family reunification, MSs are encouraged to consider the individual situation of the case and the circumstances in the country of origin. In exceptional circumstances, for instance in the context of a failed state or a country with high internal security risks, MSs are

<sup>56</sup> Case C-578/08, *Chakroun*, 4 March 2010, paras 59-64.

encouraged to accept emergency travel documents issued by the International Committee of the Red Cross (ICRC), issue a national one-way laissez-passer or offer the possibility to family members to be issued a visa upon arrival in the MS.

Administrative fees for visa are allowed but these may not be excessive or disproportionate so they do not have either the object or the effect of creating an obstacle to the obtaining of the rights conferred by the Directive and, therefore, deprive it of its effectiveness.<sup>57</sup>

Article 13(2) prescribes that MSs must grant the family members a renewable first residence permit of at least one year. According to Article 13(3) the duration of the residence permit of the family member should, *in principle*, not go beyond the date of expiry of the residence permit of the sponsor. Thus, for the sake of synchronisation of the expiry dates of the sponsor's and family members' resident permits, MSs may grant resident permits of shorter validity than one year. However, exceptions to this rule are allowed, for instance, when the sponsor's residence permit is valid for less than one year but is certain to be prolonged.

## **5.2. Access to employment**

The sponsor's family members are entitled to access to employment and self-employed activity, in the same way as the sponsor, subject to the optional restrictions of Article 14(2) and (3). For a period of maximum 12 months, MSs may set the conditions under which family members can exercise their activity. During this period MSs may also restrict the access to their labour market and even perform a labour market test. After the 12-month period MSs are obliged to authorise the family members to exercise employed or self-employed activities provided the sponsor has such authorisation.

MSs have the option to restrict the access to employment or self-employed activity of first-degree ascending relatives and adult unmarried children, yet not of other family members admitted under the Directive. The access to employment of admitted family members outside of the scope of the Directive is an entirely national competence. For the purpose of promoting the integration of family members,<sup>58</sup> to fight poverty traps and to avoid their deskilling, the Commission recommends to keep restrictions on labour market access for family members minimal.

## **5.3. Access to autonomous residence permit**

Article 15(1) prescribes that at the latest after five years of residence and if no residence permit was granted for other reasons, MSs must issue, upon application, an autonomous residence permit, independent from the sponsor, to the spouse or unmarried partner and a child who has reached majority. Residence should be understood as lawful stay and the Commission underlines that MSs are allowed to grant the permit earlier than after five years. In the event of a breakdown of the relationship, the right to an autonomous residence permit must in any case still be given to the spouse or unmarried partner, but MSs are allowed to exclude the adult child. While Article 15(4) foresees that the conditions are to be established by national law, Article 15(3) indicates that a breakdown may be understood to include widowhood, separation, divorce, death, etc.

Articles 15(2) and 15(3) first sentence allow MSs to issue an autonomous residence permit at any moment to adult children and first-degree ascendants to whom Article 4(2) applies and, upon application, to any persons who have entered by virtue of family reunifications in the event of widowhood, divorce, separation, or death of first-degree ascendants or descendants.

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<sup>57</sup> By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 69 and 79.

<sup>58</sup> See Recital 15.

Articles 15(3) second sentence prescribes that MSs must issue an autonomous residence permit in the event of particularly difficult circumstances to any family members who have entered by virtue of family reunification. MSs are required to lay down provisions in national law for this purpose. The particularly difficult circumstances must be caused by the family situation or the break-down thereof; not in difficulties that have another cause. These may be, for instance, cases of domestic violence against women and children, certain cases of forced marriages, or cases where the person would be in a particularly difficult family situation if forced to return to the country of origin.

## **6. FAMILY REUNIFICATION OF BENEFICIARIES OF INTERNATIONAL PROTECTION**

### **6.1. Refugees**

Chapter V of the Directive lays down several derogations from Articles 4, 5, 7 and 8, creating more favourable conditions for family reunification of refugees. These derogations impose precise positive obligations on the MSs, with corresponding clearly defined individual rights, requiring them to authorise the family reunification of certain members of a refugee's family under these more favourable conditions, without being left a margin of appreciation.<sup>59</sup>

At the same time the Directive allows MSs to limit the application of these more favourable conditions by restricting them to (1) family relationships that predate the entry (Article 9(2)), (2) applications made within three months of the granting of refugee status (Article 12(1) third subparagraph), and (3) families for whom family reunification is impossible in a third country with which the sponsor and/or family members has special links (Article 12(1) second subparagraph). However, this margin of manoeuvre must not be used by them in a manner which would undermine the objective of the Directive and the effectiveness thereof.<sup>60</sup> MSs should transpose and apply these provisions with special attention in order to take into account the particular situation of refugees who were forced to flee their country and prevented from leading a normal family life there.<sup>61</sup> The Commission encourages the example of a number of MSs that do not apply the optional restrictions, or allow for more leniency, in recognition of the particular plight of refugees and the difficulties they often face in applying for family reunification.<sup>62</sup>

At the same time, according to Article 7(2) second subparagraph, integration measures may be applied once refugees and/or family members of refugees referred to in Article 12 (i.e. the nuclear family of Article 4(1)) but only after having been granted family reunification. Since this rule is part of the general provisions and not of Chapter V, it prevails over the restriction of Article 9(2) which allows MSs to confine the more favourable provisions to refugees whose family relationships predate their entry. Consequently, with regards to nuclear family founded after the refugee-sponsor's entry, while Chapter V does not apply, integration measures may also only be applied after having been granted family reunification.

The Commission underlines that the provisions of Chapter V must be read in the light of the principles set out in Article 5(5) and Article 17. Therefore, also when examining applications for family reunification by refugees, MSs must make a balanced and reasonable assessment in

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<sup>59</sup> By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 60.

<sup>60</sup> By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 43.

<sup>61</sup> Recital 8

<sup>62</sup> Difficulties such as the often lengthy process of tracing of family members, providing documentation, and obtaining official documents, dealing with (potentially hostile) authorities in their country of origin, etc. within a limited timeframe.

every individual case of all the interests in play, while having due regards to the best interests of minor children.<sup>63</sup> No factor taken separately may automatically lead to a decision but must enter the equation as only one of the relevant factors.<sup>64</sup>

#### *6.1.1. Family Members*

According to Article 10(1), the definition of family members of Article 4 shall be used to define family members of refugees, thereby excluding any more stringent definitions or additional requirements. All mandatory and optional limitations set by Article 4 shall also apply, such as the exclusion of polygamous marriage, except for the third subparagraph of Article 4(1) which shall not apply to children of refugees.

Article 10(2) explicitly allows MSs to expand this scope by allowing them to authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee. MSs are encouraged to use their margin of appreciation in the most humanitarian way. Since Article 10(2) does not lay down any restrictions as to the degree of relatedness of 'other family members'. The Commission encourages MSs to also consider individuals who are not biologically related but are cared for within the family unit, for instance foster children, even though MSs retain full discretion in this regard. The concept of dependency is the determining factor.

#### *6.1.2. Absence of official documentary evidence*

Article 11 prescribes that Article 5 shall apply to the submission and examination of the application subject to the derogation with regards to official documentary evidence contained Article 11(2). Thus, in line with Article 5(2), MSs may consider documentary evidence in order to establish the family relationship, and interviews and other investigations may be carried out if appropriate and necessary.

However, the particular situation of refugees who were forced to flee their country implies that it is often impossible or dangerous for refugees or their family members to produce official documents or to get in touch with diplomatic or consular authorities of their country of origin. Article 11(2) is explicit, without leaving a margin of appreciation, in stating that the fact that documentary evidence is lacking may not be the sole reason for rejecting an application and in obliging MSs, in such case, to 'take into account other evidence' of the existence of the family relationship. Since such 'other evidence' is to be assessed in accordance with national law, MSs have a certain margin of appreciation yet they should adopt clear rules governing these evidentiary requirements. Examples of 'other evidence' to establish family links may be written and/or oral statement of the applicants, interviews with family members and investigations carried out on the situation abroad. These statements can then, for instance, be corroborated by supporting evidence such as documents, audio-visual materials, any documents or physical exhibits (e.g. diplomas, money transfer proofs,...) or knowledge of specific facts.

The individual assessment of Article 17 requires that MSs take all relevant factors into account while examining the evidence provided by the applicant, including age, gender, education, background and social status as well as specific cultural aspects. The Commission considers that where serious doubts remain after all other types of proof have been examined, or where there are strong indications of fraudulent intent, DNA testing can be used as a last

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<sup>63</sup> By analogy with Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 81; Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 62-64

<sup>64</sup> By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 66, 88, 99 and 100.

resort.<sup>65</sup> In that case, the Commission considers that MSs should observe the principles on DNA testing of UNHCR.<sup>66</sup>

The Directive does not prohibit MSs to charge refugees or applicants for DNA tests or other investigations. However, fees cannot be excessive or disproportionate in order not to have the effect of creating an obstacle to the obtaining of the rights conferred by the Directive and, therefore, deprive it of its effectiveness.<sup>67</sup> In setting potential fees, the Commission considers that MSs should take into account the particular situation of refugees and encourages MSs to bear the costs of a DNA test, especially when it is imposed upon the refugee or his/her family members.

#### 6.1.3. *Exceptions to the more favourable provisions of Chapter V*

Article 12(1) second subparagraph allows MSs not to apply the more favourable conditions where family reunification is possible in a third country with which the sponsor and/or family member has special links. This option requires that the third country is a realistic alternative and, thus, a safe country for the sponsor and family members. The burden of proof on the possibility of family reunification in a third country lies on the MS, and not the applicant. In particular, the relocation to such a third country should not pose a risk of persecution or of refoulement for the refugee and/or his family members and the former should have the possibility to receive protection there in accordance with the 1951 Convention relating to the Status of Refugees. The special links implies moreover the existence of family, cultural and social ties of the sponsor and/or family member with the third country.<sup>68</sup>

Article 12(1) third subparagraph allows MSs to require the refugee to meet the conditions of Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status. Refugees often face practical difficulties within this timeframe which may constitute a practical obstacle to family reunification. Therefore, the Commission considers the fact that most MSs do not apply this limitation as the most appropriate solution.

Nevertheless, if MSs opt to apply this provision, the Commission considers that they should take into account objective practical obstacles faced by the applicant as one of the factors when assessing an individual application. Furthermore, while MSs, in accordance with Article 11 and 5(1), are free to determine whether the application should be submitted either by the sponsor or by the family member, the specific situation of refugees and their family members may make this particularly difficult or impossible. Therefore, especially when applying a time limit, the Commission considers that MSs should allow for the possibility that the sponsor can submit the application in the territory of the MS in order to guarantee the effectiveness of the right to family reunification. Finally, in case an applicant is faced with objective practical obstacles to meet the three month deadline, the Commission considers that MSs should allow the introduction of a partial application, to be completed as soon as documents become available or the tracing is successfully completed. The Commission also urges MSs to provide clear information on family reunification, and the more favourable conditions, to beneficiaries

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<sup>65</sup> It should be kept in mind that DNA testing cannot prove marriage and extended or dependent family members, especially in cases of adoption, is not always affordable or available in locations accessible to refugees or their family members, and may cause significant delays in some cases.

<sup>66</sup> UN High Commissioner for Refugees (UNHCR), UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context, June 2008, available at: <http://www.refworld.org/docid/48620c2d2.html>

<sup>67</sup> By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 69 and 79.

<sup>68</sup> Cf. Article 17.

of the refugee status in a timely and understandable way (for instance, when their refugee status is granted).

#### 6.1.4. *Travel documents and long-stay visas*

Obtaining the necessary travel documents and long-stay visas may be particularly challenging for refugees and their family members and may constitute a practical obstacle to family reunification. The Commission, therefore, considers that MSs should pay special attention to this particular situation and facilitate the obtaining of travel documents and long-stay visas so that their right to family reunification may be effectively exercised. In cases where it is impossible for refugees and their family members to obtain national travel documents and long-stay visas, MSs are encouraged to recognise and accept ICRC emergency travel documents and Convention Travel Documents,<sup>69</sup> issue one-way laissez-passer documents, and offer the possibility to family members to be issued a visa upon arrival in the MS.

### 6.2. **Beneficiaries of subsidiary protection**

While Article 3(2) excludes the application of the Directive, and thus the more favourable conditions for refugees, where the sponsor is (a) applying for refugee status but has not yet received a final decision, a beneficiary of (b) temporary or (c) subsidiary protection, or applying for these statuses, the Commission underlines that the Directive should not be interpreted as obliging MSs to deny beneficiaries of temporary or subsidiary protection the right to family reunification.<sup>70</sup> The Commission considers that humanitarian protection needs of persons benefiting from subsidiary protection are not different from those of refugees and encourage MSs to adopt rules that grant similar rights to beneficiaries of temporary or subsidiary protection as to refugees. The convergence of both protection statuses is also confirmed in the recast Qualification Directive 2011/95/EU<sup>71</sup> as part of the ‘EU Asylum Package’<sup>72</sup>. In any case, even when a situation is not covered by European Union law, MSs are still obliged to respect Article 8 and 14 ECHR.<sup>73</sup>

## 7. **OVERALL PRINCIPLES**

### 7.1. **Availability of information**

The Directive calls upon MSs to develop a set of rules governing the procedure for examination of applications for family reunification which should be effective and manageable, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned.<sup>74</sup> In order to meet these criteria MSs should develop practical guides with detailed, accurate and clear information for applicants, and to communicate any new developments in a timely and clear manner. Such practical guides should be made widely available, including online<sup>75</sup> and in the places of application, be it consulates or other places.

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<sup>69</sup> In accordance with Article 28 of the 1951 Convention relating to the Status of Refugees.

<sup>70</sup> Council Directive 2001/55/EC explicitly entitles beneficiaries of temporary protection to reunite with their family members.

<sup>71</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on 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, OJ L 337, 20.12.2011, p. 9.

<sup>72</sup> Common European Asylum System.

<sup>73</sup> Case C-256/11, *Dereci*, 15 November 2011, para 72; Case C-127/08, *Metock*, 25 July 2008, para 79.

<sup>74</sup> Recital 13.

<sup>75</sup> On the Commission’s EU Immigration Portal and MSMSs’ national websites.

The Commission recommends making these guides available in the language of the MS, in the local language in the place of application and in English.

## **7.2. Best interests of the child**

This horizontal clause of Article 5(5) requires that the child's best interest must be a primary consideration in all actions relating to children.<sup>76</sup> MSs must therefore take the child's well-being and the family's situation into consideration in accordance with the principle of respect for family life as recognised by the Convention on the Rights of the Child and the Charter of Fundamental Rights of the EU.

The CJEU has held that Article 5(5) and recital 2 require that when an administration of a MS examines an application, in particular when determining whether the conditions of Article 7(1) are satisfied, the Directive must be interpreted and applied in the light of the respect for private and family life<sup>77</sup> and the rights of the child<sup>78</sup> of the Charter.<sup>79</sup> The CJEU has also recognised<sup>80</sup> that children, for the full and harmonious development of their personality, should grow up in a family environment,<sup>81</sup> that MSs are to ensure that a child shall not be separated from his or her parents against their will<sup>82</sup> and that applications by a child or his or her parents to enter or leave a MS for the purpose of family reunification are to be dealt with by the MSs in a positive, humane and expeditious manner.<sup>83</sup> Furthermore, the CJEU has recognised<sup>84</sup> that the right to respect for private or family life must be read in conjunction with the obligation to have regard to the child's best interests<sup>85</sup> and taking account of the need for a child to maintain on a regular basis a personal relationship with both its parents.<sup>86</sup> Consequently, when a MS examines an application it must ensure that a child shall not be separated from his or her parents against their will, except in case it decides that the best interests of the child require such separation in accordance with established law and procedures. Any such decision must be motivated as to guarantee effective judicial review.

## **7.3. Abuse and fraud**

The Commission considers it imperative to take action against abuse and fraud of the rights conferred by this Directive. In the interest of both society and of genuine applicants, the Commission encourages MSs to take firm action in line with the provisions of Articles 16(2) and 16(4).

Article 16(2) foresees that MSs may reject an application, or withdraw or refuse to renew a family member's residence permit, where it is shown that (a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used; or (b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a MS (*"marriages or relationships of convenience"*, *"false declarations of parenthood"*). In order to do so, MSs are in particular allowed to have regard to the fact that a marriage, partnership or adoption was

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<sup>76</sup> Article 24(2) of the Charter of Fundamental Rights of the EU.

<sup>77</sup> Articles 7 of the Charter of Fundamental Rights of the EU.

<sup>78</sup> Articles 24(2) and (3) of the Charter of Fundamental Rights of the EU.

<sup>79</sup> Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 80.

<sup>80</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 57.

<sup>81</sup> Sixth recital of the preamble to the Convention on the Rights of the Child.

<sup>82</sup> Article 9(1) of the Convention on the Rights of the Child.

<sup>83</sup> Article 10(1) of the Convention on the Rights of the Child.

<sup>84</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 58.

<sup>85</sup> Article 24(2) of the Charter of Fundamental Rights of the EU.

<sup>86</sup> Article 24(3) of the Charter of Fundamental Rights of the EU.

contracted after the sponsor had been issued his/her residence permit when assessing such cases.

Article 16(4) allows MSs to conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience. *A contrario*, general checks and inspections of specific categories of marriage, partnership or adoption are not allowed.

Marriages of convenience can concern marriages of third-country nationals with (a) other third-country nationals residing in the EU, (b) EU nationals having exercised the right to free movement or (c) own nationals. While different rights and legal rules are applicable to family reunification in these constellations, the main definitions, investigation and detection techniques are the same. For this reason, Section 4.2 of the 2009 guidelines on the Free Movement Directive may, *mutatis mutandis*, be referred to for guidance on definitions.<sup>87</sup>

Tackling marriages of convenience effectively requires an operational response, entailing police cooperation and the sharing of best practices between competent national authorities in the appropriate law enforcement fora.

#### **7.4. Individual assessment**

According to the CJEU, MSs are obliged to make a balanced and reasonable assessment of all the interests in play, both when implementing Directive 2003/86 and when examining applications for family reunification.<sup>88</sup> The CJEU further considers that Article 17 requires that MSs make a comprehensive assessment of all relevant factors in each individual case. This obligation also applies when MSs have made use of the possibility of requiring evidence of the fulfilment of certain conditions (such as accommodation, sickness insurance and resources in Article 7), when verifying whether a child over the age of 12 arriving independently meets a condition for integration (Article 4(1) in fine), when a child of over 15 submits an application (Article 4(6)), or when a minimum age for spouses is required (Article 4(5)). None of these factors taken separately may automatically lead to a decision but must enter the equation as one of the relevant factors.<sup>89</sup>

Examples of other relevant factors are the nature and solidity of the person's family relationships; the duration of his residence in the MS; the existence of family, cultural and social ties with his/her country of origin; the living conditions in the country of origin; the age of the children concerned; the fact that a family member has been born and/or raised in the MS; the economic, cultural and social ties in the MS; the dependency of a family members; the protection of marriages and/or family relations.

MSs enjoy a wide margin of appreciation when *taking due account* of the relevant factors in an individual case yet are limited by the principles of Article 8 of the European Convention on Human Rights, Article 7 of the Charter of Fundamental Rights of the European Union concerning protection of family and respect for family life, and the relevant case law of the European Court of Human Rights and the CJEU. The following principles should be respected: all individual circumstances of a case must be identified and the weight given to individual and public interests must be similar to comparable cases. Also, the balancing of the

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<sup>87</sup> Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application 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 MSMSs, COM(2009)313 final, pp. 15-17.

<sup>88</sup> Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 81.

<sup>89</sup> Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 66, 87, 88, 99 and 100.

relevant individual and public interests must appear reasonable and proportional. MSs should explicitly give these reasons in the decision rejecting the application.<sup>90</sup>

*X. is a third-country national residing in a MS with her daughter who wants to be joined by her third-country spouse but the income of X. does not meet the requested income threshold in this MS. Does the MS still have to examine the merits of the case?*

*Yes, the MS needs to assess all relevant factors in the individual case, including the income requirement. The MS may require proof that X. has stable and regular resources which are sufficient to maintain herself and the members of her family, yet the MS is required to still examine the application in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of the directive.<sup>91</sup>*

### 7.5. Right to legal challenge

According to Article 18, MSs are obliged to grant effective legal remedy against decisions of national authorities. The Commission recalls that when implementing Union law the MSs must respect the provisions of the Charter of Fundamental Rights and must therefore apply the Directive's redress provision in conformity with the right to an effective remedy before a tribunal as set out in Article 47 of the Charter and the CJEU's case law in this matter.<sup>92</sup>

This implies that full judicial review must be available concerning the merits and legality. Therefore, decisions may be challenged not only with regard to the law but also the facts of a case. The plaintiff is entitled to a fair and public hearing within a reasonable time by a reviewing tribunal that is independent, impartial and previously established by law. Article 47 of the Charter provides effective remedy and a fair trial before a judicial tribunal, so quasi-judicial or administrative review seems insufficient.

While the Directive explicitly lists the right to mount a legal challenge against only four possible decisions,<sup>93</sup> the case law of the CJEU provides that also with regards to any other decisions relating the restriction of subjective rights conferred to by the Directive, effective remedies must also be granted. Article 47 of the Charter applies to all rights foreseen in the Directive including, for instance, decisions concerning the restriction of the right to employment<sup>94</sup> or the refusal to grant an independent residence title.<sup>95</sup> Any consequences of the failure to decide by the MS upon an application for family reunification within the foreseen time period, whether an automatic admission or an effective legal challenge against an automatic rejection, must be determined by the national legislation of the relevant MS.<sup>96</sup> This national legislation should ensure an effective procedure for granting relief in case of an administrative failure to decide through an administrative complaint procedure or, in absence of this, a judicial procedure.

<sup>90</sup> Article 5(4) subpara 3

<sup>91</sup> Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 82.

<sup>92</sup> Article 51(1) Charter of Fundamental Rights; Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 105; See also Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 3 September 2008; 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.

<sup>93</sup> The rejection of an application for family reunification, the refusal to renew a residence permit, the withdrawal of a residence permit, and the order of removal from the territory of a MS.

<sup>94</sup> Article 14(2)

<sup>95</sup> Article 15

<sup>96</sup> Article 5(4) subpara 3, 2nd sentence

In view of the possibility of effective exercise of the right to mount a legal challenge the Commission encourages MSs to grant the right to mount a legal challenge to both the sponsor and his/her family member(s).