

Family Reunification: a barrier or facilitator of integration? A comparative study

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European Commission

DG HOME AFFAIRS - Unit B1: Immigration and Integration

Rue du Luxembourg 46 - LX46 02/178 - B-1049 Brussels/Belgium



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Contents

CHAPTER 1

INTRODUCTION	1
1.1 Introduction.....	1
1.2 Terminology	2
1.3 Selections.....	2
1.4 Research Methodology	3
1.5 Content.....	4

CHAPTER 2

LEGISLATION ON FAMILY REUNIFICATION AND THE LEGAL POSITION OF ADMITTED FAMILY MEMBERS

2.1 Introduction.....	7
2.2 Admission of TCN Family Members.....	7
2.2.1 Personal Scope	7
2.2.2 General Requirements.....	10
2.2.3 The Main Requirements	11
2.2.4 Refugees	17
2.2.5 Privileged Groups	18
2.3 Admission of Family Members of Union Citizens	20
2.4 Admission of Family Members of Own Nationals.....	20
2.5 Rights and obligations of TCN Family Members after Admission	21
2.5.1 Temporary Residence Permit	21
2.5.2 Permanent Residence Permit.....	23
2.5.3 Refugees	26
2.6 Rights and Obligations of Family Members of Union Citizens after Admission	27
2.7 Rights and Obligations of Family Members of Own Nationals after Admission	27
2.8 Conclusion.....	28

CHAPTER 3

APPLICATION OF THE PROCEDURE	31
3.1 Introduction	31
3.2 Actors Involved.....	31
3.3 Applying Abroad: The Practice.....	34
3.4 Duration of the Procedure.....	35
3.5 Refugees and Subsidiary Protected	37
3.6 Right to Appeal and Legal Aid.....	38
3.7 Fraudulent Marriages	39
3.8 Subjective Perceptions of Applicants	42
3.9 Conclusion.....	44

CHAPTER 4

THE DEVELOPMENT OF NATIONAL POLICIES.....	47
4.1 Introduction	47
4.2 Integration, Economy, Fraud.....	47
4.2.1 Integration	47
4.2.2 Economy.....	51
4.2.3 Fraud.....	51
4.3 Arguments on the Four Main Requirements.....	52
4.4 Impact of Studies and Evaluations of Family Reunification Policies.....	55
4.5 A Restrictive Turn as a Consequence of Europeanization?.....	59
4.6 Conclusion.....	62

CHAPTER 5

CASE LAW	65
5.1 Introduction	65
5.2 Factors Influencing the Role of National Courts	65
5.2.1 Different Legal Frameworks for Different Groups	65
5.2.2 Discretion.....	67
5.2.3 A Constitutional Right to Family Reunification?	67

5.3	Third Country Nationals	69
5.3.1	Main Requirements.....	69
5.3.2	Other Issues.....	74
5.4	Turkish Nationals	77
5.5	Union Citizens.....	79
5.6	‘Own’ Nationals and the Applicability of Union Law.....	81
5.7	Conclusion.....	84

CHAPTER 6

LIVES ON HOLD: THE IMPACT OF FAMILY REUNIFICATION POLICIES

	ON FAMILY LIFE AND INTEGRATION.....	87
6.1	Introduction.....	87
6.2	‘Self-selecting’ Family Members: The Numbers.....	87
6.3	Capital and What People can Do.....	91
6.4	The Four Main Requirements	92
6.5	Separation of Parents and Children.....	98
6.6	Permanent Residence and Integration	100
6.7	Lives on Hold and Sense of Belonging.....	102
6.8	Conclusion.....	104

CHAPTER 7

	CONCLUSIONS.....	107
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	LITERATURE	113
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	LIST OF ABBREVIATIONS.....	117
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Chapter 1

Introduction

1.1 Introduction

This report presents the outcome of a comparative study on the family reunification policies in six European Union (EU) Member States and their impact on the family life of the residents of these Member States. This study, 'Family Reunification: a barrier or facilitator of integration?' is the result of a research project initiated and coordinated by the Immigrant Council of Ireland. The project was funded under the Integration Fund Community Actions Programme (IFCAP), which aims to promote the integration of third country nationals in EU Member States.

In the context of the project, six national research teams conducted research on the national legislation and policies, regarding family reunification and studied the effects thereof on the ability of third country nationals to live with their family members in the EU Member States and to integrate into the receiving societies. The research teams focused on the question of whether the family reunification rules hinder or facilitate smooth reunification and what impact the rules have on the integration of both the sponsor and the admitted family. Particular attention was given to the question to what extent family reunification rules could serve as a tool for the integration of immigrants and their families in the EU. The Member States involved were Austria, Germany, Ireland, the Netherlands, Portugal and the United Kingdom.

The rationale for this project came from the recognition of a growing trend of national governments amending family reunification policies and legislation without thorough debate or research into the potential result of such changes. This project, in the absence of concrete research in this area, seeks to offer an opportunity for all relevant actors to learn from and reflect on the tangible consequences of more stringent conditions on family reunification of third country nationals with their family members residing in the Member States. All six EU Member States represented in this study have committed to respect the right to family life, as enshrined in Article 8 of the European Convention on Human Rights (ECHR). In addition to this commitment, four of the Member States have legally bound themselves to respect the right to family reunification for third country nationals by adopting the Family Reunification Directive (Directive 2003/86). This directive aims to promote family reunification and, thus, promote the integration of third country nationals and their family members. The recognition that family reunification is beneficial to integration has also led to the adoption of a strong right to family reunification for Union citizens exercising their freedom of movement within the EU. These rules are established in the Union Citizens Directive (Directive 2004/38).

1.2 Terminology

The term ‘family reunification’ is to be understood in a broad sense. It covers situations in which a family unit of third country nationals is established abroad at a time where the sponsor has already acquired legal residence in the Member State (family formation), as well as situations whereby the family relationship pre-existed in the country of origin (family reunification). Furthermore, the extent to which a family unit established in one of the Member States is protected from the expulsion of one or more of the family members (family retention) is also explored. The persons who are regarded as family members in the participating Member States are further defined in chapter two.

The term ‘sponsor’ in this report refers to a resident in one of the Member States who wishes to live with his or her third country national family member(s) in that Member State. The sponsor can be a third country national, a Union citizen who has used his or her right to free movement, or a national of the Member State in question. For the purpose of clearly defining the two last groups, we reserve the term Union citizen for those EU nationals who have moved to another EU Member State and are seeking family reunification, formation or retention there. Union citizens who remain in their country of nationality and have not availed of their right to free movement, therefore falling under the scope of national law, are defined as ‘own nationals’. References to own nationals who are able to invoke the Union citizens Directive because of previous use of the right to free movement are explicitly highlighted.

The term, ‘third country nationals’, applies to nationals from a country not belonging to the EU or EEA. For practical reasons, this term is, consequently, abbreviated to TCNs. The different treatment of certain categories of TCNs who enjoy a privileged status e.g. Turkish nationals and highly skilled workers is briefly highlighted also. Finally, refugees and beneficiaries of subsidiary protection are dealt with separately in this report.

1.3 Selections

Selection of states

The strategic selection of the six Member States represented in this study was based on a number of considerations including the varying legal frameworks across the EU. Ireland and the United Kingdom have not opted-in to the Family Reunification Directive. These divergences illustrate the influence (or absence thereof) of EU law on policy makers when drafting legislation and policy as well as on decision makers in their executive functions. Furthermore, the transposition of the directive in terms of EU harmonisation is also evident. Portugal, for example, has a distinguished position as it has only quite recently become a country of immigration. Its legislation and perception of family reunification is also quite distinct, as it preserves for all residents a strong right to family reunification and it provides the same rights to Portuguese citizens as it does to Union citizens exercising their right to free movement.

Selection of the categories of sponsors

This study considers three separate categories of third country national family migrants, each distinguished by the status of the sponsor: family migrants sponsored by (i) third country nationals; (ii) Union citizens; and (iii) own nationals. The sponsors have different rights in all three categories. Union citizens enjoy the strongest right to family reunification, derived from the Union Citizens Directive; in the majority of Member States third country nationals rely on the Family Reunification Directive and, therefore, on all principles of Union law, whereas own nationals (and third country nationals resident in Ireland or the UK) are only able to invoke national legislation. In all cases, Article 8 of the European Convention on Human Rights (ECHR) protects family life to a certain extent. Amongst third country nationals, four groups have been distinguished. Aside from the large group of regular TCNs, two groups are specifically detailed as they enjoy more privileged rights: Turkish nationals (Association Agreement with Turkey) and highly skilled workers (Blue Card Directive). Additionally, in the majority of Member States, refugees can invoke the more favourable rules on family reunification through the Family Reunification Directive, and also the 1951 Convention Relating to the Status of Refugees, which obliges States party to the Convention to protect the family life of refugees. The assessment of the rules on these heterogeneous groups and their actual family reunification, can contribute to an understanding of the impact the (different) rules have on the family life and the integration of sponsors and their family members.

Selection of themes

Given the wide range of differing requirements for family reunification across the countries participating in this study, the project partners decided to focus on, and thus limit the comparison to, the four main types of requirements: *accommodation, income, age and integration*.¹ Similarly, given the difficulties in finding a uniform definition of ‘integration’, on the one hand, and the need to draw comparisons across countries on the other, the study focuses on four areas identified as essential to integration by the European Commission. These include: employment, education, social inclusion and language skills. In addition, consideration was given to the impact of family reunification policies on family reunification itself: and whether or not the rules promote or hinder the reunification of family members. In this context, an assessment is made regarding the most beneficial family reunification rules in terms of the integration of sponsors and their family members.

1.4 Research Methodology

This study adopted a mixed method approach. Data was drawn from four main sources. Firstly, desk research included a review of existing literature (studies that have evaluated the requirements for family migration on integration and/or its ef-

1 Integration requirements are defined as those that purport to aid the integration of TCN family members into their host country.

facts), national and European case-law, parliamentary documents and commentaries on national legislation (e.g. from NGOs, national advisory committees or international monitoring committees). Secondly, quantitative data was analysed, with particular attention given to official immigration statistics and integration test pass rates. Thirdly, primary qualitative research was based on interviews with: (i) individuals who are subject to family reunification legislation and policies, (ii) lawyers and representatives of NGOs who work with these individuals; and (iii) policy makers who are responsible for developing/implementing family reunification policies.

The qualitative research was conducted using focus groups and individual interviews. Semi-structured discussion guides, developed jointly by project partners, were used to ensure consistency between interviews and across countries participating in the research. Individuals were asked about their motivations for applying for family reunification, views on the substantive criteria to be fulfilled and the application process, as well as the impact of the requirements and application process on their family and on their integration process. NGO participants were asked to detail their views on the link between family reunification and integration, the rationale for, and impact of, requirements for family reunification and the factors that they considered to be important to integration. Policy makers were asked about the reasoning behind family reunification policies, the evidence on which they are based and proof of their effectiveness in terms of their original aims. Transcripts and notes were analysed using thematic analysis and compared to findings from qualitative research conducted by others. In total, throughout the six Member States, 95 interviews have been held with individuals, 47 with lawyers and NGO's and 17 with policy makers.

The information in the national reports is current as of mid-December 2012.

1.5 Content

The comparative report contains a total of seven chapters. Chapter two assesses the requirements for family reunification and compares these requirements across the six EU Member States, and also between the different groups. The same exercise was undertaken with regard to the rights and obligations of the family members after admission to the EU Member State.

Chapter three looks at the extent to which family members are able to invoke the rights outline in chapter two by scrutinizing the application of these requirements in practice. It deals with the organisation and duration of the procedure, the level of discretion exercised by immigration authorities, the right to appeal and legal aid and the verification of marriages (where applicable) in the framework of combating fraudulent marriages. This chapter further outlines the experiences of applicants. How they perceive the procedure and its impact on their attitude and feelings.

Chapter four investigates the development of national policies in the six EU member States represented and the political debates surrounding the evolution of same. The positions which were taken, the justification for changes and the impact of evaluations and statistics on these positions was explored. This chapter furthermore probes the interaction between national and European decision making on family

reunification and asks the overarching question: Do governments or family members benefit from the European harmonisation?

Chapter five offers an overview of the case law in the EU Member States, focusing on the four main requirements. The differences and similarities between national judgments are examined and explanations are sought. The dynamics between national and European case law is also detailed and the impact of European case law on family reunification in terms of the rules, and of family reunification policies.

Chapter six answers the research questions on the basis of both quantitative and qualitative data. It evaluates to what extent the development of requirements for family reunification has impacted on the numbers availing of family reunification, but also to what extent the requirements have impacted on the sponsor and the family members in question. It is explored whether they experienced problems in meeting the requirements. The question is then posed whether, and if so, in what way, the sponsors adjusted their behaviour in order to fulfil the requirements. Furthermore, the chapter examines whether certain conditions affect specific groups more than others. Following this analysis, the question of the impact of the requirements on the integration of both the sponsor and the family members is addressed. Special attention is paid to the pre-entry test and the integration requirements after arrival. Do they help family members to feel at home and to participate in the host society?

Chapter seven brings the study to an end by presenting a series of conclusions. The chapter draws upon some findings on other effects of the development on the right to family reunification within the EU Member States. The goal of adopting common standards has been, not only to harmonise policies among the different Member States, but also to bridge the gap between the rights awarded to Union citizens and third country nationals. Are these goals being achieved? And what does this harmonisation mean for the position of 'own nationals' who remain largely dependent on the national legislator?

Chapter 2

Legislation on Family Reunification and the Legal Position of Admitted Family Members

2.1 Introduction

This chapter aims to provide an overview of the applicable legislation on family reunification in the six Member States that have been studied. The conditions for family reunification that are imposed vary not only between the different states but also between different categories of people who wish to enjoy family life with a family member in the state in which he or she resides. The similarities and differences both between the different target groups and the different Member States covered by this study will be assessed. First, the conditions that must be met in order for a family member to join a sponsor are set out. The second part of the chapter will analyse what requirements family members must fulfil in order to remain in the Member State and to consolidate their status. Both sections will first deal with the rights of family members of third country nationals, followed by an outline of the rights of family members of Union citizens and, subsequently, own nationals.

Before we start, it is useful to mention that Ireland inhabits a somewhat special position in this chapter. Irish legislation does not provide an explicit legal right to family reunification or to reside in Ireland on the basis of existing family relationships in all circumstances. The only persons who have a statutory right to family reunification are EU/EEA nationals, scientific researchers working in Ireland under Directive 2005/71/EC (hereinafter: Researchers Directive) and persons granted refugee status or subsidiary protection. Therefore, there is also no harmonization of the family reunification admission criteria or formally stated income, housing, integration requirements and age limits.

2.2 Admission of TCN Family Members

2.2.1 *Personal Scope*

Matters of family reunification generally revolve around the ‘nuclear family’. However, there is no uniform policy to answer the question of who exactly is part of the ‘nuclear family’. National policies diverge on matters such as minimum age requirements for spouses, the acceptance of same sex partners and the definition of subsisting relationships. Family reunification mostly, but not solely, deals with issues that concern the ‘nuclear family’. There are family members who are not considered part of the ‘nuclear family’ but who might be eligible for a residence permit on grounds of family reunification nonetheless. Certain states, for example, allow dependent adult children, who have not yet formed a family of their own, or dependent elderly parents to join their family member(s).

Spouses and unmarried partners

Spouses of third country nationals are considered part of the nuclear family in all six participating states. Yet not all spouses are eligible for family reunification. Both Austria and the Netherlands maintain a minimum age requirement for spouses of 21 years. While Germany and the UK require a spouse to be 18 years of age, Ireland and Portugal have no such requirement. Neither civil² nor unmarried partners are granted family reunification rights in Austria and Germany. Ireland, the Netherlands³ and the UK do allow for family reunification of registered partners and unmarried couples who are able to prove they are in a subsisting relationship. Ireland requires that a couple should have lived together for four years before allowing family reunification. Portugal does not require a couple to be officially registered as partners. However, the 'de facto relationship' of unmarried partners must be recognized under law.⁴

Same sex partners

Germany and Austria require same sex partnerships to be registered in order to receive family reunification rights. The registration requirement is often impossible to meet for same sex couples, given the fact that many home countries do not register same sex couples and some even persecute homosexuals. Portugal allows for the family reunification of same sex couples but, again, the relationship must be recognized under law. Irish law does not specifically regulate family reunification of same sex couples, in practice, however, same sex partner are generally treated in an equal manner to unmarried partners. The UK and the Netherlands grant family reunification rights to same sex couples whether they are married, in a registered partnership or in a subsisting relationship.⁵

Minor children

Children under the age of 18, whether or not adopted or in the custody of the sponsor, are generally allowed to reside with their parents. The same applies to the children of the spouse. All states covered by this research, except for Portugal, require that the child is not married and has not formed an independent family unit. The UK and Ireland demand an additional criterion to be met, namely that the child is dependent on the sponsor. Where there is still a parent abroad who also has custody over the child, the situation becomes more complicated. The explicit consent of the other parent is then generally required. Germany, however, does not grant a right of

2 Unless the partners are same sex.

3 The provision that grants an unmarried partner a right to family reunification was abolished on 1 October 2012. At the time of writing this report a proposal has been put forward by the government to reinstate this provision.

4 'A de facto partnership' is defined as 'the juridical situation of two persons who, irrespectively of their sex, have been living in conditions analogous to that of two spouses for over two years'. Sufficient proof of a de facto relationship must be provided, such as a declaration by the local authorities, a common mortgage or a shared income tax form.

5 After the provision that grants an unmarried partner a right to family reunification was abolished, the Dutch government decided to allow same sex couples to be granted a visa so as to enable them to get married in the Netherlands and subsequently qualify for family reunification. It is unclear whether this policy will remain in place once the provisions with regard to unmarried couples are reintroduced.

residence to these children. These children may be allowed to enter and reside in order to prevent exceptional hardship. Furthermore, Germany has introduced special requirements for children from age 16-18 in its legislation. These requirements will be examined below.

Adult children

Adult children are generally only allowed to reunite with their TCN parents where there are exceptional circumstances. Portugal is the exception to this rule. In Portugal parents and adult children may reunite when the child is unmarried, dependent and enrolled in a college or university course in Portugal.⁶ The UK only allows adult children to join their parents under very specific and demanding conditions. The adult child must require long-term personal care, which cannot be provided in the country of origin because it is not affordable or available. Further, the sponsor must sign a form in which he or she declares responsibility for the family member's care without having recourse to public funds for the following five years. Austria, Germany, the Netherlands and Ireland do not have provisions that allow family reunification of adult children and their parents when certain criteria are met. However, there are provisions that serve as a safety net for very exceptional cases. In Ireland, the Minister for Justice and Equality can always use his or her discretionary power to grant legal residence to an adult child. Both German and Dutch law contain clauses that aim to provide a legal ground on which residence rights can be granted in cases where (exceptional) hardship would arise when an adult child does not receive permission to reside with a parent. As a last remark on this topic, it should be noted that all countries must adhere to Article 8 European Convention on Human Rights (hereafter ECHR). The European Court on Human Rights (hereafter ECtHR) has recognized in its case law that the family bond between parents and children who do not have a family of their own does not cease to exist when a child reaches majority.⁷ However, this is usually not explicitly laid down in national legislation.

Parents

The above-mentioned rules that apply to adult children are to a large extent also applicable to the situation of parents of TCN immigrants. Portugal only requires dependence to be established, while the other countries apply much stricter rules. Austrian law does not contain provisions that give rights to parents of TCN immigrants. Parents are only allowed to enter Germany or the Netherlands for family reunification purposes if their situation is caught by the hardship clause, which is a very high standard to meet. The parents of third country nationals residing in the UK fall into the same category as adult children, therefore the same criteria are applicable.

6 This applies for adult children until the age of 25. If the child is disabled the age restriction may be waived.

7 *Osman v. Denmark*, 38058/09 [2011] ECHR 926 (14 June 2011)

Other family members of the extended family

Austrian, Dutch and Irish laws do not contain provisions that grant family reunification rights to other members of the extended family. Germany allows members of the extended family to enter and reside in the country if they no longer have similar family ties abroad and family reunification is required to prevent exceptional hardship. Portugal allows for siblings to reunite as long as the sponsor has custody over the siblings. In the United Kingdom, grandparents, brothers, and sisters are eligible for family reunification under the same conditions as parents and adult children.

2.2.2 General Requirements

Eligibility of sponsor for family reunification

The matter of eligibility for family reunification of a TCN hinges on the sponsor's prospect of settlement in the host country. Portugal grants all holders of a valid residence permit a right to family reunification. There is no requirement for a minimum period of residence to be met. Austria does not require a minimum period of residence either, however, Austrian immigration policy is unique in that a quota regulation is in place. There is a limit to the number of third country national family members to whom a residence permit can be issued each year. In 2012, the quota was set at 4,660 residence permits. When the quota is exhausted, the applications are prioritised for the following year's decisions. The maximum waiting time between the filing of the application and the decision is three years.⁸ German law requires that a sponsor holds either a permanent, EU long-term or temporary residence permit (only if there is a reasonable prospect of obtaining permanent residence). The application for family reunification may be filed when there are legitimate expectations that the permit will be granted. If the marriage was concluded after the sponsor was allowed entry into the country, the right of a sponsor with a temporary permit to be joined by his or her spouse can only be exercised after two years of legal residence. In this regard, Germany is the only country that distinguishes between family formation and family reunification, even though the CJEU has held that such a distinction is contrary to the Family Reunification Directive.⁹ Ireland does not generally require a sponsor to have resided in the country for a certain period of time. Only sponsors who are work-permit holders are to show that they have held employment in Ireland for twelve months prior to the applications and with that there is a certain period of legal residency required for some third country nationals in practice. In the Netherlands, sponsors can only apply for family reunification after one year of legal residence and they must be in the possession of a permit for a non-temporary goal. In the UK, in order to qualify for family reunification, a TCN migrant must be present and settled. The word 'settled' in this context means that he or she has been granted indefinite leave to remain. The right to family reunification for non-settled TCNs only extends to dependent members of the nuclear family. Additionally, the family

8 Austria is the only Member State bound by the Family Reunification Directive that is allowed to maintain a three-year time limit, due to the standstill clause included in Article 8 (2).

9 *Chakroun* [2010] CJEU C-578/08 (04 March 2010)

member must not intend to stay in the UK beyond any period of leave granted to the sponsor. This study focuses, however, on immigrants who wish to integrate and settle in the host country. Therefore, temporary family reunification rights are beyond the remit of this study. The national reports do provide additional information on the family reunification rights of immigrants with temporary stay for whom permanent settlement is generally not foreseen (e.g. students).

In-country application

Many of the conditions for family reunification have to be complied with before the family member enters the country. Austria, Germany and the Netherlands require family members to obtain authorization to enter the country for the purpose of family reunification from their home country or from the state in which they permanently reside. Entry clearance is one of the prerequisites for the issuance of a permit on family reunification grounds. This requirement is applied in a very stringent fashion; without the appropriate authorization an application for family reunification is highly unlikely to succeed. Portugal can be qualified as sitting at the other end of the spectrum, as family members may apply for family reunification both from abroad and in the country in which the sponsor has legal residence. In the UK, only some categories of family members, who are already present in the UK, can apply for leave to remain on grounds of family life with a TCN immigrant. Students and adult dependants are examples of groups that must return to their home country before they can apply for entry clearance and, subsequently, family reunification. Chapter 3 will go into further detail about the practical consequences of these rules that seem to be just of a procedural nature at first sight, but as it turns out impact the experience of family members greatly.

2.2.3 The Main Requirements

Income

Sponsors who wish to reunite with a family member in one of the countries that participated in this study must always fulfil certain income requirements. Having stable and/or regular financial resources which meet a certain standard is imperative in all countries in order to serve as a sponsor for family members. It is of importance that a state is confident that a sponsor will be able to look after his or her family without having recourse to public funds. The required income levels always vary according to the composition of the family; both the number of family members and the features (i.e. the age of the children¹⁰) of the individual family members can influence the exact required amount. How the sustainability of the income is assessed, and which sources of income are accepted, also differs between countries.

10 This is the case in Germany. See Table 1.

Table 2.1. Conditions for family reunification (end 2012). Third country nationals

States	Age-limit spouses	Pre-entry test ¹¹	Income requirement		Appropriate accommodation	Period of legal residence
			Required income level for a family consisting of a sponsor, his or her spouse and two children (monthly)	Median Equivalent net income ¹² (monthly) per country (2011)		
Austria	21	Yes	1473, 12 euros (net) (plus regular expenses ¹³)	1777 euros	Yes, must meet local standards	No. However, quota for TCN family members. ¹⁴ Max. three years.
Germany	18	Yes	1213 ¹⁵ euros (net) (plus rent) (Level of subsistence income for the unemployed)	1693 euros	Yes	No. Unless family formation: two years of prior legal residence required.
Ireland	No	No	2608,67 euros (net) (Income level of the 'Family Income Supplement Scheme')	1657 euros	No	No, however, one year of prior employment is required for holders of a work permit.
Netherlands	21	Yes	1572,70 euros (gross) (100% of minimum wage)	1693 euros	No	YES, one year.

11 See table 2 for more information on all the integration requirements.

12 http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_di03&lang=en.

13 E.g. rent, loan payments or alimonies. A lump sum of maximal EUR 260.35 can be deducted from the rent costs.

14 The quota rule implies that every year, the federal state defines a maximum number of TCN family members, to be admitted. If this quota is exhausted, the family reunification application is prioritised for the next year. The maximum waiting period between application and decision is three years.

15 The income level required depends on the age of the child: € 219 (0 - 5 years) € 251 (6 - 13 years) and €287 (14 - 17 years). For the purpose of this calculation the middle category was used.

Portugal	No	No	1188,25 euros ¹⁶ (gross) (100% of the minimum wage plus 50% for each additional adult and 30% per each child under 18 years old.	701 euros	Yes, criterion public health	No
United Kingdom	18	Yes	2458, 64 (gross) euros ¹⁷	1428 euros	Yes, criteria public health and over-crowding. Exclusive ownership not required	Yes

In Austria, sponsors (or other family members living in the same household) must have an income that equals the assured minimum income of pensioners. It should be noted that regular expenses, such as rent¹⁸ and loan repayments, are deducted from the sponsor's earnings when establishing his or her income. Social benefits that are received or may be received in the future are generally not taken into account when a first application is made.¹⁹ Certain benefits, however, may be considered as contributing to the stable and regular income.²⁰ For persons and their family members who intend to settle in Austria but who have a residence permit excluding work, the income requirement is doubled. In Germany, the minimum required income is based on the subsistence income that is established for unemployed persons to which the rent (including heating, etc.) must be added. Expected earnings of a sponsor's spouse or registered partner are taken into account when there is a job offer on the table or a signed employment contract. Assets and benefits from public funds based on own contributions are also sources of income that are considered by the authorities. The income is scrutinized for its sustainability by the authorities in the federal state. The manner in which this is done thus differs between states. For example, the authorities in the federal state of Hamburg make a 'forecast decision', in which not only the current employment contracts but also the previous educational and employment history are taken into account. Such a 'forecast decision' on a case by case basis may

16 In Portugal employers are obliged to pay the annual salary in 14 months. The annual salary was converted to 12 months in this table. The required income level is lowered, when the sponsor is involuntarily unemployed, to 50% of the minimum plus 30% of the minimum wage per each relative.

17 The income level was converted from pounds into euros (exchange rate 23 January 2012).

18 A lump sum of max. 260, 35 euros can be deducted from the rent.

19 They are taken into account when a temporary residence permit is renewed.

20 See chapter 5 for more information on this topic.

not be considered very beneficial for the predictability of the assessment but it does, however, enable the authorities to take individual circumstances into account.

In Ireland the weekly earnings of a sponsor who is a work-permit holder must not be below the minimum standard set by the *Family Income Supplement Scheme*. The national rapporteurs calculated that in order to fulfil this income requirement a sponsor, who wishes to reunite with a spouse and/or child, must earn approximately 133 per cent of the median equivalised net income which is the highest level that is required of all states that were researched. As mentioned before, Ireland requires a TCN sponsor who is a work permit holder to have been in full-time employment for no less than twelve months before being eligible for family reunification. Additionally, the immigration authorities not only assess an applicant's past earnings but also require the submission of an employment contract which will be valid for at least one year from the date of entry of the family member.

The Netherlands is the only country where the demanded level of income does not increase in accordance with the number of children who wish to reunite with a TCN immigrant. Furthermore, the Dutch legislator lowered the income threshold for a single parent who wishes to reunite with a child. The income requirement in the Netherlands derives from, and is equal to, the minimum wage. The sponsor has to show either a one-year employment contract or that he or she has been continuously employed for the previous three years and has received a monthly salary that matches the income requirement.²¹ This rigid requirement is in stark contrast to the German example mentioned above. Sponsors who have reached the age of 65 years and sponsors who are permanently incapable of working for medical reasons are exempted from the income requirement.

The application of Portugal's income requirements can be qualified as being significantly more lenient than the requirements of the other countries that were studied. The minimum wage serves as the standard which sets out the income threshold that is to be met. However, in the event that the TCN sponsor is involuntarily unemployed, an income of 50 per cent of the minimum wage will suffice. The latter possibility was introduced in 2009 because the government was of the opinion that unemployment and the increase in temporary work, as a consequence of the economic situation of the country, disproportionately affected immigrants. Portuguese law additionally requires that the income is stable to the extent that it is expected to subsist for at least 12 months.

In the UK, the required level of income increased drastically in 2012. Previously, a sponsor's income had to be higher than the threshold for income support. The UK rapporteur writes that the new conditions require a sponsor who wishes to reunite with a partner and a dependent minor (and one of the child's parents has limited leave to remain in the UK) to meet a financial requirement which represents approximately 173 per cent of the national minimum wage. The settled TCN's income may be generated from employment and self-employment. If the threshold is not met, other sources of capital or income can be relied upon to close the gap. However, income from family members living in the same household may not be taken into ac-

21 Self-employed sponsors have to show a stable income for a period of one year.

count. Support from third parties can also not be relied upon. With the exception of disability related welfare benefits and carer's allowance, most social welfare allowances and benefits cannot be used as a source of income to meet the requirements.²² If a spouse or partner is not already present in the UK and in possession of a valid work permit the (prospective) income of the spouse or partner may also not be taken into account. The income requirement must be met the moment a family member applies for leave to enter and, at a later stage, when applying for further leave to remain.

Pre-entry test

Ireland and Portugal do not oblige family members to pass a pre-entry test before they enter the country for the purpose of family reunification. Austria, Germany, the Netherlands and the UK do have a pre-entry test in place that must be passed before permission to enter the country for family reunification purposes will be granted. In these countries, family members must show that they have sufficient knowledge of the national language (in the Netherlands the test also includes knowledge of Dutch society) before they are given permission to enter the country. In all four countries the level is established at A1.²³ The test for Austria and Germany consists of speaking, listening, reading and writing skills, the Dutch test only includes the first three capacities, whereas the test for the UK is limited to speaking and listening. Family members who are unable to pass a test due to a medical condition may be exempted if they can provide a medical certificate. Germany and the Netherlands have linked the pre-entry test to the visa requirement, which implies that nationals who are not required to acquire a visa before entering the country are exempted from the test.²⁴ This largely concerns nationals from so-called 'western countries'. Turkish workers are also exempted in Austria and the Netherlands because of the Association Treaty with Turkey. The UK has linked the requirement to the presumed lack of knowledge of the language, as nationals from the majority English speaking countries are exempted.²⁵

In Austria, one has to show a certificate²⁶ proving A1 German language skills, before entering the country. Only minor children under the age of 14 are, in addition to the already mentioned groups, exempted.

22 Income related welfare benefits, contribution-based Jobseeker's Allowance, contribution-based Employment and Support Allowance, Incapacity Benefit, Child Benefit, Working Tax Credit, Child Tax Credit or any other source of income not specified in the Immigration Rules.

23 Basic language use: in terms of the European Council's Common European Framework of References.

24 A list of countries whose nationals are exempted from the visa requirement in Germany can be found here: http://www.auswaertigesamt.de/EN/EinreiseUndAufenthalt/StaatenlisteVisumpflicht_node.html; A list of countries whose nationals are exempted from the visa requirement in the Netherlands can be found here: <http://www.government.nl/issues/visa-for-the-netherlands-and-the-caribbean-parts-of-the-kingdom/documents-and-publications/leaflets/2012/10/04/countries-whose-nationals-do-not-need-a-schengen-visa-for-the-netherlands.html>

25 Antigua & Baruda, Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Trinidad & Tobago, the United Kingdom and the United States of America

26 The certificate must be older than one year.

In principle, applicants for family reunification in Germany, need to hand over a certificate, evidencing their required knowledge. However, if the diplomatic representation at the embassy is convinced that an applicant meets the A1 level, the requirement of a certificate can be waived. It must be kept in mind that the diplomatic representation also holds this power in reversed situations. If the family member is able to present a certificate that attests to his or her language abilities but the consular staff is not convinced, for instance if the certificate was issued long ago, the consular staff can require a new, more updated certificate. Germany is the only Member State which has established an infrastructure of preparation courses worldwide. An evaluation of the Ministry of Interior demonstrates significant differences in pass rates between applicants who have followed a course and the ones who have not (see also chapter 6). Germany does not exempt minors from having to fulfil a language requirement, if they are between the ages of 16 and 18 and only if their parents are already residing in Germany, unless it is determined the child has positive integration prospects. These minors must show a significantly higher level of command of German than is required from spouses. Their language skills must be qualified as being of C1 level by a certified language/educational institute.²⁷

The Netherlands requires spouses to take a specifically designed integration test at an embassy in the spouse's home country or country of permanent residence. Family members are tested on their knowledge of the Dutch language and of Dutch society. A computer determines whether the candidate has passed the test. The computer's decision cannot be appealed. It is possible to take the test multiple times, however a fee must be paid per test taken. A hardship clause can be invoked if a family member for certain reasons is unable to pass the test and is not allowed to enter the country. However, the requirements are rarely waived on the basis of this clause.

A family member who applies for leave to enter or remain in the UK must initially fulfil a language requirement. People who have obtained a master's degree or PhD taught in English are presumed to have sufficient knowledge of the English language. Minor children and elderly family members above the age of 65 are exempted from the requirement. If a family member cannot meet the requirement due to 'exceptional compassionate circumstances' there is a possibility of the condition being waived.

Housing

Ireland and the Netherlands do not impose accommodation requirements on TCN migrants who wish to be reunited with a family member. In Portugal, an applicant has to show evidence of the presence of available housing, e.g. by showing a rental agreement, without any further requirements. In Austria, the property must meet the 'local standard' and has to be big enough for all family members for it to be considered suitable. German law requires sufficient living space to be available for all family

27 Germany is the only Member State bound by the Family Reunification Directive that is allowed to impose these conditions, due to the standstill clause included in this derogation of Article 4 (1), last paragraph.

members. The term ‘sufficient’ is measured against the minimum space that is mandatory for social housing.²⁸ The UK links the accommodation requirement to the criteria which are set out in national public health laws and statutory overcrowding is prohibited. The property must be owned or occupied exclusively by the TCN sponsor and his or her family members. With regard to ownership, it must be noted that it is sufficient if a property is partially owned and that only an area of the house is exclusively occupied.

2.2.4 Refugees

Convention refugees, persons with subsidiary protection and other persons with asylum related claims require special attention with regard to the conditions for family reunification as they are exempted from many of the requirements. The family members who are allowed to join a sponsor (personal scope) may also differ slightly from other groups of TCNs. In all the countries covered by this research, spouses, (same sex) civil partners and (unmarried) minor children derive residence entitlements from the refugee permit granted to the sponsor where the family bond existed prior to the departure of the sponsor. In the Netherlands, the family bond is defined differently from other third country nationals, as additional requirements apply. The ‘effective bond’ criterion demands that the family lived together in the country of origin at the time of the sponsor’s departure and, additionally, in the case of children, that they are morally and financially dependent on the sponsor. A short period of separation as a result of the flight should not be objected to, according to the national case law. The UK and Ireland require the marriage or civil partnership to be ‘subsisting’. The UK does not only grant rights to spouses and civil partners but also to unmarried partners if they have been in a relationship that equals marriage for at least two years. The Netherlands only does so when the partner is dependent on the refugee (and the effective bond criterion is met). In Germany, unmarried partners and spouses receive equal treatment with the exception that unmarried partners must show they possess German language skills at A2 level. In Ireland, family members beyond the nuclear family can be granted legal residence, at the discretion of the Minister for Justice and Equality, when they are dependent. Portugal not only explicitly allows the family reunification of the nuclear family, but also of unmarried partners (if the relationship is recognized under law), dependent parents, dependent adult children of the refugee and minor brothers and sisters over whom the refugee has custody. All the countries grant parents of minor children with refugee status a derivative right of residence.

As previously mentioned, family reunification requirements often do not need to be met by refugees. The main difficulty arises when family members apply for family reunification from their home country. Although a visa for this group is not always obligatory, they usually apply for a visa at the foreign representation which can be issued as soon as the national asylum authority has decided that the family reunification will be granted. We will see in chapter 3 that the cooperation between the representa-

28 Children under the age of three are generally not taken into account for the purpose of the calculation.

tion and the domestic asylum authority that is required to properly deal with these types of cases gives rise to certain difficulties. In Germany and the Netherlands, spouses and minor children of refugees receive a derivative right of residence if the application for family reunification is filed within three months after the refugee status was granted and there is also no possibility of enjoying family life in a third country to which the applicants have close ties. In the Netherlands, if the application was filed after three months, or if the marriage was concluded after the admission of the refugee, the spouse must comply with the regular requirements, except for the integration requirement. In Germany, all the regular conditions must be complied with in these situations. Only when the application was not submitted within three months, but the marriage was concluded before the departure of the refugee, the spouse is exempted from the language requirement. In the Netherlands, if the family members have a different nationality, the requirements are only waived if there is no possibility to exercise the right to family life in a different country. In that case the family member is still not entitled to the derivative refugee status, but to a dependent regular permit. Thus, their position is much weaker if the marriage breaks down. Austria and the UK allow family members of refugees a right of residence, regardless of whether the application was submitted within a certain time limit. If the marriage, however, was not concluded before the refugee's departure from the home country, all regular requirements for TCN family members must be fulfilled. Portugal does not impose any housing, income or integration conditions on family members, regardless of whether the family bond existed before the refugee left his or her home country. A last point of interest is the Austrian situation of family members of persons with subsidiary protection. After the status has been granted, they have to wait for one year before their family member can apply for family reunification.

2.2.5 Privileged Groups

Turkish workers

Turkish workers hold a special position because of the Association Agreement that was concluded between the EU and Turkey in 1980. This agreement, in conjunction with Decision No 1/80 of the Association Council (1980), is generally interpreted as containing a so-called 'standstill clause', which prevents Member States from subjecting Turkish nationals to stricter rules on access to the EU labour market than the ones that were in place when the agreement entered into force. This may have as a consequence that they are exempted from certain immigration restrictions as well, such as visa, fees and integration requirements. It is interesting to note that there is no general agreement on how the standstill clause should be interpreted. Germany does not exempt Turkish nationals from any requirements (see chapter 5). Turkish family members are subject to some requirements in the Netherlands that were introduced after the agreement came into effect. The minimum age requirement of 21 years and the income requirement of 100 per cent of the minimum wage must be fulfilled by Turkish nationals, even though these conditions were introduced at a later stage. However, the pre-entry test is not applicable, the fees are significantly lower for Turkish nationals than for other third country nationals, and unmarried partners are still allowed to reunite (this will be reintroduced for all categories).

In Austria, two different situations can be distinguished: the family reunification of a TCN (including Turkish nationals) sponsor with Turkish national family members, and the family reunification of an Austrian national sponsor with a Turkish national family member. Both groups are exempted from the pre-entry test and the integration requirements after admission (unless the Turkish national is applying for permanent residence). There is also no minimum age requirement for spouses in place. Family members of Austrian sponsors may, additionally, await the decision inland (regardless of whether or not they entered the country legally) and are exempted from the income and accommodation requirements. The rapporteur from the UK also mentions a privileged position of Turkish nationals in its national report, stating a right to remain and protection from expulsion as examples of these privileges.

Highly skilled workers

The position of highly skilled workers and their rights to family reunification are regulated by Directive 2009/50/EC. The directive stipulates that for the purpose of family reunification Directive 2003/86/EC applies but that a number of derogations for family members of highly skilled workers must be upheld. The preamble of the directive sets out clearly that favourable conditions for family reunification and access to work for spouses are a fundamental element of the directive. These lenient conditions serve as a tool to attract highly qualified third country workers. Ireland and the UK are not bound by the directive, unlike the other countries that participated in this study. The directive does not allow Member States to impose pre-entry tests for family members. Neither is a certain period of legal residence of the sponsor required. Even though the directive allows for the introduction of language requirements after family reunification has been granted, Member States generally only impose language requirements if a family member wishes to obtain a permanent residence permit. Germany also exempts spouses of highly skilled workers from the age limit it imposes on spouses of TCNs. The Austrian quota rules do not apply to highly skilled workers and their family members.

Ireland and the UK give preferential treatment to highly skilled workers on other legal bases than the directive. Ireland provides so-called Green Card holders and researchers who reside in Ireland on the basis of the Researchers Directive with more favourable family reunification rights. Family members (i.e. spouse and dependants) may accompany a Green Card holder or a scientific researcher on admission into the State or join later (although in the latter case they will be subjected to regular immigration rules). In the UK highly skilled workers are admitted under the so-called points based system (PBS) that applies to economic migrants and students. Dependent members of the nuclear family are allowed to join the highly skilled sponsor without having to pass a pre-entry test. While the UK grants spouses of highly skilled workers a right to work, in Ireland spouses must first qualify for a spousal dependant work permit or independently qualify for an employment permit in accordance with general employment permit requirements

2.3 Admission of Family Members of Union Citizens

The Union Citizens Directive (2004/38/EC) allows spouses, registered partners, couples who can attest to their durable relationship and children up to the age of 21 to join a Union citizen who has exercised his or her mobility rights. The directive also grants rights to many members of the extended family if they are dependent on the Union citizen. This holds especially true for children older than 21, grandchildren, parents and grandparents, but other family members might also qualify if they were dependent or part of the household of the Union citizen in the country from which the family has come. Family members who require personal care by the Union citizen because of serious health problems must be allowed legal residence as well.

Union citizens, and their family members, may reside for three months in another Member State without being subject to any conditions. The family must, however, not become an unreasonable burden on the social assistance system. After three months the Union citizen will have to comply with some conditions which are significantly less strict and demanding than the requirements for TCNs. Workers and self-employed persons may be automatically joined by their family members. Union citizens who are unemployed must provide evidence of sufficient resources and health insurance. Under the directive, EU citizens are exempted from having to fulfil any housing or integration conditions. Even a common household is not necessarily required.

2.4 Admission of Family Members of Own Nationals

While Portuguese nationals have very strong family reunification rights as their position is equal to Union citizens, Dutch nationals are treated in the same manner as TCNs and, therefore, have to fulfil many conditions before they can enjoy family life with their family members in the Netherlands. The situation is a bit less straightforward in the other Member States. In Austria, family members of Austrian nationals to a large extent have the same position as TCN family members. Unlike regular TCN family members, the relatives of the Austrian national are exempted from the quota for family reunification and they may file an inland application for family reunification. Another important difference between the positions of own nationals and TCNs in Austria is the position of the extended family. The personal scope of the Union Citizens Directive applies to own nationals. However Austrian sponsors must additionally sign a declaration stating that he or she will take financial responsibility for the family member for the first five years of residence and the family member will have to adhere to the general immigration conditions.

The only difference between the situation of UK nationals and settled TCNs in the UK is that the nationality of a minor can make a difference with regard to the application of Article 8 ECHR by the authorities or the court in the UK.²⁹ The nationality of a child may not allow for a parent to be expelled.

29 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011).

In Germany, own nationals are exempted from complying with the housing condition. Furthermore, the income requirement is generally waived for the nuclear family. However, the income requirement might apply if both spouses have more links with the country of origin of the spouse, for example, if the German national has dual nationality, speaks the language and/or has lived in that country as well. Lastly, the special conditions for 16- and 17-year-old minors do not apply.

In Ireland, there are no provisions that grant explicit rights to family members of Irish nationals. In practice however, family members of both the nuclear and extended family may be granted legal residency on a discretionary basis. If the Irish national has sufficient income, the family reunification application is more likely to succeed. Should the Irish family member be reliant on public funds there may be reasons of humanitarian nature, including the right to family life, that may impel the Minister to grant a residence permit. For unmarried partners, the four year cohabitation requirement that is applicable to TCN partners in order to prove the family bond is reduced to two years. After the CJEU's ruling in the *Zambrano* case, a specific application procedure was put in place for parents of Irish minor citizens. Chapter 5 will elaborate on this further.

2.5 Rights and obligations of TCN Family Members after Admission

2.5.1 Temporary Residence Permit

In principle, the sponsor and the family have to comply with the admission criteria, with each renewal of a temporary permit, as long as the residence right of the family members is linked to the sponsor. In most cases, this means that the regular requirements for family reunification have to be met during at least the first five years after arrival. Furthermore, admitted family members are subject to integration requirements in Austria, Germany and the Netherlands, unless they can prove a sufficient level of the language or are unable to do so for medical reasons. Those who are subject to the integration requirements can be confronted with the withdrawal of their temporary residence permit if they fail to fulfil their obligations. In practice, however, a family permit can only be revoked in very exceptional cases.

In order to be able to remain in the country, Austria requires family members to obtain proof of level A2 German language skills (speaking, writing, listening and reading) within two years of receiving the first residence permit. If a family member fails to do so, the two-year time limit can be extended because of personal circumstances. The general consequence of failing to comply with this requirement, however, can be a refusal to prolong the residence permit, an administrative fine³⁰ and the possibility of expulsion.³¹ Rather similar to the Austrian situation, Dutch law requires

30 Where the fines in sum exceed the amount of 1,000 euro, the residence permit may be withdrawn and an expulsion order issued, which means the family member cannot enter Austria again for a minimum of two years.

31 Only if the expulsion does not violate Article 8 ECHR.

that family members³² pass a civic integration test within three years of entering the country. The minimum language level that is required to pass the test equals an A2 level in speaking, writing, listening and reading. The tests include questions on Dutch society. From 1 January 2013, the permits of family members who do not meet the requirements within three years after arrival can be withdrawn or not extended.³³ Furthermore, the permit can be withdrawn if the income requirement is no longer met. In Germany, admitted family members are required to attend integration courses. The initial permit is granted for one year and has to be extended on a regular basis until permanent residence is granted. The general requirements have to be re-examined each time, whereby the immigration authorities are to assess the level of participation in the integration course. If this is not sufficient, the permit can be extended for a shorter period or fines can be imposed. When assessing the requirements at the time of renewal, the authorities are able to waive the income and housing requirements where there is a subsisting family bond. Minor children will always be allowed to remain if this is the case. In the UK, the general immigration requirements are re-examined after 2.5 years, after which family members can be granted another permit for 2.5 years. Subsequently, they will be able to apply for indefinite leave to remain. There are no integration requirements after admission and before applying for indefinite leave to remain.

Independent permit

There is a possibility for spouses to obtain an independent (temporary) residence status after a certain period of time in case of divorce. In Austria, spouses are entitled to an independent permit if they are able to meet the requirements independently. In Germany, they are entitled if the marriage lasted for at least three years in the Federal Republic Germany, while in the Netherlands this required period of residence has recently been extended from three to five years. In Portugal, the family members of sponsors with permanent residence must receive an independent residence status after two years if the family bond subsists. In this context, it should be noted that parents in Portugal cannot be expelled, unless they are a threat to public order, where their child resides in Portugal and is dependent on them.³⁴

In all countries (although in Ireland this is not laid down in the law), less strict requirements apply in cases of death of a spouse or domestic violence. The Irish rapporteur also noted an increased awareness at national level of the vulnerable situation in which spouses find themselves when they are victims of abuse, yet their residence status is dependent on their marital status. Guidelines have been published on how to handle these types of situations and applications for independent permits made by victims of domestic abuse are generally looked at favourably.

32 Between 18-65 years old.

33 Article 8 ECHR must be observed.

34 In the cases that are foreseen for the application of this special article of the law, foreign citizens have to meet at least one of the following conditions: (a) were born and have residence in Portuguese territory; (b) have effective custody of minor children of Portuguese nationality and residing in Portugal; (c) have minor children, nationals from a third country and residents in Portuguese territory over whom they have effective parenthood and ensure their livelihood and education; and (d) who have lived in Portugal since less than 10 years old and live in the country.

In the absence of the special circumstances mentioned, it is usually not possible for the family member to obtain an independent permit if, in the meantime, the sponsor no longer fulfils the requirements mentioned above, e.g. the income requirement, or in case of divorce. However, it must be noted that, for example in Germany and the Netherlands, the income of the spouse may be taken into account in order to fulfil the income requirement when a residence permit is renewed.

2.5.2 Permanent Residence Permit

In Austria, Germany, the Netherlands, Portugal and the UK, a permanent residence permit (or in the case of the UK, indefinite leave to remain) can be granted after five successive years of residence in the respective state if there are no public order or national security reasons for not doing so. The preconditions for receiving a long-term residence title in Austria are fulfilling the general immigration requirements and having proof of advanced German skills in speaking, writing and understanding. Only minors before the age of schooling and persons with medical certificates are exempted from the integration requirement. German law requires that before a permanent residence permit can be granted the income and housing requirements must be met. Further, the applicant must have sufficient German language skills (B1) and have basic knowledge of the legal system, social order and living conditions in the Federal Republic of Germany.³⁵ Lastly, either the applicant or the spouse must have made contributions to the social pension fund for at least 60 months. In the Netherlands, a permanent residence permit cannot be refused to someone who was born there, or who entered before the age of four, and who has resided in the Netherlands ever since, unless there are serious reasons of public order or national security to justify a refusal.

The income requirement can be waived after ten years of residence and if an adult migrant was admitted as a minor and has resided in the Netherlands ever since. In all other cases, the applicant must provide proof of a sustainable income (the income of both spouses may be taken into account). Before granting a permanent residence permit, the Portuguese authorities verify whether the income and housing requirements have been met and whether the applicant has sufficient knowledge of the Portuguese language (A2 level). In order to acquire indefinite leave to remain in the UK, everyone between the ages of 18 and 65 must pass a 'life in the UK' integration test and meet the income requirement. Currently it is also sufficient to show progression from one language level to another. However, this more lenient rule will be abolished as of October 2013. From this date onwards applicants will also have to present an English language speaking and listening qualification at B1 level or above.

35 Both integration requirements can be verified with the successful participation in an integration course. This requirement can be waived under certain circumstances, for example, in the case of a physical, mental or psychological disorder or disability.

Table 2.2. *Integration Conditions*

	Pre-entry test			Post-entry test as a condition for the renewal of a temporary residence permit			Permanent Residence					
	Yes / No	Are minor children exempted?	Level ³⁶ /skills (speaking, listening, reading, writing)	Knowledge of society	Yes / No	Are minor children exempted?	Level/skills (speaking, listening, reading, writing)	Knowledge of society	Yes/No	Are minor children exempted?	Level/skills (speaking, listening, reading, writing)	Knowledge of society
Austria	Yes	Only exempted until the age of fourteen	A1, all skills	No	Yes	Only exempted until the age of fourteen	A2, all skills. Within two years after arrival	No	Only exempted until the age of fourteen	Exempted until the age of schooling	B1, all skills	No
Germany	Yes	Minors between the ages 16-18 must show C1 level or positive	A1, all skills	No	No ³⁸	n/a	n/a	n/a	Yes	All minors exempted	B1, Three out of four skills must be B1	Yes, basic knowledge of the legal system, social order and living conditions

36 According to the Council of Europe “Common European Framework of Reference for Languages: Learning, Teaching, Assessment” (CEFR). This is a reference tool widely used, for the assessment of language proficiency. It has a sliding scale of proficiency at a number of levels arranged in three bands: A1 and A2: basic speaker; B1 and B2: independent speaker; C1 and C2: proficient speaker

Ireland does not use the concept of ‘permanent residence’ like the other countries that were studied do. The status that resembles the permanent residence permit to a certain extent is the permission to remain in Ireland ‘without condition as to time’. This is a residence ‘stamp’ that may be granted at the Minister’s discretion to certain categories of third-country nationals who are of ‘good character’ and have completed eight years of legal residence in Ireland. In Ireland, the term ‘long-term residence’ applies to a five-year residence permit which may be granted to work permit holders only and which is granted and renewed at the discretion of the Minister for Justice and Equality.

Difference in legal position after having obtained a permanent permit

Although the national differences are substantial, in general with a permanent residence permit, a TCN migrant obtains a stronger legal position which can protect him or her against expulsion. As we have seen earlier in this chapter, in order for a temporary residence permit to be renewed, all the requirements for family reunification have to be met each time. When a permanent residence permit is obtained, a failure to meet these conditions does not result in the withdrawal of a residence permit or a refusal to grant a renewal. Furthermore, stricter withdrawal grounds apply in cases of breaches of public order or national security. Lastly, permanent residence in many Member States provides an immigrant with access to more social benefits, more opportunities on the labour market and other possibilities, for instance, access to a mortgage in order to buy a house.

2.5.3 Refugees

In Germany, a spouse and minor unmarried children can obtain a family refugee protection permit, which provides them with the same rights as their sponsor. However, the residence permit stays linked to that of the sponsor and can, therefore, be withdrawn if the sponsor, for example, is no longer recognized as a refugee. A permanent residence permit has to be granted to the sponsor, and thus also to the family member who holds a family refugee protection permit, after three years. If the family member does not have a derivative refugee status, a permanent residence permit can be obtained after he or she has resided in Germany for five years. Irish law states that a family member of a refugee is allowed to reside ‘for such period as the refugee is entitled to remain in the State’ and this is not affected by the break-up of the family, for as long as the refugee remains resident in the country. As said earlier, with the exception of the without condition as to time permit, Ireland only grants temporary permits until Irish citizenship can be obtained. In the Netherlands, the refugee’s family member receives the same rights as the refugee. Even though the family members do not have to pass any integration tests before admission, they will have to pass the regular integration course after admission also within the three-year time limit. A failure to fulfil the integration requirement will not result in withdrawal of the permit. Should the sponsor pass away, or in the event of a divorce, the permit will not be withdrawn either, although stricter (regular) criteria apply if the family member does not possess a derivative refugee status. If the permit of the sponsor is withdrawn, for example because the situation in the home country has substantially and sustainably

improved, the family member's permit will be invoked as well. In Portugal, the position of refugees does not differ from other third country nationals in this regard.

2.6 Rights and Obligations of Family Members of Union Citizens after Admission

Family members of Union citizens obtain a residence permit that is valid for five years unless the permit that has been awarded to the sponsor is valid for a shorter period of time. After five years a permanent residence permit must be granted. After one year of residence, a permit cannot be withdrawn in the event of the death of a sponsor or if the sponsor moves away. Generally, the marriage must also have lasted for at least three years. However, because children do not lose their right to education if the circumstances change after one year of residence, the spouse, in the capacity of caretaker of the children, may then still be allowed to remain in the host Member State. In the event of a divorce, it is required in Austria that the marriage or partnership has lasted for at least three years, of which one year had to be spent in Austria, the former spouse is awarded sole custody or can only exercise the right to access to a minor child in Austria, or to avoid special hardship that arises from these changed circumstances. A family member is not allowed to reside abroad for longer than six months, unless there is a good reason to justify this. If there is indeed a good justification, the allowed time period may be extended up to 12 months. Once a permanent residence permit is granted, the family member is allowed to reside abroad for up to two years.

Although the legal position of family members of EU citizens is stronger if they have a permanent residence permit, the difference with a temporary permit is much smaller compared to the situation of family members of third country nationals. The EU Citizenship Directive offers much stronger protection to admitted family members of EU citizens than are usually awarded to family members of third country nationals.

2.7 Rights and Obligations of Family Members of Own Nationals after Admission

Austria differentiates between the legal position of family members who are part of the nuclear family and family members who are part of the extended family. While members of the nuclear family have unrestricted labour market access and a right to settle, members of the extended family do not. Yet, members of the extended family may change their residence title. However, first they must obtain an immigration quota spot and fulfil the general requirements. Only then they may acquire a work permit. In order to obtain a permanent residence permit family members must have resided for five subsequent years, fulfil the general housing and income requirements, and provide proof of B1 German language skills. If the marriage or registered partnership has dissolved an independent right of permanent residence is still granted if

the marriage or partnership lasted for at least two years, provided the general conditions and integration requirement are met.

Family members of German nationals can obtain a permanent residence permit after three years of residence, in contrast to TCN family members who have to wait at least five years. In order to obtain a permanent residence permit, the family members will have to show evidence of basic language skills. Further, the family member must not be reliant on public funding. Family members of own nationals are also better protected against expulsion than TCN family members are.

As previously stated, family members of Dutch and UK nationals are treated in exactly the same manner as family members of TCNs. This means that they are subject to the most stringent rules out of all Member State nationals. Family members of Portuguese nationals have the strongest position as they are equated with the family members of Union citizens.

Ireland provides the least security to family members of any group, including family members of own nationals, because there is no entitlement to the consolidation of residence. This means that the family members find themselves in an insecure and dependent position until they become citizens of Ireland or succeed in an application to the Minister for the discretionary granting of a 'change of status', for example on the basis of domestic abuse suffered by them.

2.8 Conclusion

After having compared the six different Member States, it has become apparent that Portugal is very lenient in its family reunification policies compared to the other countries. Consequently, there is less discrepancy between the different target groups that were studied in Portugal than in the other Member States. Union citizens have been granted the strongest family reunification rights out of the different groups of immigrants. Portugal is the only country that provides its own nationals with the same rights. In all other countries, a situation of reverse discrimination towards Union citizens occurs to a certain level. While refugees, Turkish nationals and highly skilled workers hold a privileged position, all other third country nationals have to adhere to very strict conditions. With regard to the income requirement it must be remarked that the required income level for work-permit holders in Ireland seems excessive compared with other countries. The Netherlands only accepts very few documents that serve as evidence of a regular and stable income. With regard to the integration requirements, it is the Austrian situation that is rather striking as it is the only Member State that has an integration test at three different stages before permanent residence can be obtained: pre-entry, post-entry (within two years) and when applying for permanent residence. Although the Netherlands also imposes three stages, the levels do not increase a third time. The quota that is in place is another feature of Austrian immigration policy that can greatly influence the experience of family members who apply for family reunification. It will be interesting to see in the next chapter to what extent these types of requirements, which seem to be merely of a procedural nature, possibly impede the exercise of a family member's right to family reunification. Lastly, it is interesting to note that the benefit of instruments, such as the

Family Reunification Directive and the Long-Term Residence Directive, not only lies in a certain level of harmonization but also within a common frame of reference. These instruments make it easier to provide insight into the policies of different countries and to compare and evaluate them. The lack of a codified and harmonized family reunification policy in Ireland not only makes Irish policy difficult to compare to other countries, but also causes legal uncertainty for the applicants. It also raises questions of arbitrariness in decisions on family reunification in Ireland.

Chapter 3

Application of the Procedure

3.1 Introduction

In the previous chapter, we learned about the requirements for family reunification applicable to the different target groups. But how do these requirements affect the right to family reunification in practice? Are family members able to invoke their rights? The practical consequences of the legal rights largely depend on the way these requirements are applied, how the application procedure is organized and what procedural safeguards the sponsor and his or her family members enjoy. These three aspects will be addressed in this chapter, based on the different sources the national rapporteurs collected: legislation, research reports, case law, criticism from NGOs, Inspectors (UK) and the Ombudsman (Portugal), parliamentary documents and interviews with stakeholders. First, we offer an overview of the application procedure and the actors involved in the decision making process, second, we focus on some critical elements of the procedure (applying abroad, the duration of the procedure and the safeguards for refugees), and third, the practice of the procedural safeguards is analysed. Furthermore, we will highlight some national developments on the combat of fraudulent marriages. How does this combat affect couples attempting to reunite? Finally we turn to the experiences of our respondents with the procedures; how did they perceive and experience the way their application had been assessed?

3.2 Actors Involved

Horizontal division of competences

In most of the Member States in the study, the emphasis of migration control has shifted from the desks in the host country and at the national borders to consulates in the countries of origin, offering Member States more possibilities to prevent unlawful residence in the country. Due to this development, applying for family reunification abroad has become more and more the starting point, which has led to a growing role for the Ministry of Foreign Affairs. Article 13 (1) of the Family Reunification Directive prescribes a clear order: it obliges Member States to authorize the entry of the family members, inter alia, by facilitating obtainment of the visa as soon as the application has been accepted. This implies that the visa is to be issued after the positive decision has been taken by the Ministry of Interior. In practice, however, consulates sometimes take part in the decision making, for instance by verifying documents and the identity of applicants or checking on counter-indications on national security grounds. What effects do these shared competences have for the application procedure?

The involvement of the Ministry of Foreign Affairs in family reunification especially leads to problems in Austria, Germany and Portugal. Applicants experience

obstacles because of inconsistencies in the decision making, lack of transparency and in any case delays in the application procedure.

In Austria, although in principle the decision of Home Affairs is decisive, Austrian consulates have the discretion to refuse a visa if evidence is provided that the individual's entry poses a threat to public order and security. They may take up inquiries on their own initiative in this regard and in practice they use their margin of appreciation rather extensively. This leads to significant problems for individual applicants, especially for family members of refugee and subsidiary protected families who are faced with longer waiting periods in difficult situations.

In Portugal, the unclear scope of competences and the high level of competition between the two ministries generate different (if not contradictory) decisions affecting the right to family reunification. The two main problems applicants experience is the long time the consulates take to issue a visa – respondents complained about 'apathy' at the consulates – and their renewed assessment after approval by the immigration authorities (SEF). This review implies requests for extra documentation or proof of family relationship or even reversal of the positive decision. The officials of the consulate argue that the relatives are in front of them and sometimes give rise to suspicions, for example, with regard to the age of children or the family relationship. At the same time, the reason for the delay is often not explained to applicants, even if it is motivated by certain doubts. In August 2012, the legislation was slightly amended in a way that may even extend the discretion of the Ministry of Foreign Affairs. The new formulation can be interpreted as the SEF no longer taking a final decision, but making a proposal which can be revised by the consulates.

In the UK, Entry Clearance Officers posted in overseas countries are responsible for issuing visas but, increasingly, also for taking the decision on admission for family reunification reasons. Since 1999, a Joint Entry Clearance Office (JECO) has to ensure effective coordination between Entry Clearance Officers and the Home Office. However, recent reports by the Chief Inspector of the United Kingdom Border Agency (UKBA) have highlighted a number of deficiencies in the decision making of Entry Clearance Officers. These include failing to clearly indicate what evidence is required for a successful application, overlooking relevant evidence submitted with applications and, in certain instances, applying higher evidential requirements for applicants from some states (e.g. Pakistan) than for applicants from other countries. This practice not only leads to insecurity, but also to arbitrariness and discriminatory treatment.

In Germany, Ireland and the Netherlands, the role of the Ministry responsible for migration as primary responsible actor is less, or not disputed. That does not alter the fact that the visa application procedure itself leads to delays. The German embassies apply a special authentication procedure for documents on identity, nationality and family relations from countries of origin which are on a special list (currently more than 40 countries). This authentication takes several months.

The Irish Department of Foreign Affairs, in processing visa applications, is merely facilitating the work of the Minister for Justice and Equality, who decides on the policy. But here the opposite effect arises: the applicant who has been granted a visa is still not guaranteed entry to the state. The decision to grant leave to enter is up to an immigration officer on arrival, whose decision is not subject to an appeal.

In the Netherlands, in order to harmonize and gain more control over the application process, more competences regarding long-term visas have recently been shifted to the Ministry of Security and Justice. This could be motivated by the aim of a more centralized, restrictive admission policy. One respondent told that his spouse was granted a tourist visa by the ambassador, despite general instructions to deny a visa in cases of an intention to marry. After arrival, the Dutch immigration authorities tried to correct the ambassador's decision by revoking the visa, taking the woman's passport and attempting to prevent the marriage.

Vertical division of competences

In all Member States, the agencies responsible for deciding on the applications for family reunification are under the jurisdiction of the national Ministry for Home Affairs or the Ministry of Justice (the latter is the case in Ireland and the Netherlands). The national family reunification policy is executed centrally, except in Austria and Germany, where the federal structure has resulted in a different division of competences.

Especially in Austria, the federal system affects coherent decision making on applications. The competence to decide on an application for admission or renewal of the permit has recently been shifted to the heads of the federal states, who have made the regional or city administrations responsible. At the review stage, the Federal Ministry of Interior still functions as the second instance. Although this ministry is to ensure a uniform application of the rules, a respondent observed, as a counsellor, different practices between the states, and even between local authorities of the same federal state. In particular, the introduction of a new criterion on the income requirement in 2005, not clarifying whether this should be the net or gross sum of the social welfare level, left wide margins of discretion for the immigration authorities, resulting in a divergent implementation practice. With an amendment of the Act, the federal legislator has limited this discretion significantly. The legislator now only allows exemptions on grounds of Article 8 ECHR, which is, however, practically only applied after arrival, for instance at the moment of renewal of the residence permit.

In Germany, the responsibility at federal level results in a more uniform implementation of the Residence Act, via a binding regulation and special ordinances. At the state level, the Ministry of Interior establishes binding guidelines for the way local immigration authorities should use their discretion. The German Constitution probably contributes to this coherence because of the mandatory involvement in the legislative process of the *Bundesrat*, which represents the governments of the states. With regard to the implementation of the federal integration legislation, the role of the states and municipalities is just as important as in Austria.

Despite their uniform national structures, the other four Member States also differ in the level of centralization. The Dutch system has become strictly centralized during the last 15 years. Before, local officials of the Aliens Police served as the contact points for sponsors and their lawyers, using their knowledge of the cases while advising the immigration authorities. It enabled lawyers to explain the individual circumstances of a case in more detail and to obtain information on the processing of the application. With the current anonymous assessment of the applications, these possibilities have been significantly reduced. The centralization also furthers a stricter

application of the formal requirements, like the three-month period for refugees, the income or visa requirement, which is problematic in view of the obligation of the Family Reunification Directive and the Union principles (especially the principles of effectiveness and proportionality) to take all individual and concrete circumstances into account.³⁹ As the Dutch court tends to scrutinize an appeal marginally, a correction mechanism at a later stage is minimal. On the other hand, the detailed level of the legislation enables family members to invoke rules and rights which should be applicable to them.

On the other side of the coin, we find the Irish system, lacking detailed criteria or safeguards for most categories. The Irish legislation, which only entails a statutory right for Union citizens, refugees, subsidiary protected and scientific researchers who have been admitted to Ireland under the Researchers Directive, leaves a much wider scope of discretion for the authorities, compared to those in the other Member States studied. According to the Irish High Court (Hogan J.), the nominated civil servants are free to decide on an application or deportation order, but the Minister for Equality and Justice always remains responsible for these decisions. However, no real guidance is offered, specifically regarding criteria on partnerships (prior cohabitation or not), or arranged or proxy marriages. As the reasons for a decision are not always given in much detail, family members sometimes don't know why their application has been rejected. This system of a fragile legislative basis and a wide discretion for immigration authorities might allow officials to take all individual circumstances into account, but there is no guarantee to that effect. At the same time, the disadvantages are considerable: the risk of arbitrariness, lack of security of status, lack of transparency and infringements of (the right to) equal treatment, and difficulties to invoke certain rights before the court. Ireland is allowed to pursue this defective system towards third country nationals, as it is not bound by the Family Reunification Directive. Yet, the applicability of the Union Citizens Directive has forced the Irish government to establish the right to family reunification for Union citizens in the law, offering this group more security and legal safeguards and also raising the question of what rights to give Ireland's own citizens in terms of family reunification with third country nationals.

3.3 Applying Abroad: The Practice

Family members of third country nationals, not being refugees, generally have to lodge their application and await the decision in their country of origin, or at least abroad.⁴⁰ Thus, embassies are the agencies dealing with the application in the first instance. If no diplomatic representation is available, family members have to travel to neighbouring countries in order to lodge the application personally. The smaller the Member State, the more often applicants face this problem. The Austrian report

³⁹ *Chakroun* [2010] CJEU C-578/08 (04 March 2010).

⁴⁰ In Austria, family members of refugees also have to apply for a visa before being able to apply for family reunification in the country. They are therefore forced to await the issuance of an entry visa abroad, which in practice takes a long time.

mentioned this as an obstacle in general, but the German and Dutch reports point out the problems occurring in war regions. Family members have to travel long distances through unsafe areas, and even several times if passing a pre-entry test is required. Indeed family members are exempted from the pre-entry test if their sponsor is a refugee, but not if he or she received a permit on humanitarian grounds instead of a refugee status.

Not all Member States are equally rigid concerning the obligation to apply for family reunification abroad. Austria, Germany and the Netherlands apply this requirement the most strictly. By way of derogation, Austria does not refer family members of Austrian nationals back to the Austrian consulate, provided they have entered Austria legally. The provision especially targets former asylum seekers, who have mostly entered the country on an irregular base. This exemption is moreover only valid as long as the residence is legal, for instance before the visa has expired. Solely Turkish nationals covered by the Association Agreement, who are family members of Austrian nationals, are entitled to await the decision inland. As already mentioned, invoking Article 8 ECHR is hardly ever successful in the case of a first application. In Germany and the Netherlands, the requirement can be waived if the family member already legally resides in the Member State on other grounds, for instance for reasons of study or on humanitarian grounds. European and Dutch case law obliges the Dutch immigration authorities to assess whether Article 8 ECHR compels them to declare the application admissible.

In principle, applicants for leave to remain in the UK as a spouse or partner are allowed to await the decision in the UK if they have not breached the Immigration Rules (e.g. overstaying, residing illegally), although the first 28 days of overstaying are not taken into account. Furthermore, the marriage or registered partnership must not have concluded (or the relationship not have started) after a decision to deport or remove them from the UK. The UK courts proved to be reluctant to break up obviously genuine families, entitled to family reunification, by sending them abroad to wait in a long queue for the visa. As TCN family members have a directly effective, automatic right under EU law to enter the UK to join or accompany their EEA family members, they don't need to apply for an entry visa, known in the UK as an 'EEA family permit'. In practice however, airline carriers will often refuse to carry passengers who are not able to point to a document confirming their right to enter the UK.

3.4 Duration of the Procedure

Earlier studies have shown that the duration varies widely among Member States (Pascouau & Labayle 2011). Although the Member States differ in the legal time limits for decision making, they have in common that time limits are no safeguard for a timely decision. The Member States in which applicants suffer the most from long procedures are Austria and Ireland.

Although the Austrian legislation mentions a time limit of six months, the involvement of the two agencies described above (abroad and inland) can lead to considerable delays in practice. The delay causes extra complications, as the date of decision determines which requirements are applicable. Depending on the respective

content of transitory provisions, family members also have to meet requirements introduced or strengthened after the date of their application. Due to this system, a delay can imply that during the application process children lose their eligibility to reunite, as they have come of age in the meantime. Furthermore, applicants may face the annual admission quota, unless their sponsor is a highly skilled worker or an Austrian national. If the quota is already exhausted, the decision may be postponed for a period of up to three years. There is no right to appeal such a postponement. If a decision has not been taken within six months, applicants have the right to take the application to the authority in second instance. As a consequence, however, they will lose the possibility of a review. The idea of having the first decision being the final deters applicants from using this right. Another reason why this legal remedy is not very effective is that the time limit doesn't include the period during which the application is processed at the embassies, where most of the delays occur.

In Ireland, a mandatory processing time for applications for visas or residence permits is absent, with the exception of an accelerated process in the case of a qualifying family member of a Union citizen. Unlike Austria, a delay in decision making is one of the main reasons for litigation. In a judgment on this issue, the court referred to the website of the Irish Naturalisation and Immigration Service, which informed applicants that the average time for processing refugee family reunification applications is 24 months (visited in January 2008). According to Hedigan J., this is not a reasonable time, as 'every effort must be made to ensure reunification as quickly as possible'. The possibility of submitting a fresh application at any time would not dismiss the state from this obligation. After all, this could imply that children lose their eligibility for reunification if they have come of age in the meantime.⁴¹

In some of the Member States studied, measures have been taken to shorten the procedures. Since October 2012, in the Netherlands, not deciding according to the legal time limits implies a financial sanction for the IND. Two weeks after an applicant has given notice of default, the IND has to pay an administrative fine to the applicant for each day that it decides later than those two weeks. Furthermore, the residence permit is going to be automatically issued within two weeks after an application for family reunification, if the family member has arrived on a long-term visa for this purpose.

In Portugal, one of the reasons for installing liaison officers at consulates in certain countries of origin was to speed up the processing of the visa applications. This decision, taken in 2006, has not prevented that still in 2010, the large majority of complaints lodged by TCNs to the Ombudsman, dealt with the delays in family reunification procedures. The Portuguese rapporteurs consider the absence of a legal time limit as the main reason for the delays. However, taking into account the experiences in other Member States, this is not necessarily a guarantee for speedy decision making.

41 *POT v The Minister for Justice, Equality and Law Reform* [2008] IEHC 361 (High Court of Ireland November 19, 2008) (Hedigan J.) no. 361.

3.5 Refugees and Subsidiary Protected

In most Member States, the family reunification procedure of refugees is quite similar and relatively simple, as the fulfilment of requirements on income, housing or integration are not to be assessed. The most important objects for verification are identity and family relationship. If evidencing the existence of the family relationship by way of documentation is not possible, DNA testing is offered. However, due to extra conditions, refugees settled in Austria, the Netherlands and the UK face specific problems in reuniting with their families.

In Austria, the issuance of a visa to family members of refugees often takes more than six months, which results in families waiting in difficult circumstances. Combined with the long asylum procedures the sponsor has to endure before being granted protection, it can take many years before they are reunited. In the case of the subsidiary protected, this is even longer, as their family members can only apply for reunification one year after the protection has been granted. Furthermore, the quota system is applied to family members of refugees and the subsidiary protected, if they reunite on the basis of the Residence and Settlement Act. This element of the quota system has been most sharply criticized. They are only exempted from the quota system if the humanitarian situation compels family reunification. Unlike many other countries, refugees do not get permission for extended family reunification.

In the Netherlands, the additional requirement of having an 'effective family bond' can constitute a considerable impediment in practice: not only the requirement itself but also the methods to identify this bond.⁴² There is a lot at stake as family members who are not successful in meeting this criterion face the consequence that the regular requirements of income, fees, long-term visa will not be waived. In particular, the identifying assessment regarding family members without biological ties includes long interviews at the Dutch embassy in the country of origin, after which the statements are compared with the information the sponsor provided during the asylum procedure in the Netherlands. Different answers or gaps can be considered as proof of the absence of an effective bond. The answers of the children in separate interviews are evaluated accordingly. Observers (a Dutch lawyer and a children's advocate) concluded that the position of children is not taken into account when conducting these interviews and evaluating their statements. Interrogations of very young children take place, they are not fully prepared, cannot be accompanied and the interviews can last up to six or eight hours, without adequate breaks or food and beverage. The Dutch government justifies these methods as combating fraud. It, therefore, presented the increased number of rejections (from 12 per cent in 2008 to

42 In short, the requirement of an 'effective family bond' implies that the family members must have lived together in the country of origin at the moment of departure of the refugee, unless there was a good reason for a temporary separation. As a result of this, refugees who have formed a family outside their country of origin, e.g. during their stay in a refugee camp, do not enjoy the more favourable right to family reunification as established in the Family Reunification Directive. Own children who have lived with another family or who have been missing for a long time can, in principle, only be reunited if the refugee meets the regular requirements, such as income. See also para. 2.2.

81 per cent in 2011) as a success. Requiring an effective family bond in addition to the condition that the family relationship should be proved, is, nevertheless, in contravention of the Family Reunification Directive. According to Article 10 (1), the use of the definition of a family as provided in Article 4 (1) is mandatory; Article 9 (2) of the directive makes clear that the more favourable rules for refugees are only mandatory in case of family reunification, as it allows Member States to apply the regular conditions in case of family formation. The UK applies criteria which are more or less similar to the Dutch. Minor children of refugees must have formed part of the family unit of the refugee at the time that he or she fled the country. With regard to spouses or unmarried partners, the criteria are harsher than the Dutch ones, as the UK requires a certain period of cohabitation: they must have lived together for two years or more before arrival of the refugee in the UK. Although this practice may constitute a violation of Article 8 ECHR, the UK is, unlike the Netherlands, not bound by the Family Reunification Directive.

3.6 Right to Appeal and Legal Aid

In all Member States there is a right to appeal. Most of them have established three stages: during the first one the decision is reviewed by the immigration authorities, the second instance is an independent court, and the scope of scrutiny of the third instance is often limited to formal questions of law.⁴³ Many respondents did not consider the review stage as effective, as the responsible ministry was not likely to change its position. In Germany, it was observed that only a change in circumstances, for instance a higher income, led to a positive outcome of the review. For family members of refugees in Ireland, a change in circumstances or availability of new evidence are the only opportunities to get a new decision on their application for family reunification. The website of the INIS informs them that if they have '*significant new information*' it is open to them to submit a new family reunification application. Appeals, to an appeals officer within the Ministry, are only available against the refusal of a visa application and against the refusal of residence permits to the family members of EU/EEA nationals. In practice, TCNs are also able to request a review against the refusal of a residence permit, but there is no legal entitlement to this being provided. Furthermore, standards of decision making are criticized; in some cases a review may be undertaken by the original deciding officer at first instance. Irish NGOs described the administrative and judicial system in immigration cases (including the civil legal aid scheme) as '*inadequate*', '*not applicant friendly*', '*prohibitively costly*' and '*hugely lengthy*'. Yet the High Court, which is not able to review the merits or substitute the decision itself, has so far not held the heavily criticized procedural rules, or lack thereof, to be in violation of Articles 8 or 13 ECHR.

At the same time, the national reports make clear that appealing against the denial of a review is for a number of reasons not an attractive strategy. First, following an appeal procedure takes a lot of time: the Austrian report mentions that an appeal

43 In Austria, the second instance is the Ministry of the Interior.

procedure at the High Court takes on average two years. In particular, if the first decision has already taken a long time, appealing implies that family members are compelled to live separately for years, since in most cases the family members have to await the decision in their country of origin. Second, a review of the decision by the court is hard to predict (in Ireland because of the lack of statutory entitlements to family reunification) or rather unlikely (in Austria or the Netherlands due to the margin of appreciation it leaves to the immigration authorities). Third, the procedure could amount to a high financial burden; although legal representation is not always required, NGOs consider family reunification legislation as too complex to bring forward all legal arguments without professional support. In Austria and Germany, the costs for the required legal representation will only be carried by the state if the court judges the appeal to be potentially successful. In addition, in Austria the possibility of reimbursement is limited to appeals at the High Court. In Ireland, procedures on family reunification applications are not covered by legal aid at all. Furthermore, applicants who challenge decisions of the State through the High Court are faced with the enormous financial risk of having to pay the State's legal costs.

For all these reasons, taking a case to court implies taking a risk that the denial will stand, while much more time and money are consumed. The Portuguese report explicitly mentions that instead of appealing, by far most family members choose to submit a new application for family reunification, hoping that this time another official will assess their case. A Dutch lawyer also said that he advises most clients to do so.

According to the Austrian rapporteurs, family members not only need a lawyer for their admission procedure, but increasingly also to have their residence rights safeguarded after admission. They pointed to the growing number of conditions, the annual renewal, the moment they have to meet the language requirement and the application for permanent residence rights. The UK report is alarming on the shortage of legal aid in future, due to recent cuts in this specific area. Furthermore, due to changes to the Immigration Rules in 2012, all immigration matters will be removed from the scope of legal aid, with the exception of asylum and detention. NGO representatives interviewed in this study, expect that this amendment will restrict legal advice on immigration law to those who can afford it. According to them, migrants often don't know where to turn for advice if they can't afford to pay.

3.7 Fraudulent Marriages

In Austria, Germany, the Netherlands and Portugal, an increasing attention to possible fraudulent marriages can be observed. This attention is frequently evident during the assessment of the first application, when the family relationship has to be identified. In all four countries, a specific procedure has been defined in order to detect a fraudulent marriage. They have in common that the measures specifically target bi-national couples. In Austria for instance, since 2005, civil marriages of Austrian nationals with TCNs have been automatically forwarded to the Immigration Police, which may initiate inquiries on the couple's life in case of doubt. The Constitutional Court judged that this different treatment of own nationals, compared to Union citi-

zens exercising their mobility rights, was justified. The Act of 2005 had just abolished their equalization with Union citizens.

This suspicious approach might have increased during recent years, but it stems from an older discussion on the national as well as the European level. For decades, Member States have expressed concern about the supposedly large number of fraudulent marriages that circumvent restrictive immigration policies. They introduced national legislation to combat fraudulent marriages, and the concept of fraudulent marriages has also found its way into European immigration policy, such as the Directive on the Right to Family Reunification.

Before fraudulent marriage was targeted in the Family Reunification Directive, it appeared in soft law. The Resolution on the harmonization of national policies on family reunification adopted in June 1993 in Copenhagen noted that the marriage ‘must not have been contracted solely or principle for the purpose of enabling the spouse to enter and take up residence in a Member State’.⁴⁴ In 1997, the Council of Ministers adopted a Resolution on measures to be taken on the combating of fraudulent marriages.⁴⁵ The 1997 Resolution notes that fraudulent marriages constitute a means of circumventing the rules on entry and residence of third country nationals, and that Member States should adopt equivalent measures to combat the phenomenon. The Resolution defines a marriage of convenience as ‘a marriage concluded between a national of a Member State and a third-country national, with the sole aim on circumventing the rules of entry and residence of third country nationals and obtaining for the third country national a residence permit or authority to reside in a Member State’ (Article 1).

The 1997 Resolution contains a list of so-called objective factors that indicate a marriage of convenience:

- the fact that matrimonial cohabitation is not maintained;
- the lack of an appropriate contribution to the responsibilities arising from the marriage;
- the spouses have never met before their marriage;
- the spouses are inconsistent about their respective personal details (name, address, nationality and job), about the circumstances of their first meeting, or about other important personal information concerning them;
- the spouses do not speak a language understood by both;
- a sum of money has been handed over in order for the marriage to be contracted (with the exception of a dowry in the case of nationals of countries where the provision of a dowry is common practice);
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

44 Resolution on the harmonization of national policies on family reunification, Ad Hoc Group Immigration of Copenhagen, 1 June 1993 [SN 2828/1/93 WGH 1497] REV 1, point 4 under principles governing Member States policies on Family Reunification, Further Conditions concerning Spouses. The text of the Resolution can be found in E. Guild & J. Niessen, *The Developing Immigration and Asylum Policies of the European Union*, The Hague: Kluwer Law International 1996, p. 251-256.

45 Council Resolution of 4 December 1997, 97/C 382/01, Official Journal C 382, 16-12-1997.

The Resolution, though not binding, provided that Member States should bring their national legislation into line by 1 January 1999 (Article 6). Both the Family Reunification Directive and the Union Citizens Directive include the right of Member States to refuse admission and withdraw or refuse the extension of a residence permit if it has been established that a marriage, relationship or adoption was concluded with the sole aim of acquiring admission or residence in the Member State. In the interpretative guidelines of the Union Citizens Directive, the European Commission has again provided a list of indicative criteria, which resembles that of the 1997 Resolution.⁴⁶

Many of the indicative criteria Member States use are similar to these European lists, but the national reports also refer to criteria that go beyond these, like the difference in age or an unusual combination of nationalities. Furthermore, the Portuguese report mentions as additional indicators: marriage with pre-nuptial agreements, such as separation of marital property; marriages with indigents, prostitutes or persons with mental disabilities; the absence of any cultural or social sharing between spouses. In Germany, the Netherlands and Portugal, immigration authorities tend to start an assessment if indicators on their national list are applicable. The German and Portuguese authorities are not instructed on the applicability of the number of criteria, but the judgment of the Dutch authorities that a marriage is fraudulent, always needs to be based on more than one criterion. The sole fact that there is, for instance, a large difference in age is not sufficient. In practice however, such characteristics or a specific or unusual combination of nationalities (e.g. EU nationals with Egyptians) could result in the suspicion of a fraudulent marriage (Bonjour & De Hart 2013).

The way the possible fraudulent character of the marriage is assessed also shows similarities: conducting interviews with both spouses simultaneously, house calls at the sponsor's home and seeking information from third parties. The increasing use of DNA testing in connection with the proof of biological relationships serves the same purpose. The federal states in Germany enjoy a wide discretion in both the methods used and the conclusions they draw from their findings. In Bremen, for instance, the immigration authorities draw on detailed questionnaires in the individual interviews. In the past, all bi-national couples had to undergo a standard survey, until the Administrative Court rejected this practice. In all states, respondents in this study observed a trend towards regular inquiries at the stage of the visa application.

In the Netherlands, despite its recognition that the exercise of EU mobility rights in order to reunite with a TCN is perfectly legal, the Dutch government introduced a number of measures to prevent and combat fraudulent marriages and possible abuse of the Union Citizens Directive. With these measures, the minister targeted Dutch nationals as well as Union citizens. They include intensive assessments of applications for family reunification from third country nationals with a Union citizen residing in the Netherlands, more requirements on evidence and strengthened criteria for a du-

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

rable relationship, more exchange of information between the civil administration and the IND, but also with Belgium, Germany and Denmark.

In all three Member States, the immigration authorities judge whether the collected information justifies the suspicion. If they have reached this conclusion, it is in practice up to the spouses to rebut this suspicion. The decision that the marriage is fraudulent usually has consequences for residence rights, but may also lead to prosecution. As the Union Citizens Directive has limited national discretion in this regard, the German authorities often refrain from the methods described above when assessing marriages with Union citizens. However, in all cases registrars are obliged to refuse a wedding, if the existence of a fraudulent marriage is apparent. In the Netherlands, the municipal official of the Registry of Births, Deaths and Marriages is only allowed to conclude or register a marriage or partnership if one or both spouses or partners do not hold Dutch nationality or the nationality of another EU Member State, after the Alien police has advised positively. A negative advice has to be accompanied by extensive reasons, and can lead to the refusal to conclude or register the marriage. In practice, the civil registrars seldom refuse to conclude a marriage on suspicion of its being fraudulent. An evaluation study demonstrated that in the first four years after introduction of the Fraudulent Marriage Prevention Act, only 69 marriages were refused. Couples often appealed such decisions successfully, because judges had stricter norms for proving fraudulent marriages than civil registrars and immigration officers (Fonk et al. 1998). A second evaluation in 2004 again confirmed these low numbers; less than one per cent of marriages was refused, around 40 per year (Holmes-Wijnker et al. 2004).

3.8 Subjective Perceptions of Applicants

Now that we have seen how procedures are organized and what the relevant issues are concerning these procedures, we turn to the experiences of applicants. The interviews demonstrated that the problematic aspects of the procedures deeply affected them.

To understand their experiences, we turn to theories of procedural justice (Thibaut & Walker 1974). According to this theory, civilians are satisfied with a procedure, irrespective of the outcome (positive or negative for applicants), if the procedure fulfils certain requirements.

The first factor in this respect is voice. People want to be able to put forward their side of the story, they want to be heard. It seems that often applicants had no opportunity to be heard. In this context, the faceless procedure was mentioned as a problem, specifically in the Netherlands and the United Kingdom. The transformation of immigration authorities in many countries in the past decade, from a *street-level-bureaucracy* (with daily face to face contact with applicants) to a *system-level bureaucracy* (with a computerized, standardized procedure) (Böcker & De Hart 2011) seems to have certain drawbacks for individual applicants in terms of being able to tell their story.

The second factor is the control of the procedure: to what extent can the applicant influence the procedure, putting forward evidence and arguments. Especially in

countries with a high level of discretion, such as Ireland, applicants experienced a lack of control. In other countries, such as Austria and Portugal, the dual track procedures resulting in the risk of an approval by inland authorities followed by the refusal or new demands by the embassy, was often mentioned as a problem. The lack of transitional arrangements in Austria could result in applicants being denied solely because they couldn't meet the new criteria.

A further issue related to control is the duration of the procedure, an issue already mentioned earlier in this chapter. The procedure takes longer as more requirements have to be met. In most countries, the duration of the procedure was mentioned as a problem, although the length of the procedure differed significantly between the countries. For example, in the Netherlands, respondents complained about the length of the procedure for the long-term visa, which took on average six months, up to a maximum of 1½ years, after the application was initially refused. In Ireland, the procedure has taken as long as three to four years. The fact that even in the Netherlands the duration was mentioned as a problem indicated that it was not only the actual duration of the procedure itself, but also the lack of transparency and the insecurity of the outcome that made the waiting difficult. Those respondents who met with the longest procedure described their experience as their 'life being on hold'.

A final topic mentioned that falls into this category is that migrants in an advantageous legal position, refugees and EU citizens, frequently felt that they could not effectuate these rights. As explained earlier in this chapter, refugees sometimes still had to meet the normal requirements for family reunification, and Union citizens met with additional controlling practices and mistrustful authorities.

Thirdly, the availability of information is relevant. As a consequence of faceless procedures, respondents complained that they could not contact the official who had handled their application to provide information, ask questions or be informed about the state of affairs. Respondents in most countries complained about the lack of, or contradictory, information provided. For instance, in the Netherlands, respondents calling the IND helpdesks mentioned that they received different answers to the same question at different times.

Fourth, treatment by the authorities is relevant. Applicants want to be treated with respect. However, respondents in most countries complained about the mistrustful attitude of immigration authorities. Individuals complained that they felt treated like criminals, or as if they were cheating the system even when they had a right to, or had been granted, a visa. Some received remarks that they perceived as discriminatory and humiliating. For example, one British national sponsor of a Palestinian spouse described how her husband's intentions were interrogated by immigration officials even though he had been granted a spousal visa:

'The man asked him what he wanted to do in England and I said that he wants to seek work and study English and the man said "is this at your expense or the tax payer's expense?". I mean, he had his visa and they said it's alright for him to come here ... He was held for 2 hours going through customs. I think it's really detrimental for people to feel that they're not wanted here ...'

Finally, expertise is found to be relevant, as well as impartiality and independence. A decision has to be based on the facts and not on personal judgments. In relation to the fourth factor, people sometimes had the impression that decisions were based on personal judgments.

Hence, although the outcome of the procedure was positive for most of the applicants who were interviewed (the application for family reunification was granted), most of them told of their experiences in predominantly negative terms. Except for the fact that immigration procedures have a huge impact on the family life and daily lives of applicants, the theory of procedural justice may explain this seeming contradiction.

3.9 Conclusion

The Member States studied have in common that the rights established in legislation do not always ensure that these rights can be properly invoked by applicants. This partly relates to the practical application and organization of the procedure, but also to the room to manoeuvre for immigration authorities, on the one hand, and the lack of vital safeguards, like legal aid, on the other hand. Furthermore, some developments in the family reunification policies enlarge the risk of more lengthy and complicated procedures: the externalization of the admission procedure and the increasing attention being paid to fraudulent marriages.

The lack of transparency of those procedures provokes arbitrariness and different treatment on the basis of nationality during the procedure abroad, as the examples of the UK (different requirements) and Germany (authentication) show. The affected nationals pay the price of deficiencies in the civil administration systems of their country. The different treatment based on nationality goes beyond procedural aspects, like the exemptions on passing the Dutch or German pre-entry test. The family members whose nationality results in the obligation to pass the test, also deal most frequently with the above-mentioned procedural obstacles.

Procedural conditions, like time frames, fees or demands for evidence are, seemingly, solely formal criteria. Their dominance, however, can make the material rights illusory. The principle of effectiveness, established by Union law, is precisely to ensure that procedural rules do not obstruct the exercise of Union rights. This chapter shows that the Union rules on free movement have made the Member States rather cautious about hindering Union citizens in the exercise of their rights. Regarding TCNs however, the practices in the Member States show little awareness that procedural rules should be designed in a way that facilitate TCNs in exercising their right to family reunification.

The way of applying formal or material conditions, as well as the attitude of immigration authorities prove to be crucial for the perception of applicants that justice has been done. Still, the obligation to take all personal interests and circumstances into account and to act in a way that furthers family life is difficult to establish in legislation or to otherwise enforce. Yet, some national practices show that certain incentives actually influence the methods and attitude of immigration authorities. We referred to the Dutch situation, in which financial sanctions result in more speedy deci-

sion making, and the proactive role of the Portuguese Ombudsman, who has turned the operating procedures in a more family friendly direction. Furthermore, transparent complaint procedures could contribute to more accountability and learning effects for the immigration authorities. But besides these options, a legislative right to family reunification strengthens the position of applicants without doubt. In Ireland, the wide discretion of the immigration authorities in relation to most categories, results in the risk of arbitrariness and may put applicants in an uncertain and weak position. As long as Ireland continues to opt-out of the Family Reunification Directive, this instrument cannot serve as an incentive to establish a statutory right to family reunification for a broader range of categories of sponsors and family members or to limit the discretion of the authorities.

Chapter 4

The Development of National Policies

4.1 Introduction

In our study, we looked at the development of national family reunification policies in the last decade, since 2000. In the first part of this chapter, we answer the question of what arguments were used to introduce amendments of family reunification policies. We have found three main arguments that determine the development of family reunification policies: integration, economy-related arguments and fraud. After a discussion of these three arguments, we look at how they were used in the countries under study in relation to the four main requirements: income requirement, pre-entry tests, age requirement and housing requirement.

In the second part of this chapter, we look at how family reunification policies developed. First, the question is to what extent policies have been evidence-based. Did governments evaluate the impact of their policies and how did such evaluations influence policy making?

Second, we raise the question of whether a restrictive turn in family reunification policies has taken place and if so, how this can be explained. What impact did the Family Reunification Directive have? Do developments in Members States that opted out of this directive (Ireland, United Kingdom) differ from those that are bound by it?

4.2 Integration, Economy, Fraud

Table 4.1. Arguments used in policy debates

	Integration	Economy	Fraud
Austria	X	X	X
Germany	X	X	X
Ireland		X	X
UK	X	X	X
NL	X	X	X
Portugal		X	X

4.2.1 Integration

In four of the six countries under study, integration was the main argument in the development of family reunification policies in the last decade. This counts for Austria, Germany, the Netherlands and the United Kingdom. In Portugal and Ireland it was not. It is striking that integration is the main argument in the four countries that demonstrate a development towards a more restrictive family reunification policy. This can be explained by looking at the link between family reunification and integra-

tion and how this is perceived in those countries. But first, we look at the European definition of integration.

European integration definition

The starting point of the definition of integration established by the European Council in 2004 is that integration is ‘a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States’.⁴⁷ The Common Basic Principles on integration formed the guidance of the Communication of the Commission on a European Agenda for the integration of TCNs, in which it formulated more concrete actions for Member States to take.⁴⁸ The Commission defined this ‘two-way process’ as follows: on the one hand, Member States are obligated to receive migrants in a good manner, to respect their rights and culture and to point out to migrants their obligations. On the other hand, migrants have to demonstrate their willingness to integrate and respect the rules and values of the receiving society.⁴⁹ According to the Council and the Commission, family reunification helps to create socio-cultural stability facilitating the integration of TCNs into the Member State. Better integration would serve the Community objective of promoting economic and social cohesion.⁵⁰ These principles and objectives established at the European level show that, during the first five years of this century, the value attached to family reunification as a vehicle to further integration, was broadly supported by the EU institutions, including the Member States. In the Preamble of the Family Reunification Directive, the Council also underlined the Tampere Conclusions of 1999, in which the European Council had called for a more vigorous integration policy regarding TCNs, aiming at granting them rights and obligations comparable to those of Union citizens.⁵¹

According to the Commission, integration will be much easier when migrants do not have to worry about the well-being of their family members in another country. Furthermore, having children going to school in the receiving country supports the integration of the parents and children.⁵² The full and correct implementation of the migration directives for TCNs as well as Union citizens is thought to be vital for the integration of migrants.⁵³

In order to consult all stakeholders on the need to amend the Family Reunification Directive, the Commission formulated some principles in the Green Paper on the right to family reunification of third-country nationals living in the European Union.⁵⁴ With regard to integration measures, it stressed that these are only admissi-

47 Common Basic Principles for Immigrant Integration Policy in the European Union, Press Release, Doc. 14615/04 (Presse 321), 2618th Council Meeting, Justice and Home Affairs, 19 November Brussels.

48 Commission, ‘European Agenda for the Integration of Third-Country Nationals’, COM(2011) 455 final, 20 July 2011.

49 *Ibid.*, p. 2.

50 EU Directive on the right to Family Reunification, 2003/86/EC, preamble nr. 4.

51 *Ibid.*, Preamble no. 3; Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, paras. 18-21; (Doc. 200/1/99).

52 European Agenda, *supra* fn. 48, p. 6

53 European Agenda, *supra* fn. 48, p. 7-8.

54 Commission, ‘Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)’, COM (2011) 735 final, 15 November 2011.

ble if they serve the purpose of facilitating integration and respect the principles of proportionality and subsidiarity. According to the Commission, the directive contributes to the integration policy of TCNs who legally reside on the territory of Member States. The migrant can be expected to make an effort to be able to function at the daily level in the society into which he or she has to integrate. The Member State has to be able to ascertain whether a migrant is willing to integrate into the new environment. Although the Commission recognised that integration requirements can be introduced, it made clear that such requirements may not result in hindrance of the aim of the directive: furthering family reunification. It is interesting to note that the legal division of the Commission went even further by holding the denial of family reunification on the sole ground that the spouse had failed the pre-entry test a violation of the directive.⁵⁵

The link between family reunification and integration in national policies

As we have seen, the European Union sees family reunification as furthering integration. However, not all the countries under study see the link between family reunification and integration in the same way. Ireland and Portugal are closest to the European definition of integration. Ireland has not developed an elaborated integration policy, but in the context of the integration of refugees, family reunification was seen as furthering integration. Portugal has developed an integration policy, but the integration of migrants is not a controversial issue and family reunification is seen as a right that should be protected.

On the other hand, in Austria, family reunification is seen as uncontrollable and more and more as hindering integration, and the same goes for Germany and the United Kingdom. The Netherlands seems to have been most explicit in this respect. In its reaction to the EC Green Paper on family reunification, the Dutch problematized family reunification in connection to integration, stating that through family reunification, backward positions were transmitted onto the next generations. The Dutch government also saw family reunification as the result of a lack of integration, because non-western second generation migrants who were supposedly not well integrated, 'still' sought a partner from the country of origin (of the parents). The positions of Austria, the UK, Germany and the Netherlands seem antithetical to the European understanding of integration. From this perspective, it can be explained why these Member States in their response to the Green Paper emphasized that integration policy remains a topic of sovereignty and responsibility of the Member States.⁵⁶ However, their position is not entirely in line with the Treaty of Lisbon, which has created a legal basis for incentives and supportive measures towards Member States in the field of integration. Article 79(4) TFEU grants the Commission the

55 Commission, 'Schriftelijke opmerkingen aan het Hof van Justitie in de zaak C-155/11 PP, Mohammed Imran', C-155/11 PPU, 4 May 2011, ve11001517. See further in paragraph 5.2.

56 Commission, 'Summary of the Stakeholder responses to the Green Paper on the Right to Family Reunification of Third Country nationals', 11 May 2012, which can be found at: http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/pdf/0023/summary_of_stakeholder_responses_en.pdf.

opportunity to initiate and coordinate intergovernmental cooperation within the European framework (Handoll 2012).

Integration as an argument in national family reunification policies

Integration is a main argument in the development of family reunification policies; this will be elaborated on below in the discussion on arguments used for the four main requirements. As has been pointed out by many, integration is one of the most contested concepts in policy making as well as in academics.

When used as an argument in family reunification policies, integration is often very broadly defined – if it is defined at all – as including social, cultural and economic integration. However, a shift seems to have occurred from social and economic integration to an emphasis on cultural integration. Most striking is the culturalisation of integration arguments, in which the emancipation of migrants, especially Muslim women, is a central concern (Bonjour & De Hart 2013) (Scholten et al. 2011: 89). Such diverse issues as forced marriages, domestic violence and honour killings or the labour market position of migrant women are all put under the label of integration. As Bonjour and De Hart (2013) have argued for the Netherlands, migration policy is a product and producer of identities and values. Family reunification policies participate in the politics of belonging, and gender and family norms play a crucial role in this production of collective identities, i.e. in defining who ‘we’ are and what distinguishes ‘us’ from ‘the others’. Our research confirms that this trend can be discerned in several European countries, with similar effects.

It is important to point out that these arguments can work both ways: towards more liberal or more restrictive policies. The combat of domestic violence, for instance, was and still is the main argument for reducing the period of dependent residence and is, thus, a liberalization of family reunification policies. The underlying idea of such measures was that a stronger legal position of migrant women would make them more independent and less vulnerable to abuse, and that they could flee abuse. Austria and Portugal are a case in point. In 2005, Austria amended its law, stipulating that divorce or death of the sponsor does not necessarily result in withdrawal of the residence permit. In 2012, Portugal granted an automatic autonomous residence right to migrant women fleeing their aggressors. On the other hand, pleas for an independent residence permit for women or reducing the term before such an independent permit can be obtained often have to give way to fraud-related arguments, as independent permits are assumed to result in fraudulent marriages (see below). This has resulted in longer time frames before an independent residence permit can be obtained, in Germany (from 2 to 3 years in 2011 and the Netherlands (from 3 to 5 years in 2010).

Furthermore, restrictive measures such as the strict income requirement, the pre-entry test and the age requirement have also been introduced with reference to the emancipation of migrant women. These policy measures restrict migrant women’s rights to establish a family in significant ways, and make it more difficult to obtain an independent residence status. A case in point is the Dutch condition of fulfilment of the integration requirement for an independent or permanent residence permit in the Netherlands (although this condition does not apply in cases of domestic violence).

Meanwhile, Member States are faced with limitations set by the Family Reunification Directive to put forward integration as an argument in family reunification policies. As the Commission states in its Green Paper, integration measures should facilitate integration and should respect the principles of proportionality and subsidiarity. Availability and accessibility of facilities as well as individual circumstances should be taken into account.⁵⁷ Hence, Austria and Germany have pleaded for amendment of the directive, in order to explicitly allow for pre-entry tests. The Netherlands wanted the directive to explicitly allow for revocation of a residence permit if integration requirements are not met.⁵⁸

4.2.2 Economy

In all the countries under study, economy-related arguments have been put forward to introduce amendments of family reunification policies. Several arguments can be understood to be economy-related: the intent to bring net immigration down (United Kingdom), to prevent migrants from entering the social welfare system (Austria, Germany, Netherlands), or limit the burden on the taxpayer (United Kingdom). In using economy-related arguments to defend restrictive measures, family migrants and their sponsors were perceived as a burden and not an asset for the national economy, as well as assumed to be low educated, not working and not able to contribute economically.

However, economy-related arguments may also result in liberal policy measures. This is demonstrated by Portugal, which lowered the income requirement in 2009 as a response to the economic crisis, in order to not deter the right to family reunification.

4.2.3 Fraud

Fraud was an important argument in all countries under consideration. Even in a country with a relatively liberal family reunification policy, such as Portugal, fraud through fraudulent marriages was an important issue in political debates, and Portugal favoured criminalizing fraudulent marriages in the context of the directive.⁵⁹ The policies concerned have proven to be an actual hurdle in practice (see chapter 3).

Except for fraudulent marriages, two other types of fraud were mentioned in debates in the countries under study. First, the relationship between parents and children was often seen as fraudulent. Children were perceived as a means for parents to claim residence rights (Ireland) or applications for family reunification were made for children who were not the biological children of the parents involved (Netherlands). In both cases, suspicions of fraud arose especially in relation to family reunification by refugees.

57 Green paper, *supra* fn. 54, p. 4.

58 Summary, *supra* fn. 56, p. 11.

59 Summary, *supra* fn. 56, p. 20.

A third issue connected to fraud is the so-called ‘Europe route’. This refers to the notion that nationals with a TCN partner circumvent restrictive national immigration policies by moving to another Member State, even if only formally or temporarily, so that the more liberal European free movement policy of the Union Citizens Directive applies upon return to the national state. The perception of the ‘Europe route’ as fraud was especially significant in the Netherlands. More generally, EU citizens with TCN family members are faced with suspicions from authorities more than those with an EU family member, and are frequently perceived as having fraudulent marriages (see para. 3.7).

The aim of combating fraud is supported by the European Commission. In its Green Paper on the right to family reunification, the Commission invited Member States who reported problems of misuse of family reunification rights, to specify and quantify them, so that they could be addressed at the European level.⁶⁰ In the public hearing on the Green Paper, Commissioner Malmström mentioned the tension between the right to family reunification, and the Member States’ concerns with preventing misuse of this right.⁶¹

4.3 Arguments on the Four Main Requirements

Now that we have seen how the three arguments of integration, economy and fraud were used in policy debates, we will look at the role these arguments played in the introduction of the four main requirements under study.

Income requirement

In the Member States under study, the income requirement has been introduced or made stricter with a mixture of economy-related and integration arguments. In Austria, the economy-related arguments were dominant. The income requirement was defended with reference to the economic autonomy of migrants, and reduction of the burden for the state. Similar arguments were used in the United Kingdom, where apart from the intention to cut net migration, arguments for reducing the burden on the state and the tax payer were put forward. In addition to these economic arguments, the argument of integration was used: guaranteeing a sufficient standard of living would further integration. Finally, the argument of practicability was put forward, claiming that the existing system was too complex. The latter argument also played a role in the Netherlands, with the introduction of the strict income requirement in 1993 and later rising levels of required income. Comparable to the Austrian argument of economic autonomy, the ‘own responsibility’ of the sponsor was one of the major arguments. When the level was raised in 2004, integration was used as an argument, referring to the lack of integration of non-western migrants and especially

60 Green paper, *supra* fn. 54, p. 2.

61 Summary report on the Seventh meeting of the European Integration Forum: the Public Hearing on the Right to Family Reunification of Third Country Nationals living in the EU, Brussels, 31 May-1 June 2012.

female sponsors, it was argued that the labour market position of female migrants could be improved by requiring a higher income level. The expectation that migration would be reduced was accepted as a consequence.

A similar mixture of economy-related and integration arguments, and also fraud, played a role in Germany. The discussion on the income requirement emerged after the evaluation of the *Zuwanderungsgesetz* of 2005 had demonstrated that most spousal migration involved German sponsors. The government considered extending the income requirement to German sponsors, as it would be an incentive, especially for recently naturalized German nationals, to integrate. Furthermore, migration 'into the welfare system' would be prevented, as well as fraudulent marriages (Block 2012: 114). The income requirement can be applied to German sponsors in exceptional cases, if they have ties to the country of origin of their spouse, as demonstrated through dual citizenship, having lived there or speaking the language. German sponsors who are considered *Aussiedler* remain exempted from the income requirement.⁶² Hence, a clear distinction is made between 'German Germans' and Germans of migration background. It caused less public outcry, however, than the introduction of the pre-entry test (Block 2012: 118-119).

Lastly, as we have already seen, Portugal reduced its income requirement in 2009, with the economy-related argument of the economic crisis.

Pre-entry test

Not surprisingly, the introduction of the pre-entry test was defended with the argument of integration, but other, economy-related arguments played a role as well.

In Austria arguments put forward were that family migration needed to be restricted. In the discourse, migrants were held responsible for their integration. If they would make a successful effort by passing the pre-entry test, they could expect in return a set of rights granted after entry. Secondly, the arguments of promotion of integration and emancipation of women were mentioned, with Muslim migrants as specific target groups. In Germany, besides the argument that language tests would further integration, the idea was that the insight already gained in the country of origin on the necessity of learning a language facilitated access to the supportive language measures in Germany (BMI 2011: 4). A further argument was that the pre-entry test was to prevent forced marriages. During the public hearing on the Green Paper, Germany mentioned migrant women as a specific target group: the test would allow them to escape social isolation and resist forced marriage, and would promote exchange of experiences and information with people in similar situations.⁶³ As we will see in chapter 5, this argument was accepted by the German court. The German government expected a deterrent effect of the pre-entry test, as an educated partner, who would be uncontrollable for the sponsor and family-in-law, would be unattractive for these migrants (Strik 2011: 163). Finally, the economy-related argument of restricting 'immigration into the social security systems' was used as an argument for introducing pre-entry tests.

62 *Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz* 2009, par. 28.1.1.1.

63 Summary, *supra* fn. 56.

In the United Kingdom, ideas to introduce pre-entry tests were developed against the background of the race riots in 2001, linking social cohesion to language and knowledge of society. Migrant women were mentioned as a specific target group, since they were seen as isolated from society by their partners and prevented from learning English. However, as well as the social integration of migrants, dominant arguments were that migrants needed to be made economically active, and that they should be prevented from becoming a burden on the state.

In the Netherlands, the own responsibility of the family migrant and sponsor was stressed. The government formulated the aim of selecting those who were motivated to integrate. Turkish and Moroccan migrants were mentioned as target groups. It had to be prevented, according to the government, that backward positions would be transmitted from generation to generation. As in the countries discussed above, gender played an important role in the arguments: stressing the vulnerability and dependence of migrant women, their oppression and domestic violence. Defending the distinction made between those nationalities that had to and others who did not have to pass the pre-entry test, the government used economy-related arguments claiming that the countries that did not need a long-term visa, were from an economic, social and political perspective comparable to European countries (Strik 2011: 210).

Age requirement

The age requirement of 21 years in Austria, the United Kingdom and the Netherlands and 18 years in Germany was introduced with the argument of protecting young people from arranged and forced marriage. As it was formulated in the United Kingdom, the age requirement would ensure that individuals had an understanding of the full implications of what they were doing and were capable of making informed decisions about their own future. It was further argued that it would allow couples to finish their education, and offer opportunities to victims of forced marriages to escape them.

In Germany, the discussion on the age requirement was equally influenced by the debate on forced marriages, since integration and the lack thereof were perceived as a central causal problem of forced marriages (Ratia & Walter 2009: 65). During the political debates, forced marriages were in particular linked to Turkish immigrants living in Germany.⁶⁴ The introduction of a minimum age was 'meant to avoid the situation where Turks, in particular, who hold traditional values and who are living here, bring very young wives uninfluenced by Western values from their country of origin to Germany' (Severker & Walter 2010: 15).

Although in the Netherlands the aim of combating arranged and forced marriages was also mentioned as the main argument, an additional, economy-related argument was put forward, namely that at age 18 it would be uncertain whether the sponsor could comply with the own individual responsibility, both in integration and financial responsibility.

64 *Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, Drucksache 16/506523 (2007), p.172.*

Housing requirement

As the housing requirement is not a real hindrance in practice (see chapter 6) and is not subject to controversy, there is little information on the reasons behind this requirement in the countries that maintain it. Arguments provided are to ensure suitable accommodation and prevent overcrowding, e.g. in Austria. In recent proposals that have not come into effect in the Netherlands, the emancipation of women was emphasized, as the requirement of independent housing would prevent couples from living with the family-in-law and thus protect women from pressure by the family.

Counter-arguments of exclusion, selection and discrimination

In all the countries that recently introduced the income requirement, pre-entry test and age requirement, these measures were severely criticized by political opposition parties, NGOs, and academics. In general, the problem definitions, as discussed above, were not contested. The main critique in the countries under study was that the policy measures had selective and even discriminatory effects.

The income requirement was criticized as being selective or discriminatory based on socio-economic background, and gender, because it ignored gender related income disparities (in Austria and the Netherlands).

The pre-entry test was criticized for being discriminatory based on nationality (Netherlands, United Kingdom), the distinction between so-called 'western' and 'non-western' nationalities (Netherlands), and illiterates. At the international level, the Dutch pre-entry test was also critically evaluated as being discriminatory on the basis of nationality and/or ethnicity or race by the European Commission against Racism and Intolerance, the Commissioner for Human Rights of the Council of Europe Hammarberg, Human Rights Watch and the Committee on the Elimination of Racial Discrimination (CERD).⁶⁵

The age requirement was criticized because of discrimination based on cultural differences (United Kingdom), young people where coercion played no role (United Kingdom), TCNs and nationals with a TCN partner (Austria, Netherlands).

Governments have largely ignored these critiques, although they have sometimes turned up again in court cases (see chapter 5) or in studies and evaluations of the effects of specific measures. This is the next topic of this chapter.

4.4 Impact of Studies and Evaluations of Family Reunification Policies

In the countries under study, relevant studies and evaluations have been executed on specific requirements and family reunification policy issues, such as the income requirement, the pre-entry test and the age requirement for spouses. The results of

65 European Commission against Racism and Intolerance, *Third periodical report on the Netherlands*, Strasbourg, February 12, 2008, points 50, 57 and 58; Report by the Commissioner for Human Rights Thomas Hammarberg, on his visit to the Netherlands, 21-25 September 2008, 11 March 2009, paragraph 4.2, no. 83 and recommendation no. 15. *The Netherlands: Discrimination in the name of Integration. Migrants' Rights under the WTB*, May 2008, www.hrw.org, p. 4 and pp. 24-29. CERD/C/CLD/17-18 of 16.

these studies will be discussed in chapter 6. The question to be answered in this paragraph is how, if at all, the results of these studies have influenced policy making. In order to do so, we limit ourselves to studies that were instigated by the governments themselves; other relevant studies on the effects of family reunification policies will be discussed in chapter 6.

Income requirement

The effects of the income requirement were studied in the United Kingdom and the Netherlands. In the United Kingdom, this involved a report by the Migration Advisory Committee before the strict income requirement of July 2012 was introduced.⁶⁶ The committee's calculations that demonstrated that as a result of the raise of the income requirement 45 per cent of the applications for family reunification would be rejected, did not change the government's determination to introduce this higher level. In a similar vein, the Dutch government predicted that the income requirement of 120 per cent, effective in 2004, would result in a reduction in family formation of 45 per cent, without changing its intention to introduce the 120 per cent level. An evaluation study on the effects of the income requirement in the first two years after it was introduced demonstrated a drop of 37 per cent in the number of applications; very close to the predicted 45 per cent. The researchers also concluded that the income requirement did not significantly contribute to the integration into the labour market of sponsors and family migrants (WODC 2009a). However, the Dutch government concluded that the income requirement had had 'positive effects, improved the labour market position of partners and sponsors and had resulted in a reduction of family formation'. The reaction of both governments indicates that reduction in net migration was, if not the aim, a welcome effect of its policies.

Pre-entry test

The pre-entry test has been evaluated in Germany and the Netherlands. The aim of the German study was to gain insight into whether the pre-entry test was doable for migrants who had to take the test. The study demonstrated that the pre-entry test was failed by more than one-third of the migrants who took it, and in some countries, such as Ghana, a mere 38 per cent of the migrants passed the test. This raises the question of whether the test was, in fact, 'doable'. However, the German government stressed the positive results for integration – based on impressions by employees of the Goethe Institute in Turkey, that could not be quantified – such as the growing awareness of the life changes that migration would mean, the course as a first experience of education in a long time, or women failing the test on purpose in order to escape an unwanted marriage.⁶⁷ At the European level, the German government claimed that there was evidence for the effectiveness of the pre-entry test, although the

66 Migration Advisory Committee, *Review of the minimum income requirement for the sponsorship under the family migration route*, London: MAC 2011.

67 *Unterrichtung durch die Bundesregierung, Bericht über die Evaluierung des Nachweises einfacher Deutschkenntnisse beim Ehegattennachzug nach dem Aufenthaltsgesetz – Sprachlern- und Sprachtestangebote, Visumverfahren, Drucksache 17/3090* (2010), p. 5.

evaluation research the government referred to, did not actually study the effectiveness of the test on the integration of migrants (Klaassen & Søndergaard 2012).

In the Netherlands, the evaluation of the pre-entry test demonstrated that the initial level A was so low that it did not significantly improve the starting position of family migrants for integration. On the other hand, it demonstrated a drop in the number of applications of 48 per cent and 54 per cent from Morocco and Turkey respectively (Regioplan 2009a). Although further research concluded that the requirement of written language knowledge would exclude large groups of migrants if no additional means to learn the language were provided, the Dutch government introduced a reading test, becoming effective on 1 April 2011, claiming that it would make integration in the Netherlands more effective.⁶⁸ Since then, the number of successfully passed examinations has dropped from 88 per cent to 75 per cent. Some nationalities with a different alphabet have been affected even more profoundly, with Chinese family migrants showing a drop from 89 per cent to 58 per cent since the reading test was introduced. Since the Dutch government before the introduction of the pre-entry test stated that delay or even abandonment of family reunification was preferred to a situation of integration lagging behind after arrival in the Netherlands, it seems that the Dutch government may have welcomed these effects. At the European level, the Dutch government has claimed that migrants who took the pre-entry test found it a useful preparation for their move to the Netherlands and that there is broad support for the pre-entry test, although these claims are not substantiated by any of the studies (Klaassen & Søndergaard 2012).

Age requirement

Before going into the studies on the effects of the age requirement, it is important to note that little is known about the scale of forced marriages. Ratia & Walter (2009) conducted a study on forced marriages at the request of the Dutch government in 2009. On the issue of statistics, they concluded that 'very little can be said about the actual magnitude of the problem based on the numbers available'. They mention two problems that recur in efforts to measure the issue of forced marriages: the difficulty of defining the complex phenomenon of a forced marriage, and the necessity felt by both national governments and NGOs to generate numbers, making them try to measure forced marriages instead of first trying to tackle this problem. Although the Netherlands has acknowledged that it has no clear view of the scale of forced marriages, it has referred to German statistics to defend a bill to make forced marriages criminally punishable.⁶⁹ Austria has also admitted that it has no evidence available as to the scale of forced marriages. Only Germany and the United Kingdom claim to have reliable information on the scale on which forced marriages occur. The United Kingdom Forced Marriages Unit provided support in 1,500 cases in 2010, although it claims the actual numbers to be much higher. Germany had 3,400 counselling cases in 2008. However, as the researchers of this study themselves point out, there may

68 Triarii, Randvoorwaarden niveau A 1 Inburgeringsexamen Buitenland 2009.

69 *Kamerstukken I*, 2012-2013, 32840, no. A.

have been more than one counselling contact with one individual, so that these numbers cannot be taken at face value.⁷⁰

The age requirement was the topic of studies in the United Kingdom and the Netherlands. Before introducing this requirement, the UK government asked the University of Bristol to research the impact of the age requirement of 18 years. The qualitative study proved that the majority of stakeholders (authorities and NGOs that provided support to victims of forced marriages) was against a higher age requirement, pointing out the adverse effects of young people being taken abroad to marry, entering the UK with false documentation or health issues as a result of the denial of family reunification.⁷¹ Nevertheless, the British government went ahead and raised the age requirement further to 21 years, until this was struck down by the Court with its judgment on *Quila and Others v. Secretary of State of the Home Department* in 2010 (see chapter 5). Therefore the age requirement is 18 at present.

The Dutch government introduced the age requirement of 21 years in 2004, in spite of the negative advice of the Advisory Committee of Migration Affairs. The evaluation study, at the request of the government, demonstrated that the age requirement did not have a significant effect on integration, and also that the parents did not have that much influence on the choice of partner (WODC 2009a). The study showed that it did not prevent people from marrying, although it meant that they would be separated until they reached the required age. On the other hand, it made clear that the number of people affected was limited, since the number of marriages below the age of 21 was low. Remarkably, at the European level, the Dutch government did not mention this study, claiming that no large-scale studies on the effectiveness of the age requirement had been conducted, but citing several other reports about forced marriages, where the relationship to family reunification was absent (Klaassen & Søndergaard 2012). At the same time, the Dutch government announced its intention to raise the age requirement to 24 years, although the directive does not allow this.

Fraud

What has been said above about the problems of information on the scale of the phenomenon of forced marriages can equally be said about the scale of fraud. Fraud is used as an argument to introduce restrictive policy measures, although there are no reliable statistics substantiating the idea that a large number of family relationships are fraudulent. As concluded in the summary of stakeholders' responses to the Green Paper on the right to family reunification, in most Member States there is little if any systematic information available on the scale of forced and fraudulent marriages.⁷² As the study by the European Migration Network (EMN) on fraudulent marriages and false declarations of parenthood concluded, the perception amongst policymakers and the media in particular indicates that this may be a widespread phenomenon, but this could not be substantiated through the EMN study. The EMN study also con-

70 Summary, *supra* fn. 56, p. 2.

71 Home Affairs Committee, *Domestic Violence, forced marriage and 'honour'-based violence*, London: Home Affairs Committee 2008.

72 Summary, *supra* fn. 56, p. 18.

cluded that where misuse had been detected, this was primarily for fraudulent marriages rather than false declarations of parenthood. (EMN, 2012).

A relevant national study to be mentioned in this context is the Dutch study on the use of the so-called ‘Europe route’ by Dutch nationals with a TCN partner, which was perceived as misuse of European free movement rights in order to circumvent national policies (Regioplan 2009b). This study, executed in 2009 on the governments’ request, proved that, contrary to earlier claims by the Dutch government, most Dutch nationals moving to other EU Member States did not have a migrant background and the relationships involved were not fraudulent. The study also demonstrated that most families did not move to another EU Member State only formally to claim Union law, but actually lived and worked there. Finally, the study made clear that the number of people moving to another Member State was small. Nevertheless, the Dutch government persisted in its efforts to limit this form of ‘misuse’, focusing on Union citizens with a TCN family member, in control practices of fraudulent marriages. Furthermore, in its reaction to the Green Paper, the Dutch government proposed to restrict the misuse of the Europe route and reverse discrimination of Dutch nationals by making the Family Reunification Directive applicable in all cases for admittance of TCN family members, while the Union Citizens Directive would apply only in cases where the family migrant had already been admitted.

4.5 A Restrictive Turn as a Consequence of Europeanization?

A restrictive turn in family reunification policies has been observed by several authors (e.g. Block & Bonjour 2012; Bonjour & De Hart 2013; Pascouau & Labayle 2011). Block and Bonjour stated that this restrictive turn in family reunification policies started in the mid-2000s, and offer the Europeanization of family reunification policies as an explanation. Does this hold true for the countries under study?

Restrictive turn since mid-2000s

As table 4.2 clearly demonstrates in the countries under study, the strict income requirement, pre-entry test and age requirement were indeed introduced largely from the mid-2000s. Although this seems to confirm Block and Bonjour’s observation that the restrictive turn in family reunification policies started from the mid-2000s, two qualifications have to be made. First, some other restrictive measures had already been introduced in the 1990s. This goes e.g. for the prevention of fraudulent marriages in 1997 in Austria and in 1994 in the Netherlands. The Netherlands was earlier, with the introduction of a strict income requirement in 1993 and the higher level of 120 per cent in 2004. Secondly, it must be noted that liberal amendments were introduced in the ‘restrictive’ Member States also, such as the independent residence permit for family members in Austria in 2005, and the introduction of a residence right for unmarried couples in several of the Member States. Furthermore, restrictive measures were abolished, such as the effective family bond (for other than refugees) by the Netherlands in 2006. Thirdly, the restrictive turn does not include all the Member States under study, Ireland (except for the extremely high income requirement for work permit holders) and Portugal being the notable exceptions. This raises

questions about Europeanization as an explanation for the restrictive turn in family reunification policies.

Table 4.2. Introduction of income requirement, pre-entry test and age requirement in Member States

Requirement	Austria	Germany	Ireland	Netherlands	UK	Portugal
<i>Income</i>	2005 ⁷³	2007 (for German sponsors)		1993 2004 (120%) 2010 (100%)	2012	2007 2009 (lower level)
<i>Pre-entry test</i>	2011	2007	-	2006 (2011, higher level)	2010	-
<i>Age</i>	2009	2007	-	2004	2003, 2008 (21)	-

Europeanization

As far as a restrictive turn can be discerned, can Europeanization explain that development? In the literature, vertical and horizontal processes of Europeanization have been distinguished (Block & Bonjour 2012). In the vertical process, Member States strive to ‘upload’ their preferences to the European level in the negotiation of European norms, and ‘download’ these norms when transposing European regulation into national policy.

The interplay between the domestic and European level of family reunification policies creates opportunities for national governments to achieve their aims, while other stakeholders, such as political parties, parliaments and NGOs are silenced, because negotiations take place behind closed doors (Block 2012: 110-111; Lavenex 2001). Later, with the transposition of the directive into national law, the European norms create a strong normative power to introduce restrictive amendments, ‘required’ by the directive. This counted for Austria, Germany and the Netherlands, which effectively played the multi-level playing field, created by the development of European immigration law and acted together in negotiating this room. As a result, Austria maintained its room to use a quota system. Germany maintained the age requirement for family reunification of minor children of 16 years or older in national law, after it created room to do so in the Family Reunification Directive. The Netherlands interpreted the Directive in such a way that it could justify the raise of the required income level to 120 percent (until the CJEU in *Chakroun* came to the opposite conclusion). Hence, the three Member States ‘uploaded’ their national law to European law. The Netherlands did even more than that, creating room for the introduction of new requirements, such as the pre-entry test.

Of course, the positions of Member States may change over time, due to political process and changes of government. The abolition of the clauses for unmarried cou-

73 In Austria, the income requirement has not been introduced in 2005, but uniformed on a national level, which in practice implied the raise of the required level in several federal states.

ples is a case in point. The Netherlands negotiated the optional clause of recognition of a right for unmarried couples to family reunification in the Family Reunification Directive. However, on 1 October 2012, the long-standing right (since 1975) for unmarried couples to reunite was abolished, because the directive allowed this, and there was no reason to be more generous than other countries, as the government stated. The new Dutch government, installed in October 2012, recently announced its plan to reintroduce this right for unmarried couples. On the other hand, Portugal was among the countries that resisted the introduction of this optional clause during the negotiations on the directive, but has since accepted the right for unmarried couples. Portugal is a case in point that not all Member States where the directive applies, demonstrate the same development of a restrictive turn. Furthermore, Europeanization cannot sufficiently explain why Member States like Germany refer to the Netherlands as an example to introduce the pre-entry test, but not to other Member States that do not have such a test.

Europeanization is also conceptualized as a 'horizontal' process, not directly driven by binding EU norms, but as 'the result of increased competition and cooperation between countries, exchange of information on ideas, discourses and "good practices" and mutual learning simply by being part of an integrated Europe' (Block & Bonjour 2012; Vink & Graziano 2007). Although this process of policy learning within the European context was not new and was not caused by it, it was at least intensified by the European legislative process.

Although Ireland and the United Kingdom did not opt-in the directive and, thus, are not bound by it, they did not stand completely outside of the process, e.g. delivering comments on the Green Paper. As such, they are still able to draw upon the policy learning opportunities offered by the development of European Union immigration law. This could explain the restrictive turn that can also be noted in the United Kingdom that, with the introduction of a strict income requirement, pre-entry test, and higher age requirement, followed the example of other Member States that are bound by the directive. On the other hand, Member States that are bound by the directive do not restrict their policy learning to the context of the directive, but look beyond. Both Germany and the Netherlands referred to Danish family reunification policies as an example to follow, although Denmark had opted out.

Ireland (except for the earlier mentioned rise of the income requirement) and Portugal are among the countries where a restrictive turn has so far not taken place. Although the explanations offered here can only be tentative, it seems obvious that we have to return to the national level, in order to understand this. First, both countries are traditional emigration countries that were confronted with inward migration relatively late. Secondly, their perceptions of integration differ from the countries that have demonstrated a restrictive turn. In Portugal, where a receptive integration policy has been developed, it is an uncontroversial issue.

In conclusion, the directive has indeed created a multi-level playing field for Member States, but it is not carved in stone what the end result will be. Although initially some stakeholders were disappointed with the low level of protection offered by the directive, it clearly sets limits on the amount of discretion by Member States in ways that were not anticipated when the directive came about. The room created for national immigration policies turned out to be sometimes less than Member States

anticipated, as was most vividly demonstrated by the *Chakroun* case, that forced the Netherlands to lower its income requirement and has also led to amendments in Germany (see chapter 5). Secondly, the Europeanization process not only resulted in more restrictive policies (a race to the bottom), but also to more liberal policies. The minimum standard set by the directive was in some cases higher than the national policies in some Member States; conversely, Member States still go further than the directive requires. Furthermore, it is not only the Family Reunification Directive that leads to Europeanization of family reunification policies. The Union Citizens Directive regulates the family reunification of Union citizens and their family members. While the reunification with EU family members has remained largely uncontroversial, the reunification of Union citizens with TCN family members has not. It has led to controversy in several Member States (especially Ireland, the Netherlands, the United Kingdom), that see this type of family reunification as a potential misuse of free movement rights in order to circumvent national policies. As a result, the Europeanization of migration law has led to debates not only about differentiations between Union citizens and TCNs, but also between own nationals and Union citizens.

4.6 Conclusion

In this chapter, we have looked at how family reunification policies have developed in the countries under study in the past decade. As has become obvious, a restrictive turn in family reunification policies can be observed, although not all Member States studied made this turn.

Three main arguments played a role in the development of these policies: integration, economy and fraud, the first and the last of these arguments being the most important. We have described a struggle over definitions of integration between Member States and the European level. Considering that the integration measures in relation to family reunification are evaluated critically by the European Commission and are likely to meet with negative decisions by the CJEU, it can be expected that, in the future, Member States will shift their focus from arguments on integration to arguments on combating misuse and fraud, where they find more support at the European level.

Although at first sight arguments on integration and fraud seem to point to very different problem definitions, they are often interrelated and target the same immigrant groups (Bonjour & De Hart 2013).⁷⁴ Both arguments result in expansion of the scrutiny of all migrant families, opening up questions as to the normality of migrant family lives and conformity with dominant family norms (Mullally 2011). Suspicions of widespread fraud or false declarations of parenthood are often based on stereo-

74 E.g. in a Norwegian study of fraudulent marriages, the Netherlands mentioned Turkish and Moroccan migrants as groups involved in these practices, the same groups that are targeted by integration measures. See: *Marriages of convenience: a comparative study - Rules and practices in Norway, Sweden, Germany, Denmark and the Netherlands*, commissioned by the Norwegian Directorate of Immigration (UDI, 8 November 2010).

types based on gender and ethnicity and a lack of understanding of ‘deviant’ family forms, just as arguments on integration are.

We have also seen that restrictive measures met with a lot of criticism from stakeholders, aimed at its selective or even discriminatory results. Some of these critiques were evaluated in several studies into the effects of the income requirement, pre-entry test and age requirement. Our overview of national studies on the effects of family reunification policies indicates that, to some extent, most governments could rely on some kind of information on the effects of specific requirements for family reunification. However, the governments have either reinterpreted the unwelcome results of these studies in their own way, or accepted the consequences of these restrictive policies, such as a drop in the number of applications, or the effects for certain nationalities or women. They creatively use studies on the effects of policies both at the national and the European level to defend policy preferences.

On the other hand, governments do not seem to see the need for precise information on the scale of fraud or forced marriages before introducing restrictive policy measures to combat these phenomena. Their strong conviction that these phenomena are widespread seems to override any lack of statistical evidence that they are actually widespread. Hence, it is questionable to what extent family reunification policies are evidence-based policies; instead governments sometimes seem to be involved in ‘policy-based evidence-making’. Others have concluded that such deviation from advice and ignoring the results of studies of the effects of requirements could be seen as an indication of the politicized nature of family reunification policies (Scholten et al. 2011). Finally, this chapter has demonstrated the struggle between Member States and the European level about the right to family reunification policies; what some have called a ‘tug of war’ between Member States and the supranational level (Legomsky 2011). In the next chapter, we look at the role of the courts in this struggle.

Chapter 5

Case Law

5.1 Introduction

In chapter 3, we concluded that the national procedures and their application can keep family members from exercising their rights. Yet international and European safeguards, like the Convention on the Rights of the Child, Article 8 ECHR, the Union Citizens and the Family Reunification Directives, as well as the EU Charter of Fundamental Rights protect the right to family life, if necessary against national sovereignty. Apparently invoking these instruments doesn't have the same effect in the Member States studied. How can this be explained? This chapter tries to answer this question by offering an overview of the way the six Member States comply with the case law of the ECtHR and the CJEU regarding the right to family reunification. What effect does this case law have on the right to family reunification for TCNs with their sponsors living in these Member States? Furthermore, this chapter describes the way national courts assess and influence the national family reunification policies. Do courts, by applying national, international and European safeguards, (re)shape the national family reunification policy, or do they leave their interpretation up to the governments?

Before we discuss the case law in more detail, it is relevant to look at some factors that influence the position of the national courts and their role in the 'struggle' between the national and European level. These factors are: the legal framework applying to TCNs, Union citizens and own nationals and their family members, the extent to which legislation leaves a discretion to the immigration authorities and whether a constitutional right to family reunification exists and if so, for whom. In the discussion of case law for TCNs we look specifically at judgments about the main requirements: the income requirement, pre-entry test and other integration requirements, and the age requirement. Specific issues concerning Turkish nationals, Union citizens and own nationals are discussed in separate paragraphs.

5.2 Factors Influencing the Role of National Courts

5.2.1 Different Legal Frameworks for Different Groups

The three target groups of this study rely on different legal frames of reference. Before 2005, the most relevant norms regarding the right to family reunification for TCNs and nationals of the Member States were set by the European Court of Human Rights (ECtHR), interpreting Article 8 of the European Convention on Human Rights (ECHR). With regard to Union citizens and their right to family reunification with TCNs, the provisions on family reunification in the free movement rules offered more concrete and to a certain extent higher norms protecting their family life. With the adoption of the Union Citizens Directive, the different instruments in this field

have been harmonized and the long-standing case law of the CJEU has been laid down in legislation.⁷⁵

Since 2005, Union law has also become relevant for TCNs residing in the Member States that are bound by the Family Reunification Directive. With this directive, a subjective right to family reunification for TCNs has been established in the European Union, offering a substantially higher level of protection, compared to Article 8 ECHR. As a consequence of the adoption of the Family Reunification Directive, national policies on family reunification have to comply with Union law, including its principles of effectiveness and proportionality, and the Charter of Fundamental Rights. However TCNs residing in Member States that did not opt into the Family Reunification Directive (for this study: Ireland and the UK) still fall outside the scope of Union law. For them, Article 8 ECHR and the relevant case law remains the most important international legal frame of reference. This is also the case for so-called 'own nationals', nationals of the Member States who cannot rely on the Union rules for free movement. The only way for them to fall within the scope of Union law, is a successful claim to Union citizenship. Since the judgment in *Zambrano*, the CJEU has acknowledged that under strict and special conditions Union citizenship implies a right to reunite with the family, if non-admittance of the family members would force a Union citizen to leave the territory of the Union.⁷⁶ In this regard, the court seems to attach great importance to the vulnerable and dependent position of young children.

The different positions of the six Member States become apparent in the analysis of the national jurisprudence and the national effects of European case law. As the case law on the Family Reunification Directive does not have an impact in the UK and Ireland, more attention in these countries is paid to the case law on Article 8 ECHR. While applying Article 8 ECHR, the UK Supreme Court made clear in the case of *ZH Tanzania* that the best interests of the child must be the primary consideration.⁷⁷ In the same judgment the court declared the Convention on the Rights of the Child as legally binding in procedures concerning family reunification. This approach is especially meaningful in the Member States which have opted out of the Family Reunification Directive, as their TCN residents lack the protection of Article 5(5) of the directive and Article 24 (2) of the EU Charter of Fundamental rights, which both prescribe that the child's interest must be the primary consideration.

The impact of Union law on the position of own nationals largely depends on the national legislator. If their rights have been harmonized with the rights of Union citizens who have made use of the free movement rules, in this study briefly called Union citizens, they benefit from the CJEU case law on Union Citizens Directive without being able to invoke this directive themselves. If they are treated in the same way as TCNs, they benefit from the CJEU case law on the Family Reunification Directive,

75 With Directive 2004/38, Regulation (EEC) No 1612/68 has been amended and Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC have been repealed.

76 *Ruiz Zambrano* [2011] CJEU C-34/09 (08 March 2011); *Dereci & Ors* [2011] CJEU C-256/11 (15 November 2011).

77 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011).

also without being able to invoke this directive themselves. However they are always capable of invoking Article 8 ECHR. Turkish nationals who fall under the scope of the Association Treaty EEC/Turkey benefit from its large impact on their right to family reunification, since the CJEU decided that the standstill clauses of the Additional Protocol and Decision 1/80 are also applicable to the first entry to the Member States.⁷⁸ Interestingly, not all Member States have implemented this interpretation by the court, which results in large differences in the treatment of Turkish nationals throughout the European Union (see paragraph 5.3). Since 2008, highly skilled workers have been able to invoke certain rights of the Blue Card Directive. As this directive is relatively young, European and national case law has not yet been developed. Perhaps also the need for case law is absent, as Member States seem to be rather eager to facilitate family reunification of this currently most wanted group of migrants.

5.2.2 Discretion

Furthermore, the national legal systems influence the scope of discretion of the courts and the way in which they interpret the national legislation. As the Irish legislation lacks detailed rules on family reunification, the Irish courts contribute to a larger extent to the national framework of reference than the courts in Member States with a detailed legislation on family reunification. This means that the right to family reunification is not safeguarded in the same way as in other Member States in many respects: first because of the large discretion of the Irish immigration authorities, and second because the doctrine of precedent, which binds a court to follow decisions in former cases, particularly decisions of higher courts, is a policy and not a binding unalterable rule. This high level of discretion at two stages results in unpredictable decisions and thus insecurity for applicants of family reunification.

5.2.3 A Constitutional Right to Family Reunification?

Although the CJEU has made clear that the Family Reunification Directive has established a right to family reunification, this notion has not yet been fully acknowledged by all national courts. Such a right laid down in the national constitution, however, seems to play a larger role. In four Member States the right to family life has been laid down in the national constitution (Austria, Ireland, Germany, Portugal). In Austria this is the case because the ECHR is part of the Austrian Constitution. Therefore, Austrian courts interpret this term in conformity with Article 8. According to the Austrian Administrative Court, a right to family life can exist in individual reunification cases in which an expulsion would be inadmissible on grounds of Article 8 ECHR.⁷⁹ This assessment has to take place regardless of the residential status of the family members. The Austrian Constitutional Court made clear that if such an indi-

78 *Sabin* [2009] CJEU C-242/06 (17 September 2009)

79 *VwGH*, 26 September 2007, 2007/21/00247; 26 January 2010, 2009/22/0022.

vidual right to family reunification in accordance with Article 8 ECHR has been acknowledged, an application cannot be rejected on the basis of the quota system.⁸⁰

Courts in other Member States do not always interpret the constitutional right to family life uniformly with regard to the different groups. In their judgments, national courts such as the Federal Administrative Court usually take art. 6 of the Constitution as well as art. 8 of the ECHR into account while assessing the right to family reunification, regardless whether the case involves the reunification with a German or third country national sponsor. German citizens however can derive a stronger right to family reunification from the Constitution as they enjoy an absolute right to residence based on Article 11 of the Constitution (see paragraph 5.3.1).

According to the Irish courts, however, the constitution is applicable to all residents seeking justice. In the case of *POT v The Minister for Justice, Equality and Law Reform*, Hedigan J. made clear that

‘(...) the requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled to a decision within a reasonable time [...]’.

This constitutional approach resulted in the reduction of the length of the application procedure from an average of 24 months to 12 months. In the same case, the court also recognized the importance of family reunification as a facilitator of integration in holding that:

‘family reunification is not only a way of bringing families back together, but it is also essential to facilitate the integration of third-country nationals into the State [...]. Refugees finding themselves alone in a foreign country which has admitted them, traumatised by the events that brought them there, more than ever need the society and support of their immediate family. Every effort must be made to ensure such reunification occurs as quickly as possible’.

The Portuguese Constitutional Court has produced meaningful judgments by acknowledging the right to family reunification for legal residents as well. According to the Portuguese Constitution, parents cannot be separated from their children, unless they do not fulfil their fundamental duties as parents. On this basis, the Constitutional Court declared certain articles of the immigration law unconstitutional. These articles enabled the immigration authorities to expel convicted TCN parents without taking into account the interests of minor children residing in Portugal. In another judgment, the court made clear that the decision making on family reunification and on entry have to be considered as one procedure. This judgment has significantly restricted the discretion of the Ministry of Foreign Affairs to refuse a visa, once a permit for family reunification has been granted (see par. 3.2).⁸¹

80 VfSlg, 17.013.

81 *POT v The Minister for Justice, Equality and Law Reform* [2008] IEHC 361 (November 19, 2008).

5.3 Third Country Nationals

5.3.1 Main Requirements

Income requirement

Chakroun, the second judgment of the CJEU on the Family Reunification, concerned the income requirement.⁸² At the time, the Netherlands required an income level of 120 per cent of the minimum wage in cases of family formation, whereas in cases of family reunification an income level of 100 per cent was required. That difference was questioned by the sponsor. The Judicial Division of the Dutch Council of State asked two questions for preliminary ruling. The first one referred to the phrase ‘recourse to the social assistance system’ in Article 7 (1) (c) of the Family Reunification Directive. The Council of State wanted to know if this reference allowed Member States to not only take into account the social welfare that meets general subsistence costs, but also the special assistance which can be provided in individual cases by municipalities. In the second question the Court of Justice was asked whether, while applying an income requirement, Article 7(1) (c) allows a distinction according to whether a family relationship arose before or after the entry of the resident into the Member State.⁸³ It has been argued that it’s no coincidence that the Council of State requested this ruling (four years after the income level had been raised), shortly after the Commission had expressed its concerns about the Dutch required income level being the highest in all Member States.⁸⁴ According to the Commission, this level could, combined with the sustainability criterion, hamper the right to family reunification, especially for younger people.⁸⁵ To both questions, the court answered negatively. It made clear that the subjective right to family reunification granted by the directive and its aim to promote family reunification oblige Member States to interpret the permitted conditions very strictly. A more extensive application than necessary would affect the objective and, therefore, the principle of effectiveness. According to the court, the income requirement could only function as a frame of reference, as in any case the individual interests and circumstances must be taken into account.

The *Chakroun* judgment has had a direct effect in two of the six Member States. The German Federal Administrative Court revised its case law based on the *Chakroun* ruling. It decided that, given that the tax allowance for employees does not fall under the term social benefits according to Community law, this allowance should not be taken into account when assessing the income of the sponsor. The court also made clear that the actual need for a certain level of income is to be determined on the basis of an individual evaluation of each application, even if there is an entitlement to

82 *Chakroun* [2010] CJEU C-578/08 (04 March 2010).

83 ABRvS, 23 December 2008, case no. 200707879/1.

84 *Chakroun*, *supra* fn. 82, *JV* 2010/177 (case note C.A. Groenendijk).

85 Commission, ‘Report of the Commission to the Council and the European Parliament on the application of Directive 2003/86/EC on the Right to Family Reunification’, COM (2008) 610, 8 October 2008, p. 7.

public funds.⁸⁶ According to the German rapporteurs, however, in practice an application is almost always rejected if the fixed income requirement is not met.

In the Netherlands, the government lowered the required level of income for family formation from 120 per cent to 100 per cent of the minimum wage. With regard to the ruling to take the individual circumstances into account, the minister stated that the Dutch policy already complied with this obligation.⁸⁷ With this response, the minister also disregarded the criticism of the European Commission on the rigid application of the conditions for family reunification in the Netherlands.⁸⁸ One District Court referred to *Chakroun*, ruling that the rejection of an application on the sole ground that the income requirement had not been met every month (although on average the sponsor's income level was higher than required), was not in compliance with Article 7(1) (c) of the directive.⁸⁹

Although the Family Reunification Directive and Union law are not applicable, the First Tier Tribunal in the UK came to a similar conclusion regarding the income requirement.⁹⁰ It held that the income requirement should be the minimum income below which the sponsor and family member(s) would be eligible for income support. This judgment concerned the Immigration Rules as they applied before 9 July 2012. The national researchers have not reported any cases on the new income threshold. The Supreme Court also established that third party support could be counted and that admitted spouses or partners could rely on their prospective earnings (based on actual or likely job offers) in the UK to establish that the income requirement had been met.⁹¹ Fiancé(e)s could not do so because they were prohibited from working during the six-month probationary period before the marriage.

As we have seen, the income requirement not only plays a role at the time of admittance, but also for prolonged residence. In a case where the Family Reunification Directive did not play a role, as the sponsor was a Dutch citizen, a Dutch District Court ruled that the withdrawal of the residence permit of the spouse because the couple did not meet the income requirement any longer, was justified and, therefore, not in breach of Article 8 ECHR.⁹² In this case, the sponsor had lost her job and received social benefits. Although the municipality had exempted the sponsor from the requirement to work, the court approved the withdrawal because she could not prove having made efforts to find another job in order to meet the income requirement. Despite the Dutch nationality of the sponsor and her children, the court found that her Moroccan nationality enabled her to follow her husband to Morocco. The court did not take into account that during the appeal period, the sponsor had concluded a new labour contract.

86 BVerwG, 16 November 2010, 1 C 20.09.

87 *Kamerstukken II*, 2009-2010, 32 175, no. 8.

88 Commission, 'Report from the Commission to the European Parliament and the Council of 8 October 2008 on the application of Directive 2003/86/EC on the right to family reunification', COM (2008) 610, p. 11.

89 Rechtbank Amsterdam, 3 February, AWB 11/19003.

90 *KA and Others (Pakistan)* [2006]UKAIT 00065 (04 September 2006).

91 *Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16 (16 December 2009).

92 Rechtbank 's-Gravenhage, nevenzittingsplaats Den Haag, 30 August 2012, LJN: BX6545.

Integration requirement

The pre-entry test for family reunification has been applied in four of the six Member States (Austria, Germany, the Netherlands, the United Kingdom). In three of them, national courts approved the requirement for a certain level of knowledge of the language of the Member State (only the Netherlands also requires knowledge of the society).

In the Netherlands, the requirement resulted in a large number of judgments, including one request for a ruling by the CJEU. At first, a District Court judged in 2007 that the government was allowed to make the migrant fully responsible for preparation for the examination, even if that implied (as was the case) that the applicant first had to learn the English language to be able to use the preparation package.⁹³ Also, the claim that the requirement only applied to certain nationalities, which constituted discrimination on the basis of nationality and, therefore, a breach of Article 14 ECHR, was rejected by the courts.⁹⁴ At the end of 2008, the Judicial Division of the Council of State judged that illiteracy was not a ground for exemption from the integration requirement. According to the Council, the requirement for passing the pre-entry test was compatible with Article 8 ECHR since the separation between the spouses '*was in principle of a temporary nature*'. The Council relied on the opinion of the government that the examination should be eligible for illiterates as well.⁹⁵ Although since that judgment the level of the pre-entry test has been raised and complemented with a reading test (April 2011), this conclusion has not been questioned.

Four years after the introduction of the pre-entry test, a District Court asked the CJEU whether this test was in compliance with Article 7 (2) of the Family Reunification Directive. The European Commission took the position that this was not the case if this requirement meant that family reunification was denied for the sole reason that the applicant had failed the test.⁹⁶ According to the Commission, Article 7 (2) aimed to promote integration, but could not be used to undermine the objective of the directive of promoting family reunification.⁹⁷ This position went further than its opinion in 2008, when it considered that the admissibility of the pre-entry tests depended on elements such as the actual accessibility of language courses or test centres, the costs of the course and the test, the capacity of the spouse (illiteracy or medical condition), or on 'whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families)'.⁹⁸ In fact, the Commission did not reject the tests as such, but subjected them to a proportionality test.⁹⁹ With its position taken in the *Imran* case, the Commission no longer left any room to the Member States for maintaining these tests. By granting a residence per-

93 Rechtbank Den Haag, nevenzittingsplaats Middelburg, 16 August 2007, LJN: BB3524.

94 Rechtbank Den Haag, nevenzittingsplaats Rotterdam, 13 April 2008, AWB 07/35128.

95 ABRvS, 2 December 2008, LJN: BG6209, *JV* 2009/29.

96 Rechtbank Zwolle, 31 March 2011, Awb 10/9716.

97 Commission, 'Schriftelijke opmerkingen aan het Hof van Justitie in de zaak C-155/11 PP, Mohammed Imran', C-155/11 PPU, 4 May 2011, ve11001517.

98 COM (2008) 610, *supra* fn. 88, p. 8.

99 See also the Commission, 'Green Paper of the Commission on the Right to Family Reunification of third country nationals living in the European Union', COM (2011) 735, p. 4-5.

mit to the appellant, the Dutch government managed to avoid a judgment of the CJEU with probably the same content as the Commission's view.

Although the CJEU has not yet ruled on the admissibility of the pre-entry test, the Commission's view has already altered the position of some national courts. Previously, the German Federal Administrative Court had judged that the pre-entry test was in accordance with the Family Reunification Directive. According to the court, the requirement serves the legitimate aim of promoting integration and preventing forced marriages.¹⁰⁰ According to the court, the language requirement at least hampered the conclusion of forced marriages and enabled victims to communicate with officials when they sought protection. Furthermore, the requirement prevented spouses from being dependent on their family-in-law.¹⁰¹ The Constitutional Court, being asked to judge on the legitimacy of the pre-entry test, approved the attacked decision of the Federal Administrative Court, considering that a test was justified if the aim of preventing forced marriages might be better achieved with it.¹⁰² These judgments offered the German government wide discretion to judge the effectiveness of the pre-entry test for this purpose.

The judgment of the Federal Administrative Court was also sharply criticized in German legal literature, because it did not refer to the CJEU judgment in the *Chakroun* case delivered three weeks prior to the German judgment, or to the opinion of Committee on the Elimination of Racial Discrimination (CERD) published in the same period (see chapter 4), criticizing the different treatment of nationals. The main point of criticism was that the court had determined the issue without acknowledging the need for a reference in circumstances that were not an *acte clair*. Afterwards the same court judged that the Commission's view expressed in the *Imran* case should have been reason for a preliminary ruling.¹⁰³ In that case, the procedure was terminated in the meantime because the Department of Foreign Affairs had issued a visa. Finally, one year later the Administrative Court of Berlin requested a preliminary ruling. It asked, first, whether the language test was in compliance with the standstill clauses in the EEC-Turkey Association law and, second, whether it was in compliance with Article 7(2) of the Family Reunification Directive.¹⁰⁴

One month after the Berlin judgment, a Dutch District Court fully endorsed the position of the Commission. According to this court, a request for a preliminary ruling was not necessary as the interpretation of the Commission was crystal clear.¹⁰⁵

Another issue addressed in the German case-law, was whether the pre-entry test applied to the family members of German sponsors, as the German Constitution offers Germans a right to residence. In September 2012, the Federal Administrative Court held that the German sponsor can, therefore, not be expected to live abroad in order to enjoy family life. If the TCN spouse of a German sponsor has undertaken reasonable efforts to pass the test, a separation for more than one year between the

100 BVerwG, 30 March 2010, 1 C 7.09. V 28.06.

101 BVerwG, 30 March 2010, 1 C 7.09. V 28.06, para. 14.

102 BVerfG, 25 March 2011, 2 BvR 1413/10, paras. 1-10.

103 BVerwG, 28 October 2011, 1 C 9.10.

104 VerwG Berlin, 25 October 2012, VG 29 K 138.12V.

105 Rechtbank Den Bosch, 23 November 2012, AWB 12/9408.

spouses would be incompatible with Articles 6 (the right to family life) and 11 (the right to residence in Germany) of the Constitution. This period of one year does not need to be fulfilled if there are no courses (or alternatives) available or if participation in a course implies a high security risk.¹⁰⁶

In the UK, the pre-entry test has also been challenged in the case of *Chapti & Ors v. SSHD*, which led to a judgment in December 2011 by the High Court for England and Wales.¹⁰⁷ The court held that the requirement was in compliance with Article 12 (the right to marry) taken with Article 8 ECHR, as well as with Article 14 ECHR. Judge Beatson found that the aims of the pre-entry test for spouses were ‘fundamentally benign’, as it was uncontested that knowledge of the English language is beneficial to a person’s ability to integrate into UK society.¹⁰⁸ Furthermore protecting public services was accepted as a legitimate aim in the context of Article 8 (2) ECHR. Leave to appeal was granted and the case is pending.

Age requirement

In two of the three Member States studied with an age limit of 21 for spouses, this requirement has been challenged, with different national outcomes. The Austrian Constitutional Court ruled that the rise in the age limit to 21 years is in accordance with Article 8 ECHR and the Family Reunification Directive. It considered this restriction as a legitimate means to avoid forced marriages, especially of young TCNs. With this argument, the court approved the justification given in Article 4 (5) of the Directive. Even the absence of any transitional arrangement, which affected spouses between 18 and 21 years old who had already applied for reunification before the age limit was raised, was declared to be unobjectionable.¹⁰⁹

In the UK, however, the Supreme Court held that the Secretary of State had failed to establish a justification for the rise in the age limit. It therefore considered the interference with the right to family life under Article 8 that had been caused by the rule.¹¹⁰ According to the Supreme Court, the rule was

‘rationally connected to the objective of deterring forced marriages ... [b]ut the number of forced marriages which it deters is highly debatable. What seems clear is that the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters’.

This comparison shows that the national interpretation of the directive does not always lead to more protection of the family members than Article 8 ECHR, especially if national courts fail to respect the EU principle of proportionality and the obligation

106 BVerwG, 4 September 2012, 10 C 12.12.

107 *Chapti & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* (Rev 1) [2011] EWHC 3370 Admin (16 December 2011) – interventions by JCWI and Liberty CO/1183/11435/1141/2010.

108 *Ibid.*, para. 88.

109 VfGH, 17 June 2011, B 711/10.

110 *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* [2011] UKSC 45 (12 October 2011).

to take the individual interests and circumstances into account.¹¹¹ Although the legislator in both Member States had justified the age limit with the same arguments, the legitimacy in the context of Article 8 (2) ECHR can be judged differently. In the UK case, the government had pointed out the risk of a more stringent interpretation. Following this, in his dissenting opinion Lord Brown referred to other countries as a justification for the age limit:

‘Are we really to say that the position is plain and that Germany, Austria, the Netherlands, Belgium, Denmark and other such Council of Europe states with similar rules must also necessarily be in breach of article 8? What if the equivalent rule is later challenged elsewhere in Europe and eventually upheld in Strasbourg?’¹¹²

5.3.2 Other Issues

Admittance of children

While defining the scope of the family, the Austrian Administrative Court has made clear that, except for children of refugees, minor children who apply for family reunification are only considered to be members of the nuclear family if they are still minors at the moment of decision on the application.¹¹³ As a result of this interpretation, the right to family reunification can be influenced by the way the immigration authorities organize their application procedures: if these take long, minors run the risk of being denied reunification because of their coming of age in the meantime. The restriction of the reunion of TCNs with children aged under 15, in force until 2005, was also regarded as a legitimate restriction by the Constitutional Court. In the ruling, it was argued that for children of this age employment is of greater importance than family reunification.¹¹⁴

In the Netherlands, the case law of the ECtHR on Article 8 ECHR and European and national case law on the Family Reunification Directive has led to the abolition of the requirement of an effective bond between minor children applying for family reunification and their parent(s) living in the Netherlands. This requirement implied that minor children lost the right to reunification if they had lived separately from their parents for more than five years. In the *Tuquabo-Tekle* case there had been a separation exceeding five years between the mother and the daughter.¹¹⁵ The court, however, pointed out that the length of the separation between Mrs. Tuquabo-Tekle and her daughter was not a result of her own choice, but had occurred against her will. She took steps to be reunited as soon as she had acquired a residence right in Norway. The court ruled that parents who leave their children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a

111 *Chakroun*, *supra* fn. 82, para. 32.

112 *Quila & Anor*, *supra* fn. 110, Lord Brown at para. 97.

113 VwGH, 22 March 2011, 2008/22/0882; 20 October 2011, 2009/21/0206; 20 October 2011, 2010/21/0435.

114 VfSlg, 16.672/2002.

115 *Tuquabo-Tekle and others v. the Netherlands*, 60665/00 [2005] ECHR 803 (1 December 2005).

future family reunion. In this case, it had always been the intention of the mother for her daughter to join her. It was also questionable whether the mother could be said to have left her daughter of 'her own free will', bearing in mind that she had fled Eritrea during the course of a civil war. At the end of 2005, a number of Dutch District Courts ruled that the requirement of an effective family bond is incompatible with Article 16(1) (b) of the directive.¹¹⁶ One of the arguments was that Article 16 (1) (b) of the directive does not give the Member States leeway to establish their own rules on what is to be considered a 'real family relationship'. Although the Judicial Division of the Council of State annulled all of these judgments of the courts, the Minister of Alien Affairs and Integration announced in September 2006 that the five-year 'period of reference', which served as the main criterion for an effective bond, would no longer be applied.¹¹⁷ Although the minister only referred to the case of *Tuquabo-Tekle* and Article 8 ECHR, representatives of the government also mentioned the Family Reunification Directive during court hearings as a reason for this policy change.

Application from abroad

Article 5 (3) of the Family Reunification Directive requires that the application of a family member of a TCN is submitted and examined while the family members reside outside the territory of the Member State. The second paragraph, however, allows Member States by derogation 'in appropriate circumstances' to accept an application submitted when they are already in the country. How to define appropriate circumstances is not yet clear, as case law of the Court of Justice is absent. The scope of the derogation varies substantially between the Member States studied. But the ECtHR formulated a minimum obligation in 2006, when it determined that family members with part of their family residing legally in the Member State cannot be denied reunification for the sole reason that they haven't acquired a long-term visa. According to the court, such practice can be defined as excessive formalism, and is, therefore, a breach of Article 8.¹¹⁸

In some of the Member States, family members who apply for family reunification on their territory are being directed to their country of origin or the country of main residence for filing their application, regardless of whether they reside legally in the Member State, for instance on the basis of a short-term visa (see further chapter 3). Some other Member States are less stringent in that regard. Do courts allow Member States to refrain from an assessment of the application simply because it has been lodged at the 'wrong' place?

The Austrian Administrative Court has developed its reasoning on this topic. Although it pointed out that inland applications are legitimized by Article 5 (3) second paragraph of the Family Reunification Directive, it also emphasized that this directive

116 Rechtbank Amsterdam, 16 November 2005, *JV* 2006/28; Rechtbank Haarlem, 21 December 2005, *JV* 2006/65; the Rechtbank Middelburg, 14 March 2006, *JV* 2006/177; Rechtbank Middelburg of 18 October 2006, *JV* 2006/462 (case note P. Boeles).

117 ABRvS, 29 March 2006, *JV* 2006/172 (case note C.A. Groenendijk); 12 July 2006, *JV* 2006/328 (note C.A. Groenendijk); 20 September 2006, *JV* 2006/426 (case note C.A. Groenendijk).

118 *Rodrigues da Silva and Hoogkamer v. the Netherlands*, 50435/99 [2006] ECHR 86 (31 January 2006).

does not give a right to apply in the country.¹¹⁹ In another decision, this court judged that the requirements to apply for reunification abroad and to meet the quota criterion are not disproportionate and therefore, in principle, not in breach of Article 8 ECHR.¹²⁰ However: if a right to stay directly emerges from Article 8 ECHR and the sponsor legally resides in Austria, an inland application has to be accepted.¹²¹

A similar line is drawn in the Netherlands as a result of the case law of the ECtHR on this topic (see the above-mentioned case *Da Silva Hoogkamer*). In 2009, a new exemption ground for the requirement of a long-term visa was created for aliens whose expulsion would be a violation of Article 8 ECHR.¹²² One year later, the Judicial Division of the Council of State decided that the government, when assessing whether an application could be denied because the applicant did not possess a valid long-term visa, had to scrutinize fully if expulsion was in compliance with Article 8.¹²³

A genuine marriage?

In the case *Hamza & Anor*, Minister Justice Cooke criticized the required prove of the validity of the marriage.¹²⁴ The judge described this practice as follows:

‘Throughout 2009 and 2010, a practice developed whereby the Minister would insist that a declaration as to the validity of the marriage under Irish law from the Circuit Court was provided before he would grant reunification or even deal with the family reunification application. This practice appeared to apply to all Muslim marriages, traditional African marriages and any marriages “by proxy”. The general idea appeared to be that these marriages were not valid under Irish family law and that the wife or husband was not therefore the “spouse”.’

According to Cooke J. however, it is incompatible with the exclusive competence of the Minister to decide whether the person comes within the definition of a family member or that the person concerned and the refugee are parties to a subsisting marriage, if he requires a declaration from a third party on the validity of the marriage.¹²⁵ Accordingly, an assessment under the Refugee Act as to whether a person is a family member of the refugee can be based upon the reality of the conjugal relationship rather than the availability of a formal verification of the legality of the marriage contract.¹²⁶ Supporting this decision, the High Court held, on appeal, that a customary marriage conducted in Zimbabwe was valid and subsisting at Irish law.¹²⁷

In the case of *O'Donoghue v UK* the ECtHR judged that the requirements for contracting a marriage in the UK violated Article 12 ECHR and were discriminatory on

119 VwGH, 27 June 2006, 2006/18/0158; VwGH, 22 September 2009, 2008/22/0791.

120 VwGH, 24, April 2007, 2006/21/0057.

121 VwGH, 17 December 2009, 2009/22/0270.

122 *Staatsblad* 2009, no. 298.

123 ABRvS, 27 October 2010, LJN: BO2098, *JV* 2010/480.

124 O'Dwyer, C. (2011), ‘Family Reunification for Refugees and the Application of Section 29 of the Family Law Act 1995’, *The Researcher*, 6(1): 15-20, p. 17.

125 *Hamza & Anor -v- MJELR* [2010] IEHC 427 (25 November 2010).

126 O'Dwyer, *supra* fn. 124, p. 20.

127 *M. -v- F.* [2011] IEHC 415 (High Court of Ireland May 27, 2011).

the grounds of religion.¹²⁸ The legislation required foreigners, except those wishing to marry in the Church of England, to pay a high level of fees for permission from the Home Office to marry. According to the court, this requirement was not rationally connected to the stated aim of reducing the incidence of sham marriages, since no enquiries were made to establish the genuineness of the marriage.

In the so-called ‘paid love’ case, a Portuguese court protected a couple against suspicions on the basis of the constitutional right to family life.¹²⁹ It argued that the police could not violate the right to private and family life provided for in Article 26 of the Portuguese Constitution as a result of investigations based on suspicions. According to the judge, as long as applicants submitted proof of their marriage,

‘it is irrelevant if she does not cohabit with the husband and provide “paid love” to others’.¹³⁰

In Germany, as an additional requirement spouses (of TCNs or German nationals) need to intend to have a marital relationship. In a case where the German authorities doubted the existence of such intention, the Federal Administrative Court concluded that in the case of existing doubt regarding a sham marriage, the *burden of proof for the existence or the intention of having a marital relationship* lies with the applicant.¹³¹ At the same time, however, the court stated that even though the provisions of the Family Reunification Directive are not directly applicable to the present case of a German sponsor, art. 16 (2) b of the Directive is to be taken into account for the interpretation of the Residence Act – as the provision concerned is applicable to both German and third country nationals.¹³² Article 16 (2) sub b of the directive grants Member States the right to reject, withdraw or refuse to renew a family member’s residence permit in case of a fraudulent marriage. Nonetheless, according to sub 4 of the same paragraph, specific checks and inspections are only allowed where there is reason to suspect that there is fraud (Ratia & Walter 2009: 333). In May 2012, the Administrative Court of Bremen decided in a case of a Turkish/German couple that the review of a marriage is only admissible where there is ‘actual evidence in the particular case’ for such a review.¹³³

5.4 Turkish Nationals

In the *Sabin* case, the CJEU decided that the fees charged in the Netherlands to Turkish nationals were disproportionate in comparison with the fees required from EU

128 *O’Donoghue and Others v United Kingdom*, 34848/07 [2010] ECHR 2022 (14 December 2010).

129 <http://www1.ionline.pt/conteudo/7191-tribunal-considera-irrelevante-exercer-o-amor-remunerado-e-contraria-sef>.

130 Rapporteur Carlos Araújo in the Central Administrative Court of the South.

131 BVerwG, 30 March 2010 – 1 C 7.09.

132 A reversal of the burden of proof arises, if a criminal procedure is initiated because of subreption of a residence permit. In this case, foreigners’ authorities and investigation authorities have to provide proof for the existence of a sham marriage. See: Müller (2012: 13).

133 VerwG Bremen, 23 May 2012, Az. 4 V 320/12.

nationals.¹³⁴ Two months later, the Dutch legislator brought the fees for Turkish nationals down to the level for Union citizens as a consequence of this case.¹³⁵ The judgment of the court, implying that the standstill clauses also apply to the first admission of Turkish nationals to the Member State, had divergent effects in the Member States.¹³⁶ In the Netherlands, it was first the Central Appeals Tribunal which held that the standstill clauses of the Association Treaty prohibit the application of the integration requirements after admission laid down in the Act on Civic Integration.¹³⁷ As the integration requirement abroad, laid down in the Act on Civic Integration Abroad, is only applicable to the target groups of the Act on Civic Integration, the Minister for Integration announced that there would no longer be a requirement for family members of Turkish nationals (relying on the Association Treaty) to pass the pre-entry test.¹³⁸ Other restrictions introduced in recent years are also not applicable to them.

With regard to Austria, the CJEU considered that the obligation of Turkish nationals to apply for reunification from abroad constituted an illegal ‘new restriction’ within the sense of Article 41(1) of the Additional Protocol. As a result, the Administrative Court concluded that newly introduced or strengthened admission criteria (since the entry into force of the Treaty) like the pre-entry test and the income requirement represented an unjustified restriction.¹³⁹ The Austrian government adapted its administrative practice accordingly. Thus, in both Member States, some restrictive measures on family reunification have been abolished for one of the largest groups of TCNs living in their territories.

In Germany, however, neither the government nor the courts take the Association Treaty Turkey/EEC into account when defining the right to family reunification of Turkish nationals, who constitute the largest minority group in Germany. In other Member States, with significantly fewer Turkish migrants, the CJEU case law on the Association Treaty did not result in a more favourable family reunification policy towards Turkish nationals. In March 2010, the Federal Administrative Court judged that the standstill clauses are only applicable to access to the labour market and not to access to the territory. Even if this was the case, the court continued, the standstill clause would only apply to persons wishing to make use of the freedom of movement in order to access the labour market, not to persons wishing to reunite with the family.¹⁴⁰ This example shows that the establishment of certain rights at the Union level does not always guarantee the possibility to invoke them in the Member States. Harmonization, however, seems to be a matter of time: in September 2012, the *Verwaltungsgericht* Berlin requested a preliminary ruling by the CJEU on the question of

134 *Sabin* [2009] CJEU C-242/06 (17 September 2009), para. 75.

135 *Staatscourant* 12 November 2009, nr. 17361.

136 *Commission v Netherlands* [2010] CJEU C-92/07 (29 April 2010), paras. 49 and 50.

137 CRvB, 16 August 2011, case nos. 10/5248, 10/5249, 10/6123, 10/6124 INBURG, *JV* 2011/416 (case note K.M. de Vries) LJN: BR4959. These requirements imply passing the examination on A2 level for the granting of a permanent or independent residence permit and the general requirement to pass this examination within 3.5 years after arrival.

138 *Kamerstukken II*, 2011-2012, 31 143, no. 89.

139 VwGH, 19 January 2012, 2011/22/0313.

140 BVerwG, 30 March 2010, 1 C 8.09. V 28.06, paras. 18-21.

whether the Association Treaty prohibits the application of the language requirement for spouses of Turkish nationals (relying on the Association Treaty) who apply for family reunification.¹⁴¹

5.5 Union Citizens

Prior legal residence

Family members of Union citizens are not obliged to submit an application from abroad. In the case of *Metock*, the Court of Justice made clear that family members don't need to prove legal residence in the European Union prior to their application for family reunification either.¹⁴² According to the CJEU, such a requirement is unlawful as it is not part of the qualifying requirements in the Union Citizens Directive. This judgment raised a lot of resistance in a number of northern Member States, which considered the judgment as a threat to their sovereignty, and expressed their fear of abuse of the rules on free movement.¹⁴³ The judgment, nevertheless, led to the removal of this prior residence condition in Ireland and the UK in their legislation, and adjustments to the administrative conditions in Austria, Germany and the Netherlands.¹⁴⁴ In answer to a reference by the UK Upper Tribunal (Immigration and Asylum Chamber) for a preliminary ruling, the CJEU judged that this requirement of prior residence is also not applicable to family members who don't belong to the nuclear family, but who are dependent on Union citizens.¹⁴⁵

Combating fraud

The intensified attention for possible fraud and abuse of the right to family reunification, already noted in chapters 3 and 4, has led to quite a number of judgments in various Member States. On the basis of the Union Citizens Directive, the Court of Justice has developed concrete and detailed standards with regard to research methods and rejections on the basis of suspicions. In response to the judgment in *Metock*, and the subsequent debate in the Council of Ministers, the Commission developed guidelines on how to apply the Union Citizens Directive in this regard.¹⁴⁶ National courts increasingly take the relevant CJEU case law into account. Some examples are given below:

141 VerwG Berlin, 25 October 2012, VG 29 K 138.12V.

142 *Metock and Others* [2008] CJEU C-127/08 (25 July 2008).

143 See the debate in the EU Council of Ministers, Council document 16483/08 (Presse 344), 28 November 2008.

144 More Member States applied this condition, see Commission, 'Report from the European Commission to the European Parliament and Council on the 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 Member States' COM (2008) 840, p. 4.

145 *JSHD v Rahman and Others*, 5 September 2012, C-83/11.

146 Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM(2009) 313, 2 July 2009.

After having adjusted its policy rules to the CJEU judgment in *Metock*, the Irish government expressed its concerns that some applications for residence made on the basis of EU Treaty Rights might be based on ‘*marriages of convenience*’ (Quinn & Kingston 2012: 21). However, the High Court held in 2011 that the Irish authorities ‘are not empowered to prevent the solemnisation of a marriage on the grounds that they suspect – even with very good reason – that the marriage is one of convenience’.¹⁴⁷ This case concerned a Lithuanian national whose Egyptian fiancé, in respect of whom a deportation order was in place at the time, was detained following his arrest at the registry office immediately prior to their marriage. The judge concluded that if the authorities feel the legislation is unsatisfactory they should turn to the Union legislature.

In 2011, the Dutch Judicial Division of the Council of State made explicit reference to the 2009 Guidelines of the Commission on the application of that directive with regard to the proof of a ‘durable relationship’, or how to ascertain whether a marriage qualified as one of convenience. The Council required that the definition of a ‘durable relationship, duly attested’ should not be interpreted too narrowly.¹⁴⁸ It furthermore ruled that the state authorities had to substantiate why they felt that there was no ‘durable relationship, duly attested’ if evidence of a durable relationship had been presented by the applicant.¹⁴⁹ A mere reference that there was no registration in the municipal administration (GBA) was insufficient, according to the Council. These rulings led to the adaptation of the Dutch policy rules, offering more possibilities for applicants to show the durable nature of their relationship.¹⁵⁰

Where in these two judgments Union law offers protection to applicants for family reunification, in Portugal it appears to be a justification for measures combating fraudulent marriages, even in cases concerning Portuguese nationals. In a certain case, the authorities had refused to grant a residence card to a spouse because the marriage proved to be a simulated marriage.¹⁵¹ The Portuguese husband had declared that his spouse did not co-habit with him, nor did he know where she was, and that advertising of her sexual favours could be found in newspapers with her mobile phone contact. The Supreme Court approved the appeal considering that, although the law on family reunification does not define cohabitation as a prerequisite, it is only applicable to relatives in the true sense of the word. According to the court, the police investigations were executed on the basis of the national and European community frameworks criminalizing ‘marriages of convenience’. The second judgment involved a third country male citizen married to a Portuguese woman. SEF removed his resi-

147 *Izmailovic & Anor v The Commissioner of An Garda Síochána & Ors* [2011] IEHC 32 (January 31, 2011).

148 ABRvS, 6 September 2011, 201009139/1/V4, LJN: BS1678, *JV* 2011/429. See also 10 May 2012, 201105665/1/V4, 4 May 2012, 201004915/1/V4 and 201012514/1/V4; 26 April 2012, 201008207/1/V4, LJN: BW 563.

149 ABRvS, 6 September 2011, 201009139/1/V4, LJN: BS1678, *JV* 2011/429, cons. 2.4-2.4.3.

150 Besluit van de Minister voor Immigratie en Asiel van 16 december 2011, nummer WBV 2011/17, houdende wijziging van de Vreemdelingencirculaire 2000 [Decision of the Minister for Immigration and Asylum of 16 December 2011, No. WBV 2011/17, amending the Aliens Circular 2000], *Staatscourant* 23 December 2011, No. 23324, p. 2 & 15.

151 Case law no. 0718/09, 14 July 2009, rapporteur Rosendo José, and 30 September 2009, rapporteur Costa Reis.

dence card claiming abusive and deceptive use of the right of European family members.¹⁵² The Central Administrative Court of the North rejected the appeal of the immigrant, as the Portuguese former spouse had declared that she had received money for the marriage and did not have any other contact with the immigrant after the marriage.

5.6 ‘Own’ Nationals and the Applicability of Union Law

Union citizens who cannot rely on the rules of free movement are mostly dependent on the decision of the national legislator to treat them in the same way as TCNs or as Union citizens who can rely on the free movement rules. Yet they sometimes manage to invoke Union law in order to reunite with their TCN family members. This concerns young and dependent children: since the *Zambrano* judgment, they can sometimes claim the right to family reunification with their TCN parents on the basis of Article 20 TFEU. Furthermore, they are allowed to rely on the rules on family reunification of the Union Citizens Directive if they have enjoyed the right to free movement and have subsequently returned to their country. Below we discuss several judgments on these different issues of the applicability of Union law.

Children

In the *Zambrano* judgment of 8 March 2011, the CJEU ruled that on the basis of Article 20 TFEU, Union citizens cannot be deprived of their right to stay in the EU territory, which implies that TCN parents should be granted residence and the right to work in order to take care of their (small) EU children on EU territory. With *Zambrano*, the court created a new basis for family reunification derived from Union citizenship, regardless of whether cross-border elements were applicable. This judgment does not seem to have had an impact in Austria, Germany and Portugal, but it did in Ireland, the Netherlands and the UK.

In January 2003, Irish judgments led to a suspension of the Irish policy under which parents of Irish citizen children were usually granted permission to remain in the state.¹⁵³ In these cases, the Supreme Court reconfirmed that under Irish law a foreign national parent of an Irish-born child did not have an automatic entitlement to remain in the state with the child. As a result, many of the 11,493 parents of Irish citizen children who had outstanding applications for residence were issued with notifications of intention to deport them. In relation to the deportation of parents of Irish citizen children, the Supreme Court required, on the basis of Article 8 ECHR, that the authorities assess whether there were any ‘insurmountable obstacles’ to the family moving abroad with the deportee.¹⁵⁴

In response to the *Zambrano* case, the Irish High Court, has clarified that

152 Case law no. 2370/08.3 BEPRT, 24 February 2012, rapporteur José Augusto Araújo Veloso.

153 *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3 (23 January 2003).

154 *Alli [a minor] & Anor -v- MJELR* [2009] IEHC 595 (02 December 2009).

'Ruiz-Zambrano turns on factors (...) such as dependency, residence in the territory of the Member State in question and the right of European citizens to enjoy one of the real benefits of that citizenship, namely, the right to reside within the territory of the Union'.¹⁵⁵

In this case, Hogan J. found, therefore, that in a situation where the parents of an Irish citizen child were separated and, with the mother having been granted refugee status, there was

'no real prospect that the deportation of the applicant would bring about a situation where [the child] would be compelled to leave Ireland or, for that matter, the territory of the Union, (...), there are no grounds for contending that [the father] is entitled to an interlocutory injunction restraining his deportation on Zambrano grounds'.

Interestingly, when Hogan J. went on to assess the child's right to the care and company of his father under the Irish Constitution, he found himself coerced into the conclusion that

'there [are] abundant grounds for suggesting that the substance of [the child's] constitutional right to the care and company of his father would be denied were his father to be deported',

and that

'this would ordinarily be sufficient in itself to justify the grant of an interlocutory injunction restraining the deportation of [the father], his disreputable and egregious conduct notwithstanding'.

And he concluded that although the father in this case had 'manipulated the asylum system' and (...) 'engaged in egregiously wrongful conduct' and although

'(H)e has no personal merits which would entitle him to administrative or judicial protection, (...) the court must (...) approach this application not from the perspective of the father, but rather from that of the child.'

In the Netherlands, the Judicial Division of the Council of State on 7 March 2012 handed down two judgments in which, according to the Council, the 'genuine enjoyment test' (can the Union citizen stay on the EU territory while living with his or her family) should have resulted in the issuing of a residence permit and a long-stay visa respectively. These cases have in common that there was only one (TCN) parent involved in the children's care as one Dutch parent had passed away (long-stay visa) and the other had disappeared from the scene to an unknown destination (residence permit). The argument that the children could live with the paternal grandparents who were residents of the Netherlands without considering whether the grandparents

155 *AO v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (No.2)* [2012] IEHC 79 (High Court of Ireland January 17, 2012).

were willing and capable of caring for the children, was dismissed by the court. According to the State Council, the test was whether the children would have to leave EU territory in order to live with their parent(s), not whether there might be a third party in the Member State of which the children were nationals who could care for them. It also found immaterial the fact that the children had limited ties with the Netherlands as they had spent all or most of their lives in Indonesia where they attended an international school and did not speak the language of that country. These judgments have limited the possibilities for the government to refer to other adults who can take care of Dutch children or to other countries with which the children also have ties.

At the same time, the Council of State has rejected claims that Article 20 TFEU obliges Member States to ensure that both parents can live in the Netherlands in order to enjoy family life with their Dutch children. If one of the parents is Dutch or legally resides in the Netherlands, the other parent does not have a right of residence on the basis of *Dereci* or *Zambrano*. According to the Council, the *Zambrano* judgment doesn't imply a right of residence for *both* parents. This principle remains unchanged if this single parent in the Netherlands faces problems with raising the children, for instance because of medical or psychological problems. In these situations, this parent can request assistance from the relevant Dutch institutions.¹⁵⁶ The government need only derogate from this principle if it is clear that the parent, who resides legally in the Netherlands or is a Dutch citizen, is not in the factual situation to look after the children, for instance because he or she is in jail.¹⁵⁷ The District Court of Zwolle also applied this derogation in a case where the mother, who took care of the Dutch children was to be expelled, while the father had threatened to kill the mother and children and had gone underground. The court rejected the Dutch position that this father was able to look after the children and decided that the mother should be granted the right to residence.¹⁵⁸ The District Court of Haarlem ruled in a case where the Dutch father suffered from leprosy and lived in a nursing home where no children could be housed, that the mother should be granted legal residence.¹⁵⁹ In July 2012, the Dutch government informed the Parliament that according to the jurisprudence of the Judicial Division of the Council of State, it would admit the 'second' parent to the Netherlands if there was an objective obstacle for the Dutch or legally residing parent to take care of the Dutch child in the Netherlands (e.g. on medical grounds or because he or she had been deprived of his or her parental rights).¹⁶⁰

Following the *Zambrano* judgment, the British government implemented its provisions in November 2012 to cover TCNs on whom a British citizen child or adult is dependent. The Certificate of Application scheme that operated in the interim period and permitted a 'Zambrano parent' to work in the UK while their application was outstanding, is no longer in operation.

156 ABRvS, 7 March 2012, AWB 201011743/1/V1, 7 March 2012 LJN: BV8619; 6 August 2012, LJN: BX5044.

157 ABRvS, 10 July 2012, LJN: BX 1345.

158 Rechtbank Zwolle, 1 March 2012, LJN: BV7579.

159 Rechtbank Haarlem, 5 June 2012, LJN: BW8078.

160 *Kamerstukken II*, 2011-2012, 19 637, no. 1561.

Spouses

In its judgment on *Dereci*, concerning an Austrian case, the CJEU narrowed down the scope of those who could benefit from *Zambrano* to those for whom refusal of a right to live and work would mean that the Union citizen would have to leave the EU as a whole, and not only the state of which he or she was a national.¹⁶¹ The court left it to the national court to make that assessment. The CJEU further noted that Union citizens, who did not exercise their mobility rights could not rely on the Union Citizens Directive. However, the court reasoned that Union citizenship itself implied certain core rights upon individuals, otherwise the Union citizenship would be deprived of its practical relevance. As an example, the CJEU mentioned that Union citizens could in fact be forced to leave the EU territory, if their Union citizenship did not entail a right of residence within the EU territory. However, the national courts had to decide case by case whether Union citizenship led to a residence right for family members.

In several judgments, the Austrian High Courts have touched upon the legal distinction between Austrian sponsors who have or have not realised their mobility rights. While referring to the *Metock* case, the court determined that the applicability of Union law depended on the existence of a cross-border element. Such a situation was assumed even in the case of irregular marginal employment by an Austrian wife of a Nigerian citizen in the Czech Republic.¹⁶² However, the court did not consider cross-border employment to be sufficiently relevant in the case of an Indian citizen married to an Austrian national, who had stayed for several weeks in Greece to participate in a ‘turtle project’.¹⁶³ According to the Austrian Constitutional Court, this distinction should be based on objective merits and, therefore, be justified according to the principle of equality as laid out in the Austrian Constitution. However, as a result of the *Dereci* judgment, the Austrian Administrative Court has put this distinction into perspective. In a recent judgment, it argued that substantive Union citizenship rights may never be refused. This would be the case if the sponsor was forced to leave Union territory.¹⁶⁴

5.7 Conclusion

This chapter shows that the case law of the ECtHR and the CJEU has a significant impact on the national legislation and policy regarding family reunification of TCNs or EU nationals with TCNs and the rights of third country family members after admission. It can be expected that the case law of both courts will grow in importance in the coming years, as the national reports show that requirements for admission have recently become or are about to become more restrictive and the possibilities for loss of residence rights will be extended.

161 *Dereci & Ors* [2011] CJEU C-256/11 (15 November 2011).

162 VwGH, 29 September 2011, 2009/21/0386.

163 VwGH, 25 September 2009, 2009/18/0278.

164 VwGH, 15 December 2011, 2008/18/0189.

In our study, we found that the national courts cannot be characterized in the same way, even if they belong to the same Member State. In general, national courts, exercising restraint, seem to endorse the stated aims of restrictive measures without question. The critical assessment by the British Supreme Court of the arguments for the age limit, however, illustrates that some courts tend to take an autonomous stance towards the national policies, by attaching more importance to family life. Bonjour contested Joppke's conclusion that national courts contribute significantly to strengthening the right to family reunification, as she found that, at least until 2011, the authority over the Dutch conditions for family reunification was entirely in the hands of Dutch politicians and civil servants (Bonjour 2011: 113). This chapter, however, shows that once governments have adopted a legislative instrument at the EU level (which they have influenced by negotiation), judicial authorities gain more influence, on both the European and national level. National courts more easily criticize their government's policies and judge in favour of family reunification, if the case law of the European courts encourages them to do so: the explicit confirmation by the CJEU of the subjective right to family reunification for TCNs worked that way. With regard to the income requirement and the pre-entry tests, the position of the Commission also made national courts question their governments' interpretation and refer to the CJEU.¹⁶⁵

One-way pressure, however, is not always sufficient. According to Van der Vleuten, compliance by governments that do not intend to comply only occurs if there is pressure from both the national and the European level (Van der Vleuten 1998). After all, the Court of Justice cannot make conclusions in a judgment without a request for a preliminary ruling by a national court, or an infringement procedure by the Commission. The latter is in most cases the result of a large number of complaints from national NGOs or other interest groups. Also, judgments of the ECtHR often result from national lawyers or NGOs litigating or writing reports supportive of individual complaints. This means that the extent to which national governments are being compelled to adjust their legislation to European case law, largely depends on the position and perseverance of national actors. This is clearly demonstrated by the application of the CJEU case law on Turkish nationals relying on the Association Treaty. The German government still manages not to lower the requirements for them, as the national courts have approved this policy. Only recently a court at state level has turned to the CJEU for a preliminary ruling on this case. Until now the Austrian, German and Dutch governments have succeeded in preserving their pre-entry test, while attempting to avoid any development of EU case law on this topic. Their main strategy for influencing European case law is delaying an enforced adjustment of their policies by granting a residence right prior to a forthcoming judgment.

Although European case law does not always strengthen the right to family reunification, in all cases it contributes to more harmonization of this right throughout the EU Member States. Also, the CJEU's coherent interpretation of the migration directives leads to a slight approximation between the right to family reunification of Un-

165 *Parliament v. Council* [2006] CJEU C-540/03 (27 June 2006); *Chakroun* [2010] CJEU C-578/08 (04 March 2010).

ion citizens exercising their right to free movement and this right of TCNs. Strengthening these rights by Europeanization at the same time implies widening the gap between those able to rely on these rights and those who can't, namely own nationals and TCNs residing in the states that have opted out. Whereas the focus of the ECtHR is on whether a particular state has overstepped its margin of appreciation in respecting individual rights, the question for the CJEU has been whether a restriction on family migration may act to discourage EU citizens from exercising their rights to free movement, undermine the right to family reunification for TCNs, or impede the enjoyment of EU citizenship. Consequently, the parallel development of case law has resulted in the unusual situation whereby many Union citizens exercising treaty rights now enjoy far greater rights to family reunion than the states' own nationals do. However, *Zambrano* was the starting point for national courts to take consequences from Union citizenship for own nationals, albeit with divergent outcomes.

With regard to TCNs, the gap is growing between those residing in a Member State that is bound by the Family Reunification Directive and those who are not able to rely on Union law. Compared to the income requirement in the Member States that are bound, having been moderated by the *Chakeroun* judgment, the required income level for work-permit holders in Ireland and more generally in the UK are amongst the highest (see chapter 2). If the CJEU interprets the admissibility of the pre-entry test in the same way as the Commission did earlier, the UK will remain the only Member State imposing a language condition for admission.

Chapter 6

Lives on Hold: The Impact of Family Reunification Policies on Family Life and Integration

6.1 Introduction

So far, we have looked at the rules, background and development of family reunification policies. In this chapter, we look at the impact of family reunification policies on migrants' family life and integration.

As in the rest of the report, we specifically looked at the income requirement, pre-entry test and age requirement. Since the housing requirement proved to be no hindrance in practice in any of the countries under study, we have omitted it from this chapter.

To study the effects of the income requirement, pre-entry test and age requirement, we made a quantitative analysis, for which we collected statistics and other data on the fluctuations in the number of applications for family reunification and visas or permits granted and, as far as available, on the effects for certain groups of sponsors or family members. For the qualitative analysis, we made use of the interviews with individual family members and sponsors, as well as other stakeholders that were conducted in the Member States under study. We compare our results with other studies on family reunification requirements, and illustrate our findings with interview excerpts from the country reports.

6.2 'Self-selecting' Family Members: The Numbers

When looking at the quantitative effects of policy measures on the number of TCNs reuniting with their family members in the Member States, we have to involve both the development of the number of permits granted and the number of applications submitted. The combination of these data can show whether the introduction of more impediments resulted in fewer awarded applications, or also in fewer submitted applications. The latter can especially occur if submitting an application involves considerable costs and trouble, like long-distance travel to the consulate. In earlier research into family reunification requirements, the phenomenon of self-selection has been mentioned (Regioplan 2009a). Some people, who fear they cannot meet the requirements, do not apply for family reunification. This self-selective effect may explain the decrease in family reunification applications as a consequence of restrictive measures. Do we find these effects in the six Member States?

But first some introductory remarks on the data. It turned out to be very difficult to get a precise and comparative overview of the development of the applications and permits granted regarding family reunification of TCNs with TCNs, own nationals and Union citizens, due to a number of reasons. First, the groups are not uniformly classified: some groups are not registered separately, others are included in groups which are not taken into account in this research. Besides difficulties of comparison

between Member States, several researchers also reported difficulties in conducting an analysis in their own Member State because the way of registering has changed in the course of time, as the introduction of a new law or certain evaluations served as a reason for amending the kind of data collected and registered. This turned out to be a severe obstacle to making a precise overview of the development in the relevant numbers in the last ten years. Second, with regard to the different target groups, different kinds of data have been collected and registered. In Austria, for instance, with regard to TCN sponsors the granted residence permits are registered, but for own national sponsors it is the number of applications submitted. This complicates an accurate comparison. Despite these difficulties, the data collected have enabled us to draw some tentative conclusions on the quantitative effects of the policy measures. These findings proved to be relevant in combination with the information gathered in the interviews and in other evaluations.

An overall drop

The available statistics show that in all the Member States studied, the number of applications, visas and residence permits granted on grounds of family reunification have dropped in the last decade (since 2000). Depending on the Member State, the drop in numbers varies from one-third to more than half. Germany was the Member State where the drop in the number of long-term visa applications started first, in 2003: from over 85,000 in 2002, ending up to 40,000 in 2010. In the Netherlands, the number of long-term visa applications went down from 2005 (from 29,000 in 2004 to almost 12,000 in 2007).

In Austria, the numbers started to decrease a few years later, from 2007. The quota and the registration system make it impossible to gain insight into fluctuations regarding the number of applying TCNs. However, the number of Austrian citizens (not falling within the scope of the quota) applying for family reunification has dropped from nearly 9,000 in 2006 to 5,000 in 2011. The UK report suggests declining numbers of permits granted between 2007-2009, but there is limited data available. The available data however show the issuance of more than 70,000 Entry Clearance Visas (for family reasons to TCNs and UK citizens) in 2006, decreasing to just over 45,000 in 2011. These figures potentially include EEA national family members of EEA nationals.

Both Ireland and Portugal also demonstrated a decline, which has occurred since 2008. Since then, the number of arrivals in Ireland (their nationality or purpose is not registered) have dropped by one-third, whereas in Portugal the number of visas issued for family reunification has halved. Although the drops in most cases concern family members of TCNs and own nationals, the Irish report specifically points to the declining family permits granted to Union citizens as well. As Ireland and Portugal did not introduce the restrictive measures that other Member States did, and Union citizens are not affected by restrictive policies in any case, these drops raise questions about their causes.

Restrictive measures explaining the drop

An exact link between the policies and the actual immigration cannot always be established. After all, restrictions were often introduced as part of a larger reform on this

policy. Furthermore, statistics on the effects of migration measures in general show a peak just before and a sudden drop just after its introduction, followed by a gradual recovery (this sudden drop and gradual climb occurred, for instance, in Germany and the Netherlands after the introduction of the pre-entry test). But taking into account the fluctuations over a longer period, we can conclude that the decrease in Austria, Germany and the Netherlands is closely related to the introduction of restrictive measures targeting family members of TCNs and own nationals. With regard to these Member States, the self-selecting effect has been confirmed. In Austria, the drop clearly started after the introduction of the New Residence and Settlement Act in 2005. The Act affected the position of Austrian citizens, as it abolished their equal treatment with Union citizens (having exercised their EU mobility rights). As one of the consequences, own nationals for the first time had to meet the income requirement. Because of its recent introduction (2011), the quantitative effects of the pre-entry test could not yet be clarified.

Researchers in Germany attributed the sudden drop in applications in 2007 to the pre-entry test introduced in that year. An earlier sharp decrease, in 2005, is not related to family reunification restrictions, but to the accession of ten Eastern European states to the EU, implying the waiver of the visa requirement for these nationals.

The drop in the number of applications in the Netherlands can be explained by several policy measures introduced at different times. First, the abolition in 2004 of the more favourable income requirement for Dutch citizens, refugees and holders of a permanent residence permit while raising the level of the required income to 120 per cent of the minimum wage; second, the introduction of a higher age requirement for spouses in the same year, and third, the introduction of the pre-entry test in 2006. After the required language level of the pre-entry test was raised in April 2011, a further drop in the number of long-term visa applications became visible.

A more general reason for the decline can be found in the increasing preference of Turkish and Moroccan nationals to marry a partner who already lives in the Netherlands. In 2002, almost half of them selected a spouse living abroad, while in 2012, only one in six Turkish or Moroccan spouses did so. While several explanatory factors are involved in this tendency, it cannot be excluded that it is also related to the restrictions introduced since 2004.

A gradual partial recovery of the number of applications after a sudden drop is another indicator that the decrease results from restrictive immigration measures. Although for some of the applicants the measure implies a permanent impediment to reunite with the family, for others it means a delay in the reunification process. Both spouses need preparation time in order to adjust to the new criteria, be it for the sponsor to improve his or her income, or for the spouse to pass the pre-entry test.

Economic factors explaining the drop

In Ireland and Portugal, the decline seems not to be caused by immigration measures but by their national economic contraction. In both Member States, the decrease is not specific to family members of TCNs or own nationals. A large part of the decrease in Ireland concerns family members of Union citizens, as a consequence of the declining numbers of Union citizens settled there for work. The economic recession in Portugal makes TCN labour migrants and their families return to their country of

origin. This is even more the case with Brazilian nationals, where the economic growth in their home country has led to an upsurge in their return and a decrease in their inflow to Portugal. At the same time, sponsors who have suffered from the effects of the economic crisis have more frequently failed to comply with the criteria on income and housing, despite the government's lowering of the required income level. Due to the same reasons, the number of residence permits granted for family reunification has declined by one-third. At the end of 2011, two-thirds of the applications for family reunification were granted, and three-quarters in cases where children were involved.

The decline since 2006 in the UK can also not be easily linked to certain policy changes on family reunification. The requirements on housing and income remained constant between 2001 and July 2012, albeit with a more concretely defined income requirement from 2006, resulting from a tribunal decision. As the age limit for spouses was increased to 21 years no earlier than 2008, and the pre-entry test was introduced at the end of 2010, these measures cannot explain the drop since 2006, although they may have strengthened the decreasing trend. As the number of permits issued to family members of Union citizens shows a similar trend, the economic situation might be a more relevant explanatory factor than the admission criteria.

Which groups are affected?

As far as statistics are available, they demonstrate that certain nationals are affected more by restrictive measures than others. It seems that Turkish nationals have suffered the most from the measures introduced in Germany. In 1998, they formed one-third of the total number of visa required family members, and in 2010 less than one-fifth. In the period under study, the proportion of spouses immigrating to TCNs decreased by 6.5 per cent, but the percentage of spouses immigrating to Germans increased by 8.5 per cent. According to the German Federal Ministry of Interior, this trend of family reunification to Germans could be explained by the higher number of naturalizations, combined with the reunification of foreign spouses with the so-called *Aussiedler*, repatriates from Eastern Europe of German origin. Whether this first explanation holds true, is questionable since the naturalization rate in Germany has not increased, but decreased since the amendment of the citizenship law of 2000, especially for Turkish migrants (Van Oers, forthcoming: 150; Thränhardt 2008: 12).

In the Netherlands, the number dropped most dramatically for immigrants originating from Turkey and Morocco. Since the applicability of the pre-entry test to Turkish nationals was abolished in 2011, their numbers might recover in the near future. More generally, statistics show that the category of TCNs who need a long-term visa in order to reunite with their family in the Netherlands has the most problems in meeting the requirements introduced since 2004/2005. This means nationals from the non-OECD countries. Furthermore, refugees suffer severely from the restrictions introduced in 2009, concerning the 'effective family bond'. The percentage of rejected applications for family reunification by refugees rose from 12 per cent in 2008 to 81 per cent in 2011; many of them concern children. By far the largest group affected were Somali refugees.

In Portugal, Brazilians dominate the list of the TCN sponsors, accounting for more than one-third of all applications for family reunification followed, at a large

distance, by sponsors from Cape Verde, Ukraine, China and Moldova. At first glance, it seems remarkable that nationals with historical and linguistic ties with Portugal and belonging to the oldest immigrant communities (from Angola, Guinea Bissau, SAO Tome and Principe) lag behind these countries. The researchers, however, explained this order by the amendment of the citizenship law in 2006, making Portuguese citizenship substantially more accessible. A large number of Portuguese speaking TCNs who have benefited from this, have since then registered as Portuguese sponsors if applicable. The German and Portuguese examples show that other developments, like in these cases fluctuations regarding naturalization, may influence the classification of the affected groups.

6.3 Capital and What People can Do

Of the earlier studies on the impact of restrictive family reunification policies, Leerkes and Kulu-Glasgow's (2011) work on the consequences of the Dutch income requirement offers a useful analytical framework to gain insight into the consequences of family reunification policies for family members. They found that people adjust their behaviour to the requirements of family reunification in certain ways. According to their analysis, restrictive family reunification policies increase the costs of migration not only for family migrants, but also for the denizens or citizens in the country, the sponsors. How these sponsors respond is determined by capital (financial, social and otherwise) and the degree to which sponsors are willing to pay the price, in other words: their emotional commitment to the relationship (Leerkes & Kulu-Glasgow 2011).

Although Leerkes and Kulu-Glasgow's study was limited to the income requirement, we assume that this analysis is also applicable to the other requirements of family reunification policy. We further assume that the extent to which behavioural adjustments are required may increase because of the cumulation of several requirements that have to be met, an issue addressed in para. 6.6. Finally, behavioural adjustments do not limit themselves to the admission procedure. As Strasser et al. (2009) point out, families found themselves constantly strained to adapt their family project to the external circumstances of family reunification policies, rather than according to their own wishes and priorities. Hence, as long as secure residence (permanent residence or citizenship) is not acquired, family reunification policies may have a profound impact on the lives of migrant families. This raises the question of what people have to do to gain secure residence and with what effects for integration.

The individual family members and sponsors interviewed for this study almost all met the requirements. Few applications were denied because e.g. the income requirement had not been met. This can partly be explained by our selection of respondents, who often had a high educational background and favourable economic position. That does not mean that the application procedure was always easy. Applicants sometimes had to pay a high price to be able to be together. As previously stated, these costs depend on capital (what people *can* do) and emotional commitment (what people are *willing* to do). Often, the main goal of respondents is to be together and they will do whatever it takes to meet whatever requirements they have to meet.

That also means that most of them did not purposely challenge the requirements. Although, as we have seen in chapter 3, NGOs and lawyers stress the importance of legal aid to get through the complicated immigration procedures, most people do so without such aid, and do not start legal procedures. Rather, they submit their application again once they meet the requirements. Of the three strategies sought by individuals to solve legal issues (remain passive, do-it-yourself, finding legal aid (WODC 2009b), most families did it themselves. Hence, we assume that the interviews with lawyers give information on a different group of applicants: those who had no choice but to contact a lawyer because the application was initially denied.

That families did it themselves, does not necessarily mean that they did it alone. Many respondents mentioned forms of support by family, friends, and employers who helped them meet the requirements, or offered other forms of support. Their help was sometimes vital to the positive outcome of the procedure. For example, in Ireland, employment permit holders from Pakistan and India had difficulties obtaining information through the official channels, and relied on the information and support provided by their employer, who had done this before with other employees, to be able to bring over their family members.

Support by NGOs was also often mentioned, as well as internet forums of expatriates and bi-national families, as important sources of information and exchange of experiences. In contrast, immigration authorities were not experienced as helpful, but rather as a hindrance to family reunification. This issue has already been addressed in chapter 3.

6.4 The Four Main Requirements

As already mentioned, of the four main requirements, the housing requirement had little impact on family reunification, since it formed no significant hurdle. We have omitted it from our analysis.

The income requirement and pre-entry test, on the other hand, are a considerable hurdle, mentioned as such in all countries that have these requirements, whatever the required level of income or language proficiency and regardless of the way the language test was organized.

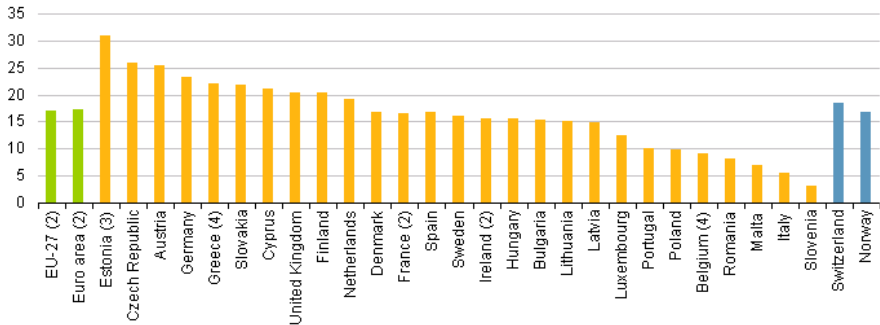
Income requirement

Respondents in the qualitative part of the study, mentioned specific groups that they expected to be affected most by the income requirement: women, low income groups, returning expatriates, disabled people and people with medical problems, and students. Can we say anything about the impact on these specific groups, based on the statistics available?

Although this could not be substantiated in the other national reports, the assumption of a selective effect based on gender has been evidenced by a Dutch study on the effects of the increase in the level of the income requirement from 100 to 120 per cent in 2004 (WODC 2009a). This study showed that after the increase in the income level, the number of female sponsors applying for reunification dropped by 48 per cent, while the number of male sponsors went down by 32 per cent. Accord-

ing to this study, this difference can be explained by the fact that female sponsors more often have a part time job, especially if they take care of children at the same time. As figure 6.1 demonstrates, the gender pay gap is still significant in most EU Member States. Hence, it is inevitable that a similar gendered effect of the income requirement occurs in other Member States.

Figure 6.1. Unadjusted gender pay gap in EU¹⁶⁶



(1) Enterprises employing 10 or more employees; NACE Rev. 2 B to S (- O).
 (2) Provisional. (3) 2007 data and NACE Rev.1.1., sections C to O (- L). (4) 2008.
 Source: Eurostat (tsiem040)

The Dutch 2009 research also revealed the effects of age and ethnic background. The increase in the income level resulted in a drop in applications by male sponsors aged 21-27 of 52 per cent, against a drop of 26 per cent in applications by older sponsors. Some difficulties younger sponsors faced could be identified, like the lower minimum wage under the age of 23, and the required durability of the income, being offered only temporary labour contracts. Due to a relatively weak socioeconomic position, more sponsors with a non-western migrant background failed to meet the income requirement: the drop in the male non-western sponsors concerned on average 54 per cent, western migrants 34 per cent and Dutch natives 22 per cent. These effects are probably also not country specific: the German report refers to data of the *Statistisches Bundesamt*, showing that the risk of poverty for persons with a migrant background is twice as high as for German natives. The most recent report on poverty in Austria also demonstrates that migrant households are particularly prone to being threatened by poverty. About 27 per cent of all households at risk of poverty are households with a migration background. Although unemployment is an influential factor related to poverty, 41 per cent of the persons at risk of poverty are employed (ÖGPP 2008: 119 ff.).

Finally, the Dutch study on the income requirement demonstrates the effects due to the *intersection* of various factors, e.g. of gender and migration background. As already demonstrated, the number of applications by female sponsors went down by 48

166 We used the percentages of the unadjusted gender pay gap because this gives the best insight into the labour market position of women.

per cent, as compared to a fall of 32 per cent of applications by male sponsors. However, comparing female sponsors of Turkish background to Dutch born male sponsors, the difference is even more striking: the number of applications by female Turkish sponsors dropped by 57 per cent, while that of Dutch born male sponsors dropped by 22 per cent (WODC 2009a).

Because of its impact on specific groups, the income requirement was critically evaluated by respondents, individuals and stakeholders alike, who did not support it. They criticized that individual circumstances were not taken into account, and even individual respondents were critical when they easily met the income requirements themselves.

In our study, there were a few couples who could not meet the income requirement. In the Dutch country report, a Turkish woman who had been living in the Netherlands for more than 25 years, and wanted to be reunited with her Turkish partner had not yet applied for family reunification because she did not fulfil the income requirement. She received welfare, because of medical problems which made it impossible for her to work. Although the couple considered living together in Turkey, she had a disabled son who lived in a home for disabled people in the Netherlands and whom she did not want to leave behind. In her view, she should be exempted from the income requirement. The German national report provided the example of Mrs. B., a citizen of the Philippines, who had been married to her German husband since 2007. In the same year, their child of the marriage was born in the Philippines. Mrs. B. was issued a visa as the mother of a German child and she and her daughter entered Germany in 2010. Mrs. B. had a minor son from a previous relationship with a citizen of the Philippines, whom she wanted to join her family in Germany. However, Mrs. B. and her husband were reliant on benefits according to the Social Security Code: Mrs. B. had not been placed in a job since her arrival in Germany and Mr. B. was unemployed and planned to go into business for himself. Since they could not meet the income requirement, Mrs. B. was only able to see her son during the holidays.

That, on the whole, most of our respondents in our study have met the income requirement, can partly be explained by our non-representative selection of respondents, but also by the behavioural adjustments that we found in our studies.

The first type of behavioural adjustment of sponsors is related to the labour market position. Students dropped their studies to work in order to meet the income requirement. Although this meant that they had a job in the short term, in the long run this hampered their income level and career opportunities. Other adjustments affecting the labour market position was that sponsors dropped career plans, because they chose job and income security over work satisfaction. Finally, the income requirement resulted in deskilling, because the sponsor sometimes chose a job (far) below the educational level that provided the required income or long-term contract above the lesser job security that corresponded with his or her own educational level. Hence, the income requirement had a significant impact on the labour market position of the sponsor, which seems contradictory to the aims of the policy of labour market integration.

A second type of behavioural adjustment is emigration. Sometimes people have no choice but to go and live in the country of origin of the family migrant, in order to

be able to be together as a family. Nationals sometimes have the choice of moving to another EU Member State. Emigration may be temporary, but if one leaves the European Union, it may become harder to return as time passes.

These adjustments only applied to TCN and citizen sponsors. EU citizens had no problems with the lower income requirement in EU law and, as noted in the Austrian report, had no problems pursuing their career plans and job opportunities.

Pre-entry tests

Both the German and the Dutch reports give evidence of a significant and sudden drop in the number of visa applications after the pre-entry test was introduced. Breaking down the pass rates of the pre-entry test according to age, education level, nationality and gender, Dutch statistics make it obvious that this admission criterion hinders low educated family members more frequently from reuniting than middle or high educated. Since a reading test was added to the Dutch test in 2011, the gap in pass rates between the low and highly educated has reached a percentage of 23. Especially illiterates and migrants from countries with another alphabet fail the test more frequently. The differences are even greater if the self-selective effect of the changing composition of candidates is taken into account: since the level was raised, more candidates are high educated (from 27 to 37 per cent), and fewer are low educated (from 23 to 19 per cent). Furthermore, older applicants fail more often. Finally, nationals from certain countries (like Morocco and China) have more problems meeting the required level than others. Also in Germany, large differences emerge between the pass rates broken down by nationality. In 2009, of the applicants from Ghana only 38 per cent passed the test, from Macedonia 33 per cent, Kosovo 51 per cent, while 82 per cent of the candidates from the Russian Federation passed the test. These figures might imply that family members from more industrialized countries have better prospects. As so-called 'western' TCNs are exempted from the test in Germany and the Netherlands, they cannot be affected by the pre-entry test.

Several national and international evaluations of the German and Dutch pre-entry test come to the same conclusions as regards the effects on integration. Both the INTEC and the PROSINT studies conclude that that effect of the pre-entry test on integration is 'marginal' (Strik et al. 2012: 329) or 'modest at best' (Scholten et al. 2011: 86). One of the explanations is that the level of the test is insufficient to significantly contribute to language proficiency, but also that other factors play a role in integration, which is a long-term process. This also points to the difficulty of assessing the effectiveness of integration programmes. In this respect, the PROSINT study listed a number of other factors, besides language proficiency, impacting the labour market position: recognition of foreign qualifications, legal labour market barriers, economic situation, and discrimination (Lechner & Lutz 2011: 9). All of these factors were mentioned by our respondents as hindering their labour market position, in all of the Member States studied.

Respondents in our study were also critical of the effectiveness of the pre-entry test. Although nobody denied the importance of integration and language proficiency, it was questioned whether the pre-entry test actually contributed to it. Besides the low level of the test, respondents also thought it to be much more effective to learn the language inside the country.

Another reason is that in both countries, a significant part of the test participants did not participate in a course, due to the costs involved. As the before-mentioned studies indicate and our study confirms, the costs of the pre-entry test involve not only the test itself, but also costs of the course to be taken, travelling to the embassy, often more than once, and travelling and staying for weeks or months in a large city to take a course, which may even involve quitting a job or taking a leave of absence. These costs may add up to considerable amounts, up to several thousand euro, which the couple cannot devote to other things that could further integration, such as housing or education. Hence, the financial capital of the family was negatively affected.

Although the interviewed migrants in both the PROSINT and the INTEC studies and in both countries were positive about the need to learn the language, they were critical about the test and its selective effects. This finding was confirmed by our study. In general, the pre-entry test was criticized for its selective effect on certain groups: low income and education groups, illiterates, women, elderly people, people living in less developed countries and rural areas or war zones. Another important critique was that only certain nationalities had to take the pre-entry test and other nationalities did not. Also the lack of exemptions for e.g. illiterates and people with learning difficulties was mentioned.

Several specific problems were mentioned in the PROSINT and INTEC studies and in our study: the difficulty of people living in war zones in travelling to the embassy to take the test, the lack of available means, e.g. language courses or approved tests in the country of origin of the family member. An example from the British report of a British husband and his Honduran wife:

'The main issue was the English test. My wife's English is perfect but it's not academic. The only test you can do in the whole of central America is the TOFL test and at the time that was set at the B2 level instead of the A1 level. I was trying to make her take the A1 test in the Cayman Islands and we spent a lot of money on Visas etc. But then the place went bust. She took the TOFL test twice and failed it.'

Finally, the husband moved to Honduras to be with his wife.

In our study, the long period of separation of family members, as a consequence of the test was mentioned as a major problem. In this respect, the pre-entry test was seen as just another bureaucratic hurdle to take, one of many. The long-term separation led to emotional stress that, according to respondents, did not weigh up to the assumed integrating effects. In the British report, a woman described how her Yemeni national husband gave up a career as a headmaster in Yemen in order to move to Jordan to take an approved language course and test. As he could not find a job in Jordan, due to the economic downturn, he could not afford many English lessons. In addition, he was not in contact with English speakers on a daily basis. So, despite his good academic background, the interviewee's husband had failed his A1 language test twice and had been living in Jordan, without a job, for a year. This had had a detrimental impact on the couple, both financially and emotionally:

‘I’ve been supporting him, but I’m having babies soon, and it would be nice for him to be there to help me ... It’s been an absolute nightmare. Words can’t describe the emotion. I’ve been referred to a psychologist for prenatal stress. I’ve been hospitalised’.

Nevertheless, as with the income requirement, most couples managed to meet the pre-entry test requirement. Except for the selective sample of our respondents, with a relatively high level of education, this can be explained by the behavioural adjustments made by family migrants and sponsors to make sure that the test was passed successfully, indeed moving to the main city or a third country to take a course or the test, studying as well as having a full-time job, etc. The family migrant often relied on the sponsor to provide study materials, to pay for the course and other costs, and to offer language practice through telephone and Skype.

In the German part of the INTEC and PROSINT studies, emigration to another EU country was mentioned as a behavioural adjustment by stakeholders. We found some indications that this happened also in other countries. For example, a British male sponsor moved to Germany after difficulties in finding an approved language testing centre in Russia where his Russian wife could take the test. It was not a choice made easily:

‘After two years apart we have now decided that for me to relocate to Germany would be our best chance to be together and enjoy our remaining lives as a family. This of course plays well into the government’s hands and maybe forcing British citizens to move abroad is part of their plan to reduce the net migration.’

Age requirement

It is difficult to establish the effects on the number of applications in the countries that introduced a higher age requirement. As in the Netherlands, where the higher age requirement was introduced together with a higher income requirement in 2004, its effects are difficult to establish. A Dutch study established a small negative impact, due to small number of couples who did not meet the age requirement (WODC 2009a). In the other countries, the quantitative effects are not clear. In Austria, the number of applications for family reunification fell by one-sixth at the moment of introduction of the stricter age requirement, but the exact cause is hard to establish. In the UK, the introduction of the higher age requirement is at most only one of the factors contributing to the drop in the number of issued visas that had already started in 2006. As noted in chapter 4 and 5, the age requirement of 21 was struck down in 2011 and therefore no longer applies.

A British study provides insight into the opinions and expected consequences of the age requirement, as the study was conducted before the requirement was introduced. The study proved that the majority of stakeholders was against a higher age requirement, pointing to the adverse effects of young people being taken abroad to marry, entering the UK with false documentation, or health issues as a result of the denial of family reunification (Home Affairs Committee 2008).

The Dutch study somewhat nuances these expectations of British stakeholders. The Dutch researchers concluded that there was little evidence that this requirement strengthened the defensibility and autonomy of the young people involved. The first

reason – besides the difficulty to study this question in the first place – was that in most couples under study, the parents had had little influence on the choice of partner of the youngsters. Secondly, the partners choosing a partner from abroad acted autonomously, irrespective of age. The researchers also found that most couples did not marry at a young age and that parents did not want them to. Even without the pressure of an age requirement, they preferred their children to finish their studies (WODC 2009a).

The researchers found several forms of behavioural adjustments to the age requirement among couples that were affected because they had married below the required age. Most frequently, couples waited before applying for family reunification until the required age was reached. Other forms of adjustment, used in exceptional cases, were (prolongation of) illegal residence of the family migrant, emigrating to the country of origin of the family migrant, ending the relationship and age fraud (WODC 2009a: 130).

In our study, we found no significant problems with the age requirement. Whether the level was 18 or 21 years, the age requirement was not mentioned as an important hurdle. Most individual respondents were older than the required age.

In the Austrian country study, one group that was affected by the age requirement came up, that may have not been at the forefront of the minds of policymakers, namely Austrian citizen students. In this context, Austrian stakeholders pointed to early parenthood as a possible behavioural adjustment, resulting from the exception to the age requirement in case a child was born from the relationship.¹⁶⁷

Contrary to the age requirement for partners, the age requirement for children in Germany caused significant problems and may result in permanent separation of parents and children. This is the topic of the next paragraph.

6.5 Separation of Parents and Children

An issue that came up during the interviews in all Member States was the separation of parents and children. The family reunification requirements sometimes result in the long-term or even permanent separation of parents and children in several ways. In Ireland, lawyers reported the common refusals of residence to a non-Irish father of a citizen child, with the argument that the family could reside together outside Ireland. In the Netherlands, lawyers were concerned that, in the case of divorce, parents were separated from their children, because the immigration authorities considered this the normal state of affairs. Another issue in the Netherlands was the separation of refugee parents from their children, as a consequence of two separate requirements: the three-month period within which the favourable requirements for refugees apply, and the additional criteria on the effective family bond (see chapter 3).

¹⁶⁷ The behavioural adjustment of early parenthood has been found earlier in the Netherlands, where until 2004 a child below the age of five could be exempted from the income requirement (De Hart 2003).

In Germany, the criteria for children between 16 and 18 were so strict that family reunification became impossible in practice and parents and children were separated permanently. A final problem, mentioned in Germany as well as Portugal, was the condition that single parents provide proof of custody of the child or the agreement of the other parent to the migration of the child. This condition caused problems if there was no contact with the other parent or he or she could not be traced. Finally, in Germany there was a practice of not admitting TCN fathers who want to join their German child while the female sponsor in Germany was pregnant, although this had no legal basis. This prevented fathers from being present at the birth of their child.

If parents and children are involuntarily separated for years, this may cause stress for all family members and even negatively impact their relationship. In the Portuguese report, a Chinese mother, still waiting to reunite with her child, commented on how the wait had become a burden in her life:

‘My daughter should live with us – no family should be torn apart at any circumstance, she was even born here (and then went to China). We cannot wait anymore.’

In the Irish country report, a father reflected on how his children’s social life had suffered while he was separated from the family:

‘Other daddies will be taking their children out. There’s no daddy for them to take them out to give them that fatherly guidance. That’s impacted much on them, especially on the second child [who was then 6 years]. I used to coach them or help them with their homework. Teach them other things [...] to help them in school. Used to take them to school and bring them back. I used to bring them to all those [cultural sites showing them] Madonnas and other things. Nobody was doing it for them anymore.’

In the time of his absence, his wife, besides having to manage two businesses on her own, was also left to rear the children as a ‘single mother’. He further exemplifies how the overall well-being of one of his sons had particularly improved since his father’s return:

‘I have not got any bad reports on [my son] since I came back. Even the teachers are telling me that he has improved since I came back. Because every time he was in class, when he withdrew from other people, they’d be asking me: “What is the problem?” and I was telling them: “He needs his daddy”. Since I’m back he has improved; has no more problems.’

Another father described a conversation with his daughter illustrating his emotional turmoil:

‘I was even feeling guilty like I abandoned them. I remember, my first daughter, one day we were talking on the phone and she said: “Dad. Why don’t we come over there? You always tell us you love us but why don’t we come over there? You know there is a war here!” She’s very, very intelligent. And she was challenging me like that. And you can’t imagine when the conversation is over, what happened in my head and in my heart.’

This emotional impact is especially strong when refugee parents are separated from their children. In the Dutch country report, a Burundian refugee woman whose family reunification process with her five children took more than four years stated:

'I came as a young and healthy women and now I am a wreck.'

These examples put into perspective the findings of earlier research on the continuing transnational bonds of migrant families (e.g. Baldassar 2007; Gardner & Grillo 2002; Mason 2004; Di Leonardo 1987), which may be not the result of choice or life designs, but involuntary, as it is immigration laws that create the need for and prolong family separation (Fresnoza-Flot 2009; Dreby 2010).

6.6 Permanent Residence and Integration

Inland integration requirement

As became clear in chapter 2, four of the six countries in this study have an inland integration requirement: Austria, Germany, the Netherlands and the United Kingdom. Experiences with the inland integration requirement have been studied earlier (Strik et al. 2012 and Lechner & Lutz 2011).

These studies show that the inland integration requirement has to some extent a similar effect as the pre-entry test, in selecting the candidates based on factors such as age, gender and education. Statistical evidence indicates that female candidates, older migrants and nationals from certain countries are affected the most. Pass rates broken down by age and sex available in the Netherlands demonstrate that until mid-2010, female candidates performed slightly worse, as 76 per cent passed the test as against 83 per cent of the male candidates. Young candidates up to 25 passed the test much more frequently (85 per cent) than migrants aged 56 and older (60 per cent).

Pass rates broken down by nationalities are available for the Netherlands and the UK. From the larger migrant groups in the Netherlands that are obliged to take the test, Turkish nationals had the lowest pass rate (63 per cent), followed by Chinese (73 per cent) and Moroccans (74 per cent). Amongst the highest percentage were nationals from the former Soviet Union (90 per cent) and former Yugoslavia (85 per cent). Since September 2011, the worst performing group, the Turkish nationals, are no longer obliged to take the test. In the UK, candidates originating from an English speaking country produced much better test results (86 per cent), compared to nationals from a non-English speaking country (70 per cent). Still, as also within the well performing group a distinction could be made between western countries (97 per cent) and the Caribbean (70 per cent), it seems that candidates from more developed countries have fewer problems in meeting the criteria than those from less developed countries. Within the group of nationals from non-English speaking countries, a distinction between the less and more developed countries occurred: 95 per cent of the nationals from Singapore and Japan passed the test, whereas this percentage of many other Asian nationals was below 50 per cent.

Statistics also indicate the consequences for refugees. In the United Kingdom, a substantial part of the holders of a permit on humanitarian grounds did not manage

to pass the test. Most of them had fled war situations: Sri Lanka, Kosovo, Afghanistan and Iraq. In the Netherlands, a similar effect is visible with regard to Somali and Ethiopians.

These effects on the distinctive groups appear in all Member States with integration requirements. In Germany, a longitudinal study showed that participants in an integration course have a better chance to make progress if they are young, highly educated and not born in Turkey, the former Soviet Union or South or East Asia.¹⁶⁸

These selective effects also show themselves in the access to permanent residence. The Dutch statistics demonstrate that the number of permits issued for permanent residence decreased following the introduction of the integration requirement in January 2010, from 17,520 in 2009 to 10,520 in 2012. The number of permanent residence permits granted to Moroccan migrants, dropped by two-thirds.¹⁶⁹

Nevertheless, the earlier studies on the inland integration requirement are somewhat more positive about its integrating effects than about pre-entry tests. For example, the PROSINT study concludes that inland integration requirements have an independent positive effect on the language proficiency of migrants. However, it also concludes that language proficiency is not the only factor contributing to the position in the labour market (Lechner & Lutz 2011: 44). Migrants, on the whole, seem positive about the inland integration requirement, even if this is obligatory (Strik et al. 2012). Nevertheless, language teachers doubted that the low level would contribute to integration, although some migrants found that it did (Strik et al. 2012: 354).

These findings are largely confirmed by our study. All respondents stressed the importance of integration and for the countries that have an inland integration test or obligation to take a course, the opinions about them were much more positive than for the pre-entry test. Nevertheless, some difficulties were mentioned. First of all, there was the difficulty of combining work obligations with the obligation to integrate. In the United Kingdom, it was mentioned that people sometimes had to quit their job to take a course. It was also noted that the combined obligations of the income requirement and integration requirement could work against each other: to fulfil the income requirement one needed a full-time job, but with a full-time job it was difficult to live up to integration obligations.

A second problem was related to the connection of the integration requirement and residence rights. This was thought to hinder language acquisition and integration into the labour market, since an insecure residence status might hinder job opportunities. This might have a negative impact on the effectiveness of the integration requirement.

Independent and permanent residence

Obtaining an independent or permanent residence status was mentioned as a problem in all countries except Portugal, because it has become more difficult to obtain such a status in recent years (see chapter 2).

168 N. Rother (2009), Working Paper 23, *Das Integrationspanel, Entwicklung von alltagsrelevanten Sprachfertigkeiten und Sprachkompetenzen der Integrationskursteilnehmer während des Kurses*, www.bamf.de.

169 Number of granted permanent residence permits 2009-September 2011, with reference to nationality, gender and age. Source: IND.

Continued legal insecurity and dependence may hinder integration and emancipation. The behavioural adjustments to the income requirement at the moment of first admittance, as described above, will continue as long as residence is not secure and the income requirement can lead to refusal of renewal or withdrawal of the residence permit. As a result, the income requirement may hamper the labour market position and financial capital of the family for a number of years.

Insecure residence hinders emancipation of female family migrants, because choices made in the relationship and tensions within families may have consequences for the residence status. But as has been noted elsewhere, and was confirmed in our study, a residence status dependent on the relationship not only has consequences for female family migrants, but also for male family migrants and for the sponsors (Strasser et al. 2009; Van Walsum 2000; De Hart 2003). The literature has noted how the dependent status of male migrants may result in a reversal of gender roles and tensions within families as a result (Refsing 1998). Stakeholders in our study noted that male family migrants may be dependent and vulnerable after divorce, if there are children from the relationship, and with custody and access rights, their residence is at stake. In the German country report, a German female sponsor related how the dependent residence status invoked uncertainty in her husband, who feared that he would not acquire equal father's rights for their child of the marriage.

Sponsors, on the other hand, may feel responsible and not act freely within their relationship, because of the consequences it may have for the family migrant. As it becomes harder to obtain independent or permanent residence status, it becomes more difficult for couples and families to reach some form of equality of gender relations within their relationship. Hence, although equal gender relations are a major topic and an often mentioned goal of family reunification policies, it is these family reunification policies that cause inequalities within families. As an Austrian sponsor related about the prolongation of her husband's residence permit:

'And because of all these requirements, there simply are barriers always present in your mind. And I really can observe, in the weeks before we prolong his residence title, we get increasingly tensed and for instance quarrel more. It really has some psychological impact, also in terms of: How do I organize my relationship? Due to this extreme dependency, which is not solely economic [...], but also simply caused by the fact that his residence title is tied to mine. [...] I take up responsibilities differently than I was used to in other relationships.'

6.7 Lives on Hold and Sense of Belonging

In several country reports, the consequences of long application procedures with insecure outcomes were vividly described. During application procedures, migrants and their family members cannot build their family relationship and build their life as long as they have to wait for the outcome of the procedure and the admittance of the family member. Waiting during the procedure means they are oriented towards the future, the present becomes secondary to the future. The present loses meaning, élan, creativity and vitality that is transposed to the future. Applicants are waiting for a decision, for security of residence and security of existence (De Hart 2003). Many

individual respondents described the period that they had to wait for admittance of the family member as a period that their lives were on hold, void of sense, and paralyzing. It is difficult to make plans for the future (buying a house, starting an education) if one is not sure whether it will be possible to be together and build a life together. These effects are stronger as the procedure takes longer. Especially if the long procedure separated parents and children, this caused a lot of stress and anxiety.

Emotional stress as a consequence of long procedures, separation, insecurity of outcome and unclear conditions, were mentioned in all country reports. This confirms earlier research that mentioned signs of stress (De Hart 2003; Van Walsum 2000; Strasser et al. 2009; WODC 2009a). Prolonged stress sometimes resulted in serious health issues, such as depression or miscarriage. Stress may again make it difficult to focus on building a life and making plans for the future, or even to work.

The stricter requirements for a secure residence permit may in a similar way hinder couples from developing long-term projects. Legal insecurity may negatively affect job opportunities, because employers may hesitate to hire an employee whose residence is not secured. It may affect families' housing arrangements, because it is more difficult to buy a house if residence is not secured. As was noted in the countries with the strictest requirements, permanent immigrants may be hindered from ever obtaining a permanent residence status (or, as in Ireland, where a permanent status does not exist in the same way as in other Member States). Naturalization offers no realistic alternative, since this has also become more difficult in these countries.¹⁷⁰

While Leerkes and Kulu-Glasgow indicated that capital may inform how applicants deal with requirements, we found that the requirements may negatively impact financial and other forms of capital. First, the growing financial costs involved with every step in the procedure until residence is finally secured can negatively impact financial capital and as a result integration, as the family cannot spend the money on other things, such as housing, education or simply social contacts and participating in society. Hence, the lack of financial capital may impact social capital. As one individual interviewed in the UK explained:

'It was a huge financial commitment ... we have spent so much money to be here. You have no idea. It's unbelievable ... I'm almost integrated but not yet because I don't have [enough] money or a stable income. That makes me stay at home a lot. I don't go out and socialise because I don't want to spend money.'

Second, behavioural adjustments, such as emigration, may have a negative impact on forms of social capital and, as a result, integration. A Dutch respondent, who had difficulties meeting the various requirements, observed that using his mobility rights to move to Germany with his Chinese wife meant that he had to leave his family, neighbourhood, and large social network behind. When the family returned to the

170 This goes for Germany, Austria, the Netherlands. See: Van Oers et al. (2010). For Irish naturalization policies, see John Handoll, *EUDO Citizenship Observatory Country Report: Ireland*, available at <http://eudo-citizenship.eu/docs/CountryReports/Ireland.pdf>.

Netherlands after a couple of years, this social capital was lost and could not be used for integrating the family. If the family had emigrated to China, his Dutch children could have entered the Netherlands at a later age, but then with a large backlog regarding their integration. Third, those with the weakest capital bear the largest costs, financially and otherwise, which further deteriorates their access to financial, social and other forms of capital. Instead of more, they seem to get less access to the capital needed for integration.

A final consequence that we want to point out is that negative experiences with family reunification policies and immigration authorities may have an impact on the sense of belonging, which is vital to integration. Yuval-Davis has described a sense of belonging as emotional connection to the country of residence, a sense of being at home, safe and secure. (Yuval-Davis 2006: 197). Earlier studies have indicated that sponsors felt ashamed of the country they were denizens or citizens of, felt that their family members were unwelcome, felt different from fellow citizens in this respect (Van Walsum 2000; De Hart 2003) and had difficulty sharing experiences with fellow citizens. Especially for citizen sponsors, it was often their first and unexpected acquaintance with immigration laws and their impact, which resulted in feelings of alienation from their own society (De Hart 2003). We have some indications in the interviews of this negative impact on the sense of belonging, as a consequence of immigration procedures. As expressed by a Dutch sponsor, looking back at a long and complicated procedure to bring his wife over:

‘I have the feeling that I do not want to be in the Netherlands anymore, I do not want to live here anymore.’

Another Dutch sponsor, born in the Netherlands, with Dutch citizenship, of Turkish descent said that her partner did not feel welcome in the Netherlands, but also that she herself did not feel welcome any longer. In this manner, requirements that have the aim of integrating migrants and their sponsors may have the opposite effect.

6.8 Conclusion

Our discussion on the impact of family reunification policies is that there is no evidence that restrictive measures have the integrating effects at which they were aimed. On the other hand, there are clear indications of unintended effects of these measures that may hinder integration: the behavioural adjustments that people develop in order to meet the requirements may hinder rather than further their integration, long and complicated procedures lead to delaying family reunification, stress and feelings of lives being on hold and lesser feelings of belonging. Although it is not clear that family reunification policies are the only factor in the integration of family migrants – and migrants may integrate against all odds, even as undocumented migrants – it is clear that restrictive family reunification policies do not contribute to integration.

Also clear is the selective effect of the income requirement, pre-entry test and age requirement, on the basis of gender, education, nationality, ethnicity and age. The requirements are more difficult for women, low-educated people, certain nationalities

and ethnic groups and elderly people to meet. It is relevant to point out that selection often takes place not on the basis of only one of these factors, but on a combination: being a migrant and a woman. To acquire an inadequate insight into the effects of the main requirements, future studies should take this intersection into account.

As we have seen in chapter 4, it is especially these selective effects that are at the core of the critical evaluation by international organizations, NGOs and other stakeholders. The development of evidence-based family reunification and integration policies requires looking at its unintended consequences and selective effects.

Chapter 7

Conclusions

In the IFCAP project, we have tried to answer the question to what extent certain family reunification policies hinder or promote reunification with TCN family members, and also their integration. Our findings show that throughout most of the Member States, family reunification policies have changed rapidly during the last ten years. Although some of the changes have implied liberalization, most of them have narrowed down the right to family reunification for TCNs and own nationals with TCN family members. The main restrictions concern strengthened income requirements, introduced pre-entry tests, raised or introduced age-limits and procedural and financial thresholds, for instance with regard to fees and visas. At the same time, we have seen that during this period the number of applications and granted permits for family reunification have dropped dramatically. Although other factors (like the economic situation or the upward trend of TCN sponsors preferring a –TCN– spouse already residing in the Member State), can partly explain the decrease, it is more than likely that the largest part of the drop relates to the restrictive measures introduced in the last decade. As the latest restrictions have only been introduced quite recently, this downward trend is expected to continue. The British Migration Advisory Committee, for instance, foresees that 45 per cent of applications are going to be refused as a result of the increase in the required income level from July 2012.

Different groups

These developments, however, are not applicable to all groups. As a result of the case law on the family reunification rules for Union citizens exercising their mobility rights, the rights of Union citizens and their family members have been strengthened. Furthermore, the CJEU has granted more legal protection to Turkish nationals and their family members, based on the Association Treaty with Turkey. Thus, the liberalizing trend towards these groups does not derive from political preferences, but from the obligation to comply with Union law. Highly skilled workers and their family members have gained a more privileged position, due to the Blue Card Directive, as well as to their attractiveness to national labour markets. As the latter form the only category of explicitly wanted migrants, their example shows that governments are aware that the conditions on family reunification can deter or further reunification.

The restrictive trend for TCNs and own nationals on the one hand, and the parallel liberalization towards Union citizens on the other hand, has further widened the gap in the right to family reunification between these two categories. This result contradicts the aim the European leaders formulated at their Tampere Conference in 1999, to approximate the legal position of Union citizens and TCNs by strengthening the legal rights of the latter. At this meeting, the Member States acknowledged that strong legal rights for TCNs, including the right to family reunification, promoted their integration into the societies of the Member States. Nevertheless, the Family Reunification Directive, adopted with precisely this objective, has mainly been used by

Member States to justify new restrictions, by applying optional clauses in order to weaken the right to family reunification. This development reveals a reversal in the attitude towards family reunification, from perceiving it as a chance to integrate migrants to a threat to social cohesion and integration. The analysis of the political debates, elaborated in chapter 4, demonstrates large similarities in the arguments Member States use to justify their restrictions: these are, apart from promoting integration, protecting the national economy and preventing fraud. Member States mainly learn from other national policies by copying them, at least as far as they imply restrictions. This learning process seems to be furthered by the Family Reunification Directive, as the negotiations on the directive and meetings on its implementation have increased the number of occasions to exchange information. Hence, the search for possibilities to reduce the number of family migrants within the limits of the directive has a harmonizing effect, albeit not in the upward sense that the directive was initially meant to create.

This brings us to the question of to what extent Member States still support the official arguments for the establishment of an EU right to family reunification and to a long term-residence status. Interestingly, the CJEU has taken this objective seriously, as it is part of the instruments with which Member States now have to comply. The way in which the court seeks a coherent interpretation of the provisions of the directive, in line with case law on the free movement rules, results in a certain level of approximation. Judgments, therefore, limit the sovereignty of the Member States to further weaken and force them to strengthen the right to family reunification. In this sense, the Family Reunification Directive has created a bottom, preventing further downward harmonization.

The protection of TCNs at the EU level places own nationals in a more isolated position, as the only group that solely falls within the scope of Article 8 ECHR and national law. During the last ten years, their position has been weakened by the loss of their privileged position, sometimes even with the argument of equal treatment with TCNs. With the Europeanization of the right to family reunification of TCNs, own nationals now lag behind. While in 2000 the Commission proposed to equalize their right to family reunification with the right of Union citizens with mobility rights, the political will to strengthen their position seems to have faded away. Member States show a reluctance to bring own nationals within the scope of Union law. The tendency to minimize the application of certain granted rights creates more and more different categories, leading to a further fragmentation of the family reunification rights in the European Union. Furthermore, Member States seem reluctant to respect the rights of Union Citizens with TCN family members.

Different Member States

Although the different treatment of these groups mentioned above shows large similarities, the Member States studied can be classified into three groups. First, Austria, Germany and the Netherlands have in common that they were the ones who started to restrict the right to family reunification for TCNs and who actively negotiated in order to be allowed to do so by the directive. The Portuguese government takes the unique position in that it perceives family reunification as beneficial to integration, and takes measures in order to enable TCNs to bring their families. The Portuguese

are treated equally with Union citizens exercising their mobility right. Ireland and the United Kingdom are not bound by the Family Reunification Directive, with the result that they apply the highest income requirement and that Ireland lacks a statutory right to family reunification for TCNs. The wide discretion of the Irish authorities creates insecurity and lack of transparency, and carries the risk of arbitrary decisions which migrants cannot challenge properly.

Practice

In all Member States, however, not only legislation determines the extent to which migrants can exercise a right to family reunification. The way requirements are applied or assessed and procedures are organized are equally important for their possibilities to bring their families. We learned that the attitude of immigration authorities or the (lack of) cooperation between agencies frequently cause delays, which seem to be unnecessary, and limited transparency. National incentives to guarantee speedy, transparent or impartial decision making, like the Dutch example of fines for immigration authorities if a decision is not taken in a timely manner, could be further investigated and promoted. Our study of the practice can contribute to the interpretative guidelines the Commission is going to formulate for applying the Family Reunification Directive.

Furthermore, Member States have intensified their assessments of the applications, focusing on the verification of family members' identity or relationship or the genuineness of the marriage or partnership. Again, these methods, applied on the basis of a wide range of indicative criteria, cause delays, and also frustration amongst the applicants. These methods seem to be a response by governments who first established a strong right to family reunification, followed by the realization and regret that they had lost sovereignty in this field. Verification, however, still falls within their scope of competence. In the interviews, it emerged that many applicants feel treated with suspicion. Own nationals using the EU route are treated as abusers of mobility rights; Union citizens and own nationals with a TCN spouse feel discriminated against as bi-national couples are targeted in the combat of fraud; nationals of 'non-western' countries feel discriminated against because they are faced with extra authentication procedures and with more requirements, like the pre-entry test.

Selection

Certain groups not only feel more affected than others, statistics clearly show that the admission rules actually lead to selective effects. In chapter 6, we investigated that the most vulnerable groups have the most difficulty reuniting with their family: older, illiterate or low educated family members, nationals from certain countries and female sponsors. The income requirement and the pre-entry test are the main obstacles for them. Thus, although the conditions are formulated neutrally, their impact is not neutral. This is not taken into account in the making of the policy, for instance by impact assessments, but selective effects shown in evaluations are no incentive for governments to adjust their policy. This makes one wonder whether these selective effects are intended. At least, politicians and policy makers seem to respond indifferently to these results.

Previous research demonstrated that migrants have developed five strategies in response to the difficulties mentioned: they give up and remain living separately, they reunite in the country of the family member, they come and live irregularly in the Member State, they keep on trying to meet the requirements at any cost, or – if they are own nationals – they move to another Member State in order to apply their mobility rights. In all situations, the rules create long-term separation, make reunification costly, frustrate people and further tensions between the spouses and families.

We found evidence for the last two strategies, which we have described as behavioural adjustments in chapter 6. With regard to the first three strategies, we were not able to collect reliable information, as the respondents we spoke to had finally met the requirements or had succeeded in exercising mobility rights. We think that more research should be done to find out about these strategies and their effects. The ones who met the requirements had given up things that could have offered them better prospects, like a good education or new job opportunities. Own nationals who moved to another Member State, gave up their social network and stable living circumstances. In both situations, the conditions for a smooth integration of the family after admission deteriorated.

On hold

These obstacles not only occur at the moment of admission. As in most Member States, the residence right of the family member depends on meeting the admission conditions, sponsors and family members keep on adjusting their lives in order to secure their family life. To secure their family life, sponsors are stuck in an employment situation, regardless of whether it's the best choice to do so, and family members have to meet integration requirements in time. As it has become more difficult to acquire independent or permanent residence rights (in the Netherlands the number of permanent permits granted has substantially decreased since this is dependent on meeting an integration requirement), their insecurity remains for a longer period of time. Respondents often described their lives during the application procedure as being on hold. But as the admission requirements are more frequently also applied after admission, this frozen situation is maintained for years. This effect contrasts with the situation of Union citizens: as the policy on this group is designed not to create any obstacle to free movement, Union citizens are more free to make choices in life. Their rights are adjusted to these choices, whereas TCNs and own nationals have to adjust their choices to their rights.

Integration

An important question for this project was to what extent the family reunification rules promoted or hindered the integration of sponsors and their families. The evidence is that the response to this question is very difficult to measure, as the integration process takes a long time and is determined by many factors, like the economic situation in the host country, the absence or existence of discrimination, especially within the labour market, more general policies like education, and the personal background of the people concerned. However, we are able to conclude that the restrictive measures on the admission and residence of family members have not furthered integration and in many cases may have actually impeded it. Being excluded means, in

any case, that integration is not promoted. Delay in the process means that the family members live separately, and thus, focus on the process and not on the host society. Children are badly affected by the delay, because they miss at least one parent and their language learning and integration process are delayed. These conclusions contrast with the objective of integration, formally used by governments to introduce restrictive admission rules.

Future

On the basis of our findings, we would recommend that further research is undertaken on the ‘dark numbers’ and the effects for family members who are excluded by the family reunification rules. As it emerges that the national policies, copied by other Member States, lead to exclusion and obstacles to integration, the policies should be evaluated more precisely. Alternatives for measures safeguarding inclusion and integration should be studied.

Our conclusions more or less confirm previous research conducted in similar contexts, like the INTEC and PROSINT projects. Those research projects also have in common that they are small-scaled and were conducted within a relatively short timeframe. Any future and similar studies will not extend the conclusions on the research in this area much further. We would, therefore, recommend that future research should be conducted on a larger scale and over longer periods. Our study clearly shows that certain conditions on family reunification affect some groups more than others. This should be taken into account while conducting further research. All the studies also have in common that they have faced huge difficulties in conducting statistical research. Yet a precise examination of the effects cannot be undertaken without proper and reliable data.

We would, therefore, suggest that statistical registration on family reunification is harmonized at the European level. The IFCAP, INTEC and PROSINT projects form a useful basis for a study on what kind of data would have to be collected and differentiated for which groups, in order to find more accurate answers. This will not only contribute to further research, but will also facilitate a public and political debate on family reunification policies, including their aims and their effects.

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List of Abbreviations

ABrvS	Administrative Law Division of the Dutch Council of State (Afdeling bestuursrechtspraak Raad van State)
BVerwG	Federal Administrative Court of Germany (Bundesverwaltungsgericht)
CJEU	Court of Justice of the European Union
CRvB	The Central Council of Appeal (Centrale Raad van Beroep)
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
OVG	German Administrative Court of Appeals (Oberverwaltungsgericht)
TCN	Third Country National
VerwG	Administrative Court Germany (Verwaltungsgericht)
VfGH	Austrian Constitutional Court (Verfassungsgerichtshof)
VfSlg	Collection of decisions of the Austrian Constitutional Court (Sammlung der Entscheidungen des Verfassungsgerichtshofes)
VwGH	Austrian Administrative Court (Verwaltungsgerichtshof)

This publication presents the outcome of a comparative study on family reunification policies in six EU Member States: Austria, Germany, Ireland, the Netherlands, Portugal and the United Kingdom. The study examined the way in which family reunification policies have developed over the past decade and the positions governments have adopted regarding four main requirements: income, pre-entry test, age and housing. Furthermore, the study analyses the application of these requirements in practice and how their application is perceived by the family members. Based on statistics and interviews, the authors draw conclusions on the impact of the applicable requirements on migrants and their family members in the Member States included in this study. Considering the recognition at EU level that family reunification is regarded as beneficial to the integration of migrants, this study seeks to clarify whether or not national policies serve to promote or hinder family reunification and contribute to the integration of migrants and their family members.



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