



Brussels, 3.4.2014
COM(2014) 210 final

**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 2008¹ 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 reunification² to gather opinions on how to have more effective rules at EU level and gather information on the application of the Directive. There were 120 responses, including contributions from 24 Member States (MSs), international organisations, social partners, NGOs and individuals³. On 31 May-1 June 2012, the Commission held a public hearing in the framework of the European Integration Forum⁴. The 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 identified issues.

This Communication therefore 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. Views may change in 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'⁵.

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 family members other than the spouse and minor children. MSs may make the exercise of the right to family reunification subject to compliance with

¹ 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.

² 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.

³ http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0023_en.htm.

⁴ 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.

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

certain requirements if the Directive allows this. They retain a certain margin of appreciation to verify whether requirements determined by the Directive are met and for weighing the competing interests of the individual and the community as a whole⁶, in each factual situation.

However, since the authorisation of family reunification is the general rule, derogations must be interpreted strictly. The margin of appreciation which the MSs are recognised as having must not be used in a manner that would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof⁷. At the same time, the right to family reunification is not unlimited. Beneficiaries are obliged to obey the laws of their host country, as set out in the Directive. In case of abuse and fraud, it is in the interests of both the community and of genuine applicants that 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 life⁸, 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 national⁹ sponsors. That 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 to preserve the family unit, whether the family relationship arose before or after the resident's entry¹⁰.

2.1. The sponsor

In accordance with Article 3(1), from the moment a sponsor holds a residence permit valid for at least one year and has reasonable prospects of obtaining the right to permanent residence, he/she may submit an application for family reunification. 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:

- visas;

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

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

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

⁹ 'Third-country national' means any person who is not an EU citizen and who is not a person enjoying the right of free movement under Union law.

¹⁰ Article 2 (a)-(d).

- permits issued pending examination of a request for asylum, an application for a residence permit or an application for its extension;
- permits issued in exceptional circumstances with a view to an extension of an authorised stay with a maximum duration of one month;
- authorisations issued for a stay not exceeding six months by MSs not applying the provisions of Article 21 of the Convention implementing the Schengen Agreement¹¹.

The condition of having ‘reasonable prospects of obtaining the right of permanent residence’ should be examined by MSs on a case-by-case basis taking into account the individual circumstances, such as the nature and type of residence permit¹², the administrative practice, and other relevant factors related to the sponsor’s situation. The Directive leaves a wide margin of appreciation to MSs when considering whether there is a reasonable probability of obtaining the right of permanent residence.

The test of reasonable prospects entails a prognosis of the likelihood of meeting the criteria for long term residence taking into account the regular administrative practice and the circumstances of the case. Thus, in every individual case MSs need to assess whether, under regular circumstances, the permit under national law may be renewed beyond the period required for permanent residence. ‘Reasonable prospects’ does not require the fulfilment of all the conditions needed to obtain permanent residence at the moment of assessment, but a prognosis that they are likely to be fulfilled. Since the type and purpose of residence permits differ substantially between MSs, it is for MSs to determine what kind of residence permits they accept as sufficient to consider that there are reasonable prospects.

X, an IT professional with significant experience, has a residence permit for work purposes valid for one year in a MS. As long as X fulfils the conditions for this residence permit, it may be renewed indefinitely, and after five years, X will be entitled to permanent residence.

X would like to be joined by her spouse. All being well, 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 administrative practice and national laws in the MS. 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 to permanent residence. They are thus excluded from the scope of the Directive. The successive issuance of extensions of permits with a specific purpose or permits valid for less than one year, with the sole intention of circumventing the applicability of the condition of reasonable prospects of

¹¹ 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.

¹² For instance, if the residence permit it is linked to employment, the assessment needs to take into account all circumstances related to the individual situation, such as the nature of the employment, the economic situation of the industry concerned, the intentions of the employer and employee, and should not be reduced to only considering the employment contract that is potentially renewable.

Article 3.1, would undermine the objective of the Directive and its effectiveness¹³. A residence permit valid for 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 valid for 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 valid for nine months. Since the permit is not valid for at least one year, the Directive is not applicable.

2.2. Family members

Article 4(1) states that members of the nuclear family, i.e. the spouse and 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.¹⁴ Minor children, including adopted children of either the sponsor or the spouse, are also entitled to family reunification on condition that the sponsor or the spouse, respectively, has custody and the children are dependent on him/her.

According to Article 4(1) (c) and (d) second sentence, in the case of children under **shared custody**, the MS may only authorise reunification if the other party sharing 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. 'Shared custody' is custody that is to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility¹⁵.

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 blockage¹⁶, it is up to MSs to determine how to deal with such situations. Nevertheless, a decision should be taken in line with the best interests of the child as set out in Article 5(5)¹⁷ and on a case-by-case basis, taking into account the reasons for not being able to obtain agreement and other specific circumstances of the case.

¹³ By analogy with Case C-578/08, Chakroun, 4 March 2010, para 43.

¹⁴ Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 60.

¹⁵ See Article 2, point 9 and 11(b), 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.

¹⁶ 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.

¹⁷ See Council doc. no. 6504/00, p. 5, note 7.

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. The facultative provision of Article 4(2)(a) allows the reunification of first-degree relatives in the direct ascending line of the sponsor or his or her spouse on the condition that they (1) are dependent on them and (2) do not enjoy proper family support in the country of origin.

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 Directive 2004/38/EC¹⁸ (the ‘Free Movement Directive’)¹⁹, the CJEU’s choice of language does not indicate that its findings were limited to that Directive. While it needs to be kept in mind that the context and purpose of both Directives are not the same²⁰, the criteria used by the CJEU to assess dependency may, *mutatis mutandis*, serve as guidance to MSs to establish criteria to appreciate the nature and duration of the dependency of the person concerned in the context of Article 4(2)(a).

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/partner²¹. When examining an applicant’s personal circumstances, the competent authority 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 sponsor and the family member²². Consequently, ‘dependency’ may differ according to the situation and the particular family member concerned

To determine whether family members are dependent, the MS must assess 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 sponsor²³. There is neither a requirement as to the amount of material support provided, nor any

¹⁸ Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, p. 77).

¹⁹ 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, para 24.

²⁰ Under the Free Movement Directive MSs have an obligation to promote reunification with ascendants while under the Family Reunification Directive reunification for ascendants is a derogation which is only allowed if certain conditions are met.

²¹ 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.

²² By analogy with Case C-83/11, *Rahman and Others*, 5 September 2012, paras 23.

²³ By analogy with Case C-1/05, *Jia*, 9 January 2007, para 37.

level of standard of living for determining the need for financial support by the sponsor²⁴. The status of dependent family members does not presuppose a right to maintenance²⁵. MSs may impose particular requirements as to the nature or duration of dependence 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. It is necessary, however, that those requirements are consistent with the normal meaning of the words relating to the dependence referred to in Article 4 of and do not deprive that provision of its effectiveness²⁶.

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 day-to-day care duties. The situation should be assessed in the light of the circumstances of the case in question.

All of the provisions in this section must be applied in accordance with the non-discrimination principle enshrined in particular in Article 21 of the Charter, as pointed out in Recital 5.

2.3. Minimum age of spouse

Article 4(5) allows MSs to require the sponsor and his/her spouse to be of a certain minimum age before the spouse is able to join him/her. This minimum age may not exceed 21. This faculty may only be used 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 thereof²⁷.

Articles 5(5) and 17 oblige MSs to have due regard for the best interests of minor children and to conduct an individual examination in applications for family reunification. If a MS requires a minimum age, it must still do a case-by-case assessment of 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 systematically refused, irrespective of an actual examination of the situation of each applicant²⁸. The minimum age requirement is only one of the factors that must be taken into account by the MSs when considering an application²⁹.

²⁴ 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).

²⁵ By analogy with Case C-316/85, *Lebon*, 18 June 1987, para 21-22.

²⁶ By analogy with Case C-83/11, *Rahman and Others*, 5 September 2012, paras 36-40.

²⁷ By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 43.

²⁸ By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 48.

²⁹ By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 99-101.

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 consider making an exception thus allowing for family reunification 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 of a common child.

Y is a 30-year-old third-country national sponsor who wants to reunite with his 20-year-old spouse whom he married two years ago and their two common children. The spouse has a basic knowledge of the language of the MS. 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 fact that Y and his spouse have two common children is an indication that a forced marriage is unlikely, and the interests of the children should also be taken into account.

The wording of Articles 4, 7 and 8 clearly indicates the point in time at which the applicant or sponsor should comply with the requirements. 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. It should therefore be possible to submit applications and to examine these before the minimum age requirement is fulfilled, especially in view of the potential processing time of up to nine months. However, MSs may postpone the effective family reunification until the minimum age is reached.

3. SUBMISSION AND EXAMINATION OF THE APPLICATION

3.1. Submission of the application

Article 5(1) states 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 the territory of the MS in which the sponsor resides.

Article 5(3) second subparagraph and recital 7 allow MSs, in appropriate circumstances, 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 stay³⁰. Hence, in appropriate circumstances, MSs may accept applications when family members are already in its territory. MSs have a wide margin of appreciation in determining the appropriateness of the circumstances³¹.

³⁰ Article 3(5) explicitly foresees that MSs have the possibility to adopt or maintain more favourable conditions.

³¹ MSs may consider, for instance, derogations in the case of new-born children, third-country nationals who are exempted from a visa, a situation where it is considered in the best interests of minor children, a relationship that predates the entry and where the partners have lived together for a considerable time, humanitarian reasons, etc. These examples are not exhaustive and always depend on the individual case.

MSs are allowed to charge reasonable, proportional administrative fees for an application for family reunification and they have a limited margin of discretion in setting these charges, as long as they do not jeopardise the achievement of the objectives and the effectiveness of the Directive³². 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 disproportionate³³. 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 evaluate whether the fees for third-country nationals are proportionate, taking into account that these persons are not in identical situations³⁴. To promote best interests of the child, the Commission encourages MSs to exempt applications submitted by minors from administrative fees. In case that an entry visa is required in a MS, the issuing conditions of such a visa should be facilitated and the visa should be granted without additional administrative fees.

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;
- (b) documentary evidence to prove compliance with the conditions of Articles 4 and 6 and, where applicable, 7 and 8;
- (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 evidence of the family relationship through interviews or other investigations, including DNA testing. The appropriateness and necessity criteria imply that such investigations are not allowed if there are other suitable and less restrictive means to establish the existence of a family relationship. Every application, its accompanying 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.

³² By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 62, 64-65.

³³ By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 69-70, 74 and 79.

³⁴ By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, para 77.

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. If the workload exceptionally exceeds administrative capacity or if the application needs further examination, the *maximum time limit of nine months* may be justified. The nine-month period starts from the date on which the application is first submitted, not the moment of notification of receipt of the application by the MS.

The exception provided for 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 strictly³⁵ and on a case-by-case basis. A MS administration which wants to make use of this possibility must justify such an extension by demonstrating that the exceptional complexity of a particular case amounts to exceptional circumstances. Administrative capacity issues cannot justify 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 a 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 difficult access to diplomatic missions, or determining the right to legal custody if the parents are separated.

Article 5(4) states that the decision must be notified in writing and that if it is negative, legal and factual reasons should be given to allow the applicant to effectively exercise the right to mount a legal challenge³⁶.

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.

³⁵ By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 43.

³⁶ 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 the CJEU. Although the relevant case law of the CJEU is not related directly with regard to third-country nationals, it may *mutatis mutandis* serve as background when defining the notions in question by analogy³⁷.

MSs should apply the principle of proportionality when assessing a particular application. Article 6(2) second subparagraph states 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 if 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 purpose³⁸.

As such, the only diseases that may be considered a threat to public health are those defined by the relevant instruments of the World Health Organisation and such other infectious or contagious parasite-based diseases as are the subject of protective provisions in relation to nationals in the host country. MSs may require a medical examination 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)(a), 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 MSs should be transparent and clearly specified in the national legislation.

The purpose of this provision is to ensure adequate accommodation for the sponsor and his/her family members. Therefore, 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

³⁷ While the context, purpose and legal regime of Directive 2004/38/EC is not the same, the case law referred to in section 3 of the 2009 guidelines on the Free Movement Directive (COM(2009) 313 final, pp. 10-14), may, *mutatis mutandis*, serve as background for MSs and national courts.

³⁸ Article 18 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

accommodation that can be expected to be available when 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 ask for this requirement to be met at the moment of application, as this could place considerable additional financial and administrative burdens on the sponsor. In such specific circumstances, the Commission encourages MSs to exercise a certain flexibility. They could, for instance, accept as evidence a conditional rental agreement which would enter into force once family reunification was granted and family members effectively entered.

4.3. Sickness insurance requirement

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

If the MS concerned has compulsory universal health insurance that is also available to and mandatory for third-country national residents, the fulfilment of this requirement must be assumed. The Commission considers that requiring additional private health insurance would impose an unnecessary burden and undermine the objective and the effectiveness of the Directive. If the MS has a voluntary contribution-based scheme, this requirement can be fulfilled through:

(a) a system of conditional health insurance granted on acceptance of an application for family reunification of a family member or

(b) a private health insurance that covers 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 sufficient to maintain him/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 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 in a manner that would undermine the objective and the effectiveness of the Directive³⁹. 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 with a view to promoting family life⁴⁰.

³⁹ 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.

⁴⁰ Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 82.

The evaluation of the **stability** and **regularity** of the resources has to 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, a permanent employment contract should therefore be considered as sufficient proof.

MSs are encouraged to take the realities of the labour market into account as permanent employment contracts may be increasingly unusual, especially at the beginning of an employment relationship. 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 in an 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 factors for assessing the availability of resources may be, for example, the qualifications and skills of the sponsor, structural vacancies in the field of the sponsor, or the labour market situation in the MS. Access to specified sums over a certain period in the past may certainly constitute an element of proof, yet this must not be imposed as a requirement, since this could introduce an additional condition and waiting period not envisaged in the Directive, especially if the sponsor is at the beginning of his/her career.

Regarding the **nature** of the resources, these may consist of income from employment, 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, to evaluate whether resources are **sufficient**, ‘sufficient, stable and regular resources’, contrasted with ‘**without recourse to the social assistance system**’, indicates that the latter is a key criterion for assessing whether the resources requirement is fulfilled. ‘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 sufficient to maintain him/herself and the members of his/her 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/her period of residence⁴¹. This is a concept which has its own independent meaning in EU law and cannot be defined by reference to concepts of national law⁴². 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 addressed⁴³. Therefore, the expression ‘recourse to the social assistance

⁴¹ Case C-578/08, *Chakroun*, 4 March 2010, para 46; See by analogy Case C-140/12, *Brey*, 19 September 2013, para 61.

⁴² Case C-578/08, *Chakroun*, 4 March 2010, para 45.

⁴³ Case C-578/08, *Chakroun*, 4 March 2010, para 49.

system' does not allow a MS to refuse family reunification to a sponsor who proves that he/she has stable and regular resources which are sufficient to maintain him/herself and the members of his/her family, but who, given the level of his/her resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his/her income, or income support measures⁴⁴.

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 stressed that this faculty must be interpreted strictly and exercised in a manner which avoids undermining the objective and the effectiveness of the Directive⁴⁵. Consequently, 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 17⁴⁶. Therefore, an application may not be rejected for the sole reason that the applicant's resources do not reach the reference amount. An individual assessment of all elements of a particular case is required before reaching a decision on an 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 resources of the third-country national for whom a right of residence is sought on the basis of family reunification⁴⁷. 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 circumstances⁴⁸.

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. The capacity of a sponsor to have regular resources which are sufficient to maintain

⁴⁴ 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.

⁴⁵ Case C-578/08, *Chakroun*, 4 March 2010, paras 43 and 47.

⁴⁶ Case C-578/08, *Chakroun*, 4 March 2010, para 48.

⁴⁷ Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 72.

⁴⁸ 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.

him/herself and the members of his/her family cannot in any way depend on the point in time at which he/she constitutes his/her family⁴⁹.

4.5. Integration measures

The Commission recognises the margin of appreciation MSs have to decide whether to require third-country nationals to comply with integration measures and to develop the measures most appropriate in their own national context⁵⁰. However, the Commission stresses 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. If integration measures are in effect used to limit family reunification, this would amount to an additional requirement for family reunification. This would undermine the objective of the directive, which is to promote family reunification, and the effectiveness thereof⁵¹.

Therefore, MSs may impose a requirement on family members to comply with integration measures under Article 7(2), but this may not amount to an absolute condition upon which the right to family reunification is dependent. The nature of the **integration measures** in Article 7(2) is different from the conditions envisaged in Articles 4(1) and 7(1). First, Article 4(1) — as a stand-still clause only⁵² — allows MSs to verify for children over 12 arriving independently of the rest of their families whether they meet a **condition for integration before authorising** entry and residence⁵³. 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 require the sponsor to achieve *before authorising* entry and residence of family members.

In contrast, Article 7(2) allows MSs to require third-country nationals to comply with **integration measures**. MSs may require family members to make a certain effort to demonstrate their willingness to integrate, for instance, by requiring participation in language or integration courses, prior to or after arrival. Since these measures are meant to help facilitate the integration process, this also implies that the way in which MSs conceive this possibility cannot be unlimited.

⁴⁹ Case C-578/08, *Chakroun*, 4 March 2010, paras 64-66.

⁵⁰ On 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); and the Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions of 20 July 2011 on the European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final.

⁵¹ Case C-578/08, *Chakroun*, 4 March 2010, para 43.

⁵² The purpose of this stand-still clause is to reflect the children's capacity for integration at early ages (recital 12).

⁵³ 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.

Article 7(2) comes down to the possibility to ask 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 MS to verify whether this person shows the required willingness to integrate in his/her new environment. The verification of willingness to integrate may take the form of an examination on basic skills deemed necessary for this purpose. This examination should be gender sensitive to take into account the specific situation of some women that might, for instance, have poor level of education. The level of difficulty of the exam, the cost of participating, the accessibility of the teaching material necessary to prepare for such an examination, or the accessibility of the examination itself must not, in fact, be barriers that complicate the achievement of this purpose⁵⁴. In other words, the integration measures that a MS may require cannot result in a performance obligation that is in fact a measure that limits the possibility of family reunification. The measures must, on the contrary, contribute to the success of 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 met⁵⁵. MSs should therefore provide the effective possibility of an exemption, a deferral or other forms 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. Special attention should also be paid to the fact that in several parts of the world women and girls have less access to education and might have a lower literacy level than men. Therefore, MSs may not refuse entry and stay on its territory to 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 provided for in the legislation of that MS⁵⁶.

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), be free or at least affordable, and tailored to individual needs, including gender specific needs (e.g. childcare facilities). 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 in the host country.

⁵⁴ Statistics and qualitative policy impact evaluations may constitute indications that certain measures constitute factual barriers to family reunification.

⁵⁵ 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.

⁵⁶ 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.

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 children⁵⁷. The CJEU has stressed that duration of residence in the MS is only one of the factors that the MS must take into account 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 children⁵⁸.

The purpose of this provision is to enable MSs to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host country for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration⁵⁹. 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. To avoid affecting family life in a disproportionate way, the Commission encourages MSs to keep waiting periods as short as strictly necessary for achieving the purpose of the provision, especially in cases involving minor children.

The Commission is of the view that to determine the duration of the 'lawful stay' of a sponsor, any period of time during which he/she has resided on the territory of a MS in accordance with its national law 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. However, irregular stays, including periods of toleration and periods of postponed return, should be excluded.

MSs may require that the lawful stay be 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. These may, for instance, include 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 before a sponsor acquires a residence permit valid for at least 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 valid for 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 requires a waiting period, and, in X's case, considers the maximum length of two years lawful stay proportionate to enable family reunification to take place in favourable conditions. In this case,

⁵⁷ Article 17 and Article 5(5).

⁵⁸ Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 99-101.

⁵⁹ Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 97-98.

X's spouse can join him at the end of the remaining waiting period, that is, after another 15 months have elapsed.

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)⁶⁰. 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 valid for at least one year and has reasonable prospects of obtaining the right to permanent residence⁶¹, but MSs may delay granting family reunification (*'before having his/her family members join him/her'*) until the waiting period specified 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 valid for two years. 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. In the interests 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 applications and the MS only reaches this decision after nine months. In Y's case, she can be reunited with her spouse and children from the moment she receives notification of the decision.

The CJEU has held that the rules in the Directive, with the exception of Article 9(2), apply to a marriage concluded before a sponsor took up residence in the MS as well as to one that was concluded afterwards⁶², therefore no distinction may be made between the two 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 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 cases, to prevent marriages of convenience.

Z is a third-country national who has been lawfully staying in a MS for four years while a student. After graduation, Z takes up a job offer and receives a new residence permit for one year that may be renewed indefinitely. Meanwhile, Z meets D, a third-country national, and starts a relationship, and 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 Z as soon as she receives notification of the decision.

⁶⁰ The 'waiting period' is an optional requirement for exercising the right to family reunification, while the 'examination period' is a timeframe foreseen to allow MSMSs to process and examine applications.

⁶¹ Article 3(1).

⁶² Case C-578/08, *Chakroun*, 4 March 2010, paras 59-64.

5. ENTRY AND RESIDENCE OF FAMILY MEMBERS

5.1. Entry, long-stay visas and residence permits

Article 13(1) requires that, as soon as an 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 visa issued should not be a short-stay visa.

If access to travel documents and visas is particularly difficult or dangerous and may thus constitute a disproportionate risk or a practical obstacle to the effective exercise of the right to family reunification, MSs are encouraged to consider the specificities 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 encouraged to accept emergency travel documents issued by the International Committee of the Red Cross (ICRC), to issue a national one-way laissez-passer, or offer family members the possibility of being issued a visa upon arrival in the MS.

Administrative fees for visas are allowed, but these may not be excessive or disproportionate. They must not have either the object or the effect of creating an obstacle to obtaining the rights conferred by the Directive and, therefore, depriving it of its effectiveness⁶³.

Article 13(2) states that MSs must grant family members a renewable first residence permit valid for at least one year. According to Article 13(3), the duration of the family member's residence permit should, *in principle*, not go beyond the date of expiry of the sponsor's residence permit. Thus, to synchronise the expiry dates of the sponsor's and family members' resident permits, MSs may grant resident permits valid for less 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 not exceeding 12 months, MSs may set the conditions under which family members can exercise their activity. During this period, MSs may also restrict access to their labour market, and even perform a labour market test. After the 12-month period, MSs are obliged to authorise family members to exercise employed or self-employed activities, provided the sponsor has such authorisation.

MSs have the option to restrict access to employment or self-employed activity of first-degree ascending relatives and adult unmarried children, but not of other family members admitted under the Directive. The access to employment of admitted family members outside the scope of the Directive is an entirely national competence. For the purpose of promoting the integration of family

⁶³ By analogy with Case C-508/10, *European Commission v Kingdom of the Netherlands*, 26 April 2012, paras 69 and 79.

members⁶⁴, to fight poverty traps and to avoid their deskilling, the Commission recommends keeping restrictions on labour market access for family members, in particular migrant women, to a minimum.

5.3. Access to autonomous residence permit

Article 15(1) states that after five years of residence at the latest, and if no residence permit was granted for other reasons, MSs must issue, upon application, an autonomous residence permit, independent of 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 stresses that MSs are allowed to grant the permit earlier. 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 an adult child. While Article 15(4) states 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 reunification in the event of widowhood, divorce, separation, or death of first-degree ascendants or descendants.

Articles 15(3) (second sentence) states 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 have been caused by the family situation or the break-down thereof, not in difficulties with other causes. Examples of particularly difficult circumstances may be, for instance, cases of domestic violence against women and children, certain cases of forced marriages, risk of female genital mutilation, 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 reunification of certain members of a refugee's family under these more favourable conditions, without being left a margin of appreciation⁶⁵.

At the same time, the Directive allows MSs to limit the application of these more favourable conditions by restricting them to

⁶⁴ See Recital 15.

⁶⁵ By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 60.

- (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 have special links (Article 12(1) second subparagraph).

However, MSs must not use this margin of manoeuvre in a manner that would undermine the objective of the Directive and the effectiveness thereof⁶⁶. MSs should transpose and apply these provisions with special attention to take into account the particular situation of refugees who have been forced to flee their country and prevented from leading a normal family life there⁶⁷. 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 reunification⁶⁸.

According to Article 12(1) MSs are not allowed to require the refugee and/or family member(s) to provide evidence⁶⁹ that the refugee fulfils the requirements set out in Article 7, i.e. accommodation, sickness insurance, sufficient resources and integration measures. However, integration measures may be applied once the persons concerned have been granted family reunification (Article 7(2) second subparagraph). Since this rule is part of the general provisions and not of Chapter V, it prevails over Article 9(2), which allows MSs to confine the more favourable provisions to refugees whose family relationships predate their entry. Consequently, with regard to a nuclear family founded after the refugee-sponsor's entry, while Chapter V does not apply, integration measures may also only be applied after family reunification has been granted.

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, when examining applications for family reunification by refugees, MSs must make a balanced and reasonable assessment in every individual case of all the interests at play, while having due regard to the best interests of minor children⁷⁰. No factor taken separately may automatically lead to a decision; each must enter the equation only as one of the relevant factors⁷¹.

⁶⁶ By analogy with Case C-578/08, *Chakroun*, 4 March 2010, para 43.

⁶⁷ Recital 8.

⁶⁸ 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.

⁶⁹ In respect of applications concerning the nuclear family members referred to in Article 4(1).

⁷⁰ 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.

⁷¹ By analogy with Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, paras 66, 88, 99 and 100.

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, as 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 states that Article 5 shall apply to the submission and examination of the application, subject to the derogation with regard to official documentary evidence in Article 11(2). Thus, in line with Article 5(2), MSs may consider documentary evidence 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 cannot be the sole reason for rejecting an application and in obliging MSs, in such cases, 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 statements from the applicants, interviews with family members, or 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, proof of money transfers...) 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 other types of proof have been examined, or where there are strong indications of

fraudulent intent, DNA testing can be used as a last resort⁷². In such cases, the Commission considers that MSs should observe the UNHCR principles on DNA testing⁷³.

The Directive does not prevent MSs from charging refugees or applicants for DNA tests or other investigations. However, fees cannot be excessive or disproportionate to the point that they have the effect of creating an obstacle to obtaining the rights conferred by the Directive and, therefore, deprive it of its effectiveness⁷⁴. 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 if 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 if 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 be 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, not the applicant. In particular, the relocation to such a third country should not pose a risk of persecution or of refoulement⁷⁵ for the refugee and/or his family members and the refugee should have the possibility to receive protection there in accordance with the 1951 Convention relating to the Status of Refugees. The 'special links' imply the sponsor and/or family member have family, cultural and social ties with the third country⁷⁶.

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 refugee status. Refugees often face practical difficulties within this timeframe and these 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 the applicant faces 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

⁷² 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.

⁷³ 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>.

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

⁷⁵ The return by a State, in any manner whatsoever, of an individual to the territory of another State in which he or she may be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

⁷⁶ Cf. Article 17.

member, the specific situation of refugees and their family members may make this particularly difficult or impossible.

Therefore, the Commission considers that MSs, especially when applying a time limit, should allow for the possibility of the sponsor submitting the application in the territory of the MS to guarantee the effectiveness of the right to family reunification. Finally, if an applicant is faced with objective practical obstacles to meeting the three month deadline, the Commission considers that MSs should allow them to make a partial application, to be completed as soon as documents become available or tracing is successfully completed. The Commission also urges MSs to provide clear information on family reunification for refugees 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 refugees may effectively exercise their right to family reunification. 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 Documents⁷⁷, issue one-way laissez-passer documents, and offer family members the possibility of being issued a visa upon arrival in the MS.

6.2. Beneficiaries of subsidiary protection

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,

Or a beneficiary of

(b) temporary or

(c) subsidiary protection,

or applying for these statuses.

The Commission stresses that the Directive should not be interpreted as obliging MSs to deny beneficiaries of temporary or subsidiary protection the right to family reunification⁷⁸. The Commission considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages MSs to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection. The convergence of both

⁷⁷ In accordance with Article 28 of the 1951 Convention relating to the Status of Refugees.

⁷⁸ Council Directive 2001/55/EC explicitly entitles beneficiaries of temporary protection to reunite with their family members.

protection statuses is also confirmed in the recast Qualification Directive 2011/95/EU⁷⁹ as part of the ‘EU Asylum Package’⁸⁰. In any case, even when a situation is not covered by European Union law, MSs are still obliged to respect Article 8 and 14 ECHR⁸¹.

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, to offer appropriate legal certainty to those concerned⁸². To meet these criteria, MSs should develop practical guides with detailed, accurate, 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 online⁸³ and in places where applications are made, whether in consulates or elsewhere. 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 interests must be a primary consideration in all actions relating to children⁸⁴. 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 a MS administration 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 respect for private and family life⁸⁵ and the rights of the child⁸⁶ of the Charter⁸⁷. The CJEU has also recognised⁸⁸ that children, for the full and

⁷⁹ 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.

⁸⁰ Common European Asylum System.

⁸¹ Case C-256/11, *Dereci*, 15 November 2011, para 72; Case C-127/08, *Metock*, 25 July 2008, para 79.

⁸² Recital 13.

⁸³ On the Commission’s EU Immigration Portal and MSs’ national websites.

⁸⁴ Article 24(2) of the Charter of Fundamental Rights of the EU.

⁸⁵ Articles 7 of the Charter of Fundamental Rights of the EU.

⁸⁶ Articles 24(2) and (3) of the Charter of Fundamental Rights of the EU.

⁸⁷ Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 80.

⁸⁸ Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 57.

harmonious development of their personality, should grow up in a family environment⁸⁹, that MSs are to ensure that a child shall not be separated from his or her parents against their will⁹⁰ and that applications by a child or his/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 manner⁹¹.

Furthermore, the CJEU has recognised⁹² that the right to respect for private or family life must be read in conjunction with the obligation to have regard for the child's best interests⁹³, taking account of the need for a child to maintain a personal relationship with both his or her parents on a regular basis⁹⁴. Consequently, when a MS examines an application, it must ensure that a child shall not be separated from his/her parents against their will, unless the MS decides that the best interests of the child require such separation in accordance with established law and procedures. Reasons for any such decision must be given so 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 interests 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) envisages that MSs may reject an application, or withdraw or refuse to renew a family member's residence permit, if 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'*).

MSs are in particular allowed to take into consideration the fact that a marriage, partnership or adoption was 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 if there is reason to suspect that there is fraud, or a marriage, partnership or adoption of convenience. However, general checks and inspections of specific categories of marriage, partnership or adoption are not allowed.

⁸⁹ Sixth recital of the preamble to the Convention the Convention on the Rights of the Child.

⁹⁰ Article 9(1) of the Convention the Convention on the Rights of the Child.

⁹¹ Article 10(1) of the Convention the Convention on the Rights of the Child.

⁹² Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 58.

⁹³ Article 24(2) of the Charter of Fundamental Rights of the EU.

⁹⁴ Article 24(3) of the Charter of Fundamental Rights of the EU.

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 definitions⁹⁵.

In its Communication of 25 November 2013 on free movement of EU citizens and their families⁹⁶ the Commission announced that it will help authorities implement EU rules which allow them to fight potential abuses of the right to free movement by preparing a handbook on addressing marriages of convenience (Action 1). This handbook will address the issue of marriages of convenience between EU citizens and non-EU nationals in the context of the free movement of EU citizens (Directive 2004/38/EC) and not between two non-EU nationals in the context of Directive 2003/86/EC. Nevertheless, given the parallels with the operational aspects of combatting potential abuses and fraud of the right to family reunification, this handbook may, *mutatis mutandis*, be referred to for guidance, where relevant, in particular on investigation tools and techniques and on cross-border cooperation.

Given the involvement of organised crime, 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. To this end, a specific strategic objective (goal 4) related to marriages of convenience was included in the EU Policy cycle for organised and serious international crime, within the framework of the priority relating to the 'Facilitation of Illegal Immigration'⁹⁷. The policy cycle priorities are implemented in a multidisciplinary way through the joint actions of national authorities and Commission agencies, such as Europol, thus enabling more operational exchanges among Member States on the different aspects of the broader issue of marriages of convenience linked to organised crime.

⁹⁵ 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 MSs, COM(2009) 313 final, pp. 15-17.

⁹⁶ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions of 25 November 2013 on Free movement of EU citizens and their families: Five actions to make a difference, COM(2013) 837 final.

⁹⁷ Implementation EU Policy cycle for organised and serious international crime: Multi-annual Strategic Plan related to the EU crime priority 'illegal immigration'.

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 reunification⁹⁸. The CJEU further considers that Article 17 requires MSs to 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 factors⁹⁹.

Examples of other relevant factors are the nature and solidity of the person's family relationships; the duration of his/her residence in the MS; the existence of family, cultural and social ties with his/her country of origin; 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; economic, cultural and social ties in the MS; the dependency of 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 they 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 the individual circumstances of a case must be identified and the weight given to individual and public interests must be similar to that in comparable cases. Also, the balancing of relevant individual and public interests must appear reasonable and proportional. MSs should explicitly state their reasons in decisions rejecting applications¹⁰⁰.

X is a third-country national residing in a MS with her minor daughter. X wants to be joined by her third-country spouse, but her income 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 still required to examine the

⁹⁸ Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 81.

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

¹⁰⁰ Article 5(4) subpara 3.

*application in the interests of the child concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of the Directive*¹⁰¹.

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 emphasises that when implementing Union law, 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 matter¹⁰².

This implies that full judicial review must be available concerning 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 may not be adequate.

The Directive explicitly lists the right to mount a legal challenge against only four possible decisions¹⁰³. However, the case law of the CJEU provides that effective remedies must also be granted with regard to any other decisions relating to the restriction of subjective rights conferred by the Directive. Article 47 of the Charter applies to all rights provided for in the Directive including, for instance, decisions concerning the restriction of the right to employment¹⁰⁴ or the refusal to grant an independent residence title¹⁰⁵. Any consequences of a MS's failure to decide on an application for family reunification within the stipulated 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 MS¹⁰⁶. This national legislation should ensure an effective procedure for granting relief in the case of an administrative failure to decide through an administrative complaint procedure or, in absence of this, a judicial procedure.

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

¹⁰¹ Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 82.

¹⁰² 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 Barakat*, 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.

¹⁰³ 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.

¹⁰⁴ Article 14(2).

¹⁰⁵ Article 15.

¹⁰⁶ Article 5(4) subpara 3, 2nd sentence.