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## **NO FAMILY TORN APART**

Challenges refugees face securing family reunification in the Netherlands and recommendations for improvements

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# LIST OF ABBREVIATIONS

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<b>ABRvS</b>	<i>Afdeling bestuursrechtspraak van de Raad van State</i> (Administrative Law Division of the Council of State, the Netherlands)	<b>IND</b>	Immigration and Naturalization Service ( <i>Immigratie- en Naturalisatiedienst</i> )
<b>ACVZ</b>	Advisory Committee on Migration Affairs ( <i>Adviescommissie voor vreemdelingenzaken</i> )	<b>IOM</b>	International Organization for Migration
<b>APD (recast)</b>	Asylum Procedures Directive: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)	<b>LGBTI</b>	Lesbian, gay, bisexual, transgender and intersex
<b>CEAS</b>	Common European Asylum System	<b>MVV</b>	Regular provisional residence permit ( <i>Machtiging tot voorlopig verblijf</i> )
<b>CJEU</b>	Court of Justice of the European Union	<b>NGO</b>	Non-governmental organization
<b>COI</b>	Country of origin information	<b>NRO</b>	Netherlands Representative Office
<b>CRC</b>	Convention on the Rights of the Child	<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>EASO</b>	European Asylum Support Office	<b>QD (recast)</b>	Qualification Directive: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
<b>ECHR</b>	European Convention of Human Rights	<b>RvS</b>	Raad van State (Council of State, the highest general administrative court in the Netherlands)
<b>ECLI</b>	European Case Law identifier	<b>Stcrt</b>	<i>Staatscourant</i> (State Gazette)
<b>ECRE</b>	European Council on Refugees and Exiles	<b>UN</b>	United Nations
<b>ECSR</b>	European Committee of Social Rights (Council of Europe)	<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>ECTHR</b>	European Court of Human Rights	<b>UNGA</b>	United Nations General Assembly
<b>EEA</b>	European Economic Area	<b>UNTS</b>	United Nations Treaty Series
<b>EMN</b>	European Migration Network	<b>USD</b>	United States dollars
<b>EU</b>	European Union	<b>VWN</b>	Dutch Council for Refugees ( <i>VluchtelingenWerk Nederland</i> )
<b>FRD</b>	Family Reunification Directive: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification		
<b>fte</b>	full-time equivalent (employees)		
<b>HRC</b>	Human Rights Committee		
<b>ICRC</b>	International Committee of the Red Cross		

# EXECUTIVE SUMMARY

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This study examines the situation of refugees in the Netherlands who are seeking to reunite with their families. Set against the wider context of increased applications for asylum in the European Union (EU) in 2015-16 and increases in the numbers of people seeking to reunify with those granted international protection, it outlines the applicable international and European Union standards regarding the right to family life, family unity and family reunification.

The study provides an overview of the family reunification procedure in the Netherlands and how the process is implemented in practice. The **central question** of the study is:

- ❓ *Which legal and practical aspects in the family reunification procedure in the Netherlands present challenges for refugee families in practice and how can the situation be improved?*

The Office of the United Nations High Commissioner for Refugees (UNHCR) undertook the research in cooperation with the Centre for Migration Law of the Radboud University Nijmegen. The **methodology** involved 33 interviews and consultations with officials from the Immigration and Naturalization Service (IND), the Ministry of Foreign Affairs and the Directorate General for Migration; experts; lawyers; immigration officers; Dutch embassy personnel; staff and volunteers at the Dutch Council for Refugees (VWN) and other NGOs; UNHCR officers; and refugees and family members. The consultations identified a number of case studies, which illustrate some of the problems refugees and their families may encounter. Desk-based research identified relevant reports and jurisprudence of national, European and international courts.

In general, UNHCR considers the Netherlands' family reunification policy to be one of the more flexible and generous in the EU, including as a result of a number of recent positive policy changes. The study nevertheless identifies certain challenges faced by refugees and their families and by the Dutch authorities that impede the swiftness, efficiency and fairness of the procedure. UNHCR therefore makes a number of recommendations to address them in the study.

Key issues identified below in the course of the research, together with UNHCR's related recommendations, follow the structure of the report and are as follows:

- ➡ **Family membership and the substantiation of family links**
- ➡ **Family definition and dependent family members**

With regard to the **family definition**, the research identified certain positive Dutch policies that go beyond the requirements of the 2003 Family Reunification Directive (FRD) of the European Union (EU). For instance, young adult children (18-25 years) of a refugee sponsor can join their parent(s) under the more favourable terms of the asylum family reunification procedure, if they were still part of the household at the time of the parent's entry to the Netherlands. There is also the possibility for a dependent parent of an adult refugee and both minor siblings and adult siblings of an unaccompanied refugee child to reunify, although they would need to apply for family reunification under the regular reunification procedure on the basis of Article 8 of the European Convention on Human Rights (ECHR).

It also shows that legislation and policy in practice prevent certain dependent family members from reuniting with refugees in the Netherlands. One reason for this is because applications to reunify with family members who are not part of the nuclear or close family must be made under the procedure that exists to ensure the Netherlands complies with its obligation to respect the right to family life under Article 8 ECHR. In Dutch policy, this requires "more than normal emotional ties" to be proven, which in practice requires a high level of **dependency** to be substantiated. Based on the case studies undertaken for the report, applicants must evidence *exclusive* dependency, i.e. no (medical) care is available or



accessible for the parent abroad, the parent cannot live without (medical) care, and no one except the refugee can care for him/her. In addition, applications considered on the basis of Article 8 ECHR must, in principle, meet more stringent requirements. According to respondents, applications where dependency must be substantiated are seldom successful.

Cases examined for the study indicated that decision-making needs to take greater account of the vulnerability of family members of refugees, whether this relates to disability, gender or other factors, and the impact of conflict and displacement on families and potential resulting dependency. They also identified decisions where the reasoning appeared to further define IND policies and/or go beyond the provisions of the FRD. At the same time, the study also identified cases where young adults applied to reunify with a parent on Article 8 ECHR grounds, which the IND approved on the basis that they were still vulnerable as young adults.

## RECOMMENDATIONS

### FAMILY DEFINITION AND FAMILY MEMBERS

In order to promote a “comprehensive reunification of the family”, as called for by Member States of UNHCR’s Executive Committee, and to take into account the specific situation of, and challenges facing refugee families:

1. UNHCR recommends that the Dutch government apply liberal criteria in identifying family members of refugees so as to promote the comprehensive reunification of families, including with extended family members when dependency is shown to exist, such as unmarried minor children who due to circumstances, namely the flight of their parent(s), were forced to live independently and self-sufficiently, or who take care of a child born out of wedlock, as well as elderly parents without other family support, adult children and siblings. Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. The concept of dependent should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.
2. In particular, UNHCR recommends that the IND take greater account of the vulnerability of family members of refugees, whether this is a result of their experience of persecution, conflict or flight or relates to age, gender, disability or other factors.
3. UNHCR is concerned that the Dutch government applies a very restrictive interpretation of the concept of dependency and requires a very high level of dependency. UNHCR recommends the adoption of guidelines on the concept of dependency consistent with international and European standards defining clearly what is understood as dependency in relation to a refugee for the purposes of family reunification.

## Unaccompanied child refugees

Unaccompanied child refugees are another group of concern. They are entitled to reunify with their parents, minor siblings, young adult siblings, as well as unmarried dependent adult siblings. An unaccompanied refugee child can apply to be reunited with his/her parent(s) under the preferential terms of the asylum family reunification procedure, if he/she applies to do so within three months of receiving his/her residence permit. Reunification with minor siblings and young adult siblings, as well as unmarried dependent adult siblings must, however, be made under the regular family reunification procedure on Article 8 ECHR grounds. In practice, their application is assessed in conjunction with an asylum family reunification application for the parents. Unmarried dependent adult siblings are required to show that “more than normal emotional ties” exist.

The study nevertheless identified concerns where an unaccompanied child refugee has no parents or they cannot be traced. Policy is not clear on whether they can be reunited with their **legal guardian or other members of the family** in such cases, although this is permitted under Article 10(3)(b) of the FRD and provided it is in keeping with the principle of the best interests of the child. In addition, an unaccompanied child refugee who has no parents or whose parents cannot be traced can in principle reunify with his/her **minor siblings, young adult siblings, and unmarried adult siblings**. In practice, however, they cannot, as “more than normal emotional ties” are very rarely considered to be met in such cases.

There is potentially also a concern, although the study did not come across such an example, if an unaccompanied child refugee in the Netherlands is unable to apply for reunification with his/her parent(s) before the three-month deadline. If there are no justified reasons to still consider the late application, the child could then only seek reunification with his/her parents under the regular reunification procedure, for which the child would then need to show sufficient financial means. In practice, if such an application is rejected this would lead automatically to an assessment whether family life on Article 8 ECHR grounds existed, a process which would also need to consider the child’s vulnerability and his/her best interests. According to the IND, in such cases, the income requirement would not be applied and it is very likely that such an application would be granted.



With regard to **unaccompanied children who reach the age of 18 during the asylum procedure**, the April 2018 judgment of the Court of Justice of the European Union (CJEU) in *A. and S.* clarified that such persons are to be considered as minors for the purposes of the FRD and that they therefore retain their right to family reunification with their parents. As a result, the IND now considers the person to be a minor for three months after the grant of international protection, this means that the family reunification application must be submitted within three months for this to be accepted. A rigid application of this deadline, however, may lead to refusal of the family reunification application and may not sufficiently take into account the specific needs of those young adult refugees.

## RECOMMENDATIONS:

### UNACCOMPANIED CHILD REFUGEES

Given the requirement to ensure the best interests of the child are a primary consideration and the importance of family reunification in facilitating the transition of child refugees to adulthood:

#### 4.

UNHCR recommends that the Dutch government clarify its policy regarding the right of an unaccompanied refugee child to reunify with “his/her legal guardian or any other dependent member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced”, as provided for in Article 10(3)(b) of the FRD.

#### 5.

In this context, UNHCR also recommends that this clarification of policy refers specifically to the right of an unaccompanied refugee child to reunite with his/her legal guardian and/or any other dependent member of the family, notably siblings (whether adult or minor), in light of the Netherlands’ obligations under Article 10(3) (b) of the FRD and the principle of the best interests of the child, thereby ensuring that vulnerability of the child is not exacerbated and separation of families not perpetuated.

#### 6.

UNHCR recommends that the IND process asylum applications lodged by unaccompanied minor children expeditiously, so that they can request family reunification, if granted international protection, as early as possible after entry. This would enable the Netherlands to uphold its obligations to ensure that the child’s best interests are a primary consideration and to deal with applications for family reunification involving children “in a positive, humane and expeditious manner”.

### Requirement to prove/substantiate family links

The Dutch family reunification procedure requires the sponsor to prove/substantiate both the identity of family members and that “**factual family ties**” exist and have not been broken. The refugee sponsor and his/her family members must provide (original) official documents to do so and, failing that, a plausible explanation showing that the absence of such documents cannot be attributed to them. Since November 2017, family ties can also be proven if this explanation is not accepted or provided, but sufficient “non-official (indicative) documents” are submitted. If the applicant is unable to provide official documents, but has a valid explanation as to why this is so and has submitted sufficient non-official (indicative) documents, then the application is also accepted. Furthermore, the IND will offer the possibility of a DNA test and/or an “identification interview” both if it accepts the explanation regarding the lack of official documents and if it does not accept this explanation, but *sufficient* non-official (indicative) documents are provided. If, however, the IND does not accept this explanation and no non-official (indicative) documents are provided, then the application will be rejected without further investigation. This is also the case if documents are false or if the sponsor/family member has given conflicting statements. (See flowchart in section [3.2.1](#)). Besides proof of family ties, documents regarding the identity of the family member must also be provided. The sponsor must also show that at the moment he/she entered the Netherlands the family members belonged to his/her family and that family ties have not been broken. These requirements imply that the refugee and his/her family must prove more than officially documented or biological ties.

The 2019 judgment of the CJEU in the case of *E.* is relevant in this respect. It states that an application cannot be rejected for lack of official documentary evidence, even if the sponsor’s explanation for its absence is deemed implausible, only by relying on general information on the situation in the country of origin, “without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin”.



With regard to the **requirement to show that the absence of documentation is not the responsibility of the sponsor**, this is shown to be especially difficult for many Eritreans, since religious marriages are often not registered and many Eritreans do not request official documents out of fear of the Eritrean authorities. Policy changes in November 2017 permit DNA testing of children, even where the lack of documentary evidence is deemed attributable to the refugee, and accept other documents as potentially “indicative” of family ties. This may improve the situation, although the identity of the parent remaining in the country of origin or first asylum must still have been credibly attested before a DNA test can be undertaken, which can be difficult to prove for refugees.

As for the **requirement that family ties not be broken**, problems were identified regarding minor biological children, who cannot reunify with their parents in the Netherlands if they are living independently, providing for their own livelihood and/or caring for a child born out of wedlock, even though the FRD only excludes minor biological children if they are married, not on other grounds. Adult children can be considered as no longer belonging to the family of the refugee if they live independently, have become self-reliant, have formed a family, or are taking care of a child born out of wedlock, even if they have become dependent again on the refugee sponsor. This situation does not adequately take into account the impact and consequences of conflict and displacement on refugees’ lives, which can lead to family structures being disrupted, changing and reforming, and to renewed dependency of family members.

Practical difficulties with family reunification identified include couples in **traditional and religious marriages** and situations where a “**declaration of consent**” is required from a parent remaining behind of a child otherwise entitled to reunite with the refugee parent in the Netherlands or a death certificate concerning the parent remaining behind is required.

## RECOMMENDATIONS

### REQUIREMENT TO PROVE/ SUBSTANTIATE FAMILY LINKS

In order to ensure the fair and efficient processing of applications for family reunification:

#### 7.

UNHCR recommends that the requirement to show “factual family ties” should, in the case of applications for family reunification made by refugees, take greater account of the unique situation of refugees who – for reasons related to their flight – do often not possess documents to prove their identity and family relationships, and may not be able to access the administrative services of their country, including for protection reasons. More consideration should be given to the impact and consequences of persecution, conflict and flight on family composition and reformation, which can lead to family structures changing and reforming and to renewed dependency of family members.

#### 8.

UNHCR recommends that the evidentiary requirements regarding the substantiation of family ties be realistic and appropriate to the situation of the refugee and take into account the specific circumstances of the sponsor and family members and the particular difficulties they have encountered before and after fleeing their country of origin; that a flexible approach should be adopted; and that the principle of the benefit of the doubt should be applied in acknowledgement of the difficulties refugees face in general in acquiring official documents from national authorities.

#### 9.

UNHCR welcomes the November 2017 policy changes stating that indicative documents to determine family ties will be considered before a decision on lack of documentation is made and permitting DNA testing of minor children if this is in the child's best interests, even if the refugee has been held responsible for the lack of documentary evidence, as long as the identity of the parent(s) abroad has been established. UNHCR recommends in this context that the Dutch government ensure these policy changes are implemented consistently, in good cooperation with the refugees concerned.

## 10.

In the event the IND assesses family reunification applications where a declaration of consent from a parent remaining behind or a death certificate is required, UNHCR recommends that greater account be taken of the situation of family members left behind in often precarious situations, that the best interests of the child be taken more consistently into account, and that the IND takes the opportunity of approaching UNHCR where the latter may be able to facilitate this process.

### Processing family reunification applications in the Netherlands

#### Three-month deadline for submitting applications

Refugees are required to submit their application for family reunification within three months of being granted international protection, if they are to benefit from the more favourable terms of Chapter V of the FRD. Otherwise, the stricter requirements of the regular family reunification procedure generally apply. Since 2013, it has exceptionally been possible for the IND to process applications submitted after the three-month deadline under the asylum family reunification procedure, if the lateness of the refugee's application is considered "excusable"/justified.

The study analyses national case law to identify the criteria that apply for this "**excusability test**", as they are not set out in policy. Factors identified where the failure to meet the deadline is considered excusable include situations where the delay results from an error by the relevant administrative authority or where the sponsor has provided plausible reasons that he/she did not receive a decision against which he/she should have appealed within a certain period. By contrast, errors of an authorized representative are generally not excusable. Courts also require the refugee to take an "active approach" at all the stages needed for a timely submission.

When the issue of the **three-month deadline** was raised before the CJEU in the case of *K. and B.*, it ruled in November 2018 that principles of equivalence and effectiveness must guide how applications lodged after the deadline should be regarded procedurally. It also ruled that national legislation may allow late applications to be rejected, as long as it is possible to lodge a fresh application under a different set of rules. This legislation must, however, provide that a late application cannot be refused where the delay is "objectively excusable" and that those concerned must be "fully informed of the consequences of the decision rejecting their initial application and of the measures which they can take to assert their rights to family reunification effectively". Furthermore, the CJEU ruled that the legislation must provide that "sponsors recognized as refugees continue to benefit from the more favorable conditions for the exercise of the right to family reunification applicable to refugees, specified in Articles 10 and 11 or in Article 12(2) of the directive". This also requires that the assessment of whether meeting the requirements of the regular family reunification procedure have been met, should take due account of the specific situation of refugees, in line with recital No. 8 and the principles of effectiveness and proportionality (regarding the objectives of both the FRD and its Chapter V).

The study finds that even though refugees can apply under the regular family reunification procedure, including on Article 8 ECHR grounds, this procedure has more stringent requirements, for instance regarding income and accommodation, that do not take adequate account of "the particular situation of refugees who have been forced to flee their country and prevented from leading a normal family life there", as required by recital 8 FRD. Requiring sufficient independent income, for instance, could in fact cause a substantial delay and even mean reunification is effectively impossible.



#### RECOMMENDATIONS:

### THREE-MONTH DEADLINE FOR SUBMITTING APPLICATIONS

With regard to the three-month deadline within which applications must be submitted by refugees to benefit from preferential terms, UNHCR recalls that the FRD does not foresee Member States to impose such a deadline and that, if a deadline is imposed, in view of the FRD's aim to promote family reunification, it should be interpreted in such a way as to ensure that the principles of proportionality and effectiveness are upheld and that it does not make family reunification impossible or extremely difficult:

#### 11.

UNHCR recommends that no deadline for submission should be imposed. It also recommends that the State ensure that proper and accessible information be provided on the deadlines that apply and the possible consequences of exceeding them. A possible deadline for submitting an application for family reunification should not be applied rigidly for cases involving children, especially unaccompanied children, as their age and specific circumstances should be taken into account.

#### 12.

UNHCR recommends, if a deadline is imposed/maintained, that the IND adopts a flexible approach; that any deadline only be applied to the introduction of an application; that if refugees are faced with objective practical obstacles meeting the deadline, they should be permitted to make a partial application or a timely notification within the deadline, which can then be completed with required documentation as soon as this becomes available or tracing is successfully completed.

#### 13.

UNHCR also recommends that, where any deadline is not met, criteria should be set out clearly in publicly available instructions defining which reasons will be accepted as justifying a delayed submission, so as to ensure the transparency and predictability of procedures, that the particular circumstances of the refugee are taken into account, and the best interests of the child are a primary consideration. UNHCR further recommends that delayed applications should not be rejected on this sole ground, but rather that a balanced and reasonable assessment be made in each individual case of all the interests at play that goes beyond a focus on the efforts made by the refugee to meet the deadline, especially where children are involved, given the requirement to respect the best interests principle.



## Time limit for deciding applications for family reunification

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Data received for the study show that the time taken to reach a decision on applications for family reunification is significantly above the maximum six months permitted under legislation, as a result not least of the increase in the number of refugees seeking to reunite with their families following the stark rise in asylum applications in late 2015. Thus, rather than decisions taking three months (or an additional three months in the case of complex applications), as was the case in early 2015, the average time taken increased to over 380 days in mid-2017, before falling again to around 200 days in December 2018. Long asylum procedures combined with lengthy decision-periods way beyond the six month time limit for deciding on family reunification applications have a negative impact on the lives and integration of refugees and their families, especially children.

### RECOMMENDATIONS:

#### TIME LIMIT FOR DECIDING APPLICATIONS

In order to ensure family reunification applications are dealt with “in a positive, humane and expeditious manner” and that reunification “takes place with the least possible delay” as required by the Convention on the Rights of the Child (CRC):

#### 14.

UNHCR recommends, in view of the continuing length of time decision-making is taking, that the State Secretary for Justice and Security examine further ways to speed up the family reunification process. This could include allocating sufficient staff and resources and linking the asylum and family reunification procedures more efficiently, for instance, by ensuring unaccompanied asylum-seeking minor children and/or asylum-seekers where there is a strong presumption of eligibility are informed about the family reunification process during the asylum procedure so they can initiate the process of tracing and collecting official and/or indicative documents as early as possible to ensure a more efficient family reunification procedure, which would also be in the best interests of the child.

## Priority processing

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Even though there is no legal obligation to process a family reunification with priority, the applicant can ask the IND to handle a family reunification application on a priority basis. This is not a legal procedure, nor is the process involved laid down in law or policy. The IND indicates priority processing is only possible in “highly exceptional cases”, such as for “pressing, life-threatening, medical reasons”. Applications for priority processing can be made by VWN, other NGOs supporting refugees, or lawyers. They can be made directly to the IND or in the form of a request to a court for interim measures.

An analysis of relevant case law for the study indicates that the types of cases where the IND has agreed to process an application on a priority basis include cases where family members have a life-threatening illness and urgently need medical treatment that is not available in the country of residence. This includes family members requiring treatment for diseases such as cancer or a pacemaker, or who have injuries caused by bombardments. In addition, for cases involving children, the IND may accept requests for priority processing even if there are no serious medical reasons, including when the child is very young, is seriously traumatized, or is in a situation where the person caring for him/her is seriously ill, is no longer able to care for him/her, or would soon no longer be there. The lack of a policy on the issue means there is no appeal possibility if the request for priority processing is rejected.

## RECOMMENDATIONS:

### PRIORITY PROCESSING

With regard to the procedure for requesting the priority handling of urgent family reunification applications:

#### 15.

UNHCR recommends to the IND to establish in the Aliens Circular a clear and concise policy on the submission of requests for priority processing. In light of States' specific obligations under Article 10 of the CRC to decide family reunification applications "in a positive, humane and expeditious manner", and in light of the principles of good administration, transparency, impartiality, proportionality, and legal certainty, as well as the best interests of the child, this policy should in particular set out the criteria applying to situations involving unaccompanied children, other vulnerable children, and families with minor children. UNHCR also recommends that the criteria for priority processing in this policy should include family members who are in dangerous or life-threatening situations, such as minor children stuck in a conflict zone.

### Financing the family reunification process and funding by VWN

Refugees wishing to reunite with their families in the Netherlands must find ways to meet the significant costs involved. The research identified numerous costs including fees for submitting applications if refugees are unable to submit their application within three months; translation and notarization costs; exit visas/fines; travel and accommodation costs to reach an embassy/consulate; and travel costs to the Netherlands.

A VWN-administered Refugee Fund provides financial support towards meeting some costs, but refugees often find themselves in debt as a result of these accumulated costs. While the costs do not appear to be deterring refugee families from seeking to reunite, they can impact the enjoyment of family life negatively and still affect their integration following reunification.

## RECOMMENDATIONS:

### FINANCING THE FAMILY REUNIFICATION PROCESS AND FUNDING BY VWN

In order to ensure that the accumulation of costs does not undermine the purpose of the FRD to promote family reunification and the effectiveness thereof:

#### 16.

UNHCR welcomes the assistance of VWN in providing financial support for some of the expenses incurred by refugees during the family reunification procedure but recommends that the government, NGOs and the private sector work together to provide additional funds to help cover the cost of airline tickets where refugees are not able to cover these costs, to minimize the costs for translations. It is also recommended that procedures at Dutch embassies/consulates are simplified to reduce the number and length of visits and thereby the associated costs involved with this part of the procedure.

#### 17.

UNHCR recommends that the Dutch government, in coordination with other EU Member States and UNHCR, advocate with countries hosting refugees in regions of origin to promote the waiving of exit visa requirements, fees and/or fines that are sometimes imposed on family members travelling to the Netherlands (and other EU countries) for family reunification purposes.



## Status granted to family members

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Family members arriving in the Netherlands receive the same status and rights as the sponsor. They derive that status from their sponsor, so if the family tie is broken after the family member's arrival in the Netherlands, the residence permit may be revoked. This may create problems for family members in particular for victims of domestic violence or family members at risk of such violence.

Currently, if a family member runs the risk of the family tie being broken (e.g. through divorce), he/she can apply for asylum independently and the IND will then examine the claim on its own merits. Alternatively, the family member can wait until the withdrawal hearing and submit his/her own grounds for asylum at that stage. The IND will reassess the case and may then issue a permit to the family member on his/her own merits.

The IND also has the possibility of protecting family members who are victims of domestic violence, human trafficking, (sexual) exploitation, and/or honour-related crimes. If the family member raises any of these issues, the IND will interview the person and, based on an individual assessment, may decide to grant the family member a humanitarian visa.

### RECOMMENDATIONS:

#### STATUS GRANTED TO FAMILY MEMBERS

In order to reduce the risks to which family members may be exposed in abusive relationships:

##### 18.

UNHCR recommends that the residence status of the family member should be independent of that of the sponsor and, failing that, that the IND ensure that family members be informed of the possibility of applying for asylum independently and of alternative statuses potentially available to them and that use is made of such statuses to ensure that the Netherlands upholds its obligations to tackle domestic violence and other forms of abuse and exploitation.

## THE ROLE OF VWN, LAWYERS AND OTHERS IN THE FAMILY REUNIFICATION PROCEDURE

### The role of VWN

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In nearly all cases concerning family reunification with refugees, it is **VWN volunteers** who provide **advice and legal assistance** to refugees throughout the procedure. VWN, lawyers and others expressed some concerns regarding the training of VWN volunteers, whose numbers have increased significantly in line with the increase in asylum and family reunification applications in recent years. While some volunteers had concerns, several found the training sufficient.

The support of VWN volunteers in the process of gathering together the required documentation to substantiate identity and family ties was found to be a key part of the process, along with the drafting of letters, if required, to explain why documentation may be lacking. Where the IND finds that documentation is still lacking, it sends a "rectification of omission letter" to the applicant. VWN volunteers again play an important role in preparing the response that must be sent within four weeks.

In the course of the research, concerns emerged that the responses of VWN volunteers too often led to a rejection of the application, so UNHCR sent out a questionnaire to VWN volunteers, and lawyers to identify the reasons why. Some felt that volunteer-based assistance did not sufficiently guarantee adequate legal support with the application and that too much responsibility is placed on VWN volunteers. Other factors identified included the tight deadlines applying, a restrictive interpretation of policy, the high level of detailed information required, the burden of proof placed on the applicant to explain why he/she is not responsible for the lack of documentation, and differences of opinion regarding documentation requirements in certain countries of origin. Recommended approaches included allocating sufficient time and resources for the research and citing of public sources on the availability of official documentation in the country of origin and double-checking the personal information contained on the application form, including against the asylum interview report.

## The role of lawyers

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**Lawyers** do not generally become involved in family reunification procedures until the appeal stage against a negative IND decision. At the initial stage, refugees are only entitled to **legal aid** if a lawyer considers an application to be factually or legally complex and the refugee is unable to pay for the legal assistance or legal representation needed.

With regard to proposals made in both 2016 and 2017 to limit government-funded legal aid in the context of the asylum procedure, the study expresses concern at the potential problems this may create when it comes to family reunification. Legal advice on the importance of providing full details of all family members during the asylum procedure and the need to submit family reunification applications within three months of the grant of international protection can be critical for the success of a family reunification application. While this advice is in principle also provided by VWN volunteers, removal of legal aid during the first instance asylum procedure removes an authoritative additional layer of advice. It could lead to practical issues related to verification of identity and the issuance of a regular provisional residence permit (MVV) enabling travel to the Netherlands, and/or an exit visa.

The study stresses the importance of ensuring the quality of initial applications, given the complexity of the process and the importance of a thoroughly grounded explanation of why the absence of certain documents is not attributable to the refugee. It finds this will help contribute to the effectiveness of the advice, representation and support NGOs, lawyers and other actors can provide during the procedure. “Frontloading” the process by investing in legal aid (in the asylum procedure) and other related support, may help reduce the need for appeals and shorten both the length of the family reunification procedure and the length of time families are separated.

## Other actors

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Other actors involved in the family reunification procedure in the Netherlands include **Nidos**, whose guardians play a key role in supporting unaccompanied child refugees. **Defence for Children** provides legal assistance in family reunification cases concerning children. The role of the **Red Cross** mainly concerns family tracing – an essential component of family reunification – as well as providing practical assistance.

### RECOMMENDATIONS:

#### ROLES OF VWN, LAWYERS AND OTHER ACTORS

In order to enable refugees to present their application for family reunification effectively and ensure the efficacy of the advice, representation and support provided by NGOs, lawyers and other actors:

#### 19.

UNHCR recommends that refugees be supported by trained volunteers and/or professionals, whether lawyers, legal counsel or civil society actors who have the appropriate expertise and knowledge of family reunification procedures and refugee protection matters. UNHCR therefore recommends that the training of VWN volunteers be provided more promptly upon their appointment, that refresher/updating training be provided more frequently, since both policies and volunteers change over time, and that cooperation between VWN volunteers and lawyers at as early a stage as possible be promoted.

## PROCESSING FAMILY REUNIFICATION APPLICATIONS ABROAD

### Continuous residence requirement

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The family reunification procedure requires family members to travel to a Dutch embassy/ consulate to submit documents, attend identification interviews, undertake DNA testing, and/or collect visas for the Netherlands. To do so, they must either go to an embassy/consulate in their country of origin or travel to a neighbouring country or to another country to reach an embassy/consulate. If the latter situation applies, they must have “continuous residence” there.

The **continuous residence requirement** can be waived for compelling humanitarian reasons, but the family member needs to provide a reason why he/she does not have a legal residence in the country in which he/she is currently residing. The research finds that this requirement fails to take sufficient account of the often extremely difficult and precarious situations faced by the family members of refugees. If they remain in their country of origin, there may be no Dutch diplomatic representation, especially if there is an ongoing conflict, which then obliges them to travel to another country, often a neighbouring country, under often treacherous and precarious conditions, through no fault of their own. If family members have themselves already fled persecution or conflict and are in a country of asylum in the region, which may or may not be a neighbouring country, they may have had to enter that country illegally and may not report themselves to the authorities to legalize their stay for fear of being expelled.

Cases identified during the research showed the precarious and dangerous situations family members, including sometimes young children, may be obliged to place themselves in as a result of the requirement of continuous residence in a non-neighbouring country. These cases concerned in particular Somali family members. They have led to families remaining separated and/or to children residing alone in a country of asylum. While practice has improved in recent years, a few recent cases were identified during the research and suggest that due to unclear policy the implementation of the continuous residence requirement appears not to be uniform. As the IND noted in the course of the research, the continuous residence requirement does not apply to family members in neighbouring countries and

when it does apply (for non-neighbouring countries), it is waived as long as a reason is provided why they do not have continuous residence in the country of asylum, but if no such reason is given the IND cannot waive this requirement.

#### RECOMMENDATION:

#### CONTINUOUS RESIDENCE REQUIREMENT

With regard to the continuous residence requirement, in recognition of the fact that many family members of refugee sponsors are in a precarious situation themselves and/or are refugees in another country of asylum and that they are not responsible for the absence of a Dutch embassy/consulate in a particular country and may not be in a position to secure continuous residence:

#### 20.

UNHCR recommends that the Dutch government no longer require continuous residence for family members of refugee sponsors as compared to family members seeking reunification with immigrants, in light of the specific circumstances and particular difficulties family members of refugees may have encountered before and after leaving their country of origin, including as a result of a requirement to travel to a Dutch embassy in another country.

### Illegal border crossing and journeys to embassies

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The research identified situations where the family members of refugees had no option but to cross a border illegally to reach a Dutch embassy/consulate. They were also exposed to dangers on such journeys, including travel through conflict zones, illegal border crossing, extortion, and detention. Sometimes they had to make multiple journeys across different borders for further investigations. The situation of single women, mothers with children, unaccompanied children, and persons with disabilities or health conditions was particularly precarious. One problem identified concerned Syrians at the Syrian-Turkish border seeking entry to go to the Dutch embassy/consulate in Turkey to submit documents, attend identification interviews, and/or collect visas.

## RECOMMENDATION:

### JOURNEYS TO EMBASSIES

In order to reduce the uncertainty and potential dangers associated with journeys to embassies, which can expose the family members of refugees to great risks, and in order to make the process more efficient:

#### 21.

UNHCR recommends that the IND and embassies identify ways to reduce the number of visits to embassies required and examine other possibilities to facilitate the process, such as strengthening efforts to ensure appointments are made closer together and using videoconferencing.

### The role of Dutch embassies/consulates

The research revealed that the various functions fulfilled by embassies/consulates can result in an accumulation of delays. This means the process can take months at certain embassies dealing with many applications.

Following problems with the **interviewing of children** at embassies/consulates in the past, the IND issued a Work Instruction on this issue in 2015. The research raised some continuing concerns regarding the quality of interviews mainly relating to age assessment and insufficient questions being asked to make an adequate assessment. Two further issues identified were: a **lack of registered interpreters at embassies** and the fact that **family members do not receive an interview report after the interview**. The latter is only shared together with the decision on the application, which means there is no opportunity for applicants to submit corrections or additions to the report. This can be particularly important if the interpretation provided is not of sufficient quality or has been done through English before being translated into Dutch. While refugees can make another application with new documentation or information, this prolongs family separation and increases the workload of the IND.

## RECOMMENDATIONS:

### THE ROLE OF DUTCH EMBASSIES/CONSULATES

With regard to identification interviews:

#### 22.

UNHCR recommends that the Dutch government be more transparent about the criteria for conducting identification interviews, when they are needed, and how they should be conducted.

#### 23.

UNHCR recommends that sufficient procedural guarantees equivalent to those applying to sponsors in the Netherlands be put in place to ensure a fair and efficient procedure in identification interviews at embassies, including by ensuring the provision of appropriate information to applicants on the family reunification procedure generally and the objective of the identification interview in particular, in a manner they can understand and sufficiently in advance for them to be adequately prepared for the interview; by ensuring access to quality, independent interpretation; and through training and review of interviews to ensure, inter alia, that they are child-friendly and gender-sensitive.

#### 24.

UNHCR recommends that the report of the interview should be provided to the refugee and family members in sufficient time and in any case before the decision is issued, so that it is possible for applicants to make corrections and additions to the report if needed. Furthermore, standard operating procedures should preferably be established to ensure that these procedural safeguards are properly implemented and a clear complaint procedure should exist so that refugees can file a complaint if an identification interview or the report of the interview appears to be incorrect.

## Cooperation with IOM, UNHCR and with other States

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In addition to the practical assistance with family reunification that the International Organization for Migration (IOM) provides to the families of refugees and, for instance, through a project where IOM, on behalf of the Dutch government, collects DNA samples in Beirut from family members, the research identified issues on which both IOM and UNHCR could provide support. It suggests, for example, that UNHCR could potentially – depending on the circumstances and capacity of the concerned office – provide assistance with DNA sampling; arrange video conference calls with family members with no access to a Dutch embassy/consulate or where travelling to one is problematic; arranging the transport of documents from family members to embassies; verify the authenticity of UNHCR-issued documents; and receive Dutch government personnel in refugee camps to prevent vulnerable refugees from having to travel long distances to capitals.

The Netherlands has investigated possibilities for joint action on family reunification matters with other EU embassies/consulates in the past. The research identifies further possibilities for such collaboration with European States.

## RECOMMENDATIONS

### COOPERATION WITH OTHER ACTORS

In order to enhance the efficiency of the family reunification process and reduce the number of costly, long, and potentially dangerous journeys family members have to make to reach embassies/consulates:

#### 25.

UNHCR recommends that the IND investigate the possibilities for strengthening its cooperation with UNHCR and IOM, perhaps along the lines suggested above, both where embassies/consulates face increased workloads dealing with family reunification applications and where the security or other conditions mean the Netherlands is not able to provide consular services.

#### 26.

UNHCR recommends that the Dutch government work with other EU Member States to develop EU common or pooled administrative support in countries outside the EU, building on its previous investigation into the option of sharing a facility centre, and that it explore with EU and European Economic Area (EEA) States mechanisms to facilitate the family reunification process further. In this light, UNHCR recommends that the Ministry of Justice and Security make a renewed assessment of the option of carrying out identification interviews, DNA testing, and/or issuing regular provisional resident permits (MVVs) at a shared facility centre, or at other EU Member State embassies/consulates, potentially through an external service provider. This would be in the best interests of children involved and prevent family members from having to take unnecessary risks to reach an embassy/consulate



# 1. INTRODUCTION

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Once refugees have reached safety and their need for international protection has been recognized, their priority concern is often reunification with family members, who may still be in uncertain and even perilous circumstances. Knowing family members are still not safe causes refugees stress and anxiety and makes it much more challenging for them to build a new life in the country of asylum.

A swift and flexible family reunification procedure that takes into account the particular situation of refugees can be crucial for the successful integration of both refugees and their families.<sup>1</sup> It is generally the only way refugees are able to realize their right to family life and family unity.<sup>2</sup> Yet the reality for many refugees is that they face numerous obstacles reuniting with their families. European Union (EU) Member States, many of which received significant increases in the number of people seeking asylum in 2015-16, have generally sought to reduce the numbers of people arriving. In some cases, this has included imposing stricter conditions on and/or postponing the reunification of family members with beneficiaries of international protection.<sup>3</sup>

Against this background, this study examines the situation of refugees in the Netherlands who are seeking to reunite with their families or who have managed to do so. It provides an overview of the family reunification procedure in the Netherlands, including notably several recent positive developments. The study also identifies challenges faced both by refugees and their families and by the Dutch authorities and makes a number of recommendations to address them.

**Note on terminology:**<sup>4</sup> For the purposes of this study, the term “refugee” encompasses both refugees recognized as being in need of international protection under the 1951 Convention relating to the Status of Refugees<sup>5</sup> and beneficiaries of complementary or subsidiary forms of international protection. In some jurisdictions, individuals who do not meet the 1951 Convention refugee definition but who are nevertheless recognized as being in need of international protection are granted complementary forms of protection or in the EU context subsidiary protection, as provided for under the Qualification Directive (recast).<sup>6</sup> Such persons are also referred to as “other persons in need of international protection”.

## 1.1 UNHCR’s mandate and interest in family reunification

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The UN General Assembly has entrusted the Office of the United Nations High Commissioner for Refugees (UNHCR) with the mandate to provide international protection to refugees and, together with governments, to seek solutions to refugee problems.<sup>7</sup> In addition, the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR), *Refugee Family Reunification: UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, Feb. 2012, available at: <http://bit.ly/2YrCMdp>, pp. 1-3; UNHCR, *A New Beginning: Refugee Integration in Europe*, Sept. 2013, available at: <http://bit.ly/2T9CNwk>.

<sup>2</sup> See UNHCR, *Discussion Paper Prepared for the Expert Roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification*, 4 Dec. 2017, available at: <http://bit.ly/2OH967y>, paras. 8-15, for a brief overview of relevant provisions under international and regional law.

<sup>3</sup> See Chapter 1.2 Background to the study below for more information.

<sup>4</sup> For further information on key terms used in the study, see Annex 4: Definitions.

<sup>5</sup> UN General Assembly (UNGA), *Convention relating to the Status of Refugees* (“1951 Convention”), 28 July 1951, United Nations Treaty Series (UNTS), vol. 189, p. 137, available at: <http://bit.ly/33hdfSU>.

<sup>6</sup> UNHCR, Executive Committee (“ExCom”), *Conclusion on the Provision of International Protection Including through Complementary Forms of Protection No. 103 (LVI) – 2005*, 7 Oct. 2005, No. 103 (LVI) – 2005, available at: <http://bit.ly/2ZCnGho>, para. (i); UNHCR, *Persons in Need of International Protection*, June 2017, available at: <http://bit.ly/2ZLLO16>, p. 4; Council of the European Union (EU), *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* (“QD (recast)”), 20 Dec. 2011, OJ L 337/9-337/26, available at: <http://bit.ly/2T8DRke>, Art. 2.

<sup>7</sup> *UNHCR Statute*, 14 Dec. 1950, available at: <http://bit.ly/2GNsgCa>, para. 1. See also generally, UNHCR, *UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, pp. 2-3.

of its mandate and to facilitate UNHCR's duty of supervising the application of the 1951 Convention.<sup>8</sup>

UNHCR's supervisory responsibility extends to each EU Member State, all of whom are party to the 1951 Convention, and is reflected in EU law, including pursuant to Article 78(1) of the Treaty of the Functioning of the EU, which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention.<sup>9</sup> This role is reaffirmed in Declaration 17 to the Treaty of Amsterdam, providing that "consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy".<sup>10</sup>

UNHCR promotes family reunification with refugees and other beneficiaries of international protection and stresses the importance of the role of the family in the specific situation of refugees. Family reunification is a fundamental aspect of restoring the lives of persons who have fled persecution or serious harm and who have become separated from their family during flight and forced displacement. In addition, UNHCR has emphasized that family reunification is an important element for the integration of beneficiaries of international protection in their host societies.

UNHCR therefore has a direct interest in, and competence to advise States on, policy issues with a direct effect on the lives of persons of concern to UNHCR, including in relation to family reunification. UNHCR understands that it is important for family reunification procedures to be implemented carefully and with due diligence and believes that this can

be done while still ensuring a flexible, prompt and effective decision-making process.

## 1.2 Background to the study

In 2014-15, the number of first time asylum applications submitted in EU Member States more than doubled from 562,680 applications in 2014 to 1,255,640 in 2015. The highest numbers of such applications were registered in Germany, Hungary, Sweden, Austria, Italy and France, while the highest increases in applications (ranging from plus 822 per cent to plus 155 per cent) were registered in Finland, Hungary, Austria, Belgium, Spain, and Germany.<sup>11</sup>

This led several EU Member States to implement dissuasive measures to reduce the numbers of migrants and refugees entering these countries, including notably by closing the route to the EU through the Balkans and by implementing the EU Turkey Statement, which introduced a series of measures in March 2016 designed to end irregular migration from Turkey to the EU.<sup>12</sup> In the course of 2016, several EU Member States also sought to respond to the anticipated arrival of family members of those who had already gained protection, in particular to restrict the arrival of family members of beneficiaries of subsidiary protection.<sup>13</sup> For instance, legislative amendments in both Austria and Denmark in 2016 required beneficiaries of subsidiary and temporary protection generally to wait three years before being entitled to apply to reunify with family members.<sup>14</sup> In Sweden, legislation only permitted people, who had sought asylum after November 2015 and had been granted subsidiary protection, to reunite with family members in exceptional

<sup>8</sup> 1951 Convention, Art. 35; UNGA, *Protocol Relating to the Status of Refugees*, 31 Jan. 1967, UNTS, vol. 606, p. 267, available at: <http://bit.ly/2YFWotz>, Art. II.

<sup>9</sup> EU, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 Dec. 2007, 2008/C 115/01, available at: <http://bit.ly/33h4DLM>, Art. 78(1).

<sup>10</sup> EU, *Treaty on European Union (Consolidated Version), Treaty of Amsterdam*, 2 Oct. 1997, available at: <http://bit.ly/2M1NmkH>, Declaration 17.

<sup>11</sup> Eurostat, "Asylum in the EU Member States: Record number of over 1.2 million first time asylum seekers registered in 2015", News release 44/2016, 4 March 2016, available at: <http://bit.ly/2MGIXDe>.

<sup>12</sup> Council of the EU, *EU-Turkey statement*, 18 March 2016, available at: <http://bit.ly/2YvATfj>.

<sup>13</sup> See generally, Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, June 2017, available at: <http://bit.ly/2YKmoQv>; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, Jan. 2018, rev. 1, available at: <http://bit.ly/2T6Q1Kk>, pp. 142-147 focusing in particular on restrictions introduced for beneficiaries of subsidiary protection; European Council on Refugees and Exiles (ECRE), *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, June 2016, available at: <http://bit.ly/2YLRXcm>, p. 4.

<sup>14</sup> See e.g. UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, pp. 142-143.



circumstances.<sup>15</sup> In Germany, legislative amendments in 2016 similarly implemented a waiting period for beneficiaries of subsidiary protection for two years.<sup>16</sup> When this restriction ended in February 2018, it was extended until July 2018, after which family reunification has been permitted for 1,000 beneficiaries of subsidiary protection per month.<sup>17</sup>

With regard to the situation in the Netherlands, the number of first-time applications for international protection almost doubled in 2015 to over 43,000 in comparison with 2014.<sup>18</sup> This increase, while less than in several EU Member States, as noted above, led to an increased workload for staff of the Dutch Immigration and Naturalization Service (IND),<sup>19</sup>

which handles both asylum and family reunification requests, and placed pressure on the authority's capacity. UNHCR observed longer procedures for deciding both asylum and family reunification applications, resulting in families remaining separated for extended periods. UNHCR therefore welcomed the decision to hire more IND staff to process asylum requests and an anticipated increase in family reunification applications. Since that time, the number of first-time asylum applications in the Netherlands has fallen significantly in 2016 and 2017, with 18,171 such applications being made in 2016 and 14,716 in 2017.<sup>20</sup> More recently, the number of first-time asylum applications started to increase again, with 20,353 in 2018.<sup>21</sup>

<sup>15</sup> *Ibid.*, p. 145.

<sup>16</sup> Bundesregierung, *Asylpaket II in Kraft: Kürzere Verfahren, weniger Familiennachzug*, (Federal Government, *Asylum package II in force: Shorter procedures, less family reunification*), 17 March 2016, available in German at: <http://bit.ly/2OlzUV0>.

<sup>17</sup> *Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land: Koalitionsvertrag zwischen CDU, CSU und SPD*, (A new start for Europe, A new dynamic for Germany, A new cooperation for our land: Coalition Agreement between CDU, CSU and SPD), Berlin, 7 Feb. 2018, available in German at: <http://bit.ly/2YJYy7s>.

<sup>18</sup> In 2015, 43,093 first asylum applications were lodged in the Netherlands compared to 21,811 first asylum applications in 2014. See Immigration and Naturalization Service (IND), *Asylum Trends: Monthly Report on Asylum Applications in the Netherlands*, Dec. 2016, available at: <http://bit.ly/2T6QD2A>, p. 5.

<sup>19</sup> The IND is an agency of the Dutch Ministry of Justice and Security. It assesses all applications from foreign nationals who want to live in the Netherlands or become Dutch citizens. See <http://bit.ly/2YpQ21S>.

<sup>20</sup> See IND, *Asylum Trends: Monthly Report on Asylum Applications in the Netherlands*, Dec. 2017, available at: <http://bit.ly/2H2T1mv>, p. 5.

<sup>21</sup> See IND, *Asylum Trends: Monthly Report on Asylum Applications in the Netherlands*, Dec. 2018, available at: <https://bit.ly/2mg63po>, p. 5.

In terms of family reunification, the numbers of family members arriving under the asylum family reunification procedure has fluctuated. In 2015, 13,845 family members entered the Netherlands, this figure falling in 2016 to 11,814. In 2017, it increased to 14,490, of whom 59 per cent were Syrian nationals.<sup>22</sup> In 2018, there were 6,463 arrivals, the largest proportion of whom were Eritrean and Syrian nationals.<sup>23</sup>

It is noteworthy that, unlike the Member States referred to above, the Netherlands, which provides “one status” entitling both refugees and beneficiaries of subsidiary protection to the same rights, did not seek to apply such restrictive measures.

Nonetheless in May 2016, the Dutch State Secretary for Justice and Security<sup>24</sup> informed asylum-seekers in a letter that the waiting time for the beginning of the asylum procedure was at that time at least seven months and that the overall period in which the IND was required to make a decision had been extended from six to 15 months.<sup>25</sup> Aiming to create more flexibility for the IND, as a result of the increased influx, the legal time limit for decisions on asylum claims was also extended from six to 15 months (and in certain cases to 18 months). With regard to family reunification, the State Secretary for Justice and Security wrote:

“ *It is only possible for you to submit an application for your family to come to the Netherlands if you have an asylum permit. There are no guarantees that you will be able to have your family come to the Netherlands. Owing to the large number of applications it may take a long while before the situation is clarified and your family will actually be able to come to the*

*Netherlands. The statutory period in which the IND has to make a decision on an application for family reunification is currently six months. This means that all told it could take over two years before your family can come to the Netherlands, depending on your personal situation.*<sup>26</sup>

The Ministry of Justice and Security indicated that the objective of this letter was to manage refugees’ expectations and provide them with a realistic time frame concerning their family reunification applications.<sup>27</sup> The way the information regarding the family reunification process was formulated in the letter nonetheless caused concern and disquiet among asylum-seekers and refugees. A Council of Europe report went so far as to suggest that “[i]n effect, this was understood to establish an equivalent practice to the newly introduced German two-year waiting period”.<sup>28</sup>

In general, UNHCR considers the Dutch family reunification policy to be one of the more flexible and expansive in Europe. For instance, in recent years most family reunification applications have been approved at first instance (2014 – 67 per cent; 2015 – 73 per cent; 2016 – 68 per cent; 2017 – 56 per cent; 2018 – 52 per cent), although a downward trend in the rate of approval is noticeable.<sup>29</sup> Furthermore, a number of significant improvements have been implemented in policy and practice in recent years, as outlined in chapter 2.2 Overview of Dutch legislation and policy on asylum family reunification and subsequent chapters.

<sup>22</sup> See IND, “Asylum influx in 2017 equal to 2016”, 16 Jan. 2018, available at: <http://bit.ly/2KkJvx3>.

<sup>23</sup> IND, *Asylum Trends: Monthly Report on Asylum Applications in The Netherlands December 2018*, Dec. 2018, available at: <https://bit.ly/349oQTz>, p. 7. The high proportion of Eritrean families reunited reflects the fact that their applications took longer to process, as documentation was often lacking and the process was also slower for them due to difficulties approaching embassies. For Syrians, it reflects the high proportion of Syrian refugees in the Netherlands.

<sup>24</sup> The title of the State Secretary for Security and Justice was changed to State Secretary for Justice and Security in November 2017 after the new government was announced. The main text of the study uses the current title of the State Secretary and the related ministry, while the footnotes use the title of the State Secretary at the relevant time.

<sup>25</sup> Letter from the State Secretary for Security and Justice to Asylum-seekers Crossing the Border, 23 May 2016, available in English at: <http://bit.ly/31ndpGC>.

<sup>26</sup> *Ibid.*

<sup>27</sup> Ministry of Justice and Security respondent.

<sup>28</sup> Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13, pp. 40-41.

<sup>29</sup> Data provided by IND.



Over time, UNHCR has nonetheless observed certain aspects of the policy that impede its swiftness, efficiency and fairness. These issues are not necessarily related to the volume of applications, since some predated the 2015 increase in asylum applications. These challenges are listed in Table 1 below and are examined in more detail in subsequent chapters.<sup>30</sup>

**Table 1: Challenges identified in the family reunification process in the Netherlands**

- The scope of the family definition and factual family ties (chapter [3.1](#));
- The treatment of elderly and other dependent relatives in the family reunification procedure (chapter [3.1](#));
- The situation of child/young adult beneficiaries of international protection who reach the age of 18 (majority) during the asylum procedure (chapter [3.1.8](#));
- The requirement to prove/substantiate “factual family ties” (chapter [3.2](#));
- The three-month deadline by which refugees must submit family reunification applications to benefit from preferential terms (chapter [4.2](#));
- The handling of priority applications (chapter [4.4](#));
- The high costs associated with the family reunification procedure (chapter [4.5](#));
- The requirement of continuous residence (chapter [6.1](#)); and
- The processing of applications abroad (chapter [6.3](#)).

### 1.3 Aim of the study

With this study, UNHCR aims first to provide an overview of the rules and policies governing family reunification for refugees in the Netherlands and then to assess how these rules and policies are implemented in practice. The report provides insights into a number of legal and practical challenges refugees face. Some are of longer standing; others result from recent changes in asylum and family reunification policy.

The study does not offer a comprehensive qualitative and quantitative evaluation of the entire policy or indeed a comparative analysis vis-à-vis the situation in other European countries. Instead, it seeks to identify remaining obstacles to refugees’ capacity to realize their right to family reunification in the Netherlands, so as to formulate recommendations for further improvements. The research therefore focuses on outstanding problems that practitioners encounter when supporting applicants for family reunification and that refugees and their family members also face. Given this focus, it should be noted that the problematic issues identified in individual cases should not be interpreted as representative of all identical cases, even though the study also encountered problematic effects of certain policies and practices that have a more general character.

The central question in this study is thus:

- ❓ *Which legal and practical aspects in the family reunification procedure in the Netherlands present challenges for refugee families in practice and how can the situation be improved?*

<sup>30</sup> For challenges faced in EU Member States generally, see: UNHCR, *UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1; European Migration Network (EMN), *Family Reunification of Third-Country Nationals in the EU plus Norway: National Report: EMN Synthesis Report*, 13 April 2017, available at: <http://bit.ly/2M9XDLN>; UNHCR, *The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13; Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13; UNHCR, *UNHCR Written Contribution to the Public Consultation on the European Union’s (EU) Legislation on the Legal Migration of Non-EU Citizens (Fitness Check on EU Legal Migration Legislation)*, Sept. 2017, available at: <http://bit.ly/33h7BQq>, p. 3.



## 1.4 Methodology and scope

UNHCR carried out the research for the study between 2016 and 2018 in close cooperation with four academics at the Centre for Migration Law of the Radboud University Nijmegen. They undertook the primary research and wrote the first draft of the study, which was then reviewed by UNHCR and further adapted.<sup>31</sup>

Desk-based research was initially carried out to identify and set out the applicable standards regarding the right to family reunification under international, European and national law and policy. Several parliamentary documents, reports,<sup>32</sup> and documents from non-governmental organizations (NGOs)<sup>33</sup> provided insights on the theoretical and practical aspects of the family reunification procedure. Relevant judgments of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) along with national and international case law are referred to and provide clarification on particular issues as needed. A detailed examination of these courts' jurisprudence as it relates to family reunification is, however, beyond the scope of the study.<sup>34</sup>

Initial interviews with key experts in the field of family reunification with refugees along with UNHCR's observations over the years led to the identification of a number of obstacles facing refugee families seeking reunification in the Netherlands, as summarized in

Table 1 above. These issues then became the main focus for follow-up interviews and consultations with other respondents. The challenges identified require attention and are discussed further in this study.

In all, UNHCR and the four researchers working on the study undertook 33 interviews and consultations with experts, lawyers, immigration officers, Dutch embassy personnel, NGO staff and volunteers, and UNHCR officers, as well as with refugees and family members.<sup>35</sup> Persons interviewed and responding are cited in footnotes, for instance, as "VWN Location 1" to protect their anonymity.

The IND, the Ministry of Foreign Affairs and the Directorate General for Migration<sup>36</sup> were interviewed about the Netherlands' family reunification policy, including its background and application. Views on the application of this policy and the roles of external actors in the family reunification procedure were gathered through interviews and consultations with the following NGOs: VluchtelingenWerk Nederland (Dutch Council for Refugees – VWN), the largest Dutch NGO defending the rights of refugees in the Netherlands;<sup>37</sup> Defence for Children;<sup>38</sup> Nidos, an independent family guardianship agency;<sup>39</sup> and the Netherlands Red Cross.<sup>40</sup> In addition, the Advisory Committee on Migration Affairs (Adviescommissie voor vreemdelingenzaken – ACVZ), a quasi-governmental advisory body, was consulted and provided its views on current policy and practice including in response to a questionnaire,<sup>41</sup> while

<sup>31</sup> The academics participating in the research on behalf of the Radboud University were A. Terlouw, T. Strik, S. Kappel, and R. Khatraoui.

<sup>32</sup> See e.g. Adviescommissie voor Vreemdelingenzaken (ACVZ)/Advisory Committee on Migration Affairs, *Na de vlucht herenigd: advies over de uitvoering van het beleid voor nareizende gezinsleden van vreemdelingen met een verblijfsvergunning asiel* ("ACVZ, Reunited after Flight"), Oct. 2014, available in Dutch at: <http://bit.ly/2MDRQNE>, with English summary at pp. 133-137; European Commission, *Communication from the Commission to the European Parliament and the Council on Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 3 April 2014, COM(2014) 210 final, available at: <http://bit.ly/2yCKiTI>; UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1; and European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification*, COM(2008) 610 final, 8 Oct. 2008, available at: <http://bit.ly/2M36MFE>.

<sup>33</sup> Most of these documents are available at: <https://www.vluchtweb.nl> (accessible only with user account).

<sup>34</sup> Publications providing deeper analysis include: C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13; Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13.

<sup>35</sup> For further details, see Annex 1: Overview of the respondents interviewed and consulted.

<sup>36</sup> The Directorate General for Migration is part of the Ministry for Justice and Security.

<sup>37</sup> See <https://www.vluchtelingenwerk.nl>.

<sup>38</sup> See <https://www.defenceforchildren.nl>.

<sup>39</sup> See <https://www.nidos.nl>.

<sup>40</sup> See <https://www.rodekruis.nl>.

<sup>41</sup> See <https://acvz.org/en/> and in particular, ACVZ, *Reunited after Flight*, 2014, above fn. 32.



the International Organization for Migration (IOM) was also consulted.<sup>42</sup> Local VWN offices provided information on the various obstacles refugees face and provided examples thereof.

Refugees and family members, who had either succeeded in reunifying or were in the process of doing so, were interviewed and consulted in order to be able to reflect their personal experience during the procedure abroad and in the Netherlands. They were identified with the help of the VWN and lawyers and were interviewed by phone.

Given the involvement of lawyers in the family reunification procedure, UNHCR also contacted lawyers experienced in handling hundreds of such complex family reunification cases. They were interviewed for their perspectives and experience of representing refugees in the family reunification process. In addition, about 26 case files<sup>43</sup> were studied

to grasp and illustrate the challenges for refugee families during the family reunification procedure. This process of selecting and reviewing individual case files is thus a key feature of the study.

For an understanding of the situation regarding the processing of applications abroad, the project also consulted the Ministry of Foreign Affairs, several Dutch embassies and UNHCR offices, notably those in Pakistan and Turkey. The IND and the Directorate General for Migration were also helpful in providing data to provide a statistical overview of family reunification applications and the length of the procedure in practice.<sup>44</sup>

The questions for interviews were drafted taking into account the positive developments in the family reunification policy in recent years, as well as the issues identified in desk research and initial interviews. Stakeholders were given tailored

<sup>42</sup> For more on the role of external actors in the family reunification procedure, see chapter 5 'The role of VWN, lawyers and others in the family reunification procedure' below.

<sup>43</sup> See Annex 3: Number of case studies for an overview of the criteria for selecting those cases received from respondents (which does not include case-law found through desk-research).

<sup>44</sup> See Annex 2: Overview of data requested and received for an overview of the data requested and received.



questionnaires based on their role in the family reunification process. The first round of interview results were then analysed for similar and opposing views and subsequently used to elaborate on these results with respondents in further rounds of interviews/consultations, so that stakeholders have had several possibilities to comment on the study and its findings.

The field research was conducted from July 2016 until October 2017. Hence conclusions derived from the interviews and case files were based on policies and practices from that time. Relevant policy developments and more recent case law up until March 2019 have also been included in the study, as the latter needs to be reflected in policy.

## 1.5 Outline

Following this introductory chapter, **Chapter 2 Context of the family reunification policy in the Netherlands** sets out the legal and policy framework for family reunification in the Netherlands, including the applicable international and European legal framework and an overview of the law and policy applying in the Netherlands.

**Chapter 3 Family membership and the substantiation of family links** sets out which family members are permitted to apply for family reunification, as well as the obstacles posed by the requirement to show factual family ties and to substantiate/prove family links. It focuses on procedural challenges to reunification with family members with specific needs, notably dependent elderly parents and other dependent family members, and on the situation of children and in particular unaccompanied child refugees who turn 18 during the asylum procedure and wish to reunite with their parents.

The main part of **Chapter 4 Processing family reunification applications in the Netherlands** analyses the legal and policy framework and case law applicable to the deadlines that apply during the family reunification procedure. These concern the three-month deadline by which refugees must submit their family reunification application if they are to benefit from preferential terms and the time limit within which the IND is required to make a decision on the application. The chapter also examines the

impact of the deadlines that apply during the asylum procedure on the reunification process. It further contains a statistical overview of the handling of family reunification applications and the length of the procedure. Another section on priority requests explores the procedure and criteria for requesting the IND to process an application expeditiously. The last section provides an overview of the costs associated with the family reunification procedure and concludes with a section on the status granted to family members.

**Chapter 5 The role of VWN, lawyers and others in the family reunification procedure** discusses the role of other actors in addition to the IND in the family reunification procedure in the Netherlands. For each of **VWN, Nidos, lawyers, Defence for Children**, and the **Netherlands Red Cross**, it specifies the content of their assistance and support to refugees during the family reunification procedure.

**Chapter 6 Processing family reunification applications abroad** looks at the process of family reunification outside the Netherlands. It begins with an analysis of the requirement that, where family members must travel to a Dutch embassy/consulate that is not in the family member's country of origin or a neighbouring country, they are required to have continuous residence there or must provide an explanation as to why they do not have continuous residence. It then focuses on the role of Dutch embassies/consulates in the family reunification procedure followed by a description of practical challenges family members may face travelling to embassies/consulates, including situations where they may need to cross borders illegally and situations where there is no embassy/consulate in the country. The chapter ends with possible ways the IND, IOM, and UNHCR could facilitate family reunification in view of these practical challenges.

Finally **Chapter 7 Conclusion** briefly sets out the priority concerns identified in the research for the study and the core standards to guide implementation of family reunification procedures.

## 2. CONTEXT OF THE FAMILY REUNIFICATION POLICY IN THE NETHERLANDS

The rights to family life and to family unity are entrenched in international and European law and underpin refugees' related right to family reunification. This chapter covers the main standards on family reunification for refugees, followed by an overview of how the Dutch legislation, policy and regulations have evolved over time.

“ It was very difficult to be all by myself. I worried constantly about the situation of my wife and my three-year-old daughter. Fortunately, I succeeded in having them join me here.”

Refugee father/husband from Eritrea

### 2.1 International and European legal framework

International and European legal instruments and jurisprudence provide the framework that underpins the right to family life and family unity. They set out important safeguards for the family reunification of refugees and other beneficiaries of international protection. The Dutch family reunification procedure must be implemented in line with these instruments and standards, as they are directly applicable in the Netherlands.<sup>45</sup>

#### 2.1.1 International legal framework

At the international level, the rights to family life and to family unity are underpinned by the recognition under **international human rights law**

and international humanitarian law of the family as the fundamental group unit of society, which is entitled to protection and assistance and of the right to marry and found a family, which may not be subject to unlawful interference.<sup>46</sup>

These instruments apply to all human beings, meaning that the rights to family life and family unity apply to all, regardless of their status, including refugees. As has been noted, respect for these rights “frequently requires that States not only refrain from actions which could result in family separation, ... but also take positive measures to maintain the family unit, including the reunion of separated family members”.<sup>47</sup> Where families are unable to enjoy the rights to family life and family unity in another State, as is the case for refugees and other beneficiaries of international protection who face persecution or serious harm in their country of origin, then reunification in the country of asylum becomes necessary.

A key source of rights in relation to family reunification under international human rights law can be found in the **Convention on the Rights of the Child (CRC)**.<sup>48</sup> This Convention sets out some of the strongest protections of the child's right to

<sup>45</sup> *Constitution of the Kingdom of the Netherlands*, June 2002, available at: <http://bit.ly/2M2ezni>, Arts. 90-94.

<sup>46</sup> See e.g. *Universal Declaration of Human Rights*, 10 Dec. 1948, 217 A (III), available at: <http://bit.ly/2ZAgCSL>, Art. 16; *International Covenant on Civil and Political Rights*, 16 Dec. 1966, UNTS, vol. 999, p. 171, available at: <http://bit.ly/2YLW6Ns>, Arts. 17 and 23; *International Covenant on Economic, Social and Cultural Rights*, 16 Dec. 1966, UNTS, vol. 993, p. 3, available at: <http://bit.ly/2T9DSEL>, Art. 10(1); ICRC, *Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <http://bit.ly/2yE3nEy>, Art. 74.

<sup>47</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW Committee) and Committee on the Rights of the Child (CRC Committee), *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 Nov. 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <http://bit.ly/2YFYHNd>, para. 27. The language echoes that of CRC Committee, *General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, 1 Sept. 2005, CRC/GC/2005/6, available at: <http://bit.ly/2GOXKla>, para. 13, and of UNHCR, “Summary Conclusions: Family Unity, Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 Nov. 2001”, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Feller et al. eds), Cambridge University Press, 2003, pp. 604-608, available at: <http://bit.ly/2M37cMe> (UNHCR, Summary Conclusions, Family Unity), para. 5.

<sup>48</sup> UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, p. 3, available at: <http://bit.ly/31jH6rY>.

family unity, as well as States Parties' corresponding obligations.<sup>49</sup> Underpinning these rights is the principle that the best interests of the child must be a primary consideration in all actions concerning children (Article 3). Importantly, Article 10 extends an express right to apply for family reunification to both children and parents, a provision representing "the only explicit right to family reunification in international human rights law".<sup>50</sup> This Article also provides that applications must be dealt with in a "positive, humane and expeditious manner" and must be determined in accordance with the obligations contained under Article 9(1), which provides a right for children to maintain relations and direct contact with their parents if this is in their best interests. Another important provision in the context of the consideration of applications for family reunification involving children is Article 12 CRC. This requires States Parties to give the views of children who are capable of forming their own views due weight in accordance with their age and maturity and to give children the opportunity to be heard.<sup>51</sup>

In addition, Article 22(1) CRC specifically concerns refugees. It requires States Parties to "take appropriate measures" to ensure that an asylum-seeking or refugee child, "whether unaccompanied or accompanied by his or her parents or by any other person, receive[s] appropriate protection and humanitarian assistance". Further, Article 22(2) requires States Parties to cooperate with the UN and NGOs "to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family". The CRC thus obliges States Parties to undertake prompt tracing of

refugee children's family members and expeditious processing of family reunification requests involving children that involve child-friendly procedures, in which the best interests of the child are always considered and taken as a primary consideration.

## International refugee law

The 1951 Convention relating to the Status of Refugees itself is silent on the issue on family reunification. Nevertheless the Final Act of the UN Conference of Plenipotentiaries which adopted the Convention recommends that governments:

take the necessary measures for the protection of the refugee's family, especially with a view to ... ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.<sup>52</sup>

As UNHCR has noted, this recommendation "is observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol".<sup>53</sup>

The member States of UNHCR's Executive Committee (ExCom) have also adopted a series of Conclusions that reiterate the fundamental importance of family unity and reunification.<sup>54</sup> In particular, ExCom Conclusion No. 24 calls for the facilitated entry of family members and hopes that "countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family".<sup>55</sup> ExCom Conclusion No.

<sup>49</sup> Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13, pp. 18-19; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, pp. 8-10.

<sup>50</sup> UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons in Need of International Protection*, 4 Dec. 2017, Expert Roundtable, available at: <http://bit.ly/31kMs69> (UNHCR, Summary Conclusions, Family Reunification), para. 2.

<sup>51</sup> For further discussion, see Section 6.3.2.

<sup>52</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://bit.ly/2YpR0v2>.

<sup>53</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued 2011, HCR/1P/4/ENG/REV. 3, available at: <http://bit.ly/2yFgtS1>, para. 183.

<sup>54</sup> See in particular, ExCom Conclusions No. 9 (XXVIII) on Family Reunion, 1997; No. 24 (XXXII) on Family Reunification, 1981; No. 84 (XLVIII) on Refugee Children and Adolescents, 1997; No. 88 (L), 1999 on the Protection of the Refugee's Family; No. 104 (LVI), 2005 on Local Integration; and No. 107 (LVIII), 2007 on Children at Risk. See UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7<sup>th</sup> edition, June 2014, available at: <http://bit.ly/2YLX78e>, pp. 223-229. Although not binding, ExCom Conclusions are generally accepted as constituting "soft law", contributing to the interpretation and application of refugee law instruments.

<sup>55</sup> UNHCR ExCom, Conclusion No. 24, *Family Reunification*, above, fn. 54, para. 5.



104 also notes the potential role of family members in promoting the smoother and more rapid integration of refugee families given that they can reinforce the social support system of refugees.<sup>56</sup>

### 2.1.2 Council of Europe legal framework

At the European level, a key Council of Europe instrument protecting the right to family life is the **European Convention on Human Rights (ECHR)**, which states in Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>57</sup>

Other relevant Articles of the ECHR include Article 13 on the right to an effective remedy and Article 14 on the prohibition of discrimination.

The case law of the European Court of Human Rights (ECtHR) regarding Article 8 initially evolved in the context of States' obligations not to divide families of settled migrants in the expulsion context. By contrast, States' positive obligations to admit family members

so that individuals are enabled to enjoy their right to family life and family unity are less well developed by the Court, notably because the ECtHR generally rules against reunification if family life can be enjoyed elsewhere.<sup>58</sup>

The Court generally accords States a considerable "margin of appreciation" when it comes to the admission of non-nationals.<sup>59</sup> It has nonetheless clearly recognized that for persons fleeing persecution or armed violence and conflict, this is usually not possible, since they have been recognized as facing persecution or serious harm in their country of origin and cannot be expected to return there to enjoy their right to family life.<sup>60</sup> In such cases, family reunification in the country of refuge is the only way to re-establish family life.

Two judgments concerning refugees issued in July 2014 are particularly relevant.<sup>61</sup> In *Tanda-Muzinga v. France*, the Court recalled that "family unity is an essential right of refugees and that family reunification is a fundamental element allowing persons who have fled persecution to resume a normal life" and that "obtaining such international protection constitutes a proof of the vulnerability of the persons concerned".<sup>62</sup> It noted that it was accepted that refugees should "benefit from a family reunification procedure that is more favourable than that available to other foreigners" and considered that the national authorities were required "to take account of the vulnerability of the applicant and his particularly difficult personal experience, for them to pay great attention to the pertinent arguments he raised in the matter, for them to provide reasons for not implementing his family reunification, and

<sup>56</sup> UNHCR ExCom, Conclusion No. 104, *Local Integration*, para. (n)(iv).

<sup>57</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 Nov. 1950, ETS 5, available at: <http://bit.ly/2YK2vsO>, Art. 8.

<sup>58</sup> See generally, Costello, *The Human Rights of Migrants and Refugees in European Law*, above fn. 34, p. 138; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, pp. 12-15; Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13, pp. 21-22.

<sup>59</sup> See e.g. *Gül v. Switzerland*, Application no. 23218/94, ECtHR, 19 Feb. 1996, available at: <http://bit.ly/2ZBiCKr>, para. 38; *Jeunesse v. Netherlands*, Application no. 12738/10, ECtHR Grand Chamber, 3 Oct. 2014, available at: <http://bit.ly/2YFZ22r>, para. 106.

<sup>60</sup> See e.g. *Tanda-Muzinga c. France*, Requête no. 2260/10, ECtHR, 10 July 2014, available at: <http://bit.ly/2Kz9ijl>, paras. 74-75; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, ECtHR, 12 Oct. 2006, available at: <http://bit.ly/2KgTvHj>, para. 75; and, in relation to flight from armed violence and conflict, *Tuquabo-Tekle and Others v. The Netherlands*, Application no. 60665/00, ECtHR, 1 Dec. 2005, available at: <http://bit.ly/2GKf2WX>, paras. 47-50. See also at the international level, *El Dernawi v. Libya*, No. 1143/2002, UN Human Rights Committee, CCPR/C/90/D/1143/2002, 2007, available at: <http://bit.ly/2Kiprer>, para. 6.3.

<sup>61</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, para. 73. and *Mugenzi c. France*, Requête no. 52701/09, ECtHR, 10 July 2014, available in French at: <http://bit.ly/2YMrxYe>.

<sup>62</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, para. 75 (authors' translation), and *Mugenzi c. France*, ECtHR, 2014, above fn. 61, with similar language at para. 54.

for them to rule on the visa request promptly”.<sup>63</sup> It determined that applications for family reunification made by refugees should be examined “rapidly, attentively and with particular diligence”<sup>64</sup> and ruled that the accumulation and prolongation of multiple difficulties and the authorities’ failure to take account of the specific situation of the applicant meant that the decision making process had not shown the requisite guarantees of “flexibility, promptness and effectiveness” required to respect his right to family life.<sup>65</sup>

Another area where the case law of the ECtHR regarding the right to family life provides useful guidance concerns the requirement to ensure that the best interests of the child, although not decisive alone, are accorded “paramount importance” and “significant weight”.<sup>66</sup> The Court has emphasized that “in cases regarding family reunification ... particular attention” must be paid “to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents”.<sup>67</sup> It has also determined that “[w]hile the best interests of the child cannot be a ‘trump card’ which requires the admission of all children who would be better off living in a Contracting State, the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it.”<sup>68</sup>

Further judgments of the ECtHR are referred to at relevant points in subsequent chapters.

A number of **other Council of Europe instruments and guidelines** also set standards and provide guidance relevant to the family reunification of refugees and are referred to at relevant points in the

study. Notable among them is the European Social Charter, which requires States “to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory”.<sup>69</sup> The European Committee of Social Rights (ECSR) has clarified that the rights under the Charter “are to be enjoyed to the fullest extent possible by refugees” and, in its 2015 Conclusions interpreting the rights of refugees under the Charter, the ECSR stated that States’ obligations under the Charter “require a response to the specific needs of refugees and asylum seekers, such as ... the liberal administration of the right to family reunion”.<sup>70</sup> Most recently, the Parliamentary Assembly of the Council of Europe adopted a draft Resolution on Family Reunification of Refugees and Migrants in the Council of Europe Member States in September 2018, which calls on national authorities to “adopt an enabling approach to family reunification”.<sup>71</sup>

### 2.1.3 European Union legal and policy framework

In addition to being bound by the ECHR, EU Member States are also bound by EU instruments and legislation, as outlined below.

### Charter of Fundamental Rights

The EU Charter of Fundamental Rights sets out Member States’ obligations, including regarding the right to family life (Article 7); to marry and found a family (Article 9); to non-discrimination (Article 21); the best interests principle (Article 24(2)); the right of every child to maintain direct contact with their parents unless this is contrary to their best interests (Article 24(3)); the right to good administration

<sup>63</sup> *Ibid.*

<sup>64</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, para. 73, *Mugenzi c. France*, ECtHR, 2014, above fn. 61, para. 52.

<sup>65</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, paras. 73, 81, and 82; *Mugenzi c. France*, ECtHR, 2014, above fn. 61, para. 62; and also *Senigo Longue et autres c. France*, Requête no. 19113/09, ECtHR, 10 July 2014, available in French at: <http://bit.ly/2yFmheb>, para. 75.

<sup>66</sup> See e.g. *Jeunesse v. The Netherlands*, ECtHR, 2014, above fn. 59, para. 109.

<sup>67</sup> *El Ghatet v. Switzerland*, Application no. 56971/10, ECtHR, 8 Nov. 2016, available at: <http://bit.ly/2Kh0hwQ>.

<sup>68</sup> *Ibid.*, para. 46 (references removed).

<sup>69</sup> *European Social Charter*, 18 Oct. 1961, ETS 35, available at: <http://bit.ly/2GPk4Bn>, Art. 16(6).

<sup>70</sup> European Committee on Economic and Social Rights, *Conclusions 2015, Statement The Rights of Refugees under the Charter*, Jan. 2016, available at: <http://bit.ly/2OCILar>. Other guidance can be found, for instance, in Parliamentary Assembly of the Council of Europe (PACE), Committee on Migration, Refugees and Displaced Persons, *Position Paper on Family Reunification*, 2 Feb. 2012, AS/Mig (2012) 01, available at: <http://bit.ly/2yFRJsP>.

<sup>71</sup> PACE, *Family Reunification of Refugees and Migrants in the Council of Europe Member States*, Resolution 2243 and Recommendation 2141, adopted 11 October 2018, 11 Oct. 2018, available at: <http://bit.ly/2KgUxTH>, para. 3.

(Article 41); and to effective judicial protection (Article 47).<sup>72</sup> These rights apply to everyone, therefore including refugees and other beneficiaries of international protection. The Charter “has the same legal value as the treaties” and constitutes primary EU law, meaning that it serves as a parameter for examining the validity of secondary EU legislation and national measures.<sup>73</sup>

## Family Reunification Directive

In terms of the EU’s “asylum *acquis*”, the 2003 Family Reunification Directive (FRD)<sup>74</sup> sets out the terms under which third country nationals, including refugees, residing lawfully in the EU are entitled to family reunification. It specifically states that such persons have a right to family reunification (Article 1). Member States are required to authorize the entry of the spouse and minor children of such persons and may do so for wider family members (Article 4). The Directive’s provisions must be interpreted “in conformity with the obligation to protect the family and respect family life” (recital 2) and “due regard” must be had to the best interests of minor children (Article 5(5)).

The Directive entitles refugees to more favourable conditions than other third country nationals, “on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there” (recital 8). They are in particular able to benefit from more preferential terms as set out in Chapter V of the Directive. Acknowledging the difficulties refugees may face providing “official documentary evidence of the family relationship”, Member States are required to “take into account other evidence ... of the existence of such relationship” and must not reject an application “solely on the fact that documentary

evidence is lacking” (Article 11(2)). Chapter V also exempts refugees from having to show evidence of accommodation, sickness insurance, and stable and regular resources unlike other third country nationals, although Member States may require this if the application is submitted more than three months after the granting of refugee status (Article 12(1)). Refugees are also not required to have resided in a Member State for a period of time before being able to seek family reunification (Article 12(2)).

The CJEU has set out the standards that apply when Member States implement various aspects of the FRD in a number of judgments. These are referenced at relevant points in this study.

More generally, the CJEU has on several occasions affirmed that “authorisation of family reunification is the general rule” with the result that, while its requirements “must be interpreted strictly”, the “margin for manoeuvre” which EU Member States are recognized as having “must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification”.<sup>75</sup> The Court has specified that the Directive “must be interpreted in the light of the right to respect for family life enshrined in both the ECHR and the Charter”.<sup>76</sup> The CJEU has likewise confirmed that “general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules”.<sup>77</sup> Such general principles set out in the Charter include the principles of effectiveness and proportionality.

For its part, the European Commission issued guidance on the implementation of the FRD in 2014.<sup>78</sup> This built on its 2008 report on the implementation of the Directive<sup>79</sup> and followed a public consultation

<sup>72</sup> EU, *Charter of Fundamental Rights*, 26 Oct. 2012, 2012/C 326/02, available at: <http://bit.ly/2Kv1YWw>.

<sup>73</sup> EU, *Consolidated Treaty on the Functioning of the European Union*, 2007, above fn. 9, Art. 6(1).

<sup>74</sup> Council of the EU, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification* (FRD), OJ L. 251/12-251/18, 3 Oct. 2003, available at: <http://bit.ly/2GMgCHK>, (FRD).

<sup>75</sup> *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, CJEU, 4 March 2010, available at: <http://bit.ly/2Kr9aCW>, para. 43.

<sup>76</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 75, paras. 43-44, and also *Minister van Buitenlandse Zaken v. K. and A.*, C-153/14, CJEU, 9 July 2015, available at: <http://bit.ly/2KxJep5>, para. 50.

<sup>77</sup> *European Parliament v. Council of the European Union*, C-540/03, EU: CJEU, 27 June 2006, available at: <http://bit.ly/2ZCDdxl>, para. 105.

<sup>78</sup> European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32.

<sup>79</sup> European Commission, *Report from the Commission on the Application of Directive 2003/86/EC on the Right to Family Reunification*, 2008, above fn. 32.

involving Member States and stakeholders, including UNHCR.<sup>80</sup> A second consultation to evaluate and assess the existing EU legislation on legal migration, known as the “Legal Migration Fitness Check or REFIT initiative”, was held in 2017.<sup>81</sup>

The IND’s 2017 European Migration Network report on family reunification in the Netherlands notes that “the [2014 EC] guidelines are used in the judicial system in the Netherlands. They provide a reference point for the interpretation of the directive”.<sup>82</sup> Specific issues on which the European Commission has provided guidance are referred to at relevant points later in this study.

### Other instruments of the EU asylum *acquis*

With regard to other instruments of the Common European Asylum System (CEAS), the **Dublin III Regulation** sets out the rules for determining the Member State responsible for examining an asylum claim made in one of the Member States.<sup>83</sup> The Regulation contains several provisions designed to ensure respect for the principles of family unity and the best interests of the child (recitals 14-17). Where the application of the criteria under the Dublin III Regulation would otherwise lead to the separation of family members and/or minor unmarried siblings, who have submitted applications for international protection simultaneously (or nearly so), the Regulation defines which Member State is deemed responsible for examining the applications, so that family members are not separated and their claims can be assessed together (Article 11). In addition, the Regulation requires Member States “normally [to] keep or bring together” dependent family members (Article 16) and permits them to

assume responsibility for examining the asylum claim of an applicant “in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations” even when that Member State is not responsible (Article 17(2)). This “humanitarian clause” thus allows Member States to derogate from the binding criteria laid down in the Dublin III Regulation in order to protect family unity. It should be noted, however, that the Regulation only concerns the reunion of family members already present in an EU Member State and does not confer any right to family reunification with family members outside the EU.

The European Commission’s 2016 proposed recast of the Dublin Regulation extends the definition of family members by including families formed in transit and siblings of the applicant.<sup>84</sup> If adopted, the proposal will, however, make it more difficult for family members to reunite with beneficiaries of international protection residing in another Member State, as it would oblige or allow the first Member State where the asylum claim is lodged to return the applicant to a first country of asylum, a safe third country or a safe country of origin, if applicable.<sup>85</sup> This inadmissibility procedure takes precedence over applying the family criteria, which would therefore become less relevant.<sup>86</sup>

In the Dublin context, EU Member States should in UNHCR’s view make greater use of the discretionary clauses in the Dublin III Regulation and apply them in a flexible, proactive, expeditious and pragmatic manner, with a special focus on the transfer of unaccompanied and separated children. Further, in UNHCR’s view, the assessment of responsibility on the basis of family links under Articles 10-13 and 18

<sup>80</sup> See UNHCR, *UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1.

<sup>81</sup> European Commission, Migration and Home Affairs, “Legal Migration Fitness Check REFIT initiative”, available at: <http://bit.ly/2YLS2kz>. For UNHCR’s input see UNHCR, *UNHCR Written Contribution to the Public Consultation on the European Union’s (EU) Legislation on the Legal Migration of Non-EU Citizens (Fitness Check on EU Legal Migration Legislation)*, 2017, above fn. 30.

<sup>82</sup> EMN/IND, *Family Reunification of Third-Country Nationals*, May 2017, available at: <http://bit.ly/2OJ8Uon>, section 2.1.2, p. 18. The report gives an overview of the situation as regards the family reunification of third-country nationals in the Netherlands.

<sup>83</sup> Council of the EU, *Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, available at: <http://bit.ly/31p3MqX>. For more on the application in practice of this Regulation, see UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, Aug. 2017, available at: <http://bit.ly/2TeoHtN>.

<sup>84</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-country National or a Stateless Person (Recast)*, COM(2016) 270 final, 4 May 2016, available at: <http://bit.ly/2OHK73Y>, Arts. 2(g) and 19.

<sup>85</sup> *Ibid.*, Art. 3(3) and also the explanation at p. 15.

<sup>86</sup> The family criteria are set out in Arts. 8-11 (Dublin III Regulation) and Arts. 10-13 (COM (2016)270).

of the proposed recast should be conducted before the application of safe country notions, so as to ensure respect for the right to family unity and the best interests of the child, as enshrined inter alia in international law and the EU Charter. If an applicant can be reunited with family members or, in the case of children, relatives who are present in a Member State, then he/she should not be subject to the application of safe country concepts and instead be transferred to the Member State responsible under the family criteria.<sup>87</sup>

**Other CEAS instruments** contain provisions on the requirement to maintain the family unity of family members already within the Member State's territory who were part of the family in the country of origin, as for instance set out in the 2013 Reception Conditions Directive (recast)<sup>88</sup> and the 2011 Qualification Directive (recast).<sup>89</sup> The European Commission's proposals on each of these issues extend those persons considered to be member of the family to persons whose relations were formed after leaving the country of origin but before arrival on the territory of the Member State.<sup>90</sup> These provisions are complementary to those in the FRD. They do not give a right of access, as they only apply to those who are already within a Member State.

A more detailed analysis of these other instruments of the asylum *acquis* and the rights to family life and family unity is beyond the scope of this study.

## 2.2 Overview of Dutch legislation and policy on asylum family reunification

In the Netherlands, refugees and beneficiaries of subsidiary protection receive the same status and rights, as is the case in the majority of EU Member States.<sup>91</sup> The conditions under which they, as “asylum permit holders”, are able to sponsor family members to join them in the Netherlands are generally less stringent than those that apply to other migrants.<sup>92</sup> This process is known as “asylum family reunification” as compared to “regular family reunification”, which primarily applies to other third country nationals and Dutch citizens who want to reunite with third country national family members.

This section provides a brief overview of the legislation and policy that apply in the Netherlands and of key changes in recent years. These changes have arisen following the approval of new legislation and/or resulted from precedent-setting national and European case law. They have had the effect of rendering legislation and policy on family reunification in the Netherlands less restrictive, especially regarding the requirements concerning family ties. Further information on each of the issues below is set out in subsequent chapters, which review law, policy and practice in more detail.

The **family definition** that applies in the context of asylum family reunification includes the spouse or partner, minor children, young adult children, as well as unmarried dependent adult children of the refugee sponsor. An unaccompanied child sponsor is entitled to reunify with his/her parents under the asylum

<sup>87</sup> UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* – COM(2016) 270, 22 Dec. 2016, available at: <http://bit.ly/2KAgsEG>, p. 14.

<sup>88</sup> Council of the EU, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, available at: <http://bit.ly/2ZEsnrk>, Arts. 2(c) and 12.

<sup>89</sup> QD (recast), above fn. 6, Art. 23(1).

<sup>90</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, COM(2016) 466 final, 13 July 2016, available at: <http://bit.ly/2Zx2UQm>, Art. 2(9); European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down Standards for the Reception of Applicants for International Protection (Recast)*, COM(2016)465 final, 13 July 2016, available at: <http://bit.ly/2GRuQXR>, Art. 2(3).

<sup>91</sup> UNHCR, *The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, p. 147.

<sup>92</sup> For further information, see subsequent chapters and EMN, *Family Reunification of Third-Country Nationals*, 2017, above fn. 82; IND et al., *The Family Reunification Procedure for Holders of an Asylum Residence Permit*, Jan. 2018, available at <http://bit.ly/2M0okCx>; IND, *Family Member of Refugee*, online list of conditions applying, available at: <http://bit.ly/2YvefUA>.



family reunification procedure.<sup>93</sup> In addition he/she is entitled under the regular family reunification procedure to reunify with his/her minor siblings, young adult siblings, and unmarried adult siblings who are dependent on the parents. In recent years, precedent-setting case law, legislative and/or policy amendments have broadened the family definition that applies. A 2012 Council of State judgment ensured that a distinction between biological and foster children could no longer be made. From January 2014, amendments to the Aliens Act replaced the requirement that family ties have been formed in the country of origin with a requirement that they were formed before the sponsor's arrival in the Netherlands. A requirement that family members have the same nationality was also abolished, thus bringing Dutch legislation into line with the FRD on these issues. A policy change in 2015 made young adult children (i.e. aged 18 to 25 years) and unmarried dependent adult children eligible for reunification under the asylum family reunification procedure under certain conditions. (For more on these issues see Chapter 3.1 Scope of the family definition.)

An applicant for family reunification is in addition required to **substantiate "factual family ties"**<sup>94</sup> by submitting official (original) documents. If he/she or his/her family members cannot do so, he/she should provide a plausible explanation showing that the lack of documents cannot be attributed to him/her. If the IND accepts this explanation, it will offer the possibility of a DNA test and/or an "identification interview".<sup>95</sup> Since November 2017, in keeping with the principle of the best interests of the child, the IND has also permitted DNA testing of spouse and minor children, even where the lack of documentary evidence is deemed attributable to the refugee, if the identity of the parent, wishing to join the refugee spouse, has been "credibly attested" through documentation.<sup>96</sup> At the same time, it also allowed "indicative documents" (i.e. other types of evidence)

to be considered before a lack of documentary evidence was determined. If the refugee sponsor is able to provide sufficient non-official (indicative) documents and the explanation why he/she does not have official documents is accepted then the IND will also accept the family reunification. With the new policy the IND will now allow the possibility of a DNA test and/or an "identification interview" both if it accepts the explanation regarding the lack of official documents but no or insufficient non-official (indicative) documents are provided and if it does not accept this explanation, but sufficient non-official (indicative) documents are provided. If, however, the IND does not accept this explanation and no non-official (indicative) documents are provided, then the application will be rejected without further investigation. This is also the case if documents are false or if the sponsor/family member has given conflicting statements.

An applicant must also provide plausible grounds showing that at the moment of his/her entry into the Netherlands the family member(s) belonged to his/her family and that the **family ties have not been broken**. This "factual family ties" requirement means that the applicant and his/her family members must prove more than just officially documented or biological ties. In 2009, factual family ties were defined as having lived in the household of the refugee at the moment the refugee left his/her country of origin. In 2013, the State Secretary decided no longer to consider the family ties to be broken if a minor child had been included in another family. Currently, the family ties between children and their parents can only be considered broken if the child lives independently and provides for his/her own livelihood or when other contra-indications lead to the conclusion that the child no longer belongs to the family. In mid-2017, precedent-setting national case law meant that the requirement of having lived in the same household was changed to

<sup>93</sup> Aliens Act 2000, Article 29, para. 2.

<sup>94</sup> "Feitelijke gezinsband". For more on the background to this requirement and related ECtHR jurisprudence, see Kinderrechtencollectief: Dutch NGO Coalition for Children's Rights, *Growing up in the Low Countries: Children's Rights in the Netherlands: The second report of the Dutch NGO Coalition for Children's Rights on the implementation of the Convention on the Rights of the Child in the Netherlands, Annex: Alien Policy and Children's Rights*, May 2003, available at: <http://bit.ly/2Yr1NW4>, pp. 36-39. This states at p. 36: "The introduction of the term 'factual family relationship' in 1982 was actually intended to broaden the set of family members, namely to make children other than biological children eligible for family reunification. Over the course of time it has been interpreted as a double requirement for family reunification with children." The requirement contrasts with practice in other countries, where evidencing the legal relationship is sufficient to be granted the right to family reunification.

<sup>95</sup> "Identificerend gehoor" (referred to as an identifying hearing in some publications).

<sup>96</sup> "Aannemelijk gemaakt" (translates variously as "credibly attested", "made plausible" or "provided a plausible explanation for").

be defined an indicator of family ties rather than a strict requirement for partnerships and religious or traditional marriages, as was previously the case. As a result of Dutch case law interpreting the FRD, the requirement of cohabitating no longer applies to legal marriages. (See Chapter [3.2](#) Requirement to prove/ substantiate for more on how “factual family ties” must be proven.)

Family reunification is in addition possible under the regular family reunification procedure on **Article 8 ECHR grounds**, where persons are not considered to be family members under the family definition under the asylum reunification procedure. Under this procedure the IND assesses whether a decision to deny reunification would breach the Netherlands’ obligations under Article 8 ECHR. In such cases, applicants must, however, show that there are “more than normal emotional ties” between the family members concerned and (unless they are unaccompanied child refugees) they must meet the income and other requirements. (For more on these issues see Sections [3.1.2](#) to [3.1.6](#) below.)

An asylum permit holder must submit an application for family reunification within **three months** of being granted status, if his/her application is to be exempt from having to meet the requirements otherwise applying to sponsors under the regular family reunification procedure. If they do not meet this deadline, the sponsors under the regular procedure must show they have sufficient and independent sustainable income; they must wait a year before applying; and family members must take a civic integration test abroad. Refugees are, however, rarely able to meet these stricter conditions. In practice, if a refugee is unable to meet the three-month deadline and applies under the regular procedure but cannot meet these conditions, then the IND would automatically assess whether there were Article 8 ECHR grounds for approving the application. Depending on the individual circumstances of the case one or more of the conditions might be waived after a careful balancing of the interest of the individual and that of the State. (See Chapter [4.2](#) Deadline for applying for family reunification below.)

Where family members are in a particularly vulnerable situation, it is also possible to request that the application for family reunification be **processed on a priority basis**. This is particularly where there are acute, medically life-threatening reasons for doing so, but also, for instance, for very young children. (See Chapter [4.4](#) Priority processing.)

**Family members** arriving in the Netherlands receive the **same status and rights as the sponsor**. They derive that status from their sponsor, with the result that if the family tie is broken after the arrival of the family member(s) in the Netherlands, the residence permit may be revoked. Currently, if a family member runs the risk of the family tie being broken (e.g. through divorce), he/she can apply for asylum independently and the IND will then examine the claim on its own merits. Alternatively, the family member can wait until the withdrawal hearing and submit his/her own grounds for asylum at that stage. The IND will reassess the case and may then issue a permit to the family member on his/her own merits.

The IND also has the possibility of protecting family members who are victims of domestic violence, human trafficking, (sexual) exploitation, and/or honour-related crimes. If the family member raises any of these issues, the IND will interview the person and, based on an individual assessment, may decide to grant the family member a humanitarian visa.<sup>97</sup> (For more on this issue, see chapter [4.6](#) Status granted to family members.)

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<sup>97</sup> Article 14 under 1 sub e Aliens Act j article 3.6a Aliens Decree.

## 3. FAMILY MEMBERSHIP AND THE SUBSTANTIATION OF FAMILY LINKS

This chapter sets out the scope of the family definition applied. In particular, it explains the challenges faced by refugees seeking to reunite with dependent elderly parents and with other dependent family members, as well as by unaccompanied child refugees, who reach the age of majority during the asylum procedure and then seek to reunite with family members.

It goes on to examine the requirement to prove/substantiate family links, known as “factual family ties”, either by providing official documents or, if these are lacking, by other means. Particular issues concern the requirement to prove that a lack of official documents is not attributable to the refugee; couples in traditional and religious marriages; and situations where a “declaration of consent” is required from the parent of a child otherwise entitled to reunite with the refugee parent in the Netherlands. Recommendations are at the end of sections [3.1.7](#), [3.1.10](#), and [3.2.7](#).

### 3.1 Scope of the family definition

#### 3.1.1 National legislative framework and case law

As outlined briefly in chapter [2.2](#) above, **family members eligible for reunification** under the asylum family reunification procedure in the Netherlands are the spouse or partner of the sponsor, their minor children (i.e. those under the age of 18 years)<sup>98</sup> and their young adult children. Unmarried dependent adult children can also reunify under the asylum

reunification procedure, if the IND considers that more than normal emotional ties exist. In the case of young adult children, they are considered to belong to, and to have always belonged to, the family, except where contra-indications suggest that they are no longer dependent on their parent(s). The latter are considered to prevail over the individual interests of the young adult child.<sup>99</sup>

The parents of a minor refugee child are also eligible to reunify under the asylum reunification procedure. Minor siblings and young adult siblings of a minor unaccompanied refugee child can also reunify,<sup>100</sup> but for them an application needs to be submitted under the regular family reunification procedure and is in principle only granted if submitted alongside the application for the parents.

In addition, unmarried adult siblings, who are dependent on the parents, can reunify under the regular reunification procedure, if the IND considers that more than normal emotional ties exist. Family members who were not mentioned by the permit-holder during his/her asylum procedure are not eligible.<sup>101</sup>

<sup>98</sup> See Aliens Act 2000, Art. 29(2); Aliens Circular 2000, para. C2/4.1. Dutch asylum and migration matters are regulated by the Aliens Act 2000 (Vreemdelingenwet 2000), the latest version of which can be found in Dutch at: <http://bit.ly/2KgRdlu>. Key implementing decrees and regulations include the Aliens Decree (Vreemdelingenbesluit 2000), the latest version of which is available in Dutch at: <http://bit.ly/2MGB9kF> and the Aliens Circular 2000 (Vreemdelingenbesluit 2000, also referred to as Aliens Act Implementation Guidelines 2000), the latest version of which is available in Dutch at <http://bit.ly/2YHGfzK>. (The Aliens Circular has three parts, A, B and C, the latter setting out provisions relating to asylum.) There are in addition a series of IND Work Instructions, some of which are available publicly in Dutch and occasionally in English at: <http://bit.ly/2ZBfmP9>. The IND describes the latter as being “explicitly not policies, but procedural instructions”, which “are therefore not meant to substitute the provisions set out in the Aliens Act Implementation Guidelines 2000”.

<sup>99</sup> Letter of 21 May 2015 from the State Secretary for Security and Justice, available at: <http://bit.ly/31jnYdz>; *Stcrt.* 2016, 46741. See also Decision of the State Secretary for Security and Justice No. WBV 2017/9, 15 Sept. 2017, available at: <http://bit.ly/2yCMyKj>.

<sup>100</sup> Aliens Act 2000, Art. 29(2)(c); Aliens Circular 2000, para. C2/4.1. Minor and young adult siblings are assessed as if it were the parent who had submitted the application. Young adults are stipulated as being aged 18 to 25 years old under the regular family reunification procedure, but no age is specified in the asylum family reunification procedure. According to the IND, it applies an upper age of 25 years for a young adult, but this is not a hard threshold, as the assessment evaluates both age and level of dependency, with the result that reunification with children over the age of 25 may occasionally be approved. Otherwise, reunification with siblings over the age of 25 is also possible if more than normal emotional ties exist.

<sup>101</sup> ACVZ, *Reunited after Flight*, 2014, above fn. 32, 2014, p. 133.

Table 2 below sets out in more detail which family members are entitled to reunify under both the asylum and the regular family reunification procedures (the latter also including applications made on Article 8 ECHR grounds). The regular family reunification procedure applies to refugees if they are unable to apply for family reunification within three months of being granted international protection and the IND decides that exceptional circumstances do not apply. The sponsor must be aged 21 years or older, though someone aged 18-21 years can bring their spouse, if both are aged at least 18 years and were married before the sponsor's entry into the Netherlands. Under the regular procedure sponsors must wait a year before being able to apply; must meet income, accommodation and identity documentation requirements; and the reunifying family member must pass a civic integration test before entry to the Netherlands. Family reunification applications on Article 8 ECHR grounds are permitted

if “more than normal emotional ties” exist between the family members concerned. In principle, the sponsor must also meet the stricter requirements of the regular family reunification procedure, unless the sponsor is an unaccompanied refugee child. The terms used in the Table are further explained in the text below.

From January 2014, amendments to the Aliens Act replaced the requirement that family ties have been formed in the country of origin to become a requirement that they were formed before the sponsor's arrival in the Netherlands. This implies that also families formed outside the country of origin, for instance in a refugee camp, are entitled to family reunification, in line with Article 9 of the FRD. The amendments also removed the requirement that family members have the same nationality, thus bringing Dutch practice in line with the FRD,

**Table 2: Who is entitled to family reunification in the Netherlands?**

Family member	Under asylum family reunification procedure	Under regular family reunification procedure	On Article 8 ECHR grounds under regular procedure
Spouse/Partners	Yes	Yes	Yes
Minor children, including foster and adopted children	Yes	Yes	Yes
Young adult children (≤ 25 years)	Yes	No	Yes
Unmarried dependent adult children (≥ 25 years)	Yes	No	Yes
Parents of minor unaccompanied child	Yes	Yes <sup>102</sup>	Yes
Minor and young adult siblings (≤ 25 years) of minor unaccompanied child	No	No	Yes <sup>103</sup>
Unmarried adult siblings (≥ 25 years) of minor unaccompanied child	No	No	Yes <sup>104</sup>
Dependent parents of adult children	No	No	Yes
Other family members	No	No	Yes

Table verified by IND

<sup>102</sup> Article 3.24a Aliens Decree 2000; under the regular procedure minors would need to meet the income requirement (Article 3.24a Aliens Decree sub 2).

<sup>103</sup> Applications for minor and young adult siblings to reunify with an unaccompanied child refugee are officially submitted under the regular procedure. If submitted in conjunction with an application for the parents of an unaccompanied child family ties are assumed to exist; unless there are contra-indications that young adult siblings are able to live independently from their parent(s). If not in conjunction with an application for the parents; more than normal emotional ties need to exist between the siblings in order to qualify for reunification.

<sup>104</sup> Applications for unmarried adult siblings to reunify with an unaccompanied child refugee are officially submitted under the regular procedure. If they are submitted in conjunction with an application for reunification with the parents of an unaccompanied child refugee, more than normal emotional ties need to exist between the parent and the unmarried adult child. If not, more than normal emotional ties need to exist between the siblings in order to qualify for reunification.

which does not link the right to reunification to nationality.<sup>105</sup>

With regard to the **spouse or partner**, this may be a married spouse, a registered partner or a non-married/non-registered partner in a lasting and exclusive relationship with the sponsor,<sup>106</sup> including partners of the same sex. Family reunification is not possible if the couple is divorced or the marriage is in fact broken or there is a sham relationship or a marriage of convenience. If the sponsor has more than one spouse/partner, the IND only grants a residence permit for family reunification to one partner and the children born from the relationship with this partner. Under the asylum family reunification procedure, the spouse or partner must be aged at least 18 years, not 21 years as for regular family reunification.<sup>107</sup>

With regard to the term “**children**”, the Aliens Circular clarifies that as used in legislation the term also includes children of one of the spouses or partners from a previous marriage or long-term relationship and adopted or foster children.<sup>108</sup> Following a Council of State ruling 2012, a distinction between biological and foster children can no longer be made.<sup>109</sup> The inclusion of foster children (which is not mandatory in the FRD) is thus positive, although in practice adopted and foster children face greater difficulties proving family ties, as DNA testing cannot be used to prove family ties and there may be no official documentation showing adoption/fostering.<sup>110</sup> Dutch policy also permits family reunification with

minor children who are married or in a relationship if they are not living independently and providing for their own livelihood, which appears to be an example of positive practice that UNHCR welcomes.<sup>111</sup> On the other hand, the Dutch policy excludes unmarried minor children who lived independently and self-sufficiently (after the arrival of the sponsor), or who take care of a child born out of wedlock (the latter only in case of self-sufficiency). This exclusion is in violation of Article 4(1) of the FRD, which only permits married minor children to be excluded from family reunification.<sup>112</sup>

With regard to **adult children**, a policy change introduced in 2015 also means that adult children are now also eligible for family reunification. For **young adult children**, they are required to have been part of the household when the parent entered the Netherlands and are considered to belong to, and to have always belonged to, the family, except where contra-indications suggest that they are no longer dependent on their parent(s). The latter are considered to prevail over the individual interests of the young adult child. **Unmarried dependent adult children** need to fulfil the more than normal emotional ties criterion before they can be eligible for family reunification.

Applications concerning other family members wishing to reunite with a refugee, such as the dependent parents and siblings of adult refugees, can be filed on condition that they have “more than

<sup>105</sup> Aliens Act 2000, Art. 29(2). *Parliamentary Documents II*, 2011/12, 33 293; Stb. 2013, nos. 478 and 587. The national grounds for protection were laid down in Aliens Act, Art. 29(1)(c) and (d). See ACVZ, *Reunited after Flight*, 2014, above fn. 32, p. 134.

<sup>106</sup> Aliens Decree, Art. 3.14.

<sup>107</sup> Aliens Circular 2000, para. C2/4.1.

<sup>108</sup> Aliens Circular 2000, para. C2/4.1.

<sup>109</sup> *Case no. 201112315/1/V1*, ABRvS (Afdeling bestuursrechtspraak van de Raad van State, Administrative Law Division of the Council of State, the highest general administrative court in the Netherlands), 10 Oct. 2012, ECLI:NL:RVS:2012:BY0146, available in Dutch at: <http://bit.ly/2KjcXDd>. The case concerned the biological son of a deceased biological daughter of one sponsor and a foster son of another sponsor.

<sup>110</sup> Aliens Circular 2000, para. C2/4.1, which specifies that the assessment of whether the child is factually a family member involves examining: the duration and reason for the inclusion of the foster child in the family of the sponsor; the foster child's (financial) dependence on the sponsor; the extent to which the biological parents of the foster child are able to care for the foster child and, if this is the case, to what extent they have remained involved in the upbringing of the child; and whether the sponsor has been granted custody of the foster child.

<sup>111</sup> The legal age for marriage in the Netherlands is 18, but by way of exception it can be lowered to 16 where the parents' consent to this. Thus, a child over the age of 16 but under 18 married with his/her parents' consent would be deemed legally married under Dutch law.

<sup>112</sup> See section 3.1.2 International and European standards: Family definition which follows.



normal emotional ties” with the sponsor as defined by the ECtHR in its case law on Article 8 ECHR.<sup>113</sup> According to the Council of State, more than normal emotional ties have to be established while assessing the existence of family life, not at the stage of weighing individual interests.<sup>114</sup>

For information on the particular situation of unaccompanied child asylum permit holders, see sections [3.1.8](#), [3.1.9](#), and [3.1.10](#) below.

### 3.1.2 International and European standards: Family definition

In terms of international standards regarding the **family definition**, the Human Rights Committee (HRC) has affirmed that “the term ‘family’ ... [should] be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned”.<sup>115</sup>

UNHCR promotes an inclusive family reunification policy and encourages States to allow family reunification for family members beyond those belonging to the “nuclear family”. This includes dependent elderly parents of adult refugees, single siblings, uncles, aunts, cousins and other non-blood related persons who lived with the family unit in the country of origin who were dependent on the family unit.<sup>116</sup> Regarding the nuclear family, UNHCR recommends, besides spouses and minor children, the inclusion of legally-recognized spouses, fiancées, common-law or customary marriages and long-term partnerships. Underage children are evidently part of

the nuclear family, but UNHCR also includes adopted and foster children and unmarried dependent adult children who resided with the parents in the country of origin. Unaccompanied children must be able to reunite with their parents, guardians and siblings.<sup>117</sup>

At the European level, the FRD requires legal and/or biological family ties between refugees and their family members. It *requires* Member States to authorize the admission of the sponsor’s spouse; the minor children of the couple (i.e. unmarried children below the legal age of majority), or of one member of the couple, where he/she has custody and the children are dependent on him/her, including in each of these cases adopted children (Article 4(1)). Member States *may* also permit reunification with the parents of an adult applicant or of his/her spouse, as well as his/her or his/her spouse’s adult unmarried children where they are dependent (Article 4(2)), and with an unmarried partner, persons in a registered partnership, their unmarried minor children, including adopted children, as well as adult unmarried children who are objectively unable to provide for their own needs on account of their state of health (Article 4(3)).<sup>118</sup> Article 10(2) takes into account the specific situation of, and challenges facing, refugee families by permitting their reunification with other dependent family members. The Netherlands has transposed this paragraph regarding foster children, unmarried partners and adult children up to 25 years of age who live with the family into national regulations. Article 10(3) *requires* Member States to permit unaccompanied minor refugee children to reunify with their parents and *permits* them to allow reunification with the child’s “legal guardian or any

<sup>113</sup> “*Meer dan gebruikelijke afhankelijkheidsrelatie*”, which can also be translated as “more than usual relationship of dependency”, although the term “more than normal emotional ties” is used (in English) in Decision of the State Secretary for Security and Justice No. WBV 2017/9, above fn. 99; Aliens Circular 2000, para. C2/4.1; Decision of the State Secretary for Security and Justice No. WBV 2016/11, 4 Sept. 2016, available at: <http://bit.ly/2YLywvx>. In case law, it was also decided that family reunification with family members other than those eligible for family reunification with refugees could only follow the regular procedure on the basis of Art. 8 ECHR. See 12/5683, District Court Assen, 17 July 2012. For more on the Article 8 ECHR procedure, see IND, Work Instruction 2019/15, “Guidelines for the Application of Article 8 ECHR”, p.6, 19 July 2019, available at: <https://bit.ly/31TJDJj>.

<sup>114</sup> 201605600/1/V1, ABRvS, 29 May 2017, ECLI:NL:RVS:2017:1417, available at: <http://bit.ly/2GPfqDz>.

<sup>115</sup> Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <http://bit.ly/2Tafzqg>, para. 5.

<sup>116</sup> UNHCR, *UNHCR Resettlement Handbook*, 2011, July 2011, available at: <http://bit.ly/2KjLlhm>, pp. 271-274 and p. 178 for a UNHCR definition of dependency; UNHCR, *UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, pp. 7-8.

<sup>117</sup> *Ibid.*, p. 272.

<sup>118</sup> Family members under Art. 4(2) are listed as: first-degree ascendants in the direct line (father and mother of the foreign national) where they are dependent on them and do not enjoy proper family support in the country of origin); adult unmarried children where they are objectively unable to provide for their own needs on account of their state of health, and under Art. 4(3) as unmarried partners in a duly attested stable long-term relationship, persons in a registered partnership, their unmarried minor children, including adopted children, and their adult unmarried children who cannot provide for their own needs on account of their state of health.

other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced". The FRD does not specify the situation as regards married children (whether minors or not) and thus leaves this issue up to Member States to regulate.

As for the Council of Europe, the 2018 PACE Draft Recommendation on Family Reunification of Refugees and Migrants advises national authorities to apply a family definition that goes "beyond the traditional definition of family which does not necessarily correspond to the multitude of ways in which people live together as a family today".<sup>119</sup>

### **3.1.3 Practice: Vulnerable family members with specific needs**

Subsequent sections examine the situation of three groups of vulnerable family members of refugees, who face particular challenges in the family reunification procedure in the Netherlands, as outlined in the following subsections. These persons are:

- Dependent elderly parents of adult refugees,
- Other dependent family members, and
- Unaccompanied children.

### **3.1.4 Practice: Dependent elderly parents of adult refugees**

Until 2012, the Netherlands had a specific more flexible policy on the family reunification of vulnerable elderly persons, which applied to refugees as well as other third country nationals. Under this policy, a residence permit for family reunification could be granted to dependent family members aged 65 years and older who were single and wished to stay with their children in the Netherlands, as long as

they had no other children residing in the country of origin who could take care of them.<sup>120</sup> This policy was, however, revoked in 2012 on the grounds that elderly people would have limited options to integrate into Dutch society unlike people able to integrate through work or education.<sup>121</sup> As a result, elderly parents of adult refugees and indeed other dependent family members not considered part of the nuclear family are now only able to reunify with an asylum permit holder under the Article 8 ECHR procedure.

The study therefore sought to identify what specific problems elderly parents of adult refugees may face, following this change in policy. A parliamentary question regarding the number of requests for family reunification on the basis of Article 8 ECHR were granted in the year 2013 indicated that only 20 residence permits had been granted to migrants older than 65, although this data does not distinguish between refugees and migrants.<sup>122</sup>

In terms of practice, several people interviewed said that there were few cases where applications under Article 8 ECHR led to a positive outcome.<sup>123</sup> The Dutch government is seen as among the EU States that "apply a very strict interpretation and require a very high level of dependency"<sup>124</sup> between an elderly dependent parent and the adult refugee if they are to be found eligible for family reunification under the Article 8 ECHR procedure. Some who were interviewed thought it was only possible if there were extreme circumstances substantiated by sufficient evidence. One lawyer noted that the IND only allows elderly parents and other dependent family members to reunify if there is "no doubt" that the family member cannot live without care and cannot be cared for by someone other than the refugee.<sup>125</sup>

The following case study illustrates some of these issues.

<sup>119</sup> PACE, *Family Reunification of Refugees and Migrants in the Council of Europe Member States, Draft Resolutions*, 2018, above fn. 71, para. 3.

<sup>120</sup> See Aliens Decree, former Art. 3.25.

<sup>121</sup> *Stb.* 2012, 148.

<sup>122</sup> *Parliamentary Documents II* 2013/14, 32 175, no. 52.

<sup>123</sup> See e.g. VWN main office respondent.

<sup>124</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 8.

<sup>125</sup> Lawyer 4.

## CASE STUDY<sup>126</sup>

A Syrian refugee applied to be reunified with his 79-year-old sick mother on the basis of Article 8 ECHR and with his spouse and two daughters under the asylum reunification procedure. The IND first rejected the application concerning his mother on the grounds that there were no “more than normal emotional ties” and that the applicant’s spouse (who was still in the country of origin) could continue to care for her mother-in-law. Several weeks later, the IND authorized the issue of a regular provisional residence permit (MVV) to the refugee’s spouse and two daughters. While the two daughters were able to join him in the Netherlands, his spouse decided not to use the MVV as she did not want to leave her mother-in-law in Syria all by herself, since she was medically, financially and emotionally dependent on her and apart from the applicant’s wife, there was no one in Syria who could take care of his mother. The District Court subsequently annulled the IND’s decision rejecting the applicant’s request for reunification with his mother. It ruled that the IND’s reasoning finding the mother was not exclusively dependent on the refugee’s care solely on the basis that the spouse was taking care of the mother was inadequate.<sup>127</sup>

This example underlines the importance not only of considering existing family relations and common households, but also of taking into account the impact of potential separation on other dependent family members, if one (or more) family member(s) in a household has/have a right to family reunification and would be obliged to leave other dependent family members behind if they were to exercise that right.

Several VWN respondents stated that they did not submit family reunification applications for elderly parents of the refugee. One stressed that this takes a large amount of time and would give false hope to refugees.<sup>128</sup> Other VWN respondents said that they only submitted applications for elderly parents if there were distressing circumstances.<sup>129</sup> Another explained that, due to the absence of a policy for elderly family members, submitting an Article 8 ECHR application almost always resulted in a negative decision and that this was the main reason VWN volunteers did not submit applications.<sup>130</sup> The respondent noted that in the past years he/she was only aware of two cases where an elderly parent had been granted family reunification after an Article 8 ECHR application.<sup>131</sup> One case concerned a 77-year-old woman and the other an 87-year-old woman, both of whom lived alone. They had serious medical problems and, despite the efforts of the family members who had all left the country of origin, it was not possible for the two women concerned to get the care they needed.

Various respondents gave examples of elderly parents who had to remain behind due to the strict policy rules. One VWN respondent stated that the wife and four children of a refugee were given permission to come to the Netherlands, but his 83-year-old mother had to remain behind alone.<sup>132</sup> One lawyer referred to a refugee, who had taken care of his disabled, elderly mother for the preceding eight years, but whose application for his mother to be reunited with him in the Netherlands was rejected, because his mother was included in the medical facility of a refugee camp with the result that the IND decided that the mother’s ability to access medical care abroad proved that she was not solely dependent on him, even though it was the refugee who had arranged access for his mother to the medical care facility.<sup>133</sup>

<sup>126</sup> Response of 8 Aug. 2016 from VWN location 3 to the IND decision of 6 June 2016.

<sup>127</sup> AWB 16/14315, District Court Roermond, 21 Dec. 2016, available in Dutch at: <http://bit.ly/2YFR2dG>.

<sup>128</sup> VWN location 1 respondent, who stated that if refugees still wished to submit an application, they could, but that he would not include a supporting letter describing the circumstances of the case.

<sup>129</sup> VWN locations 2 and 5 respondents. The former stated that s/he looks at factors such as the presence of family members and the health and income of the elderly parent.

<sup>130</sup> VWN main office respondent. See e.g. IND decisions of February and May 2016. All support to refugees for family reunification is provided by volunteers working at local VWN offices. For more information, see chapter 5.1 The role of VWN in the family reunification procedure below.

<sup>131</sup> *Ibid.*

<sup>132</sup> VWN location 1 respondent.

<sup>133</sup> Lawyer 1.

### 3.1.5 Practice: Other dependent family members

Apart from elderly parents, the family definition can also be problematic for **other dependent family members**. Some regulations have nevertheless been relaxed in recent years. In 2015, the asylum reunification policy for adult children was amended so that for young adult children family ties are assumed to exist, unless there are contra-indications that he/she would be able to live independently.<sup>134</sup> Dependent unmarried adult children (older than 25 years) have also been considered eligible under the asylum family reunification procedure, but only if more than normal emotional ties exist between the child and refugee sponsor.<sup>135</sup>

The following case study concerning an older brother with disabilities illustrates some of the challenges faced.

#### CASE STUDY<sup>136</sup>

An adult Syrian refugee applied for reunification with his mentally disabled older brother, who remained behind in Syria. Although the applicant's brother lived in their mother's apartment in Syria, it was he who was responsible for the care of his brother. Since they, however, had a sister who herself had multiple sclerosis and lived in Saudi Arabia, the IND rejected the application for the older brother to come to the Netherlands on Article 8 ECHR grounds on the basis that the disabled brother could live with the sister in Saudi Arabia. During the appeal phase of the procedure, the mentally disabled brother did in fact go to live with his sister in Saudi Arabia, but he was sent back to Syria as he did not have legal residence in Saudi Arabia, and was living on his own in Syria. The appeal was nonetheless rejected.

Two other case studies concern the young adult children of refugee sponsors. The first foundered on the requirement under Dutch policy that family ties cannot be restored after they have been broken.<sup>137</sup>

#### CASE STUDY<sup>138</sup>

A Syrian refugee applied for family reunification with his 20-year-old daughter. She had been married under a religious ceremony, had lived with her husband for a while and had a child from that relationship, but after her husband went missing, she returned to the family home and was fully financially dependent on the refugee. The IND rejected the application, finding that the "factual family ties" between the applicant and his daughter had been broken since she had formed her own family. The applicant's lawyer argued that the "factual family ties" had been restored because the daughter had moved back home and was fully financially dependent on him, but the District Court<sup>139</sup> and the Council of State did not share this opinion.<sup>140</sup>

In the second case, the IND appeared to apply an additional requirement in assessing the factual family ties between a refugee and his young adult children by requiring the family members to prove not only that they were not able to support themselves, but also that they would be unable to do so in the future.

<sup>134</sup> Letter of 21 May 2015 from the State Secretary for Security and Justice, above fn. 99.

<sup>135</sup> Decision of the State Secretary for Security and Justice No. WBV 2017/9, above fn. 99.

<sup>136</sup> IND decision of June 2016.

<sup>137</sup> Aliens Circular, para. B7/3.2.1.

<sup>138</sup> IND decision, Jan. 2015.

<sup>139</sup> AWB 15/1889, District Court Middelburg, ECLI:NL:RBDHA:2015:9591, 23 July 2015, available at: <http://bit.ly/31rWm6l>.

<sup>140</sup> 201506676/1/V1, ABRvS, 5 July 2016.



## CASE STUDY<sup>141</sup>

A Syrian refugee applied for family reunification with his two young adult children (aged 18-25). The daughter had an accountancy degree and was looking for a job, although she had not found one. The IND decided in January 2017 that her active search for a job would probably lead to her finding one in the future. The son had had a part-time job after his studies, but was not studying or working anymore and still had to complete his military service. Since the daughter was able to work and the son had worked after his studies, the IND rejected the application on the grounds that the brother and sister were able to provide for their own livelihoods, which they determined meant that the family tie was broken. While the policy rules speak of providing for one's own livelihood, in this case the IND went further by requiring the family members to prove not only that they were not able to support themselves but also that they would not be able to do so in the future. The refugee's lawyer appealed the decision and in late 2018, two days before the hearing for the daughter, the IND withdrew its decision regarding the daughter (but not regarding the son), and a new decision on her application is now awaited. In the meantime, the son travelled to the Netherlands via Greece.

In this case study, it would appear that, even though the IND accepted that at the time the son and daughter were not able to support themselves (and were thus accepted as being dependent on the applicant in the Netherlands), a further requirement was identified instead. This requirement appears to go further than the FRD, as outlined further below. Meeting such a forward-looking requirement also places a heavy burden of proof on the applicant and his family. In addition, the case indicates the length of time the process can take, which in turn means that family members feel they have no option but to take unsafe journeys and pay smugglers if they are to be able to reunite.

The three case studies above indicate that in some cases decision-making needs to take greater account of the vulnerability of family members of refugees, whether this relates to disability, gender or other factors, as well as of the impact and consequences of conflict and displacement on refugees' lives, which can lead to family structures changing and reforming and to renewed dependency of family members. In addition, it is important that reasoning in decisions does not further define IND policies, nor go beyond the provisions of the FRD.

By contrast, three case studies below all concern refugees and provide examples of good practice by the IND in the case of refugees who were young adults by the time their applications for reunification with family members were considered. In each of these cases, the IND approved the reunification of by then young adult refugees with family members on Article 8 ECHR grounds on the basis of their continuing vulnerability and the continuing existence of close family ties.

## THREE CASE STUDIES<sup>142</sup>

A young Syrian adult, who was born in 2000, applied for family reunification with his mother and sister within the three-month deadline and while he was still a child, but this application was not taken into consideration, as fees had not been paid for his family members. In August 2018, by which time he had turned 18 years old, a new application for reunification with his mother (not including the sister) was submitted on Article 8 ECHR grounds. He had lived with his mother in both Syria and Turkey, fees were paid, and official documents proving identity and family ties were provided. Reunification with his mother was approved in early 2019.

A young adult from Eritrea, who was born in 1998, applied in 2015 as a minor to reunify with his father who lived in Israel. The application was, however, rejected because he had not responded to "rectification of omission letters".<sup>143</sup> In 2017, he applied again, by which time he was no longer a minor. As a result, his application

<sup>141</sup> IND decision, Jan. 2017. Case study provided by lawyer 5.

<sup>142</sup> Case studies provided by the IND.

<sup>143</sup> For more on rectification of omission letters, see sections [3.2.1](#) and [5.1.3](#) below.

was automatically transferred for consideration on Article 8 ECHR grounds. The father was able to use his Eritrean identity documents to prove his identity and the IND accepted that the lack of documentation proving the family ties was not the responsibility of the applicant. Following DNA tests, the reunification of father and son was approved at the end of 2018.

The first application by a young adult from Syria, who was born in 1998, for reunification with his mother was first rejected because he was no longer a minor. In 2018, he applied again to reunify with his mother on Article 8 ECHR grounds. His mother's identity and the family relationship had been established at the stage of the first application and the IND approved the second application in early 2019, finding that dependency still existed.

### 3.1.6 International and European standards: Vulnerability and dependence

While refugees and asylum-seekers often show great strength and resilience in the face of adversity, they have been recognized by the ECtHR as a "particularly underprivileged and vulnerable population group in need of special protection".<sup>144</sup> Certain refugees may in addition be particularly vulnerable, including on account of their age, dependency, gender, and health, and as a result have specific needs that require responses adapted to their situation. In *Novruk v. Russia*, the ECtHR ruled that, while States' normally have a wide margin of appreciation in immigration matters:

If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered significant discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for imposing the restrictions in question.<sup>145</sup>

In the family reunification context, the situation of particularly vulnerable refugees correspondingly requires greater flexibility in regulations and procedures and a clear individualized assessment that takes into account their personal situation and needs. As the ECtHR ruled in *Tanda-Muzinga v. France*:

The Court recalls that family unity is an essential right of refugees and that family reunification is a fundamental element allowing persons who have fled persecution to resume a normal life. It recalls also that it has also recognized that obtaining such international protection constitutes a proof of the vulnerability of the persons concerned. It notes in this respect that the necessity for refugees to benefit from a family reunification procedure that is more favourable than that available to other foreigners is a matter of international and European consensus ... In this context, the Court considers that it was essential for the national authorities to take account of the vulnerability of the applicant and his particularly difficult personal experience, for them to pay great attention to the pertinent arguments he raised in the matter, for them to provide reasons for not implementing his family reunification, and for them to rule on the visa request promptly.<sup>146</sup>

In the EU context, other CEAS instruments require Member States to "take into account the specific situation of vulnerable persons", including elderly people.<sup>147</sup> While the FRD predates these instruments, it is clear the EU recognizes that elderly people have specific needs that need to be taken into account.

<sup>144</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09, ECtHR Grand Chamber, 21 Jan. 2011, available at: <http://bit.ly/2GO7D96>, para. 251.

<sup>145</sup> *Novruk and Others v. Russia*, Applications nos. 31039/11, 48511/1, 76810/12, 14618/13 and 13817/14, ECtHR, 15 March 2016, available at: <http://bit.ly/2KyLUD9>, para. 100. The case concerned the failure to grant a residence permit to HIV+ non-nationals. See also *O.M. v. Hungary*, Application no. 9912/15, ECtHR, 5 July 2016, available at: <http://bit.ly/2yF1ZRZ>, para. 53, ruling that it was necessary to take into account that the refugee was a member of a vulnerable group in the country of origin, in that case that of lesbian, gay, bisexual, transgender and inter-sex (LGBTI) persons.

<sup>146</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, para. 75 (author's translation, references omitted); and *Mugenzi c. France*, ECtHR, 2014, above fn. 61, for similar language on applicable standards at para. 54.

<sup>147</sup> QD (recast), above fn. 6, Art. 20(3), this provision being specifically referenced in Art. 31(7)(b) of EU Directive 2013/32 of 26 June 2013, OJ L 180/60, while Art. 21 of the Reception Conditions Directive also includes elderly persons among vulnerable persons whose specific situation must be taken into account.

With regard to the concept of **dependency**, UNHCR states:

Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. ... [T]he concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.<sup>148</sup>

UNHCR refers to a “relationship of social, emotional or economic dependency”, which is presumed between close family members. For other family members, it must be established “on balance ... on a case-by-case basis, in light of the applicable credibility indicators and taking into account social, emotional or economic factors”. This “determination requires a detailed examination of all available evidence, including documentary evidence and other relevant information regarding the personal circumstances [of the refugee and family members]”.<sup>149</sup>

In the European context, Article 10(2) of the FRD takes into account the specific situation of, and challenges facing, refugee families by permitting their reunification with “other family members [who] ... are dependent on the refugee”. In addition, Article 4(2) (b) of the FRD indicates that States may authorize entry for family reunification of “the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health”.

As for the CJEU, it has held that the status of a “dependent” family member is the result of a factual situation characterized by the fact that legal, financial, emotional or material support for that family member is provided by the sponsor or by his/her spouse/partner and “the extent of economic or physical dependence and the degree of relationship between the family member” and the person he/she wishes to join.<sup>150</sup> While this determination relates to the Free Movement Directive,<sup>151</sup> the European Commission has noted that this definition may “serve as guidance to [Member States] to establish criteria to appreciate the nature and duration of the dependency”.<sup>152</sup>

With regard to elderly persons, among the family members, whom Article 4(2)(a) of the FRD indicates States may authorize entry are “first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin”. On this basis, EU Member States generally permit family reunification with the parents of a sponsor, if they cannot take care of themselves, on health or age grounds, or if the parents are dependent and lack family support in their country of origin.<sup>153</sup>

<sup>148</sup> UNHCR, *UNHCR Resettlement Handbook*, 2011, above fn. 116, p. 178.

<sup>149</sup> UNHCR, *UNHCR RSD Procedural Standards – Processing Claims Based on the Right to Family Unity*, 2016, available at: <http://bit.ly/2GPanmA>, section 5.2.2 and 5.2.3. While this publication concerns refugee status determination, the principles set out are also relevant in the family reunification context.

<sup>150</sup> *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others*, C-83/11, CJEU, 5 Sept. 2012, available at: <http://bit.ly/2M2L4Sf>, para. 23.

<sup>151</sup> *Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing 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*, 29 April 2004, 2004/38/EC, available at: <http://bit.ly/2YM3iJs>.

<sup>152</sup> European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32, p. 6.

<sup>153</sup> See EMN, *EMN Synthesis Report – Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, 2017, above fn. 30, p. 21; UNHCR, *The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, pp. 36-56.

### 3.1.7 RECOMMENDATIONS:

#### FAMILY DEFINITION AND DEPENDENCY

In order to promote a “comprehensive reunification of the family”, as called for by ExCom, and to take into account the specific situation of, and challenges facing, refugee families:

##### 1. \_\_\_\_\_

UNHCR recommends that the Dutch government apply liberal criteria in identifying family members of refugees so as to promote the comprehensive reunification of families, including with extended family members when dependency is shown to exist, such as unmarried minor children who due to circumstances, namely the flight of their parent(s), were forced to live independently and self-sufficiently, or who take care of a child born out of wedlock, as well as elderly parents without other family support, adult children and siblings. Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. The concept of dependent should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.

##### 2. \_\_\_\_\_

In particular, UNHCR recommends that the IND take greater account of the vulnerability of family members of refugees, whether this is a result of their experience of persecution, conflict or flight or relates to age, gender, disability or other factors.

##### 3. \_\_\_\_\_

UNHCR is concerned that the Dutch government applies a very restrictive interpretation of the concept of dependency and requires a very high level of dependency. UNHCR recommends the adoption of guidelines on the concept of dependency consistent with international and European standards defining clearly what is understood as dependency in relation to a refugee for the purposes of family reunification.

#### 3.1.8 Practice: Unaccompanied child refugees

This section and the two sections that follow examine two questions:

- Which family members are unaccompanied child refugees entitled to reunite with and
- The situation of unaccompanied child asylum-seekers who reach the age of majority during the asylum procedure and how this affects their right to family reunification once they are granted international protection.

Unaccompanied child refugees are entitled to reunify with their parents and with minor and young adult siblings, as well as unmarried dependent adult siblings. Applications to reunify with parents can be submitted under the asylum family reunification procedure, while those for siblings must be submitted under the regular procedure. In practice, applications concerning siblings are assessed on the basis of their link with their parent<sup>154</sup> and are in principle granted as long as the application is submitted in conjunction with the application concerning the parents. For young adult siblings family ties are assumed to exist, unless contra-indications indicate that they can live independently; for unmarried dependent adults more than normal emotional ties with the parents need to be shown.

There are, however, concerns regarding the situation of unaccompanied child refugees whose parents are no longer living or who cannot be traced, as policy is not clear on whether they can be reunited with their **legal guardian, foster parents or other members of the family**. Section C (on asylum family reunification) of the Aliens Circular contains no clear policy on this issue, but section B (on regular family reunification) of the Aliens Circular states that a family relationship in accordance with Article 8 ECHR is assumed to exist *inter alia* for adoptive and foster parents.<sup>155</sup> It would seem logical that the same should apply for legal guardians of unaccompanied refugee children. Section C of the Aliens Circular requires proof of the family relationship between parents and

<sup>154</sup> Aliens Act 2000, Arts. 29(2) (c), which refers only to the parents of an unaccompanied child, and 29(2) (a) respectively.

<sup>155</sup> See Decision of the State Secretary for Justice and Security, Dec. 2017, available in Dutch at: <http://bit.ly/2KjVafq>, section 3.8.1, concerning an amendment to para. B7/3.8 of the Aliens Circular, referring *inter alia* to adoptive and foster parents.



foster/adopted children,<sup>156</sup> suggesting that similar requirements should apply for the reunification of legal guardians or foster parents. An IND respondent stated, however, that in practice legal guardians and foster parents of an unaccompanied refugee child do not qualify for family reunification.

There is potentially also a concern, although the study did not come across such an example, if an unaccompanied child refugee is unable to apply for reunification with his/her parent(s) before the three-month deadline. Late applications can still be submitted under the regular procedure,<sup>157</sup> but then the unaccompanied child refugee needs to show sufficient financial means.<sup>158</sup> In practice, if such an application is rejected, this would lead automatically to an assessment of the applicability of Article 8 ECHR. Account would need to be taken not only of any justified reasons for the late application but also of the vulnerability and the best interests of the child.

As for **minor siblings, young adult siblings and unmarried adult siblings** of an unaccompanied child refugee, their applications are in effect assessed as if it were the parents who had submitted the application.<sup>159</sup> This means that a problem arises where the parents of an unaccompanied child refugee are no longer living or cannot be traced. In the absence of a clear policy on reunification when the parents of an unaccompanied child refugee are no longer living or cannot be traced, this approach means that siblings of an unaccompanied child refugee without a parent are currently unable to reunify with their siblings with whom they lived together prior to their flight, as more than normal emotional ties are very rarely considered to exist between siblings, according to the IND.

Dutch law states that it is only minor unaccompanied refugee children who can apply for family reunification with their parents under the more favourable conditions applying under Chapter V of the FRD.<sup>160</sup> The question of **the point at which the child becomes an adult in the process** is therefore critical. Until the April 2018 judgment of the CJEU on this issue outlined below,<sup>161</sup> IND policy and practice treated the date of submission of the application for family reunification as the reference date at which an unaccompanied refugee child had still to be a minor. From the moment they were considered adult children or if the three-month deadline had been exceeded, they could only submit family reunification requests under the regular family reunification procedure, including on Article 8 ECHR grounds. Consequently, children who arrived as minors in the Netherlands but who reached the age of majority during their asylum procedure were until recently at a disadvantage as regards family reunification.

Since the CJEU judgment, the Aliens Circular has been amended to state that the child's status as a minor remains valid until three months after the asylum residence permit was granted, although the family reunification application must be submitted within three months for this to be accepted.<sup>162</sup> In cases predating the CJEU judgment where minors had reached the age of majority during the asylum procedure and they did not appeal, it was reported that the IND is refusing them, as they argue that they should have appealed initially.<sup>163</sup>

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<sup>156</sup> Aliens Circular, section C2/4.1.

<sup>157</sup> Aliens Decree 2000, Art. 3.24a sub 1.

<sup>158</sup> Aliens Decree 2000, Art. 3.24a sub 2.

<sup>159</sup> With regard to adult siblings of an unaccompanied child refugee, the State Secretary for Justice and Security indicated in September 2016 in a reply to parliamentary questions that he would resolve the omission of adult siblings in such cases and that the IND would assess such applications on Article 8 ECHR grounds under the regular procedure. Such an application will, however, only be granted if made in conjunction with an application for family reunification in respect of the parent(s). State Secretary for Security and Justice, "Answers to Parliamentary Questions regarding the Family Reunification of Brothers and Sisters", 5 Sept. 2016, available at: <http://bit.ly/2Kj7e0E>. The same difference of assessing young adults and unmarried dependent adults is applied as if it were the parents who submitted the application: for young adult siblings family ties are assumed to exist, unless there are contra-indications which indicate that he/she can live independently and for unmarried dependent adults more than normal emotional ties with the parents need to be shown.

<sup>160</sup> Aliens Act 2000, Art. 29(2)(c).

<sup>161</sup> See section 3.1.9 International and European standards: Unaccompanied child refugees below.

<sup>162</sup> Aliens Circular, C2/4.1. For more on concerns regarding the three-month deadline within which submissions must be made to benefit from favourable terms, see chapter 4.2 Deadline for applying for family reunification.

<sup>163</sup> Lawyer 1.

### 3.1.9 International and European standards: Unaccompanied child refugees

With regard to the question as to **whom an unaccompanied child should be entitled to reunify with**, the CRC Committee has noted in its General Comment No. 14 of 2013:

[T]he child who is separated from one or both parents is entitled 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests' (art. 9, para. 3). This also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.<sup>164</sup>

In September 2018, the CRC Committee set out a wide range of issues the authorities were required to take into account in the case of a Belgian-Moroccan couple who were seeking a humanitarian visa to come to Belgium for a child for whom they had responsibility under the Arabic scheme of *kafalah*, a process of legal guardianship akin to adoption.<sup>165</sup> The CRC Committee ruled inter alia that the authorities were required to take into account the *de facto* links between the child and the couple into whose care she had been entrusted, including her educational, affectional, social and financial needs, such as would be provided if they were living together, the legal link established by the *kafalah* ruling assigning responsibility to the couple (even if this were not a formal adoption), the child's best interests, and her right to be heard, which in this case concerned a child of five years of age, who was determined to be able to express an opinion on whether she wished to live permanently in Belgium with the couple caring for her.<sup>166</sup> While the child in this case was not a refugee, the issues that must be considered and taken into account appear equally relevant where family reunification with an unaccompanied child refugee is concerned.

For its part, UNHCR has noted with regard to unaccompanied child refugees:

Where a child has lost his/her parents during conflict or due to persecution by the government, it may be impossible to formalize legally the fact that s/he has since been taken care of by an uncle or a grandparent. UNHCR would recommend to all Member States, as part of the examination of the best interest of minor children, to consider and provide the possibility for refugee children to be reunited with other family members or guardians where their parents in direct ascending line cannot be traced.<sup>167</sup>

In the EU context, Article 10(3)(b) of the FRD permits Member States to authorise the reunification of unaccompanied child refugees with their "legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced".

With regard to **the situation of children who reach the age of 18 during the asylum procedure**, the CJEU clarified the situation in its judgment in the case of *A. and S. v. Staatssecretaris van Veiligheid en Justitie* handed down in April 2018,<sup>168</sup> following a question referred by the District Court in The Hague. The judgment determined that unaccompanied refugee children who reach the age of 18 in the course of the asylum procedure retain the family reunification rights of an unaccompanied child, as long as the application for family reunification is made within a reasonable time frame, principally within three months after having been recognized as a refugee.

<sup>164</sup> CRC Committee, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, available at: <http://bit.ly/2WB1S8q>, para. 60.

<sup>165</sup> *Y.B. and N.S. v. Belgium*, CRC Committee, CRC/C/79/D/12/2017, 27 Sept. 2018, available in French at: <http://bit.ly/2TahBXq>.

<sup>166</sup> *Ibid.*, paras. 8.5, 8.8, 8.9, and 8.11.

<sup>167</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, pp. 9-10.

<sup>168</sup> *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, C550/16, CJEU, 12 April 2018, available at: <http://bit.ly/2M3lv3j>.

The Court found that making an applicant's right to family reunification under Article 10(3) of the FRD dependant

upon the moment at which the competent national authority formally adopts the decision recognizing the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority, would call into question the effectiveness of that provision and would go against not only the aim of that directive, which is to promote family reunification and to grant in that regard a specific protection to refugees, in particular unaccompanied minors, but also the principles of equal treatment and legal certainty.<sup>169</sup>

By contrast, "taking the date on which the application for international protection was submitted" as the reference point "enables identical treatment and foreseeability to be guaranteed" and ensures that "the success of the application for family reunification depends principally upon facts attributable to the applicant and not to the administration such as the time taken processing the application for international protection or the application for family reunification".<sup>170</sup> The Court ruled that a child under such circumstances must nonetheless make his/her application for reunification "within a reasonable time", which it defined as "in principle" being "within a period of three months of the date on which the 'minor' concerned was declared to have refugee status".<sup>171</sup>

<sup>169</sup> *Ibid.*, para. 55.

<sup>170</sup> *Ibid.*, para. 60.

<sup>171</sup> *Ibid.*, para. 61.

### 3.1.10 RECOMMENDATIONS:

#### UNACCOMPANIED CHILD REFUGEES

Given the requirement to ensure the best interests of the child are a primary consideration and the importance of family reunification in facilitating the transition of child refugees to adulthood:<sup>172</sup>

#### 4.

UNHCR recommends that the Dutch government clarify its policy regarding the right of an unaccompanied refugee child to reunify with "his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced", as provided for in Article 10(3)(b) of the FRD.

#### 5.

In this context, UNHCR also recommends that this clarification of policy refers specifically to the right of an unaccompanied refugee child to reunite with his/her legal guardian and/or any other member of the family, including siblings (whether adult or minor), in light of the Netherlands' obligations under Article 10(3)(b) of the FRD and the principle of the best interests of the child, thereby ensuring that vulnerability of the child is not exacerbated and separation of families is not perpetuated.

#### 6.

UNHCR recommends that the IND process asylum applications lodged by unaccompanied minor children expeditiously, so that they can request family reunification, if granted international protection, as early as possible after entry. This would enable the Netherlands to uphold its obligations to ensure that the child's best interests are a primary consideration and to deal with applications for family reunification involving children "in a positive, humane and expeditious manner".

<sup>172</sup> UNHCR and Council of Europe, *Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate?*, March 2014, available at: <http://bit.ly/2YG1fuL>, p. 10; UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 13.

## 3.2 Requirement to prove/substantiate family links and “factual family ties”

### 3.2.1 Legislative framework and case law

In the Netherlands, persons seeking to reunify with a permit holder in the Netherlands must provide plausible reasons attesting their identity and family relationship with the applicant (i.e. the permit holder in the Netherlands). The starting point is that family ties must be proven/substantiated by (original) official documents. The burden of proof rests on the refugee and his/her family members. If the applicant or family members cannot produce such documents, they are requested to provide a plausible explanation showing that the absence of official documents cannot be attributed to them.<sup>173</sup>

With regard to **documentation**, the State Secretary for Justice and Security informed the House of Representatives in November 2017 that besides official documents, “indicative documents” would also be considered in determining both identity and family ties before an application would be rejected for lack of documentary evidence.<sup>174</sup>

As set out in Figure 1 below, if the applicant is unable to provide official documents, but has a valid explanation as to why he/she does not have these documents and has submitted sufficient non-official (indicative) documents, then the application is also accepted. If the IND accepts the explanation regarding the lack of official documents, but no or insufficient non-official (indicative) documents are provided, then it will offer the possibility of a DNA test for biologically related children<sup>175</sup> and/or an “identification interview”.<sup>176</sup> If the IND does

not accept the explanation regarding the lack of official documents or no explanation is provided, but sufficient non-official (indicative) documents have been submitted, the IND will also offer the possibility of a DNA test and/or an identification interview. If the IND does not accept the explanation regarding the official documents and no non-official (indicative) documents are provided, then the application will be rejected without further investigation. This is also the case if documents are false or if the sponsor/family member has given conflicting statements. Besides proof of family ties, documents regarding the identity of the family member must also be provided.

While there is no list of what is accepted as an “**indicative document**”, a ruling by the Council of State in May 2018 provides an overview of indicative documents used by the State Secretary for Justice and Security to determine the family relationship. These include religious marriage certificates; residence cards or other documents or statements from the both higher and lower authorities; photographs and videos; and agreements for example regarding rent, purchases, proof of contact or of financial transactions. The judgment also refers to the following documents as indicative in the assessment of an applicant’s identity: documents or statements issued by the authorities, preferably with a passport photo; documents issued by UNHCR; documents issued by third countries; school passes; diplomas; vaccination booklets; and witness statements.<sup>177</sup>

If the IND considers an application for family reunification to be incomplete, it sends the applicant a “rectification of omission letter” (*herstel verzuimbrieff*) setting out what still needs to be provided to support the application sufficiently and giving them four weeks within which they must respond.<sup>178</sup>

<sup>173</sup> IND, *Work Instruction 2016/7*, 17 Nov. 2016, available in Dutch at: <http://bit.ly/2T87KkC>, p. 1. The phrase “make plausible” is sometimes also referred to as “credibly attest” or “provide a credible explanation for”. These terms are therefore used interchangeably in this study.

<sup>174</sup> State Secretary for Justice and Security, “Letter to House of Representatives with Information about family reunification applications” (Kamerbrief met informatie over nareisaanvragen), 23 Nov. 2017, Religious marriage certificates, residence cards or other document or declarations made by the authorities, photos and or videos of events, rental agreements, purchase, proof of contact and proof of financial transactions, documents or declaration from authorities, preferably with photo, documents issued by UNHCR or third countries, school passes, diplomas, vaccination booklets and witness reports. Available at: <http://bit.ly/2MGGhWb>. As the latter notes, the change in policy followed questions from the VWN, UNHCR and the Ombudsman.

<sup>175</sup> Aliens Circular 2000, para. C1/4.4.6. For more on when the IND conducts a DNA test, see IND, *Work Instruction 2016/7*, above fn. 173.

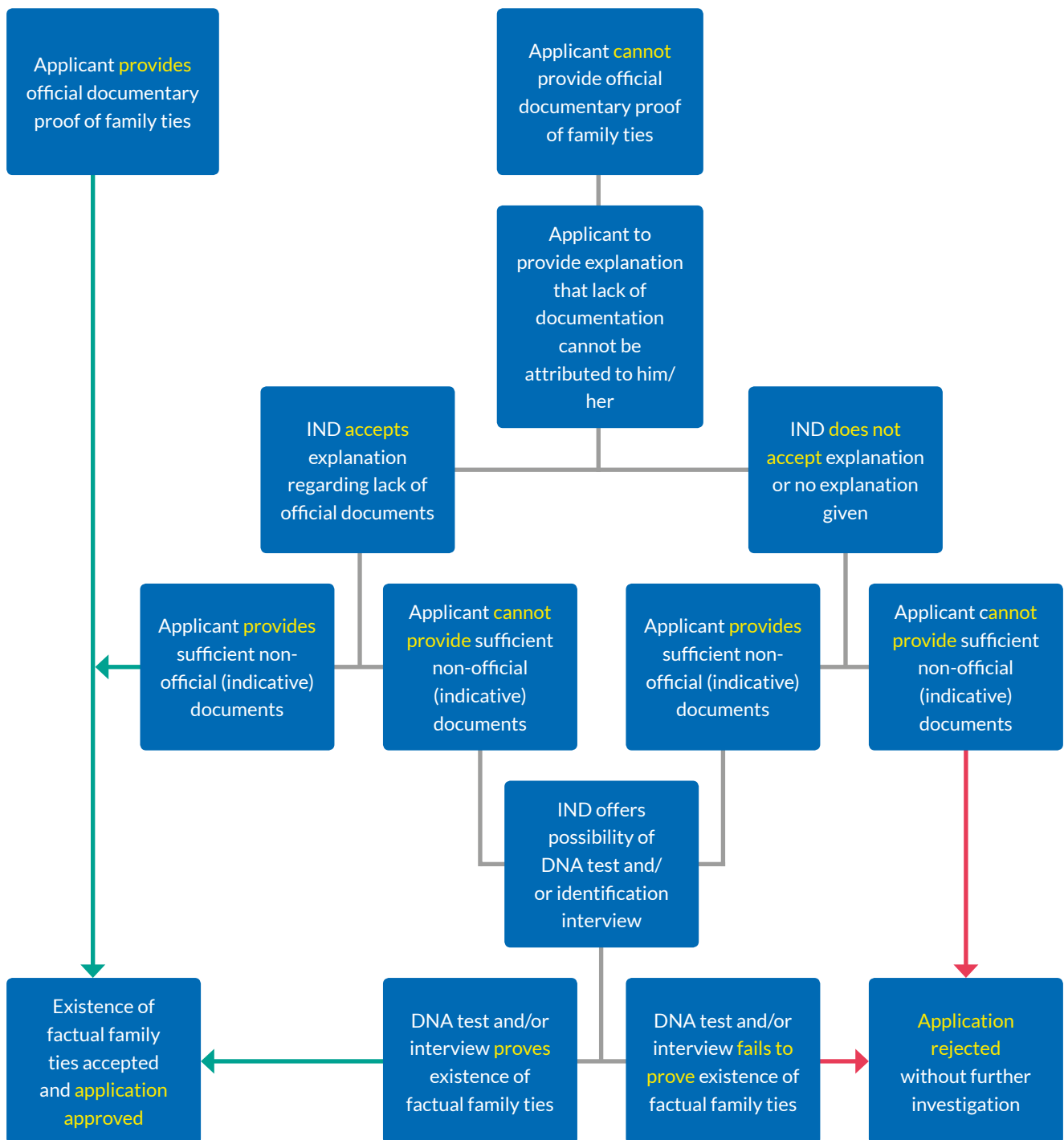
<sup>176</sup> Aliens Circular 2000, para. C1/4.4.6. For more on identification interviews, see chapter 6.3.2.

<sup>177</sup> Council of State judgments of 16 May 2018, *Cases nos. 201707504/1*, ECLI:NL:RVS:2018:1508, available at: <http://bit.ly/33fXH1y>; *201705053/1*, ECLI:NL:RVS:2018:1637; *201705243/1*, ECLI:NL:RVS:2018:1638; *201706281/1*, ECLI:NL:RVS:2018:1639, available at: <http://bit.ly/2GNtOYc>; *201706439/1*, ECLI:NL:RVS:2018:1640, and *201708910/1*, ECLI:NL:RVS:2018:1509. Case no. 201706281/1 concerned an unaccompanied child refugee seeking to reunify with his/her parents and three siblings.

<sup>178</sup> For more information see section 5.1.3 “Rectification of omission letters” from the IND below.



Figure 1\*: IND practice concerning documentary evidence



\* Figure 1 verified by IND.



With regard to **DNA testing**, this was not previously possible for families if the lack of documentary evidence was attributed to the refugee, but this policy changed in November 2017.<sup>179</sup> If it is considered to be in the best interests of the child, the IND now permits DNA testing in cases involving minor children where the refugee has been held responsible for the lack of documentary evidence. The identity of the parent remaining in the country of origin or first asylum must, however, have been credibly attested before a DNA test can be undertaken. Since 2012, biologically-related nuclear family members have no longer been subject to an identification interview when documentary evidence is lacking, unless it is to confirm the identity of the family member. The

statements of the refugee in combination with the results of a DNA test are considered sufficient.<sup>180</sup>

The IND also requires a “**declaration of consent**” if one of the biological parents of the child remains in the country of origin or residence, for instance, when the child was born from a previous relationship.<sup>181</sup> This is necessary in order to prevent children from being taken away against the will of the other parent.<sup>182</sup> In cases concerning adult biological children, the refugee must prove that the adult child was part of the refugee’s family at the moment he/she entered the Netherlands.<sup>183</sup> As regards family members who are not biologically related, such as the spouse or partner and foster or adopted children, the factual family ties must be proven through an

<sup>179</sup> State Secretary for Justice and Security, “Letter to House of Representatives with Information about family reunification applications”, 2017, above fn. 174.

<sup>180</sup> Letter of 16 July 2012 from the Minister of Immigration, Integration and Asylum, available at: <http://bit.ly/2T9QZ8A>.

<sup>181</sup> If the parent cannot identify him/herself with identification documents containing a signature and no document can be submitted proving the family ties with the child, the parent must undergo a DNA test. See IND, *Work Instruction 2016/7*, above fn. 173, p. 6; Aliens Circular 2000, para. C2/4.1. If the declaration of consent is missing, the child of the refugee can only obtain a residence permit if the permit holder can submit documents showing that the parent who remained behind cannot submit a declaration of consent. If this is not possible, the permit holder has to provide additional information and/or plausible, credible and consistent statements as to why the declaration of consent cannot be submitted.

<sup>182</sup> Decision of the State Secretary for Justice and Security, No. WBV 2009/18, 24 July 2009.

<sup>183</sup> Aliens Circular 2000, para. C2/4.1.

identification interview and, where children are involved, a declaration of consent must also be provided.<sup>184</sup>

According to a change in policy rules introduced in January 2018, the IND concludes that a **marriage**, including a traditional or religious marriage, is legal when it is considered a legal marriage according to applicable laws in the country where the marriage took place.<sup>185</sup> If the refugee and his/her spouse state that they entered into a legally valid marriage in that country, the IND assumes this to be the case. It is, however, up to the applicants to provide proof of this marriage through official documents, or to provide a plausible explanation as to why they do not have these documents. Indicative documents will also be considered in the assessment regardless of whether or not the couple has credibly attested that the lack of official documentation is not attributable to them.

When a marriage cannot be proven or credibly attested, the application is rejected. If it concerns a marriage that has not been concluded in accordance with local legislation, it will be examined if it fulfils the requirements of a “lasting and exclusive relationship” with the sponsor.<sup>186</sup> Financial or any other dependency is not a part of the examination.<sup>187</sup> Both individuals must have reached the age of 18, while policy rules also provide that, when the couple have lived together outside of the Netherlands, this is used as an indicator of family ties.<sup>188</sup> Jurisprudence led to a change in the IND’s Work Instruction to clarify that the requirement of cohabiting does not apply to legal marriages.<sup>189</sup> It still applies to partnerships, but

the IND considers cohabiting to be an indicator of a sustainable, exclusive partnership instead of a strict requirement.<sup>190</sup>

The sponsor is, in addition, required to **prove/substantiate that family ties have not been broken**. He/she must provide documentary proof and, failing that, plausible grounds showing that at the moment of his/her entry into the Netherlands the family members belonged to his/her family and that the family ties have not been broken.<sup>191</sup> This “**factual family ties**” requirement implies that the refugee and his/her family members must prove more than officially documented or biological ties.

In 2009, factual family ties were defined as existing if the family members had lived in the household of the refugee at the moment he/she left the country of origin. This policy meant that children, who had lived separately from the refugee, even if the family life was disrupted by conflict or internal displacement, were excluded from family reunification. Foster children who were placed in the care of another family after the refugee fled, were also excluded.<sup>192</sup> In 2013, however, the State Secretary decided no longer to consider the family ties to be broken if a minor child had been included in another family.<sup>193</sup> In mid-2017, the fact of having lived in the same household was changed to be defined an indicator of family ties rather than a requirement for partnerships and religious or traditional marriages, as was previously the case.<sup>194</sup>

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<sup>184</sup> Aliens Circular 2000, para. C2/4.1. In assessing the factual family ties between the permit holder and a foster child, the IND *inter alia* looks at the duration of the inclusion of the foster child in the family of the permit holder, the (financial) dependency of the foster child on the permit holder, the reason why the foster child has been included in the family of the permit holder and, if applicable, the reason why the foster child has been temporarily placed outside the family. All facts and circumstances prior to the entry of the permit holder are examined in the assessment of the family ties between the permit holder and the foster child. For more information on when and how the IND conducts an identification interview, see IND, *Work Instruction 2016/7*, above fn. 173.

<sup>185</sup> Decision of the State Secretary for Justice and Security, No. WBV 2017/14, 14 December 2017.

<sup>186</sup> Aliens Circular 2000, para. C2/4.1.

<sup>187</sup> Before the recent policy change, a claimed marriage that could not be proven would be considered a relationship for the purposes of family reunification, not only if could be shown to be lasting and exclusive, but also if the couple were financially dependent on each other.

<sup>188</sup> IND, *Work Instruction 2019/15*, above fn. 113, p. 6.

<sup>189</sup> 201601089/1/V1, ABRvS 20 February 2017, ECLI:NL:RVS:2017:455, available at: <http://bit.ly/2KAKJYK>; *ibid.*

<sup>190</sup> Directorate General for Migration respondent.

<sup>191</sup> Aliens Circular 2000, para. C2/4.1.

<sup>192</sup> *Parliamentary Documents II* 2008/09, 19 637, no. 1261; Decision of the State Secretary for Justice, No. WBV 2009/18, 2009, above fn. 182; Aliens Circular 2000, para. C2/6.2.

<sup>193</sup> *Parliamentary Documents I*, 2012-2013, 31 549, M, <https://bit.ly/2Tz7XOf>.

<sup>194</sup> See Decision of the State Secretary for Security and Justice No. WBV 2017/5, str 36329, 21 June 2017, available in Dutch at: <http://bit.ly/2H332QD>, point P, explanatory note in the Aliens Circular to the amended Art. 29(2)(a, b or c) of the Aliens Act.

In the case of **minor children** (i.e. children aged under 18 years), the family link can only be considered broken in exceptional situations. One or more of the following circumstances may indicate broken family ties: the child is living independently and is providing for his/her own maintenance; or if the child has the care of her/his child born out of wedlock. If the child is him- or herself in charge of dependent family members, including children (born out of wedlock), this is only a reason to assume family ties with the parent(s) are broken, if in addition the child is also living independently and is providing for his/her own livelihood. If the minor child is married or in a relationship and none of the aforementioned circumstances or other contra-indications apply, the IND does not consider the family ties to be broken.<sup>195</sup> This exclusion of unmarried minor children from the entitlement to family reunification is not in line with the mandatory provision in Article 4(1) of the FRD, which only leaves room to exclude married minor children.

For **young adult children** (i.e. children aged 18-25), one or more of the following circumstances would result in broken family ties: the child is living independently, the child is providing for his/her own livelihood, the child is married or in a relationship, or the child has the care of a child born out of wedlock. When one or more of these circumstances are present, an individual assessment takes place for determining whether or not the family ties are considered to be broken.<sup>196</sup>

For **spouses**, the Council of State (the highest national court), ruled that the FRD<sup>197</sup> does not leave Member States the discretion to restrict the right to family reunification to spouses who had been “temporarily separated as a result of their flight from their country of origin” and that the FRD also does not permit a “requirement that the applicant and alien must have lived together” before coming to the Netherlands.<sup>198</sup> A legal marriage is therefore sufficient as long as

there is no fraud or misuse of the right to family reunification.<sup>199</sup> This court ruling did not apply to partnerships and traditional or religious marriages. Until July 2017, policy rules required the refugee and his/her spouse or partner to have lived together outside the Netherlands. As a result of the previously mentioned court ruling, policy rules now provide that having lived together is only used as an indicator of family ties.<sup>200</sup>

### 3.2.2 Practice: Requirement to provide official documents

“ VWN volunteers and Nidos staff tell refugees [including in the case of Nidos unaccompanied child refugees] which documents are needed and refugees respond that they cannot provide them. The volunteers then say they must comply and refugees repeat that it is not possible. For unaccompanied child refugees, the process causes a lot of stress, including because their parents are often hoping for a quick reunification procedure, thus adding to the pressure.

Lawyer 1

The largest numbers of refugees seeking family reunification in the Netherlands are from Eritrea and Syria.<sup>201</sup> The practice examples in this and the following subsections therefore focus in particular on applications concerning these two nationalities.

Syrian family members in Turkey face problems obtaining official documents to prove their family ties, as it is difficult for them to obtain them in Turkey. There is a consulate in Istanbul that issues passports, but Syrian refugees in Turkey report irregularities in the process. Sometimes family members resort to private individuals who claim they are able to obtain passports or identity cards, which sometimes results in fake documents being obtained.<sup>202</sup>

<sup>195</sup> Aliens Circular 2000, para. C2/4.1.

<sup>196</sup> Aliens Circular 2000, para. C2/4.1.

<sup>197</sup> FRD Art. 9(2), in particular and the aim of the FRD to promote family reunification.

<sup>198</sup> *Case no. 201601089/1/V1*, Netherlands Council of State, ECLI:NL:RVS:2017:455, 20 Feb. 2017, available at: <http://bit.ly/31kj9AQ>, para. 5.8 (authors' translation).

<sup>199</sup> FRD, Art. 16(2).

<sup>200</sup> Aliens Circular 2000, para. C2/4.1. See also Decision of the State Secretary for Security and Justice No. WBV 2017/5, above fn. 194.

<sup>201</sup> IND, *Asylum Trends December 2018: Main Report*, above fn. 23, p. 7.

<sup>202</sup> Information provided by various actors consulted for the research.



For Eritreans, some sources claim that every Eritrean should be in possession of, or be able easily to obtain, official documents.<sup>203</sup> It became clear during consultations for this study, however, that this strongly depends on the region where Eritreans have lived in or with which they have connections.<sup>204</sup> One lawyer also affirmed that when other sources are referred to stating that the requested official documents are not available, the IND still rejects the application without examining these sources.<sup>205</sup> The lawyer furthermore noted that it is unclear in which cases the IND accepts a lack of documentary evidence and said he/she had the impression that this largely depends on the case manager involved, rather than on clear policy guidance. According to the Directorate General for Migration, the IND and the Ministry for Justice and Security pay great attention to investigating which documents are provided by the Eritrean government, how they are registered. Up until mid-2016 it occurred that family members were requested to turn to the Eritrean authorities to obtain these documents<sup>206</sup>, this has changed after the summer of 2016 and refugees and family members are no longer requested to approach the authorities for documents.

The Directorate General for Migration also said that the Dutch Government does not require Eritrean and Syrian refugees or their family members to contact their authorities in the country of origin if they are in fear for these authorities. Various VWN volunteers nevertheless cited examples of complications regarding rectification of omissions letters requesting official documents sent by the IND that appeared to suggest that refugees had to turn to their authorities for documents.<sup>207</sup> Contacting the Eritrean government can, however, put family members at risk of being detained. As a result, the IND has revised the wording of its letters adding that family members may

contact the Eritrean government, but are not required to do so if they are in fear of their government.<sup>208</sup>

On the question of approaching embassies of the country of origin, UNHCR has expressed concern that in some EU States “the requirements to prove family links are exceptionally high and that family members are required to return to situations of danger to retrieve official documents.”<sup>209</sup> The Summary Conclusions of the 2017 UNHCR expert roundtable on family reunification stated: “It would normally be wrong to request a refugee to turn to the authorities of their country of origin for the procurement of documents or any other service, as it may exacerbate the risks they face and their fear of persecution.”<sup>210</sup>

### 3.2.3 Practice: Lack of documentary evidence

“ If you tell the IND that you never had an identification card because you did not need one, the IND says: “You could have had it, so it’s at your own risk and expense that you did not have it and cannot request it now out of fear of your government. You should have requested it before you feared your government, but you did not, so there is a lack of documentary evidence.” Why would you request something when you do not need it? Do you have to anticipate the fact that you might be fleeing in the future? This is a violation of Article 11(2) FRD [which requires Member States to take into account other evidence if official documents are lacking and states that an application cannot be rejected solely for lack of documentary evidence].

Lawyer 1

As already mentioned, if asylum permit holders seeking family reunification cannot provide official documents proving identity and family relations, other indicative documents have since November

<sup>203</sup> See e.g. EASO, *Country of Origin Information Report: Eritrea Country Focus*, May 2015, available at: <http://bit.ly/2M3Fq2q>, pp. 55-56. The report refers to the Netherlands’ and other countries’ reports on country of origin information. See also Ministry of Foreign Affairs, “Country Report on Eritrea”, Feb. 2017, available at: <http://bit.ly/2OFSYmB>.

<sup>204</sup> Interviews with VWN locations 4 and 5.

<sup>205</sup> Lawyer 1. See e.g. EASO, *Eritrea Country Focus*, 2015, above fn. 203, pp. 50-51.

<sup>206</sup> Directorate General for Migration respondent. See also, Ministry of Foreign Affairs, “Country Report on Eritrea”, 2017, above fn. 203, pp. 20-31.

<sup>207</sup> VWN respondents from locations 1 and 2.

<sup>208</sup> Interview with the VWN main office and local offices 2 and 4.

<sup>209</sup> UNHCR, *UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 12.

<sup>210</sup> UNHCR, *Summary Conclusions Family Reunification*, 2017, above fn. 50, para. 15.

2017 been considered as evidence.<sup>211</sup> If a plausible explanation has been provided for the absence of official documents and “indicative documents” have been provided, then it is possible for identity and/or family ties to be accepted as proven on that basis. As the IND’s Work Instruction 2016/7 indicates, whether the IND concludes that a lack of documentary evidence is not attributable to the applicant depends “in particular on the individual arguments applicable to the situation of the person concerned”.<sup>212</sup>

In practice, this means that refugees must be able to provide plausible reasons as to why the lack of official documents cannot be attributed to them, that they did not possess these documents, and that they had been unable to obtain these documents in the past.<sup>213</sup> Where documentation cannot be provided, most lawyers and respondents interviewed indicated that the IND considers an applicant’s statements explaining why he/she is unable to provide official documents to be insufficient in most cases. For its part, the IND explained that this policy has since changed and that the mere fact that it could have been possible to obtain these documents is not as such a reason to reject an application for lack of documentary evidence. Cases that had previously been rejected on this basis have since been re-assessed if they were at the appeal or higher appeal phase. Cases that were rejected on this basis and were final with no appeal possible are able to reapply, indicating clearly the reasons for their reapplication.<sup>214</sup>

The situation is particularly difficult for Eritrean families. The IND’s reasoning in its decisions in these cases is based on the Ministry of Foreign Affairs’ official report on Eritrea which sums up the documents which could have been issued by the Eritrean State to its citizens.<sup>215</sup> Based on this report, the IND requests Eritreans to provide official documents such as identity cards and official marriage certificates to prove the identity of the family members and their factual family ties. As the IND has noted, however, Eritreans are unable to provide “(valid) official evidence to substantiate their identity and family ties in the vast majority of cases”,<sup>216</sup> a situation confirmed by the majority of respondents in the research study.<sup>217</sup> In one case, for instance, an Eritrean couple in a religious marriage had not registered the marriage, leading the IND to conclude that, since they were able to register their marriage but had failed to do so, the applicant was deemed responsible for the lack of documentary evidence and the application was therefore rejected.<sup>218</sup> The IND explained that information in the file is always checked against the information in country of origin information reports from the Dutch Ministry of Foreign Affairs. The resulting assessment then needs to take account of the family members’ specific circumstances and particular difficulties encountered, according to their testimony, before and after fleeing their country of origin, as noted by the CJEU in its recent judgment referred to in section [3.2.5](#) below.

With regard to practice following the November 2017 change to permit DNA testing if this is considered to be in the best interests of the child in cases involving

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<sup>211</sup> State Secretary for Justice and Security, “Letter to House of Representatives with Information about family reunification applications”, 2017, above fn. 174.

<sup>212</sup> A lack of documentary evidence can be assumed when registers do not exist, are incomplete or unreliable, or if no documents can be obtained because of the political situation and, as a result, it is considered acceptable that the lack of documents is not attributable to those involved. It can also be assumed if it is considered likely that the absence of documents is not attributable to those involved and it cannot be expected from those involved to obtain and submit documents. Whether a lack of documentary evidence will be considered likely, mostly depends on the individual and situated arguments of the persons involved about why they were not and/or are not in the possession of the documents. As a rule, the persons involved are asked to give a plausible explanation for this. What is known in general sources about (obtaining) official documents will be taken into account in assessing lack of documentary evidence; IND, *Work Instruction 2016/7*, above fn. 173, p. 4.

<sup>213</sup> Lawyer 1.

<sup>214</sup> IND respondent.

<sup>215</sup> Ministry of Foreign Affairs, “Country Report on Eritrea”, 2017, above fn. 203, pp. 20-31.

<sup>216</sup> State Secretary for Justice and Security, “Letter to House of Representatives with Information about family reunification applications”, 2017, above fn. 174.

<sup>217</sup> Respondents from the VWN main office, all respondents from other VWN locations, lawyers 1, 4, 5, and 6, a Defence for Children respondent, and a Nidos respondent.

<sup>218</sup> IND decision of July 2016, according to information provided by Lawyer 1.

minor children where the refugee has been held responsible for the lack of documentary evidence,<sup>219</sup> this initially appeared to be implemented to permit DNA testing in a larger number of cases. In May 2018, however, Council of State judgments in six cases returned the only one of them to concern children (though not minor children) to the IND for reconsideration because the reasoning of the decision was insufficient.<sup>220</sup> It nevertheless appears that in practice the IND is refusing DNA testing where the parent is unable to prove his/her identity.<sup>221</sup>

### 3.2.4 International and European standards: Substantiation of family links and documentary evidence

With regard to the **requirement to provide official documentation and if not to provide a plausible explanation for not being able to do so**, ExCom member States have agreed that “[w]hen deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment”.<sup>222</sup>

In the EU context, the FRD requires applications to be “accompanied by documentary evidence of the family relationship” and permits Member States to carry out interviews with the sponsor and his/her family members and other investigations as necessary to obtain evidence that a family relationship exists.<sup>223</sup> The CJEU has ruled that Member States are obliged to make a “balanced and reasonable assessment of all the interests at play” when examining applications for family reunification.<sup>224</sup> For its part, the European Commission has emphasized that interviews and other investigations must be proportionate with respect for fundamental rights, in particular the right

to privacy and family life, for them to be admissible under Union law.<sup>225</sup> The Commission further considers that Article 17 FRD requires Member States to make a comprehensive assessment of all relevant factors in each individual case and that Member States should explicitly state their reasons in decisions rejecting applications.<sup>226</sup>

Regarding the family reunification of refugees, the FRD requires more lenient procedures. Article 11(2) states that an application may not be rejected on the sole basis that there is no documentary evidence. According to the European Commission, the particular situation of refugees who were forced to flee their country means that it is often impossible or dangerous for refugees or their family members to produce official documents, or to get in touch with diplomatic or consular authorities of their country of origin. According to the Commission, Article 11(2) obliges Member States to “take into account other evidence” of the existence of the family relationship. As examples of such “other evidence”, the Commission mentions written and/or oral statements from the applicants, interviews with family members, or investigations carried out on the situation abroad. These statements can then, for instance, be corroborated by supporting evidence such as documents, audio-visual materials, any documents or physical exhibits (e.g. diplomas, proof of money transfers, etc.) or knowledge of specific facts, taking into account the individual circumstances of the refugee and his/her family members. In the Commission’s view, DNA research should be used as a measure of last resort.<sup>227</sup>

The interpretation of Article 11(2) of the FRD and the requirement to provide official documentary evidence came before the CJEU as a result of a request for a preliminary ruling made by the

<sup>219</sup> See text at fn. 180 above.

<sup>220</sup> Council of State judgments of 16 May 2018, *Cases nos. 201707504/1; 201705053/1; 201705243/1, 201706281/1; 201706439/1; and 201708910/1*, above fn. 177.

<sup>221</sup> Lawyers 1 and 5.

<sup>222</sup> UNHCR ExCom, , Conclusion No. 24, *Family Reunification*, above, fn. 54, para. 6.

<sup>223</sup> FRD, Art. 5(2). See also European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32, pp. 9 and 22.

<sup>224</sup> *O. and S. v. Maahanmuuttovirasto (C-356/11) and Maahanmuuttovirasto v. L. (C-357/11)*, C356/11 & C357/11, CJEU, 6 Dec. 2012, available at: <http://bit.ly/2YqxTKB>, para. 81.

<sup>225</sup> European Commission, *Guidance on the Application of Directive 2003/86/EC on the Right to Family Reunification*, 2008, above fn. 32, p. 10.

<sup>226</sup> *Ibid.*, p. 28.

<sup>227</sup> *Ibid.*, para. 6.1.2.

District Court in The Hague. The case concerned an Eritrean beneficiary of subsidiary protection in the Netherlands seeking to reunite with her minor nephew, who was living in Sudan with a foster family. She asserted he had been placed under her authority and guardianship since the death of his parents. In its judgment in *E. v. Staatssecretaris van Veiligheid en Justitie*, issued in March 2019, the Court found that in such circumstances, Article 11(2) of the FRD must be interpreted as precluding the rejection of the application

solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor's biological parents and, consequently, that she has an actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin.<sup>228</sup>

As for the Council of Europe, the Committee of Ministers recommends on this issue that member States “should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way”, while “[t]he absence of such documents should not per se be considered as an impediment to the application and member states may request the applicants to provide evidence of existing family links in other ways”.<sup>229</sup>

With regard to the **standard of proof** applied in such cases and the need to provide satisfactory reasons for the absence of documents, the ECtHR has ruled in this context that the decision-making process

where Article 8 ECHR is engaged must be “equitable” and respect the interests guaranteed under Article 8<sup>230</sup> and that, as in the case of asylum claims, it is necessary in many cases to give applicants the benefit of the doubt when assessing the credibility of their declarations and of the documents submitted to support their application.<sup>231</sup> The Court has also found that where there are good reasons to doubt the veracity of the declarations of the applicant, it is necessary for him/her to provide a satisfactory reason for any incoherence in their account and that it is similarly incumbent upon the applicant to provide an explanation that is sufficient to rebut possible relevant objections as to the authenticity of the documents produced.<sup>232</sup>

Specifically with regard to the standard of proof imposed in the Dutch family reunification context, the European Commission found in 2008 that the Dutch “provision placing the burden of proof on the refugee to show that it is impossible for her/him to produce such a document is ... questionable”.<sup>233</sup>

At the international level, the 2001 UNHCR expert roundtable on family unity agreed:

The requirement to provide documentary evidence of relationships for the purposes of family unity and family reunification should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin. A flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences. An example was given where strict documentation requirements had created a market for forged documents in one host country.<sup>234</sup>

Meanwhile the experts at the 2017 UNHCR expert roundtable on family reunification argued that “bearing in mind the particular and challenging situation in which family members of refugees often

<sup>228</sup> *E. v. Staatssecretaris van Veiligheid en Justitie*, CJEU, C-635/17, 13 March 2019, available at: <http://bit.ly/2KjWkaM>, para. 81.

<sup>229</sup> Council of Europe: Committee of Ministers, *Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, 15 Dec. 1999, Rec(99)23, available at: <http://bit.ly/2GKkbhJ>, para. 4.

<sup>230</sup> *Mugenzi c. France*, above fn. 61, para. 46.

<sup>231</sup> *Mugenzi c. France*, above fn. 61, para. 47 and *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, para. 69.

<sup>232</sup> *Ibid.*

<sup>233</sup> European Commission, *Guidance on the Application of Directive 2003/86/EC on the Right to Family Reunification*, 2008, above fn. 32, p. 9.

<sup>234</sup> UNHCR, *Summary Conclusions, Family Unity*, 2001, above fn. 47, para. 12.



find themselves, the evidentiary requirements for verification of their identity and family relationships should not be as high as those imposed on other foreign nationals. If the family relationship can be made probable, it should be accepted".<sup>235</sup>

With regard to the requirement to **substantiate family links**, the ECtHR has ruled on the question of the continuation of family life even in the case of separation in the case of *Saleck Bardi*.<sup>236</sup> It determined that the mother's relationship with her daughter was covered by the definition of family life under Article 8 ECHR, even though they were de facto separated. Reiterating that in seeking to reconcile the interests of the parent, child and host family, the best interest of the child must be a primary consideration, the Court found that the passage of time, the lack of diligence on the part of the authorities responsible, and the lack of coordination among the relevant services had contributed to the daughter's sense of abandonment by her mother and her refusal to rejoin her. It found that in order to be adequate, measures to reunite parent and child must be put in place promptly, since the passage of time can have irremediable consequences for the relations between the child and his/her parents who are not living with him/her. It therefore concluded that the national authorities had failed to fulfil their obligation to act promptly as is particularly required in such cases and that the Spanish authorities had not made appropriate and sufficient efforts to ensure respect for Mrs Saleck Bardi's right to her child's return and had lacked the requisite promptness for such a case.<sup>237</sup>

With regard to the requirement in the Netherlands that "**factual family ties**" be substantiated, the FRD permits Member States to reject an application for family reunification, inter alia, "where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship" (Article 16(1)(b)). While the Dutch requirement may initially

seem to be in line with this provision and in principle factual ties will not be deemed broken where a spouse or child has been left behind because of war or violence, it appears that the Dutch interpretation of the factual family ties requirement sometimes considers family ties to be broken, when separation and/or independency is related to the reasons that forced family member(s) to flee not the break-up of the family relationship(s). The FRD's provisions must nevertheless be implemented in such a manner as to ensure that "[s]pecial attention [is] paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there".<sup>238</sup> Indeed, the CJEU has ruled that States should neither interpret the provisions of the Directive restrictively nor deprive them of their effectiveness, meaning that they do not have discretion to introduce distinctions in national law that may have this effect.<sup>239</sup>

With regard to **DNA testing**, UNHCR advises that this "may be resorted to only where serious doubts remain after all other types of proof have been examined, or, where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud".<sup>240</sup>

### 3.2.5 Practice: Traditional and religious marriages

One issue that arose during the research concerns religious and traditional marriages in particular, but not only, in **Eritrea**. According to the country of origin information report on Eritrea by the European Asylum Support Office (EASO), the Eritrean authorities recognize a religious marriage as a legal marriage and an official state marriage certificate is therefore not necessary for it to be recognized as such under Eritrean law.<sup>241</sup> In the view of the Directorate General for Migration, however, the EASO report also indicates that Eritrean refugees

<sup>235</sup> UNHCR, *Summary Conclusions, Family Reunification*, 2017, above fn. 50, para. 18.

<sup>236</sup> *Saleck Bardi c. Espagne*, Requête no. 66167/09, ECtHR, 24 May 2011, available at: <http://bit.ly/2YvHCpZ>.

<sup>237</sup> *Ibid.*, paras. 49, 52, 55, 57, 58, and 64-66.

<sup>238</sup> FRD, recital 8.

<sup>239</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 75, para. 64.

<sup>240</sup> UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <http://bit.ly/2Texzj5>, para. 13. UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, pp. 12-13.

<sup>241</sup> EASO, *Eritrea Country Focus*, 2015, above fn. 203, pp. 55-56.



with religious marriage certificates must have their marriage registered in a Sub-Zoba (*sub-region*) or Kebabi (*village*).<sup>242</sup> This argumentation has also been used in the IND's decision-making practice.<sup>243</sup>

Numerous respondents said that the IND used not to consider Eritrean religious marriages to be legal marriages, although religious marriages are recognized in Eritrea.<sup>244</sup> These issues have also arisen before national courts. While some District Courts have agreed with IND's interpretation and upheld their decisions, others have ruled that the registration of an Eritrean religious marriage is not necessary for it to be recognized in Eritrea.<sup>245</sup> In a July 2017 ruling,

one District Court referred to two opinions of experts in Eritrean law regarding Eritrean marriages.<sup>246</sup> In a recent court case, the IND reportedly accepted religious and traditional marriages as legal, based on expert opinions and provisions of the Eritrean Civil Code.<sup>247</sup> In May 2018, the Council of State ruled that the IND is allowed to assess the validity of a document proving a religious or traditional marriage, if it has doubts about the marriage or the content of the document.<sup>248</sup>

The issue has also arisen in the case of religious marriages concluded in **Syria**. In August 2018, the Administrative Division of the District Court of The

<sup>242</sup> Directorate General for Migration respondent.

<sup>243</sup> Cases seen by UNHCR and lawyers.

<sup>244</sup> Respondents from the VWN main office, VWN location 3, and three lawyers.

<sup>245</sup> See AWB 16/27273, District Court Amsterdam 8 Feb. 2017, and also, AWB 16/26926, District Court Roermond, 5 July 2017; AWB 17/806, District Court Amsterdam, 20 April 2017. In several cases, the courts have also expressed doubts about the correctness of the Eritrean country report of the Dutch Ministry of Foreign Affairs, which interprets the EASO, *Eritrea Country Focus*, 2015, above fn. 203, to require this.

<sup>246</sup> AWB 16/26926, District Court Roermond, 5 July 2017.

<sup>247</sup> Lawyer 1.

<sup>248</sup> 201708910/1/V1, ABRvS, ECLI:NL:RVS:2018:1509, 16 May 2018, available at: <http://bit.ly/2OI3IRG>.

Hague upheld the appeal of a couple who had been married in a religious ceremony in Syria, but whose application for family reunification in the Netherlands had been rejected twice.<sup>249</sup> The Court found that according to a 2017 report by the Syrian Ministry of Foreign affairs regarding documents in Syria, the official date of a marriage is the date determined by the Sharia court. It therefore considered that the marriage in question should be deemed valid under Dutch law, as of that date.

It thus appears that, while in the past a traditional or religious marriage concluded outside the Netherlands was not considered to be a legal marriage, meaning that a lasting and exclusive relationship had to be proven,<sup>250</sup> the IND now accepts traditional or religious marriages as legal marriages if they are legal in accordance with local laws, as long as this can be proven. The fact that initially rejected applications for family reunification have now been granted indicates that the Dutch authorities are aware of former misinterpretation of the legality of these marriages. The recognition of these marriages may therefore no longer be an obstacle, although the marriage still needs to be proven. This revised approach has reportedly also been amended in policy rules and internal procedural guidelines.<sup>251</sup>

### 3.2.6 Practice: Declaration of consent

Applicants seeking to reunite with biological or foster children or a child from a previous marriage/relationship must not only provide a copy of the child's birth certificate or other supporting documents showing the biological relationship between the sponsor and the child (e.g. a family record book or an extract from the register of births, deaths, marriages and registered partnerships), but also a signed "declaration of consent of the parent

remaining behind" if the other parent remains abroad. Where a parent is deceased, a death certificate is required and in the case of a foster child, a copy of the death certificate of the biological parents of the foster child must be provided.<sup>252</sup>

Respondents made it clear that it can be difficult to obtain a declaration of consent for children. Several respondents said it was difficult to prove that the parent had been sought, but not found.<sup>253</sup> Others mentioned that if the parent was deceased it was difficult to provide a death certificate.<sup>254</sup> Another said that Red Cross associations would not provide assistance tracing missing family members if there were indications the person was still alive.<sup>255</sup> One lawyer mentioned that Red Cross associations refrained from providing assistance in tracing when it could not be proven that a person was missing instead of deceased and the sole reason for the search was to obtain a declaration of consent.<sup>256</sup> Many respondents stated that in cases where a declaration of consent was provided, it was difficult to verify the signature on the declaration since many parents either did not have official documents or if they had such documents these did not have a signature, a situation that was particularly evident for Eritreans.<sup>257</sup> As a consequence, parents and children are obliged to travel to a Dutch embassy for DNA testing or an identification interview, which can expose them to danger and which is not an option for foster children.<sup>258</sup>

<sup>249</sup> AWB 17/15601, District Court The Hague, 16 Aug. 2018, ECLI:NL:RBDHA:2018:9927, available in Dutch at: <http://bit.ly/31nFYUh>.

<sup>250</sup> Aliens Circular 2000, para. C2/4.1.

<sup>251</sup> Directorate General for Migration respondent. See Aliens Circular 2000, para. C2/4.1.

<sup>252</sup> Aliens Circular 2000, para. C2/4.1

<sup>253</sup> VWN main office, respondents from VWN location 1 and Nidos, Lawyer 1.

<sup>254</sup> Respondents from VWN location 1 and 2 and Lawyers 1, 2 and 4.

<sup>255</sup> VWN location 2 respondent.

<sup>256</sup> Lawyer 1.

<sup>257</sup> Respondents from VWN main office, VWN locations 3 and 5 and lawyers 1 and 5.

<sup>258</sup> See Chapter 6 Processing family reunification applications abroad for more on this matter.

The following case illustrates the obstacles many Eritrean refugees face gathering proof of family ties.

#### CASE STUDY<sup>259</sup>

The wife and children of an Eritrean refugee tried to cross the border from Eritrea to Ethiopia illegally. Only the six-year-old daughter succeeded. Her mother and the rest of her siblings were arrested and the mother was detained in Eritrea. The daughter is now living alone in Ethiopia. The IND rejected the application finding that factual family ties could not be proven, because there were no official documents. The IND was also unable to conclude that the lack of documentation could not be attributed to the refugee and added that, even if this could be concluded, DNA testing was not possible since the mother of the daughter could not go to an embassy to provide DNA since she was in detention. When a declaration of consent by the mother was obtained with a lot of effort, it was rejected by the IND, since the IND could not compare signatures because the identity card of the mother did not have a signature and the mother was not able to go to a Dutch embassy because she was detained.

This case also shows the difficulties the IND can be faced with when evaluating cases where the situation of the family members – both the mother and children in detention and the daughter on her own in Ethiopia – is precarious. It also highlights the need for a more flexible approach in such circumstances especially when children are involved, as this would enable the family reunification to be concluded more speedily and ensure the respect for the best interests of the child. If the IND had approached UNHCR for assistance it could also have played a facilitating role, since UNHCR is present in all the refugee camps in North Ethiopia, where the majority of refugees there are hosted.

Another case concerns an Eritrean father seeking to reunite with his son, where the declaration of consent by the mother was not accepted as valid. The application has still not been resolved, 12 years after it was first submitted.

#### CASE STUDY

In mid-June 2007 and early 2008, the father had filed applications to reunite with his three sons. This application was rejected based on the fact that family ties were considered not to exist between the boys and their father, as the last contact between the father and his sons was six years before the interview with the IND.

In 2014, the father filed another application for his youngest son (the other two sons had in the meantime travelled irregularly to the Netherlands) along with a signed declaration of consent from the mother. The IND rejected the application stating that it could not be determined that it was the biological mother who signed the declaration of consent. The IND wanted the mother to undergo DNA testing in the nearest embassy, which was located in a neighbouring country, but travelling to that country would only be possible by crossing the border illegally. At the father's request, UNHCR verified and confirmed the identity of the mother as well as her signature. The father appealed the rejection and in October 2016 the District Court of The Hague (seated in Amsterdam)<sup>260</sup> ruled that a verification of identity and declaration of consent by a UNHCR field operation was sufficient to determine the identity and validity of the mother. Consequently, the mother could not be asked to travel to a neighboring country for DNA testing.

To this day, almost 12 years after meeting the three-month deadline for his first application, the boy has still not been reunified with his father. After the court ruling, a higher appeal was filed by the State Secretary for Justice and Security, which was retracted after one year and a new rejection formulated. The rejection no longer concerns the declaration of consent, but the rejection now states that the father had a permanent residence permit instead of a temporary permit at the time of the family reunification application. In the decisions of the IND the best interests of the child appear never to have been considered.

<sup>259</sup> IND decision of June 2014.

<sup>260</sup> District Court of The Hague (seated in Amsterdam), AWB 16/6279.



As a result of cases such as this, the IND has developed a working method that would no longer require a parent who remains behind in the country of origin to undertake dangerous journeys and/or cross borders illegally to undergo DNA testing. The parent needs to submit the following documents: proof that he/she lives in the country of origin; a signed declaration of consent; and an official identity document of the parent. If these three documents are submitted, there should be no need for additional DNA testing.

### 3.2.7 RECOMMENDATIONS:

#### REQUIREMENT TO PROVE/ SUBSTANTIATE FAMILY LINKS

In order to ensure the fair and efficient processing of applications for family reunification:

#### 7.

UNHCR recommends that the requirement to show “factual family ties” should, in the case of applications for family reunification made by refugees, take greater account of the unique situation of refugees who – for reasons related to their flight – do often not possess documents to prove their identity and family relationships, and may not be able to access the administrative services of their country, including for protection reasons. More consideration should be given to the impact and consequences of persecution, conflict and flight on family composition and reformation, which can lead to family structures changing and reforming and to renewed dependency of family members.

#### 8.

UNHCR recommends that the evidentiary requirements regarding the substantiation of family ties should be realistic and appropriate to the situation of the refugee and take into account the specific circumstances of the sponsor and family members and the particular difficulties they have encountered before and after fleeing their country of origin; that a flexible approach should be adopted; and that the principle of the benefit of the doubt should be applied in acknowledgement of the difficulties refugees face in general in acquiring official documents.

#### 9.

UNHCR welcomes the November 2017 policy changes stating that indicative documents to determine family ties will be considered before a decision on lack of documentation is made and permitting DNA testing of minor children if this is in the child’s best interests, even if the refugee has been held responsible for the lack of documentary evidence, as long as the identity of the parent abroad has been established. UNHCR recommends in this context that the Dutch government ensure these policy changes are implemented consistently, in good cooperation with the refugees concerned.

#### 10.

In the event the IND assesses family reunification applications where a declaration of consent from a parent remaining behind or a death certificate is required, UNHCR recommends that greater account be taken of the situation of family members left behind in often precarious situations, that the best interests of the child be taken more consistently into account, and that the IND takes the opportunity of approaching UNHCR where the latter may be able to facilitate this process.

## 4. PROCESSING FAMILY REUNIFICATION APPLICATIONS IN THE NETHERLANDS

This chapter describes the legislative framework setting out the time limits and deadlines for decision-making and the submission of applications that apply during the asylum and family reunification procedures. As regards the requirement that refugees apply for family reunification within three months of recognition, it looks in particular at how the courts have ruled in cases where this deadline has been exceeded and where the IND has nevertheless accepted that the application can be considered under the preferential terms of asylum family reunification procedure.

The chapter also examines how the IND tackled the increase in family reunification applications received during 2015-17; how the procedure to prioritize the handling of certain applications works in practice; the costs of the family reunification process and the work of the VWN Refugee Fund; and the status granted to family members. Recommendations are made at the end of sections [4.2.3](#), [4.3.3](#), [4.4.5](#), [4.5.5](#), and [4.6.2](#).

### 4.1 Deadlines affecting the family reunification process

The succession of time limits and deadlines that apply, initially for the asylum procedure and then for the family reunification process, means that it

can sometimes take a long time before families can be reunited. This has in particular been the case following the significant increase in the numbers of applications for asylum in 2015-16 and of those for family reunification subsequently. These developments have required the authorities to allocate additional resources to respond. For refugee families, the impact of these deadlines and the longer time it can take for procedures to be completed can have a negative impact on their lives, can cause distress, since it leads to longer periods of separation, and can slow the process of integration.

These different time limits and deadlines are summarized in Table 3 as follows:

**Table 3: Time limits and deadlines in asylum and family reunification procedures**

Time limit/ deadline	Extension possible?	Allowed under EU law?
<b>Time limit for the IND to decide on the asylum application</b>		
Six months	Yes, with another nine months in exceptional situations.	Yes, APD (recast) <sup>261</sup> (Article 31(3)) obliges implementation of a maximum decision time limit of six months, permits an extension of another nine months and, in duly justified circumstances, an additional three-month period.
<b>Deadline for the refugee or family member to submit the family reunification application if he/she is to benefit from more favourable conditions</b>		
Three months	No, but the IND agrees to assess applications made after the three-month deadline in certain situations, if it finds that it is excusable that the deadline has been exceeded. National courts can also annul applications for family reunification rejected due to late submission.	Yes, FRD (Article 12(1)) allows the implementation of a three-month application deadline, but only if the application is assessed in another procedure, in which the sponsor is still treated as a refugee, in line with Chapter V and recital 8 FRD.

<sup>261</sup> Council of the EU, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L 180/60-180/95, available at: <http://bit.ly/2yE8Xa9>.

Time limit/ deadline	Extension possible?	Allowed under EU law?
<b>Time limit for the IND to decide on the family reunification application</b>		
Three months	Yes, with another three months in exceptional situations. Before this six-month period ends, IND can extend the decision period further.	Yes, FRD (Article 5(4)) requires a decision “as soon as possible and in any event no later than nine months” from the date of application. A period of nine months is only acceptable if the workload exceptionally exceeds administrative capacity or if the application needs further examination. An extension beyond the nine-month period is only justified in exceptional circumstances linked to the complexity of the examination of a specific application. <sup>260</sup>

## 4.2 Deadline for applying for family reunification

The Netherlands is among a number of EU Member States that, as permitted by the FRD, requires refugees to apply for family reunification within three months of being granted international protection if they are to benefit from the more favourable requirements of Chapter V of the Directive.<sup>263</sup> The asylum permit holder can apply within three months, even if the whereabouts of the family are unknown, and thereby still benefit from these more favourable terms, although they must still submit the required documentation with the application.

If this deadline is exceeded, the regular family reunification procedure generally applies entailing stricter requirements, including regarding income, official and legalized documentation and fees. Under the regular procedure, the refugees’ personal circumstances are also not given any weight. Since 2013, however, it has exceptionally been possible for the IND to process family reunification applications submitted after the three-month deadline under the more favourable terms of the asylum family reunification procedure, if the lateness of the refugee’s application is considered “excusable”/

justified.<sup>264</sup> The State Secretary for Justice and Security referred to a delay of two weeks beyond the deadline as an example. The IND has since developed an “excusability test” to guide the assessment of whether the late application can be considered excusable/justified. This assesses the sponsor’s efforts to meet the deadline, the length of time by which the deadline is exceeded, and the efforts of third party organizations.

This report does not seek to provide a detailed comparison of the practice in other EU Member States, but it is worth noting that some Member States apply no such deadline, while others provide a deadline of six or 12 months. States imposing a three-month deadline include: Austria (imposed in June 2016 before which no deadline applied); the Czech Republic; Germany; Hungary (reduced from six to three months in July 2016); Malta; Sweden (introduced from 2016 to 2019).<sup>265</sup> By contrast, a six-month deadline is imposed in Estonia and Poland, while Belgium and Ireland impose a 12-month deadline, and no deadline is imposed in Bulgaria, France, Italy, Romania, Spain and the United Kingdom.<sup>266</sup>

<sup>262</sup> According to the Commission, this derogation should be interpreted strictly and on a case-by-case basis. See European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32, para. 3.3.

<sup>263</sup> Aliens Act 2000, Art. 29(2) and (4). Until 2001, family members had to submit a family reunification application within a “reasonable period of time”. In practice, this period was around six months after the refugee was granted a residence permit. This changed with the introduction of the Aliens Act 2000, which introduced the three-month deadline. The Dutch government stated that the shortened period would accelerate integration into Dutch society, see *Parliamentary Documents II 1999/00, 26 732, 7. p. 48*. The optional three-month deadline was incorporated into the FRD at the Dutch government’s suggestion, as noted in Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13, p. 41.

<sup>264</sup> *Parliamentary documents II 2012/13, 32 293, no. 21*. See also, EMN, *Family Reunification of Third-Country Nationals*, 2017, above fn. 82, p. 32, for more on this issue.

<sup>265</sup> UNHCR, *The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, pp. 88-93.

<sup>266</sup> *Ibid.*

Imposing a deadline does “not take sufficiently into account the particularities of the situation of beneficiaries of international protection or the special circumstances that have led to the separation of refugee families”.<sup>267</sup> The ACVZ had recommended in 2014 that a clause should be inserted in the Aliens Act permitting derogation from the (three-month) deadline should be permitted in exceptional cases, arguing that this should be possible, if it was plausibly established that there were well-founded reasons for not applying within this period.<sup>268</sup> The Directorate General for Migration clarified, however, that it was not considered necessary to include a provision allowing for derogation from the deadline in exceptional cases, as applicants could always rely on Article 8 ECHR.<sup>269</sup> This reasoning does not recognise the protection refugees have under the FRD, which is much stronger than Article 8 ECHR. An application must be made under the stricter criteria of the regular family reunification procedure. However, the CJEU has made clear that if a refugee has to rely on a regular procedure on family reunification, the sponsor still has to be treated as a refugee in the context of the FRD, taking into account his/her vulnerable situation and difficulties in meeting the regular requirements.

#### 4.2.1 Case law: Deadline for applications

National courts have the power to annul IND decisions to refuse to assess applications submitted after the three-month deadline under the more favourable terms of the asylum family reunification procedure. Their case law indicates the factors that need to be evidenced for exceptional circumstances to be found, so that the application can be decided under the asylum family reunification procedure.

The Council of State has described the “excusability test” referred to above as “not a weighing of interests” but an assessment of whether the failure to apply within the deadline “can reasonably be

attributed to the sponsor or his/her family member”. It describes as an excusable situation one where the delay in submission is the result of an error by the relevant administrative authority or if the sponsor has provided plausible reasons that he/she did not receive a decision against which he/she should have appealed within a certain period. Errors of an authorized representative are generally no reason to accept a delay in application excusable.<sup>270</sup>

At District Court level, while courts have not clearly defined what constitutes an “active effort” or “active approach” by the refugee justifying the annulment of the IND’s decision, they have ruled that the refugee is required to take an active approach at all the stages needed for a timely submission. The courts have also ruled that the refugee is responsible for being correctly informed about the family reunification procedure,<sup>271</sup> in line with the Council of State’s 2011 ruling that, while the VWN has the role of assisting the refugee, responsibility for a timely submission lies with the refugee or family member (since either the refugee or family member can submit an application for family reunification).<sup>272</sup>

Courts do not, however, interpret the State Secretary for Justice and Security’s statement and the IND’s assessment of justified reasons consistently, as indicated in several 2016 judgments set out below.

In one case, an Eritrean refugee lodged an application a couple of days after the three-month deadline, since she had believed her spouse was missing. The court ruled in her favour concluding that even though there was no “active approach” the application was lodged with a delay of only a couple of days.<sup>273</sup> The court found that length of the delay and the refugee’s belief that the spouse was missing were thus determining factors.

In another case, however, a Syrian refugee submitted an application two days after the deadline due to

<sup>267</sup> UNHCR, *UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 6.

<sup>268</sup> ACVZ, *Reunited after Flight*, 2014, above fn. 32, pp. 67-69.

<sup>269</sup> Directorate General for Migration respondent.

<sup>270</sup> *Uitspraak no. 201505478/1/V1 en 201605532/1/V1*, Netherlands, Council of State, ECLI:NL:RVS:2017:1609, 21 June 2017, available at: <http://bit.ly/2Ksy6d9>.

<sup>271</sup> *AWB 16/7469*, District Court The Hague, 26 Aug. 2016, ECLI:NL:RBDHA:2016:10034. See also *AWB 15/16357*, District Court The Hague, 3 March 2016, ECLI:NL:RBDHA:2016:2012.

<sup>272</sup> *ABRvS, Decision no. 201004536/1/1*, 21 March 2011, ECLI:NL:RVS:2011:BP9273.

<sup>273</sup> *AWB 15/18132*, District Court Middelburg, 17 March 2016.

miscommunication with VWN, leading the court to conclude that a timely submission of the application was the refugee's responsibility and therefore to uphold the IND's decision.<sup>274</sup> Similarly, in another case concerning a refugee who submitted an application to reunify with his family four months after being granted a residence permit the court ruled in favour of the IND.<sup>275</sup> The reason for the delay was that his VWN contact person had asked for better translations of relevant documents before assisting him with submitting the application. Registered notes at the VWN location showed that the refugee visited the assisting VWN location for an update on his application several days after a two-week "grace period" beyond the deadline, that is generally accepted by the IND and courts. In court, the refugee argued that during the two-week period he had repeatedly visited the VWN location and even delivered authentic translations, but was merely told that his VWN contact person was ill and no other VWN volunteer could assist him. The court disregarded his arguments, stating that there was no proof of these visits and assuming that it would not have been likely that all VWN volunteers had sent him away knowing that the two-week period was about to end. Regardless of the fact that his VWN contact person was sick, the court ruled that he had not shown an active approach because he could not prove his repeated visits. In this case, the court failed to consider that the refugee might indeed have visited the VWN during the two-week, but that these visits might not have been registered by the VWN. This would have meant that there had been an active approach that could not be supported by evidence.

By contrast, in another case, five months had passed after the granting of the residence permit before a Syrian refugee lodged applications for reunification with his wife and daughters and also with his mother and son.<sup>276</sup> The reason for the delayed submission for reunification with his mother and son was that the VWN did not immediately assist him even though he regularly asked the VWN about the status of these applications. This was because the VWN had assumed that the three-month deadline had already been

"secured" by the timely submission of the application concerning his wife and daughters. The refugee had already mentioned his mother and son as family members during the asylum procedure and even had a VWN volunteer write a letter as a simplified application for reunification with them. These circumstances and the letter led the court to conclude that the refugee had shown an active approach and had been responsible enough for the submission to be deemed timely. The court thus annulled the IND's rejection of the application regarding the mother and son on the grounds that in this case exceeding the application deadline by two months was justified.

One case reviewed for this study concerned an unaccompanied refugee child. The court found that the circumstances meant that even though the application was submitted nine days late, the circumstances justified the late submission.

#### CASE STUDY<sup>277</sup>

The IND approved the reunification of an unaccompanied minor Syrian with his mother, but denied it with his father, whose application was submitted later than that of the mother, because the request was made nine days after the three-month deadline for applications had passed. The refugee was still a minor when he submitted his application for family reunification and thus dependent on the assistance of VWN and his Nidos legal guardian. Even though he repeatedly made efforts to ensure both assisting NGOs submitted the application within three months, this did not happen due to a VWN volunteer's lack of experience and the lack of a quick response from Nidos, as admitted in court by the director of Nidos. In its judgment the court did not refer to the best interests of the child, but considered the circumstances to be justified reasons for missing the deadline by nine days, the delay being due to the shortcomings in the NGO support provided to the refugee.

<sup>274</sup> AWB 16/6666, District Court Arnhem, 18 Aug. 2016.

<sup>275</sup> AWB 16/7469, District Court The Hague, 26 Aug. 2016, ECLI:NL:RBDHA:2016:10034, available at: <http://bit.ly/2YNqX0g>.

<sup>276</sup> AWB 16/12143, District Court The Hague, 18 Oct. 2016, ECLI:NL:RBDHA:2016:13328. The judgment is not clear as to whether the son is a minor, a young adult or an adult.

<sup>277</sup> AWB 14/25415, District Court The Hague, 6 July 2015.



This last case shows that errors made by actors such as NGOs are sometimes accepted as a justification for exceeding the application deadline, although if the child had not made any effort to get the NGOs to submit the applications, the judgment might have been different. It also shows that consideration of the best interests of the child did not play a significant role, even though this is required *inter alia* by Article 5(5) of the FRD. It thus appears that courts generally give considerable weight to the “active approach” of the refugee.

See Section 4.2.3 European standards: Deadline for applications below, for more on the preliminary question referred by the Council of State to the CJEU on this issue and the CJEU’s judgment.

#### 4.2.2 Practice: Deadline for applications

“ This deadline should not hinder the reunification of family members who have been separated from each other due to flight.<sup>278</sup>

ACVZ

In its 2014 report *Reunited after Flight*, the ACVZ mentioned certain situations that would constitute justified reasons for exceeding the deadline for applications, such as where there is a prolonged search for missing family members and the assumption that these family members are no longer alive.<sup>279</sup> One lawyer mentioned a case where the refugee believed that his daughter had died in the conflict, but it turned out that she was alive and this was accepted by the court as a justified reason for exceeding the deadline.<sup>280</sup> Some lawyers said that the deadline is mainly exceeded when VWN volunteers have a high workload due to the high influx of refugees.<sup>281</sup> The VWN itself confirmed this situation and mentioned that in such situations the challenges of providing sufficient training to ensure volunteers

have the skills needed and ensuring that there are enough volunteers available can present problems.<sup>282</sup> Some lawyers noted that volunteers sometimes advised refugees not to apply for family reunification if they considered it pointless, even in cases where lawyers afterwards concluded that the refugee would have had a chance.<sup>283</sup>

According to the VWN, the approach of the refugee is given more weight in this consideration whilst the role of external actors is rarely the determining factor in this check, even when it is evident that a mistake was made by an external actor.<sup>284</sup>

“ Policy constructed in such a way that it makes family reunification not possible due to mistakes of volunteers is unacceptable. In these cases there should be an individual assessment that allows for derogation.

VWN main office respondent

VWN was aware of 38 cases in 2015, where the three-month deadline was exceeded. Although the size of this problem is not clear, all respondents emphasized the serious consequences of exceeding the deadline, which they found not proportionate. VWN respondents stressed that the IND did not condone mistakes made by volunteers, which led to rejections of family reunification under the asylum family reunification procedure for that reason alone.<sup>285</sup> Rejecting an application solely for this reason may have grave consequences for the family members of refugees. Sometimes there may be justified reasons for not meeting the application deadline, especially in case of a delay within the two-week “grace period” after the deadline.<sup>286</sup> According to the VWN, however, in practice while the IND rejects applications that are not submitted by the deadline, refugees are able to resubmit their application, which is, however, processed under the regular procedure where stricter requirements apply.

<sup>278</sup> ACVZ, *Reunited after Flight*, 2014, above fn. 32, p. 27.

<sup>279</sup> ACVZ, *Reunited after Flight*, 2014, above fn. 32, p. 48.

<sup>280</sup> Lawyer 2.

<sup>281</sup> Lawyers 1 and 2.

<sup>282</sup> VWN main office respondent. The respondent said these omissions only occurred a few times a year and acknowledged that local offices did not always report cases to the main office.

<sup>283</sup> Lawyers 1 and 3.

<sup>284</sup> VWN main office respondent.

<sup>285</sup> VWN main office respondent.

<sup>286</sup> See section 4.2.1 Case law: Deadline for applications above.

#### 4.2.3 European standards: Deadline for applications

The CJEU's April 2018 judgment in *A. and S.* sheds some light on the question of the three-month deadline. In the specific circumstances of the case, which concerned an unaccompanied child who reached the age of 18 during the asylum procedure and was seeking to reunify with his parents, the Court determined that the application seeking reunification under Article 10(3)(a) of the FRD could not be made "without any time limit". Rather, the Court found that it "must be made *within a reasonable time*", which "must, *in principle*, in such a situation be submitted within a period of three months of the date on which the 'minor' concerned was declared to have refugee status."<sup>287</sup>

The issue was raised more generally in another preliminary question referred by the Council of State to the CJEU on 26 June 2017. This case, *K. and B.*, concerned the IND's rejection of several applications for family reunification under the favourable conditions of Chapter V of the FRD solely because they were submitted after the three-month deadline.<sup>288</sup> The question referred asked *inter alia* whether the FRD "preclude[s] a national rule ... under which an application for consideration for family reunification on the basis of the more favourable provisions of Chapter V of that directive can be rejected for the sole reason that it was not submitted within the [three-month deadline]". The Council of State also asked whether it was relevant that in such circumstances it was possible to apply for family reunification on the basis of Article 7 of the FRD, if the best interests of the child and individual circumstances (as required under Articles 5(5) and 17 of the FRD) are taken into account.

The CJEU's November 2018 judgment in *K. and B.* ruled that, since the Directive does not determine how the application in question should be regarded procedurally if lodged out of time, an examination of the question should be made considering the principles of equivalence and effectiveness. The Court found that EU law does not preclude national

legislation, which permits the rejection of a family reunification application on the ground of late submission, as long as other possibilities of lodging a fresh application under a different set of rules are provided. Such legislation, however, must ensure that the refusal of a late application cannot be made in cases where "particular circumstances render the late submission of the initial application objectively excusable" and that "the persons concerned [must] be fully informed of the consequences of the decision rejecting their initial application and of the measures which they can take to assert their rights to family reunification effectively". Furthermore, the legislation must provide that "sponsors recognized as refugees continue to benefit from the more favorable conditions for the exercise of the right to family reunification applicable to refugees, specified in Articles 10 and 11 or in Article 12(2) of the directive".<sup>289</sup> This latter provision does not refer to Article 12(1) of the FRD, which requires Member States to exempt refugees from the requirements of Article 7(1) regarding accommodation, sickness, and stable and regular resources, which Member States are otherwise permitted to apply. The CJEU thereby appears to condone the practice of Member States that require refugees who are unable to submit an application for family reunification to meet these requirements. Given the situation many refugees find themselves in, this is frequently beyond their means. In line with the reasoning of the CJEU and the principles of effectiveness and proportionality, national authorities have to take refugees' specific vulnerable situation and the obstacles they face fulfilling these requirements into account, and that the interests of the family members are given due weight, whereas the interest of children shall be a primary consideration.

More generally, it is interesting to note that the principle of effective legal protection means that national rules must not make it "virtually impossible or excessively difficult", in practice, to exercise Community law rights. Effective legal protection requires that national measures implementing a Directive be applied in such a way as to achieve the

<sup>287</sup> *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, C550/16, CJEU, 2018, above fn. 168, para. 61 (emphasis added).

<sup>288</sup> Request for a preliminary ruling from the Netherlands Council of State lodged 26 June 2017. See *Staatssecretaris van Veiligheid en Justitie, K. and B.*; Other parties: *H.Y., Staatssecretaris van Veiligheid en Justitie*, CJEU, Case C-380/17, 26 June 2017, available at: <http://bit.ly/2MIPtZt>.

<sup>289</sup> *Staatssecretaris van Veiligheid en Justitie, K. and B.*; Other parties: *H.Y., Staatssecretaris van Veiligheid en Justitie*, CJEU, Case C-380/17, 7 Nov. 2018, available at: <http://bit.ly/33jsgnl>, para. 66.

result sought by it<sup>290</sup> and that the time set “must be sufficient to ensure that the right ... is effective”.<sup>291</sup>

As for the European Commission, in its 2014 Guidance on the FRD, it stated with regard to the three-month deadline for submissions permitted under Article 12(1) of the FRD that it should be applied “with special attention” taking “into account the particular situation of refugees who have been forced to flee their country and prevented from leading a normal family life there” in line with recital 8 of the FRD.<sup>292</sup> It notes that “[r]efugees often face practical difficulties within this timeframe and these may constitute a practical obstacle to family reunification”, and therefore “considers the fact that most [Member States] do not apply this limitation as the most appropriate solution”.<sup>293</sup> If Member States opt to do so, it advises that “they should take into account objective practical obstacles the applicant faces as one of the factors when assessing an individual application”.<sup>294</sup> The European Commission further recommends that “if an applicant is faced with objective practical obstacles to meeting the three month deadline ... [Member States] should allow them to make a *partial application*, to be completed as soon as documents become available or tracing is successfully completed.”<sup>295</sup>

UNHCR has similarly noted that the three-month deadline:

does not take sufficiently into account the particularities of the situation of beneficiaries of international protection or the special circumstances that have led to the separation of refugee families, and may prove to be a serious obstacle to family reunification for refugees. Refugees may not be aware if their family members

are still alive, or of their whereabouts if they were separated during flight. Tracing of family members is a lengthy process which exceeds three months in many cases. Refugees also face more difficulties in providing the documentation required for family reunification as documents may have been lost or destroyed during flight, and family members are unable to approach the authorities of their country of origin for documents due to risks of persecution.<sup>296</sup>

UNHCR therefore recommends that “[a]s a minimum, time limits should only apply for the introduction of an application for family reunification and should not require that the applicant and family member provide all the documents needed within the three month period”.<sup>297</sup>

One example of a more flexible approach to the deadline concerns Syrian refugees seeking to reunify in Germany. Sponsors there may not only make a formal application within the three-month deadline but may also register a “timely notification” online within the deadline and then bring the timely notification, the full visa application form, and supporting documentation to their embassy appointment.<sup>298</sup> This thus allows more time to gather documentation needed.

More generally, the CJEU has confirmed that “the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the [FRD], which is to promote family reunification, and the effectiveness thereof” and that Article 17 of the FRD “requires individual examination of applications for family reunification”.<sup>299</sup> The CJEU has further confirmed that Member States are required

<sup>290</sup> *Marks and Spencer plc v. Commissioners of Customs and Excise*, CJEU, Case C- 62/00, 11 July 2002, available at: <http://bit.ly/2MQOSWv>, paras. 24 and 35.

<sup>291</sup> *Marks and Spencer plc v. Customs and Excise*, CJEU, Case C- 62/00, 2002, above fn. 290, para. 36.

<sup>292</sup> European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32, p. 21.

<sup>293</sup> *Ibid.*, p. 23.

<sup>294</sup> *Ibid.*, p. 23.

<sup>295</sup> *Ibid.*, p. 24, emphasis added.

<sup>296</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 6.

<sup>297</sup> *Ibid.*, p. 6.

<sup>298</sup> Germany: Foreign Office, *Timely Notification (Fristwahrende Anzeige)* according to Residence Act, Section 29(2)1, available at: <http://bit.ly/2YNftJN> with further information at: <http://bit.ly/31hg8B6>. See also, Council of Europe, Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe*, 2017, above fn. 13, pp. 41-42.

<sup>299</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 75, paras. 43 and 48.

“to examine ... applications for reunification ... in the interests of the children concerned and with a view to promoting family life” and “to make a balanced and reasonable assessment of all the interests at play, taking particular account of the interests of the children concerned”.<sup>300</sup> The European Commission has similarly stated that the two principles set out under Articles 5(5) and 17 of the FRD are “two horizontal mandatory clauses” requiring Member States to pay due regard to the best interests of minor children when examining an application and to make individual examinations of each case.<sup>301</sup>

It is therefore important that the approach of the IND and the national courts’ interpretation of the implementation of the three-month deadline and any exceptional circumstances that may apply take into account the issues set out above if they are to implement the FRD in line with EU law and international legal principles. The rejection of an application solely on the ground that it was submitted after the deadline does not allow the authorities to make an individualized assessment of the application that has due regard of the best interests of any children involved. In addition, even the application of a longer six-month deadline would need to incorporate an assessment of whether there may be exceptional circumstances justifying the delayed submission that would require assessment of the application. Even though refugees have the possibility of applying under the regular family reunification procedure, including on Article 8 ECHR grounds, these procedures have more stringent requirements that do not take adequate account of the particular situation of refugees who have been forced to flee their country and prevented from leading a normal family life there as required by CJEU jurisprudence and the European Commission’s Guidance.

<sup>300</sup> *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.*, Joined Cases C-356/11 and C-357/11, CJEU, 2012, above fn. 224, paras. 81-82.

<sup>301</sup> European Commission, *Green Paper on the Right to Family Reunification of Third-country Nationals Living in the European Union (Directive 2003/86/EC)*, 15 Nov. 2011, COM(2011) 735 final, available at: <http://bit.ly/2KjQy96>, section 5.5, pp. 8-9.

#### 4.2.4 RECOMMENDATIONS:

### THREE-MONTH DEADLINE FOR APPLICATIONS

With regard to the three-month deadline within which applications must be submitted by refugees to benefit from preferential terms, UNHCR recalls that the FRD does not require Member States to impose such a deadline and that, if a deadline is imposed, in view of the FRD’s aim to promote family reunification, it should be interpreted in such a way as to ensure that the principles of proportionality and effectiveness are upheld and that it does not make family reunification impossible or extremely difficult:

#### 11.

UNHCR recommends that no deadline for submission should be imposed. It also recommends that the State ensure that proper and accessible information be provided on the deadlines that apply and the possible consequences of exceeding them. A possible deadline for submitting an application for family reunification should not be applied rigidly for cases involving children, especially unaccompanied minors, as their age and specific circumstances should be taken into account

#### 12.

UNHCR recommends, if a deadline is imposed/maintained, that the IND adopt a flexible approach; that any deadline should only be applied to the introduction of an application; that if refugees are faced with objective practical obstacles meeting the deadline, they should be permitted to make a partial application or a timely notification within the deadline, which can then be completed with required documentation as soon as this becomes available or tracing is successfully completed.

#### 13.

UNHCR also recommends that, where any deadline applied is not met, criteria should be set out clearly in publicly available instructions defining which reasons will be accepted as justifying delayed submission, so as to ensure the transparency and predictability of procedures, that the particular circumstances of the refugee are taken into account, and the best interests of the child are a primary consideration. UNHCR further recommends that

delayed applications should not be rejected on this sole ground, but rather that a balanced and reasonable assessment should be made in each individual case of all the interests at play that goes beyond a focus on the efforts made by the refugee to meet the deadline, especially where children are involved, given the requirement to respect the best interests principle.

### 4.3 Time limit for deciding family reunification applications

Dutch legislation currently requires the IND to make a decision on family reunification applications within three months; in the case of complex applications, this can be extended by another three months especially where further investigation is necessary.<sup>302</sup>

This time limit may be extended further, if the IND writes to the applicant before the end of the six-month decision period stating that it wishes to exceed this period and indicating by how much it will be extended.<sup>303</sup> If a decision has not been communicated after six months or if an extended deadline has passed, the applicant can send a written “notice of default” (*ingebrekestelling*) by fax or mail stating that the decision period has been exceeded. Upon receiving it, the IND must decide within two weeks or pay a fine to the applicant.<sup>304</sup>

In response to the increase in the number of people seeking asylum in 2015,<sup>305</sup> the IND recruited 100 additional employees (full-time equivalent) in June 2015 and another 100 in September 2015.<sup>306</sup> While they initially prioritized assessment of asylum claims over examining family reunification applications, by September 2016, the State Secretary for Justice and Security announced that 300 employees in the Asylum Unit would be assigned to the Family Reunification Unit.<sup>307</sup>

Table 4 sets out data provided by the IND to UNHCR on the numbers of applications for family reunification processed in 2014-18.<sup>308</sup> It shows how the numbers of applications and decisions increased in 2015-16 and how both have fallen in 2017-18.

**Table 4: Family reunification applications filed, processed, granted and rejected**

	Filed	Processed	Granted (at first instance)	Rejected
2014	14,040	9,060	6,080	2,800
2015	24,100	19,850	14,540	4,960
2016	31,680	22,840	15,710	6,540
2017	7,590	21,420	11,760	8,960
2018	6,580	9,500	4,950	4,360

Source: IND. Numbers rounded to tens.

The IND also provided data on the processing backlog of family reunification applications in 2015-18. These show how the backlog was significantly reduced to 1,820 cases by June 2018, after which the backlog started to slightly increase again (Table 5).

<sup>302</sup> Aliens Act 2000, Art. 2u(1). If information is missing and the IND asks the applicant to provide further information, the time limit will be suspended.

<sup>303</sup> General Administrative Law Act, Art. 4:14(1). If it is not clear whether the applicant agrees with this extension, the IND must ask the applicant for permission to exceed the decision period in writing. See General Administrative Law Act, Art. 4:15(2)(a). Even if both the applicant and the IND agree by phone on an extended decision period, the applicant can still send a written notice of default and if this is received in time, the IND is required to ask for permission from the applicant to exceed the decision period. See IND, *Work Instruction 2013/17*, 5 Sept. 2013, available at: <http://bit.ly/2KnN3gw>, p. 19.

<sup>304</sup> General Administrative Law Act, Art. 4:17(3).

<sup>305</sup> For further details statistics see text at fn. 18 and 20 above.

<sup>306</sup> *Parliamentary documents II* 2014/15, 19 637 no. 2027.

<sup>307</sup> Response by State Secretary for Security and Justice to Parliamentary Questions, 27 Sept. 2016, available at: <http://bit.ly/33eKJRP>.

<sup>308</sup> See also Annex 2: Overview of data requested and received. For data on the number of family reunification applications lodged each year, see also IND, “Rapportage Vreemdelingenketen 2015”, 31 March 2016, available at: <http://bit.ly/2MGI79y>, para. 3.2.1, pp. 24-25; IND, “Rapportage Vreemdelingenketen 2016”, 21 March 2017, available at: <http://bit.ly/2ZEfCnS>, pp. 21 and 23.



**Table 5: Family reunification applications not yet processed**

	2015	2016	2017	2018
Jan	9,210	14,670	18,430	5,540
Feb	10,950	18,910	17,340	4,320
Mar	12,490	21,760	15,990	2,580
Apr	11,170	24,210	15,270	2,280
May	9,800	26,390	14,320	2,120
June	8,540	28,400	13,170	1,820
July	8,050	28,840	11,660	1,930
Aug	7,450	28,520	10,060	2,160
Sept	7,370	26,510	8,690	2,150
Oct	7,820	24,180	7,530	2,790
Nov	9,560	21,390	6,710	3,030
Dec	11,590	20,300	6,160	3,180

Source: IND. Numbers rounded to tens.

The average time taken to process family reunification applications from the date of submission until the date the IND made a decision is shown in Table 6. In 2016, the average period between the submission of an application and the decisions was 232 days, well over 180 days which corresponds approximately to the maximum six-month period generally allowed. The Table shows that the IND has exceeded this permitted period since October 2015 and continues to do so by significant margin even though the length of time taken to make decisions was decreasing until November 2018.

**Table 6: Average number of days between lodging a family reunification request and the decision**

	2015	2016	2017	2018
Jan	129	211	302	300
Feb	133	223	329	303
Mar	135	227	350	312
Apr	114	224	356	184
May	117	232	382	206
June	135	225	384	275
July	156	228	383	181
Aug	147	224	362	195
Sept	166	223	374	147
Oct	205	225	353	182
Nov	180	244	353	171
Dec	190	280	319	206
<b>Average</b>	<b>145</b>	<b>232</b>	<b>354</b>	<b>258</b>

Source: IND.

In September 2016, the Ministry of Security and Justice envisaged extending the deadline for deciding on family reunification applications from six to nine months.<sup>309</sup> The State Secretary for Justice and Security justified this proposal by the longer processing time for applications submitted by Eritrean refugees. For many of these applications, he indicated that the IND needed an average of 220 days due to the need for further investigation and assessment of the application.<sup>310</sup> The Directorate General for Migration also thought that at times of high influx a longer time limit was needed and that this could occur again in the future.<sup>311</sup> In a letter on 12 July 2019, the State Secretary for Justice and Security informed the House of Representatives that the bill would be withdrawn explaining that the focus would be on reducing the backlog as well as the decision-making timeframes in both the asylum and family reunification procedures.<sup>312</sup>

<sup>309</sup> *Parliamentary Documents II 2016/17*, 34 544. For other changes proposed in the bill, see section 4.2 Deadline for applying for family reunification above.

<sup>310</sup> See also *Parliamentary documents II 2016/17*, 34 544, no. 3.

<sup>311</sup> Directorate General for Migration respondent.

<sup>312</sup> *Parliamentary documents 2018/19*, 34,544 no. 6, available at: <https://bit.ly/2Zai3tS>.

#### 4.3.1 Practice: Time limit for deciding on family reunification applications

“ When I was still in Syria, two of my children died in the war. When I fled to the Netherlands I had to wait a whole year until my wife and our four children were able to join me. Time goes so slowly when you are separated from your loved ones. Witnessing my two other children die in front of my eyes and knowing that my wife and other children were still in danger kept me awake at night. A day seems like a month. A month seems like a year. The ambulance took me to the hospital twice because of heart problems. As a father and a husband I felt the need to protect my wife and children, but I could not do so. I felt powerless. I started to lose hope. I almost withdrew my request for family reunification and was about to go back to Syria to be with my family.

Refugee father/husband from Syria

Lengthy decision-periods of six months or longer – the average decision-making period being 10 months (2016-18) as per the data provided by the IND – have a negative impact on the lives and integration of refugees and their families, especially children, as was expressed by the refugees interviewed.

Several respondents from VWN locations confirmed that the IND regularly exceeds the six-month decision-making period, in particular at times when application numbers are high, as is also indicated in Table 6 above. One said that the IND usually started processing six months after the submission of the family reunification application.<sup>313</sup> Others confirmed that in some cases the family reunification application of a refugee was processed nine months after the date of application.<sup>314</sup> Still others thought that the IND appeared to process applications in a random order independent of the date of submission.<sup>315</sup>

This led to significant differences in the handling of apparently similar cases, which sometimes created frustration and anxiety among the refugees, who felt the IND was not complying with the IND’s “first-in, first-out” principle.<sup>316</sup> For its part, the Directorate General for Migration indicated that this was due to an increase in time taken to reach a decision on family reunification applications, especially where they were not well documented, and that the IND had again been working according to the “first-in, first-out” principle from the beginning of 2017.<sup>317</sup> Another reason mentioned by the respondent was the fact that it took time for the IND to respond to the letters refugees can send when the IND decision-making was delayed, which took time away from the processing of applications.<sup>318</sup>

As explained above, in certain cases, the IND may ask the refugee for permission to exceed the decision period;<sup>319</sup> in others, the refugee may ask the IND to exceed the decision period. This mostly concerns Eritrean family members who need more time to collect documents or family members who need more time to reach an embassy for additional investigations/examinations.<sup>320</sup> In other cases, however, the IND sometimes exceeds the decision period without obtaining the refugee’s permission and without sending out a letter informing the applicant that they will not be able to take a decision within the deadline.<sup>321</sup> Two VWN respondents stated that the IND sometimes sends a letter two days before the end of the decision period informing the refugee about the extension of the decision period, or the IND remains silent and when contacted it emerges that the application has not yet been assigned to a decision officer.<sup>322</sup> One VWN respondent mentioned that the IND regularly asks for permission to exceed the decision period.<sup>323</sup> In most cases, however, the IND

<sup>313</sup> VWN location 1 respondent.

<sup>314</sup> VWN location 4 and 5 respondents.

<sup>315</sup> VWN locations 2 and 5 respondents.

<sup>316</sup> During this research, UNHCR received a letter dated 16 Dec. 2015 shared by VWN location 3 in which the IND stated they process applications on a “first-in, first-out” basis.

<sup>317</sup> Directorate General for Migration respondent.

<sup>318</sup> Directorate General for Migration respondent.

<sup>319</sup> See the beginning of section 4.3 Time limit for deciding family reunification applications.

<sup>320</sup> Respondents from various VWN locations.

<sup>321</sup> VWN location 4 respondent.

<sup>322</sup> VWN location 1 and 2 respondents.

<sup>323</sup> VWN location 5 respondent.

reportedly exceeded the decision period by no more than a couple of weeks.<sup>324</sup>

All VWN location respondents stressed that they found it risky to send a written notice of default if the IND exceeds the decision period, especially in cases concerning Eritrean family members, since they said the IND would most likely reject the application due to a lack of information.<sup>325</sup> Family members then have to submit a new application meaning the family reunification procedure takes even longer. Instead, in this situation, VWN volunteers generally do not send a notice of default, but contact the IND informally which has led to a speedier decision-making.<sup>326</sup> The IND explained that they generally send a letter of rectification if the application is not complete even if they receive a written notice of default.

Lengthy decision-making can be particularly problematic for families where children are involved, especially if they are young, as explained by one Syrian teenager.

“ I left Syria and came to the Netherlands in 2014 at the age of 16. I was granted a residence permit after five months. I asked for reunification with my parents and my sister immediately. From the moment that I had my residence permit until the time that my parents joined me a year had passed. The procedure took a long time. Not seeing them for one and a half years was very difficult for me. I cried tears of joy when I finally saw them again. The IND rejected my sister’s application at first because she was already 18 years old. I did not see my sister for two years. Fortunately, she was allowed to come six months later, but it was difficult for us to be separated from each other for such a long time.

Teenage refugee from Syria

When very young children are separated from a parent for long periods this can be damaging and may even mean that the bond can no longer be restored if the separation is, for instance, for two or three years. One example concerned a nine-year-old Syrian boy who came to the Netherlands and learned Dutch within a year, but when he spoke to his mother, who remained in Turkey, they had difficulties communicating,<sup>327</sup> although it may well be that in that particular case such difficulties are not insurmountable. The respondent mentioned that applications for family reunification should be dealt with “in a positive, humane and expeditious manner”.<sup>328</sup>

#### 4.3.2 International and European standards: Time limit for deciding applications

At the international level, Article 10(1) of the CRC requires States Parties to deal with “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification ... in a positive, humane and expeditious manner”. UNHCR ExCom also calls on “countries of asylum and countries of origin ... to ensure that the reunification of separated refugee families takes place with the least possible delay”.<sup>329</sup>

At the European level, the ECtHR has noted that to be effective measures to reunify a parent and child must be put in place promptly since the passage of time can cause irremediable damage to the parent-child relationship if they are separated.<sup>330</sup> In *Tanda-Muzinga*, the Court found further that it was of overriding importance for applications to be examined “rapidly, attentively and with particular diligence” and to evidence the required guarantees of “flexibility,

<sup>324</sup> VWN location 2 respondent.

<sup>325</sup> Respondents from VWN locations 1, 3 and 5 stated, for instance, that they had stopped sending a notice of default since this had led to the IND rejecting the application in the past. Another respondent from VWN location 4 indicated that he/she only sent such a notice when the family members are well documented. For its part, the IND indicated that such cases would not be instantly rejected and that a rectification of omission letter would probably be sent out.

<sup>326</sup> VWN location 2 respondent.

<sup>327</sup> Defence for Children respondent.

<sup>328</sup> *Ibid.*

<sup>329</sup> UNHCR ExCom, Conclusion No. 24, *Family Reunification*, above, fn. 54, para. 2.

<sup>330</sup> *Saleck Bardi c. Espagne*, ECtHR, 2011, above fn. 236, paras. 50-53.

promptness and effectiveness” needed to respect the right to family life.<sup>331</sup>

Article 5(4) FRD requires applications for family reunification to deliver a decision “as soon as possible and in any event no later than nine months from the date on which the application was lodged”. The European Commission therefore states in its 2014 Guidance that

as a *general rule*, a standard application under normal workload circumstances should be processed promptly without unnecessary delay. If the workload exceptionally exceeds administrative capacity or if the application needs further examination, the *maximum time limit of nine months* may be justified.<sup>332</sup>

These criteria imply that a *general* application of the maximum time limit is not allowed. The Commission further states that “an extension beyond the nine-month deadline is only justified in *exceptional circumstances* linked to the complexity of the examination of a specific application” and that any “derogation should be interpreted strictly and on a case-by-case basis”.<sup>333</sup> National authorities wishing “to make use of this possibility must justify such an extension by demonstrating that the exceptional complexity of a particular case amounts to exceptional circumstances. Administrative capacity issues cannot justify an exceptional extension and any extension should be kept to the strict minimum necessary to reach a decision.”<sup>334</sup>

#### 4.3.3 RECOMMENDATIONS:

##### TIME LIMIT FOR DECIDING APPLICATIONS

In order to ensure family reunification applications are dealt with “in a positive, humane and expeditious manner” and that reunification “takes place with the least possible delay” as required by the CRC:

#### 14.

UNHCR recommends, in view of the continuing length of time decision-making is taking, that the State Secretary for Justice and Security examine further ways to speed up the family reunification process. This could include allocating sufficient staff and resources and linking the asylum and family reunification procedures more efficiently, for instance, by ensuring that unaccompanied asylum-seeking children and/or asylum-seekers where there is a strong presumption of eligibility are informed about the family reunification process during the asylum procedure. They can then initiate the process of tracing and collecting official and/or indicative documents as early as possible to ensure a more efficient family reunification procedure, which would also be in the best interests of the child.

<sup>331</sup> *Tanda-Muzinga c. France*, ECtHR, 2014, above fn. 60, paras. 73, 81, and 82. See also, *Mugenzi c. France*, ECtHR, 2014, above fn. 61, para. 52; *Longue c. France*, ECtHR, 2014, above fn. 65, para. 75.

<sup>332</sup> European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32, p. 10 (emphasis in original).

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*



## 4.4 Priority processing

Even though there is no legal obligation to process a family reunification with priority, an applicant can ask the IND to handle a family reunification application on a priority basis. This is not a legal procedure, nor is the process involved laid down in law or policy. A limited number of criteria are indicated and practice suggests which types of cases are more likely to be accepted for prioritized processing, as outlined in subsequent sections.

### 4.4.1 Criteria for receiving priority

The IND website states that priority processing of an application is only possible in “highly exceptional cases”, such as for “pressing, life-threatening, medical reasons”.<sup>335</sup> According to the IND, there is no definition of what constitutes prioritized treatment of an application in the family reunification procedure, but if someone is considered vulnerable for the above reasons, regardless of whether that person is the refugee or the family member, the IND may decide to handle the application with priority.<sup>336</sup> Applications involving children can also be given priority for other reasons, but priority is not given to cases on safety grounds. The IND also indicated that the same criteria for considering applications on a priority basis are applied to all applications, while the decision to give priority to an application always depends on the circumstances of the case.<sup>337</sup>

In the absence of more detailed IND guidance on which cases qualify for prioritized processing, Section 4.4.3 Practice: Priority requests granted and refused below provides examples of the types of cases that have been accepted for priority processing as well as cases where this has been rejected. These examples give further indications as to how the process works. They include in particular examples where children

are involved that have been accepted for priority processing, even in the absence of “pressing, life-threatening, medical reasons”.

A request for priority handling must be supported by documentary evidence such as a translated medical statement.<sup>338</sup> In effect, this resembles a medical record.<sup>339</sup> In practice, refugees have difficulties obtaining the required documentary evidence, but without supporting documentation requests are not accepted for priority processing.<sup>340</sup>

### 4.4.2 Practice: Procedure for requesting priority processing

Anyone including VWN, Nidos, lawyers and refugees can ask for a family reunification application to be handled with priority according to the IND.<sup>341</sup> When priority is accorded, the IND processes the case within several days instead of six months.<sup>342</sup>

Asking the IND to process a family reunification application with priority is, however, only possible for applications that are not yet assigned to an IND case manager because at that moment it is still possible for the IND to take a case out of the unassigned applications.<sup>343</sup> This requirement still applies now that the IND has resumed deciding which priority requests to approve (see below). If the application is already assigned to a case manager, volunteers at VWN local offices can then only request priority processing of the application with the respective IND case manager.

Given that the procedure for requesting and receiving priority is not laid down in law and policy, there are no procedural guarantees for refugee families. Thus, if the IND rejects a request for priority processing there is no possibility to appeal this decision. According to a respondent from the Directorate General for Migration, advocating for a written procedure with

<sup>335</sup> IND, *FAQ journey in connection with family reunification asylum*, available in English at: <http://bit.ly/2yFWUJ8>.

<sup>336</sup> IND respondent.

<sup>337</sup> IND respondent.

<sup>338</sup> VWN main office respondent.

<sup>339</sup> Directorate General for Migration respondent.

<sup>340</sup> VWN location 4 respondent.

<sup>341</sup> IND respondent.

<sup>342</sup> VWN main office respondent.

<sup>343</sup> Normally, i.e. when there are no delays, the IND assigns family reunification applications to individual case managers on a “first-in, first-out” basis.

accompanying procedural guarantees could run the risk that the possibility of requesting priority processing would be removed altogether.

With regard to **referrals by the VWN**, a system mutually agreed between VWN and IND operated between January 2015 and May 2017, whereby the VWN main office selected which cases submitted by VWN local offices qualified for onward submission to the IND for prioritized processing based on the criteria set by the IND. From 9 May 2017, however, this responsibility reverted to the IND, which once again became responsible for deciding which applications to prioritize. The VWN main office indicated that this had been a possibility from the time it had been given the role and that it had found itself in a difficult position vis-à-vis the local offices, as it had become responsible for deciding on prioritization, when in the end the IND was the determining authority. The VWN main office assured UNHCR that when a request was forwarded to the IND it was assumed that the specific family reunification application would indeed be handled with priority and that there had been no indications this was not the case.<sup>344</sup>

With regard to **referrals by lawyers**, there is no specific procedure other than simply contacting the IND employee who is handling the case and explaining why it requires priority. One lawyer explained that the IND only considers a request for priority during the applications phase when an individual IND case manager starts handling the case.<sup>345</sup> Others said it was generally difficult to obtain priority handling of an application.<sup>346</sup>

Informal approaches sometimes work, as in the following case:

#### CASE STUDY

A lawyer secured priority processing of a case concerning a mother seeking to reunify with her four-year-old daughter who had remained behind.<sup>347</sup> The case had not yet been assigned to a case manager, but the lawyer sent a direct letter to the IND employee who had processed the family reunification application of the child's father and the case was given priority after the employee discussed it with her supervisor.

#### 4.4.3 Practice: Priority requests granted and refused

Since the criteria for requesting priority are not specified in any detail in policy or guidance, examples provided by individuals consulted for the research provide further indications of the kinds of cases that may be accepted by the IND for priority processing. The criteria have not changed, even though the method of referral for the VWN is now directly to the IND rather than through the VWN main office. So the information gathered below from UNHCR's interviews with respondents remains relevant. This section first provides examples of requests that have been approved, then of requests that were not deemed severe enough by the IND, and finally requests concerning children.

In terms of **requests approved**, the VWN cited as examples cases where family members had a life-threatening illness and urgently need medical treatment that was not available in the country of residence, including family members requiring treatment for diseases such as cancer, who required a pacemaker, or who had injuries caused by bombardments.<sup>348</sup> In one case, priority processing was accorded to an application concerning a Syrian spouse with a severe form of breast cancer who needed an operation and chemotherapy immediately to try and

<sup>344</sup> VWN main office respondent, also confirmed by a VWN location 5 respondent.

<sup>345</sup> Lawyer 1.

<sup>346</sup> Lawyers 1 and 5.

<sup>347</sup> Lawyer 5.

<sup>348</sup> VWN main office respondent.

save her life and this treatment was not available in the Syrian town where she was living.<sup>349</sup> Another case where priority processing was accepted concerned a family member with diabetes for whom medication was unavailable.<sup>350</sup> In all cases, the circumstances of the family member must be severe, clearly described, and documented in the letter.<sup>351</sup>

As for **requests rejected** by the VWN main office as not involving a sufficiently severe medical threat justifying onward submission to the IND, these included a broken leg, an ear infection, appendicitis, and a case where the conflict situation was not deemed threatening enough.<sup>352</sup> In another case, a lawyer requested priority handling on medical grounds,<sup>353</sup> but the IND found that these were not severe enough, even though treatment for the family member was not available in her home country, as follows:

#### CASE STUDY

A wife wishing to reunify with her husband in the Netherlands was suffering from HIV. Treatment was not available for her in her home country. The IND refused to prioritize the case and stated that there were many dire situations, so only the most severe cases could be handled with priority. The IND added that no matter how severe HIV may be, it had not yet developed into AIDS.

As for cases involving **children**, the examples below show that the IND may accept requests for priority processing not only when there are pressing, life-threatening, medical reasons, but also when other dire circumstances apply. The IND's policy regarding the prioritization of applications concerning children is, however, not clear. As the IND noted in a letter rejecting a request for priority processing of an

application involving a nine-year-old child who was alone in Eritrea:

The IND cannot process all applications of children who are left behind with priority. That would be at the expense of other applications involving children who have an interest in a speedier family reunification. Of course when children are in very dire situations, such as medical indications, this can be addressed to the IND.<sup>354</sup>

One example given by the IND that was accepted for priority processing concerned a three-year-old child who had remained behind on his/her own.<sup>355</sup> Another case where no medical circumstances applied involved a four-year-old daughter as follows:

#### CASE STUDY<sup>356</sup>

A four-year-old Eritrean girl was still in Eritrea when her father joined her mother in the Netherlands. Her grandfather brought her to Sudan assuming that his granddaughter would soon be able to travel to the Netherlands, but the grandfather unfortunately had to return to Eritrea before this was possible. A woman in Sudan was renting a room next to where the girl was staying. When the grandfather left, the woman temporarily took the girl under her care. The girl was often sick and very sad. Since the girl's mother did not personally know this woman and the Sudanese woman planned to continue her journey to another place, the mother became anxious. Moreover, the mother was heavily pregnant and thus could not fly to Sudan to take care of her child. The lawyer's request for priority processing of the application was granted within two weeks after referring the case to the IND.

<sup>349</sup> Case study based on filled in question list with the information about the spouse.

<sup>350</sup> Example provided by VWN location 1.

<sup>351</sup> Example provided by VWN location 3.

<sup>352</sup> VWN main office respondent.

<sup>353</sup> Lawyer 1.

<sup>354</sup> Letter of 16 Dec. 2015 from the IND in the name of the State Secretary for Security and Justice in response to a request for priority processing by a volunteer at VWN location 3.

<sup>355</sup> IND respondent.

<sup>356</sup> Case study based on e-mail contact containing the request made by lawyer 5 for prioritized handling of the application and the IND's response.

Another case concerned an older daughter, who had been severely traumatized as follows:

#### CASE STUDY

A refugee was seeking to reunify with his/her 14-year-old daughter, but she was kidnapped before DNA sampling could take place. She was seriously traumatized by her experience of the abduction and, once she was found, a second application for family reunification was processed expeditiously.<sup>357</sup>

According to Nidos, it is only in exceptional or serious circumstances, such as those involving young children who are in a dire situation or who have severely ill parents, that Nidos can successfully ask the IND to process an application on a priority basis.<sup>358</sup>

Sometimes it is possible to request an interim measure from the court,<sup>359</sup> including at the appeal stage, as in the following case where the IND agreed to process the application with priority even before the court hearing.

#### CASE STUDY<sup>360</sup>

In a case concerning two young children who remained in Somalia, the IND initially rejected the family reunification request. At the appeal stage, the lawyer asked the IND to process the appeal with priority due to the children's young age and requested an interim measure from the District Court obliging the IND to prioritize the appeal on the basis of Article 10 CRC.<sup>361</sup> Eventually, the IND considered the appeal to be well-founded and agreed to the request for priority processing before the court hearing took place.

These examples show that requests for priority processing involving children may be accepted by the IND even if there are no serious medical reasons, including in cases where the child is very young, he/she is seriously traumatized, or the child is in a situation where the person caring for him/her is seriously ill, is no longer able to care for him/her, or would soon no longer be there.

#### 4.4.4 International and European standards: Priority processing

Applicable international and European standards regarding the obligation to process applications in a "positive, humane and expeditious manner", as required by Article 10(1) of the CRC, are set out in section 4.3.2 International and European standards: Time limit for deciding applications above.

Given the often precarious, dangerous and life-threatening situations that family members of refugees may find themselves in, States hosting refugees have responsibilities towards such family members. Even though family members in third countries are not directly within the jurisdiction of host States, they have responsibilities towards refugees on their territory, since they cannot enjoy family life elsewhere. As the ECtHR has noted, "[w]hen assessing the compliance of State authorities with their obligations under Article 8 [ECHR], it is necessary to take due account of the situation of *all members of the family, as this provision guarantees protection to the whole family*".<sup>362</sup>

<sup>357</sup> Case study based on a completed questionnaire with the information about the daughter.

<sup>358</sup> Nidos respondent.

<sup>359</sup> Lawyer 1.

<sup>360</sup> Mentioned by lawyer 1.

<sup>361</sup> Appeal of Jan. 2014 and request for an interim measure of Jan. 2014.

<sup>362</sup> *Jeunesse v. The Netherlands*, ECtHR, 2014, above fn. 59, para. 117 (emphasis added).



#### 4.4.5 RECOMMENDATIONS:

### PRIORITY PROCESSING

With regard to the procedure for requesting the priority handling of urgent family reunification applications:

#### 15.

UNHCR recommends the IND to establish in the Aliens Circular a clear and concise policy on the submission of requests for priority processing. In light of States' specific obligations under Article 10 of the CRC to decide family reunification applications "in a positive, humane and expeditious manner", of the principles of good administration, transparency, impartiality, proportionality, and legal certainty, as well as the best interests of the child, this policy should in particular set out the criteria applying to situations involving unaccompanied children, other vulnerable children, and families with minor children. UNHCR also recommends that the criteria for priority processing in this policy should include family members who are in dangerous or life-threatening situations, such as minor children stuck in a conflict zone.

## 4.5 Financing the family reunification procedure and funding by VWN

Refugees wishing to reunite with their families in the Netherlands must find ways to meet the significant costs involved. These costs include fees for submitting applications (if they are unable to submit their application within three months); translation and notarization costs; fees for exit visas; travel and accommodation costs to reach an embassy; and travel costs to reach the Netherlands, as outlined further below. A Refugee Fund administered by the VWN provides financial support towards meeting some of these costs, but refugees often find themselves in debt as a result of these accumulated costs.

### 4.5.1 Costs of the family reunification procedure

With regard to **fees for submitting family reunification applications**, no fee is charged if the asylum permit holder is able to submit the application within three months of being granted the asylum permit. If this is not possible, however, and the IND sees no good reason to permit the deadline to be extended, the application comes under the regular family reunification procedure. Under this procedure, every adult family member wishing to join the sponsor must pay 171 euros, while a fee of 57 euros applies for each minor child.<sup>363</sup>

Families must in addition pay for the **official translation of documents** and the administrative costs for receiving documents.<sup>364</sup> These costs were initially reimbursed by VWN, but this is no longer the case due to the high numbers of family reunification requests. Obtaining official translations of documents such as an identification document costs at least 77 euros.<sup>365</sup> Translation costs for a Syrian marriage certificate can be about 150 euros in total.<sup>366</sup> The translation of a genealogical register issued to Syrians is costly, since it can be about 10-12 pages long.

Other costs related to procedures include the **cost of exit visas and/or exit fines**, as family members may need to pay exit visa fees to be able to leave their country of residence and/or exit fines if they have been staying in an irregular manner in another country.<sup>367</sup> Although these fees/fines appear not to deter refugees from seeking to reunify, they make the whole process more costly and stressful.

Exit fees and fines are a particular challenge for family members seeking to travel from Ethiopia and Sudan. In Ethiopia, practice indicates that illegal residence is penalized by a maximum fine of 1,150 USD per person. In principle, exit fines for illegal residence are not imposed on refugees who are officially registered with UNHCR.<sup>368</sup> To avoid exit fines refugees should

<sup>363</sup> Under the Article 8 ECHR procedure, persons without sufficient means may apply for an exemption from these fees, but must provide documentary evidence of lack of any income or assets and failure to obtain a loan from others. See <http://bit.ly/2GPJ4IH>, "Additional information".

<sup>364</sup> VWN location 1 respondent.

<sup>365</sup> VWN location 3 respondent, who added that this concerns documents translated by the Stichting Instituut Gerechtstolken en Vertalers, a translation bureau registered by the national bureau for sworn interpreters and translators.

<sup>366</sup> VWN location 3 respondent.

<sup>367</sup> For instance, when Somalis leave Ethiopia or when Eritreans leave Sudan.

<sup>368</sup> Information provided by Dutch embassy in Ethiopia to the VWN main office.



ensure that their documentation is complete and still valid.<sup>369</sup> Nonetheless, even if this is the case, an exit fine can still be charged, although it is likely to be less high than for illegal residence.<sup>370</sup> In 2015, however, a spouse and five children, of whom three were minors, had to pay an exit fine of almost 7,000 USD in order to be able to leave Ethiopia due to their illegal residence there.<sup>371</sup>

Eritreans in Sudan who have identity documentation issued by the Sudanese Commissioner for Refugees must pay 154 USD (1,032 Sudanese pounds) per person in exit visa fees. Eritreans who are not registered with the Sudanese Commissioner for Refugees must obtain an “exit assessment”, in effect exit fee,<sup>372</sup> which costs USD 12 (82 Sudanese pounds) per day for a period of three months, amounting to around 1,120 USD (7,472 Sudanese pounds) in total per person, although refugees can request a discount on these fees on humanitarian grounds.<sup>373</sup>

Finally, family members must meet **travel and accommodation costs** if they have to travel to, and stay in, another country to go to a Dutch embassy or consulate during the procedure and to meet the cost of travelling to the Netherlands once reunification is approved.

#### 4.5.2 The VWN Refugee Fund

The VWN Refugee Fund, which is funded by private donations, can cover certain costs primarily related to the travel to the Netherlands for the family members of refugees, but also including the cost of exit visa fees or fines where these are imposed. The money in this fund is distributed over the five regional VWN Associations, who are responsible for managing submissions for assistance. Local VWN offices can meet the costs for the family’s airline tickets with money from the Refugee Fund, if there is a financial need and the total costs of all the airline tickets exceeds 1,000 euros.

<sup>369</sup> Information provided by IOM.

<sup>370</sup> Information provided by the Dutch Embassy in Ethiopia and IOM in 2015 and 2016 at VWN’s request.

<sup>371</sup> VWN location 3 respondent. This example concerned an Art. 8 ECHR application because the three-month deadline had been exceeded.

<sup>372</sup> Respondent from Dutch embassy in Sudan.

<sup>373</sup> *Ibid.*



With regard to the requirements for receiving funding, a financial need is assumed to exist when one week<sup>374</sup> has passed since the positive decision on the family reunification application.<sup>375</sup> The aim of this (short) waiting period is to stimulate refugees to gather the money themselves. It is possible to waive this waiting period and the threshold of 1,000 euros under certain circumstances. Examples cited include a young applicant under the age of 23 years with a low income and someone responsible for the care of a sick family member with high medical costs in the country of origin.<sup>376</sup> Most requests concern airline tickets, but in some cases up to 50 per cent of the cost of exit visa fees or fines can be covered. There is no minimum payment for these costs required from the refugee and exit visa fees/fines are covered in addition to ticket costs.<sup>377</sup>

Local offices have been responsible for managing the Refugee Fund from 2014, with the result that the VWN main office does not have its own fund, but rather contributes to the fund of the regional offices, most of which is spent on supporting family reunification applications.<sup>378</sup> In 2018, the VWN main office contributed a total amount of 350,000 euros out of its own budget to the Refugee Fund.<sup>379</sup> Regional offices can add to this amount through local fundraising. In 2018, the total amount spent by the Refugee Fund was approximately 580,000. In 2016 the total amount spent was 474,000 euros, and in 2017 it was 450,000 euros.

#### 4.5.3 Practice: High costs

Although costs for family reunification are generally high, this does not seem to be dissuading refugees from seeking to reunify with family members, but they need to contribute more and more themselves, as less support is available from the VWN Refugee Fund or other sources. The resulting high cumulative costs for refugee families often means they have to go into debt, which can have a negative impact on family life and affect their integration. As one VWN respondent noted:

Family members are seldom unable to come to the Netherlands because of the costs, but these costs lead to debts and thus put the family in a disadvantaged position, which is very damaging for their integration.<sup>380</sup>

One refugee father from Eritrea explained his situation as follows:

I have no money for when my son will join me in the Netherlands. I do not know who I could borrow money from. My son is not registered with UNHCR and entered Sudan illegally. In Sudan the exit visa fees are very high. I do not have such money. I cannot send anything to help my son and it is impossible to get help.

<sup>374</sup> The waiting period was previously four weeks, but was reduced to one week in December 2016.

<sup>375</sup> According to the chair of one of the Regional Dutch Council for Refugee Associations, the waiting period was previously four weeks, but had been reduced to one week by December 2016.

<sup>376</sup> VWN location 5 mentioned the threshold being removed for one refugee with a sick child in the family in Turkey, for whom all the money sent was used to cover the child's medical costs.

<sup>377</sup> Information provided by a Refugee Fund's regional chair.

<sup>378</sup> For example, one of the VWN regional fund commissions received 92 requests for funding in 2014 of which 63 were granted. Most requests granted concerned costs for family reunification. Total spending in 2014 was 59,464 euros, of which family reunification costs were 46,091 euros. At the end of 2014, 118,732 euros was still available due to local fundraising and money received from the VWN main office. By the end of the June 2015, total spending on family reunification was 105,000 euros due to the influx. See also VWN Oost Nederland, *Noodfondsverslag 2014*, available at: <https://bit.ly/2Z5OZDR>.

<sup>379</sup> VWN main office respondent.

<sup>380</sup> VWN location 4 respondent.

For a Syrian refugee father, the overall costs of bringing his wife and four children to the Netherlands were significant:

#### EXAMPLE

One refugee from Syria set out the costs he had to meet during the family reunification procedure for his wife and four children who had fled Syria and stayed in Turkey before travelling to the Netherlands. These included:

- the costs involved for him to travel within the Netherlands for DNA sampling;
- the cost of translating Arabic documents into Turkish;
- payment by the family to soldiers so as to be able to cross the Syrian-Turkish border;
- travel for his wife and children back and forth within Turkey to the consulate and embassy; and
- the costs of his family's food and accommodation in Turkey.

In addition, when his family was about to travel to the Netherlands they could not take the flight because the Turkish authorities told them that his wife's identification document had first to be translated to Turkish. He thus had to pay the price of five airline tickets twice.

Overall, he stated that he paid about 20,000 euros in total during the family reunification procedure.

#### 4.5.4 International and European standards: Costs

The CJEU has provided clarification on the issue of fees that may be charged for "integration measures" imposed under the FRD and those that may be charged for residence permits under the Long-term Residents' Directive.<sup>381</sup> With regard to the former, the Court determined:

whilst the Member States are free to require third country nationals to pay various fees related to integration measures adopted under Article 7(2) of [the FRD] as well as to determine the amount of those fees, the fact remains that, in accordance with the principle of proportionality, the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult if it is not to undermine the objective of [the FRD] and render it redundant.<sup>382</sup>

In the Dutch context, the CJEU has also addressed this issue in two judgments concerning fees charged under the Long-term Residents' Directive.<sup>383</sup> It determined that, while Member States were permitted to charge for the issue of residence permits under that Directive, "the level at which those charges are set must not have either the object or the effect of creating an obstacle to the obtaining of the long-term resident status conferred by that directive, otherwise both the objective and the spirit of that directive would be undermined".<sup>384</sup> Similarly, it has ruled that fees applied in relation to the integration test under that Directive "must not be liable to jeopardise those objectives".<sup>385</sup>

The principles set out in these three CJEU judgments also apply in the family reunification context more generally. The principle of proportionality applies equally in the context of the FRD, the objective of which is "to promote family reunification, and the effectiveness thereof".<sup>386</sup>

<sup>381</sup> Council of the EU, *Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23 Jan. 2004, OJ L. 16-44, available at: <http://bit.ly/2Yt0Dtc>.

<sup>382</sup> *Minister van Buitenlandse Zaken v. K. and A.*, C-153/14, CJEU, 2015, above fn. 76, para. 64.

<sup>383</sup> Council of the EU, *Council Directive 2003/109/EC of 25 Nov. 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23 Jan. 2004, OJ L. 16-44, available at: <http://bit.ly/2Yt0Dtc>.

<sup>384</sup> *European Commission v. The Netherlands*, C-508/10, CJEU, 26 April 2012, available at: <http://www.refworld.org/cases,ECJ,5bbb852b4.html>, para. 69.

<sup>385</sup> *P. and S. v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen*, C-579/13, CJEU, 4 June 2015, available at: <http://bit.ly/2T7lvAe>, para. 49.

<sup>386</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 75, para. 43.

While the Dutch government is not directly responsible for the accumulation of costs that many refugees face when they seek to reunify with their families, certain costs are within its control, such as the fees charged by the institution with the task of translating documents, which falls under the Ministry of Justice and Security.<sup>387</sup> In addition, where refugees are obliged to travel to another country to go to Dutch embassies/consulates, sometimes more than once, measures to help reduce the length and number of such visits would also help reduce the costs refugees are obliged to meet. Failure to reduce such costs runs the risk of undermining the aim of the FRD by making family reunification increasingly difficult.

Where States require exit visas and/or fines of persons leaving the country, it is worth noting that the International Covenant on Civil and Political Rights, requires State to ensure everyone is “free to leave any country, including his own”.<sup>388</sup> Restrictions on the exercise of this right are only permitted if they are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the Covenant.<sup>389</sup> The Human Rights Committee has noted that “it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them” and that “[r]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function”.<sup>390</sup> In a case involving someone imprisoned inter alia for “illegal travelling abroad or illegal exit”, the Committee found a violation of Articles 12(2) and 12(3) of the Covenant on the grounds that that the State had “not provided any such information that would point to the necessity of the restriction nor justify it in terms of its proportionality”.<sup>391</sup>

<sup>387</sup> See text at fn. 365 above.

<sup>388</sup> *International Covenant on Civil and Political Rights*, 1966, above fn. 46, Art. 17(2).

<sup>389</sup> *Ibid.*, Art. 17(3).

<sup>390</sup> UN HRC, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 Nov. 1999, CCPR/C/21/Rev.1/Add.9, available at: <http://bit.ly/2MG03RC>, paras. 11-15.

<sup>391</sup> UN HRC, *Zoolfia Batyrova and Zafar Batyrov v. Uzbekistan*, Communication No. 1585/2007, 30 July 2009, UN Doc. CCPR/C/96/D/1585/2007, para. 8.3.

#### 4.5.5 RECOMMENDATIONS:

##### COSTS

In order to ensure that the accumulation of costs does not undermine the purpose of the FRD to promote family reunification and the effectiveness thereof:

##### 16.

UNHCR welcomes the assistance of VVN in providing financial support for some of the expenses incurred by refugees during the family reunification procedure but recommends that the government, NGOs and the private sector work together to provide additional funds to help cover the cost of airline tickets, to minimize the costs for translations. It is also recommended that procedures at Dutch embassies/consulates are simplified to reduce the number and length of visits and thereby the associated costs involved with this part of the procedure.

##### 17.

UNHCR recommends that the Dutch government, in coordination with other EU Member States and UNHCR, advocate with countries hosting refugees in regions of origin to promote the waiving of exit visa requirements, fees and/or fines that are sometimes imposed on family members travelling to the Netherlands (and other EU countries) for family reunification purposes.





#### 4.6 Status granted to family members

Family members arriving in the Netherlands receive the same status and rights as the sponsor. They derive that status from their sponsor, so if the family tie is broken after the family member's arrival in the Netherlands the residence permit may be revoked (*intrekken*).<sup>392</sup> Due to their specific vulnerable situation, tensions in a refugee family may lead to particularly difficult circumstances, which justify the granting of an autonomous residence permit.

Until 2013, the IND automatically assessed whether the derivative residence permit received could be converted to an independent asylum residence permit if a derived residence permit were withdrawn, but from 2013 this was not done automatically. This meant there could be a gap in residence, which might

affect the family member's right to social benefits and could create problems for naturalization.

In May 2015, however, the Council of State ruled that, when revoking a residence permit granted in the context of family reunification, the State Secretary was required automatically to assess whether the person concerned qualified for an asylum permit on their own merit, this based on the requirement not to return persons to torture, inhuman or degrading treatment and to avoid an accumulation of procedures.<sup>393</sup> After parliamentary questions were asked about this policy,<sup>394</sup> the State Secretary responded that in the event of revocation (*intrekking*) the IND would assess whether the person qualified for a permit on his/her own merits and also that the person concerned may opt to submit an asylum application independently.<sup>395</sup>

<sup>392</sup> Asylum Information Database (AIDA), *Country Information: The Netherlands*, 2017, available at: <http://bit.ly/2M2s3iQ>, p. 85.

<sup>393</sup> *Case no. 201410500/1/V1*, Netherlands Council of State, 21 May 2015, ECLI:NL:RVS:2015:1694, available at: <http://bit.ly/31p1vfp>, consideration 2.2, final sentence.

<sup>394</sup> Letter of 19 Dec. 2016 of the Committee for Immigration and Asylum/JBZ-Council of the First Chamber, available at: <http://bit.ly/2GPIpXE>.

<sup>395</sup> Letter of 16 May 2017 of the State Secretary for Security and Justice to the House of Representatives, available at: <http://bit.ly/31jFb6K>. See also, Decision of the State Secretary for Security and Justice No. WBV 2017/9, above fn. 99; Aliens Circular, para. C2/10.6.

New policy rules effective from 1 October 2017 now provide that when the IND withdraws a derivative residence permit, it will assess if there are asylum-related grounds for granting the family member international protection on his/her own merits. Under such circumstances, the assessment of the family member's independent asylum grounds needs to pay particular attention to issues relating to age and gender, including sexual orientation, in the country of origin of the family member concerned.<sup>396</sup>

Despite these guarantees, the risk of withdrawal of the residence permit may mean that spouses decide to stay with their sponsor, even if the circumstances are damaging. In many refugee families, trauma caused by previous persecution, flight situations and insecurity can lead to tensions. Even if a spouse does not have independent grounds for asylum, he/she may face problems retaining family relations (including with children) and if returned to their home country. An independent status protects the spouse against vulnerability and dependency, which also supports his/her integration.

The IND also has the possibility of protecting family members who are victims of domestic violence, human trafficking, (sexual) exploitation, and/or honour-related crimes. If the family member raises any of these issues during the revocation assessment, the IND will interview the person and, based on an individual assessment, may decide to grant the family member a humanitarian visa.

#### **4.6.1 International and European standards: Status granted to family members**

Where the status of family members is dependent on that of the sponsor or where the path to an independent status is a long one, this can result in situations of dependency between family members, which may create problems for family members in particular for victims of domestic violence or family members at risk of such violence. UNHCR therefore recommends that the residence of the family member should be independent of those of the sponsor.<sup>397</sup>

The FRD requires Member States to promote the integration of family members including by granting "a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships" (recital 15). In addition, Article 15(1) permits the issuance of an autonomous residence permit to the spouse or unmarried partner and a child who has reached majority no later than after five years of residence, while Article 15(3) states:

In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

<sup>396</sup> See also, UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: <http://bit.ly/2YLB1Yj>, noting at para. 33 that "[w]omen are also frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives".

<sup>397</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 18.

For its part, the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe (PACE) recommends more proactively:

Cases of abusive relationships within reunited families should be detected and dealt with in a fair and humane manner and it must be ensured that victims of domestic violence or forced marriage are not sent back to their countries of origin against their will. Spouses should be entitled to an autonomous residence permit as soon as possible ... This is particularly important for those who may be victims of domestic violence or other problems.<sup>398</sup>

In addition, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence requires States Parties to

take the necessary legislative or other measures to ensure that victims [of violence against women or domestic violence] whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship.<sup>399</sup>

#### 4.6.2 RECOMMENDATIONS:

### STATUS GRANTED TO FAMILY MEMBERS

In order to reduce the risks to which family members may be exposed in abusive relationships,

#### 18.

UNHCR recommends that the residence status of the family member should be independent of that of the sponsor and, failing that, that the IND ensure that family members be informed of the possibility of applying for asylum independently and of alternative statuses potentially available to them and that use is made of such statuses to ensure that the Netherlands upholds its obligations to tackle domestic violence and other forms of abuse and exploitation.

<sup>398</sup> PACE, Committee on Migration, Refugees and Displaced Persons, *Position Paper on Family Reunification*, 2 Feb. 2012, available at: <http://bit.ly/2MHT2jd>, para. 12.

<sup>399</sup> Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, available at: <http://bit.ly/2MDb1aB>, Art. 59(1).

## 5. THE ROLE OF VWN, LAWYERS AND OTHERS IN THE FAMILY REUNIFICATION PROCEDURE

Refugees are in contact with various different actors during the family reunification procedure. The chapter begins by exploring the role of VWN volunteers during the procedure, including the training provided to volunteers, and their roles in gathering documentation and explaining why documentation may be missing. It then focuses in particular on access to legal assistance and legal aid and the role of lawyers, before examining the roles of other actors, including Nidos, Defence for Children, and the Netherlands Red Cross. Suggestions made by these different actors on how to improve the process are made throughout the chapter, while UNHCR's recommendations are contained in section 5.5.

### 5.1 The role of VWN in the family reunification procedure

The IND provides a factsheet on rights and obligations to all refugees who are granted international protection, this factsheet also contains information on the family reunification procedure in the Netherlands.<sup>400</sup> It is, however, in nearly all cases, VWN volunteers who assist refugees with their applications for family reunification supporting them through the procedure; the VWN locations are set up in central reception centres in order to provide legal assistance.<sup>401</sup> These local offices are located in 75 per cent of all Dutch municipalities.<sup>402</sup>

VWN employees in the local offices select and coordinate the work of volunteers supporting refugees in the family reunification procedure.<sup>403</sup> “VluchtWeb” – an online VWN legal database accessible to volunteers and law firms with a user account – provides extensive information about the family reunification procedure. Volunteers can download a “family reunification procedure checklist”, containing all the required steps before submitting an application. Through VWN’s “Intranet” volunteers can also access the latest policy developments concerning refugees. The VWN main office has regular policy

meetings with the IND and the Ministry of Justice and Security.

Issues examined in subsequent subsections consider the training of VWN volunteers concerning their work supporting refugees, to gather the required documentation and the handling of so-called rectification of omission letters.

#### 5.1.1 Training of volunteers

“ The training is insufficient to understand the VWN online legal database. Due to the complexity of law and policy regarding the family reunification procedure you need to have studied law before assisting refugees.

Respondent from VWN location 4

The VWN main office organizes two-day training sessions on family reunification throughout the year and a yearly theme day for experienced volunteers and supervisors.<sup>404</sup> The two-day training session is usually full, meaning new volunteers may not complete it before taking on family reunification cases.<sup>405</sup> New volunteers nevertheless work first alongside a more experienced volunteer before assisting clients in the family reunification

<sup>400</sup> IND Factsheet on rights and obligations after international protection has been granted: <http://bit.ly/2KglW8p>; information on family reunification <http://bit.ly/2T96a24>.

<sup>401</sup> VWN main office respondent.

<sup>402</sup> If there is no VWN location, refugees can visit regional VWN support points.

<sup>403</sup> VWN main office respondent.

<sup>404</sup> VWN location 1 respondent. Supervisors are employees rather than volunteers.

<sup>405</sup> VWN locations 1, 4 and 5 respondents.

procedure.<sup>406</sup> Thus, volunteers mostly learn on-the-job, read up on issues themselves, while the first applications they prepare are checked by experienced volunteers or supervisor employees before they are submitted.<sup>407</sup> Several VWN respondents considered the training to be sufficient<sup>408</sup> and one added that having submitted several applications before the training session provided a better context to the session.<sup>409</sup> One respondent said that he/she also attended special information days intended for lawyers in order to stay up-to-date with rules and policy and that refresher training should be provided to volunteers.<sup>410</sup>

### 5.1.2 Gathering of required documentation

During the important phase of gathering the required documentation to substantiate identity and family links, it is mostly VWN volunteers, who support refugees in central reception centres. They assist the refugee by explaining which documents are necessary.<sup>411</sup> Several VWN respondents mentioned that this can be particularly difficult for Eritrean refugees, given the difficulties of obtaining official documents from the authorities, whereas this process is easier for most Syrian refugees.<sup>412</sup> If the refugee and his/her family cannot obtain the required documentation, the VWN volunteer sends a letter to the IND stating that it has not been possible to obtain the required documentation and why.<sup>413</sup> One VWN respondent said that in such situations, he/she encourages applicants to provide the IND with as many other types of proof as possible to support their application and show family links. Examples of other evidence included the names of public servants in the country of origin whom family members have contacted, phone messages and letters, and photographs of family members in front of the town hall to prove that the refugee and his/

her family are making efforts to obtain the required documentation.<sup>414</sup>

Lawyers do not generally become involved at this stage, but rather at the appeal stage if an application is rejected. Sometimes, however, a family reunification case is considered to be complex, whether because they involve complex issues of law or because documentation to prove family links is lacking, at an earlier stage, in which they become involved, as outlined in greater detail in section 5.2 Legal assistance, legal aid and the role of lawyers in the procedure.<sup>415</sup>

### 5.1.3 “Rectification of omission letters” from the IND

As already mentioned in section 3.2.1 Legislative framework and case law above, if the IND considers an application for family reunification to be incomplete, it sends the applicant a “rectification of omission letter” indicating what further information is required and giving him/her four weeks within which to do so. Since it is primarily VWN volunteers supporting applicants, responding to such letters is their responsibility. Responding effectively to a rectification of omission letter is thus an important part of the process. Failure to do so may result in rejection of the application.

It appeared during the research for the study that there were concerns that the responses of VWN volunteers too often led to rejection of the application. In order to clarify the content of this problem, UNHCR sent a questionnaire out to lawyers and respondents from VWN locations. The responses received are summarized here.

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<sup>406</sup> VWN locations 1, 2 and 5 respondents.

<sup>407</sup> VWN location 1 respondent.

<sup>408</sup> VWN locations 1, 2 and 5 respondents.

<sup>409</sup> VWN location 1 respondent.

<sup>410</sup> VWN location 3 respondent.

<sup>411</sup> Respondents from VWN locations.

<sup>412</sup> VWN locations 1, 4 and 5 respondents. See also section 3.2.3 Practice: Lack of documentary evidence above.

<sup>413</sup> VWN locations 1 and 2 respondents.

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<sup>414</sup> VWN location 4 respondent.

<sup>415</sup> See para. 4.3 for more information on the role of lawyers.



In the view of two lawyers, volunteer-based assistance does not sufficiently guarantee adequate legal support with the family reunification application<sup>416</sup> and too much responsibility is placed on VWN volunteers.<sup>417</sup> It was also pointed out that the current family reunification procedure is known for time pressures such as the three-month deadline for submitting applications and the four-week time frame for providing additional information, thus limiting the time for preparation and response, and that there is also a restrictive interpretation of policy in which a high level of detailed information is required, thus placing additional pressure on volunteers.<sup>418</sup> On the other hand, the intensive contact and resulting trust between VWN volunteers and refugees can lead to the provision of better information for the family reunification procedure.<sup>419</sup>

Some lawyers maintained that the main problem lay with the burden of proof placed on the applicant to explain why he/she is not responsible for the lack of documentation.<sup>420</sup> One lawyer said that applicants are required to provide certain documents, which they say they did not need in the country of origin, while the IND assumes that they did need them.<sup>421</sup> One example cited concerned agreements on the custody of a child after the parents had died, which are sometimes arranged by a unanimous vote of the village in some countries with the result that a court does not become involved, there is no formal process, and consequently no formal proof of the custody.<sup>422</sup>

In these and similar situations, recommended approaches included researching and citing public sources on the availability of official documentation in the country of origin and referring to the report of the first asylum interview (including any corrections made by the applicant for international protection to the report at that stage).<sup>423</sup> One lawyer stated that explaining why a refugee does not have certain documents requires thorough research and where VWN volunteers do not manage to do this, it has to

be done at appeal, which means the whole procedure takes much longer.<sup>424</sup> Another lawyer stressed the importance of double-checking the personal information contained on the application form, including against the asylum interview report.<sup>425</sup>

Other lawyers recommended that one way to avoid the unintentional introduction of contradictions vis-à-vis the report of the asylum interview was to ensure that VWN volunteers have sufficient time and resources to read the asylum interview report when preparing the reply to the rectification of omission letter, rather than relying unduly on explanations given by the refugee, whose account has been received through an interpreter.<sup>426</sup> Sometimes it even appeared that what the refugee told the lawyer was different from what the VWN volunteers told the IND.<sup>427</sup> This appeared to be so, for instance, in a case where a VWN volunteer had written that the spouse of a refugee had never possessed an identity card, since this was not mandatory until the age of 18 years and was difficult to obtain, whilst in his explanation to the lawyer the refugee said he had never said it in that way and that rather his spouse had had an identity card but had lost it during the flight to Ethiopia.<sup>428</sup> In this case, the IND had rejected the application, deciding that, based on its assumption that every Eritrean should possess an identity card, it was not plausible that the spouse had never possessed an identity card. The reason for such discrepancies appears to lie in misunderstandings on both sides, in particular bearing in mind that communication is generally through interpreters.<sup>429</sup> Such issues can be difficult to clarify at appeal.<sup>430</sup>

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<sup>416</sup> Lawyers 3 and 5.

<sup>417</sup> Lawyer 5.

<sup>418</sup> VWN main office respondent.

<sup>419</sup> VWN main office respondent.

<sup>420</sup> Lawyers 1 and 3.

<sup>421</sup> Lawyer 3.

<sup>422</sup> Lawyer 3.

<sup>423</sup> Lawyer 1.

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<sup>424</sup> Lawyer 1.

<sup>425</sup> Lawyer 4.

<sup>426</sup> Lawyers 3 and 5.

<sup>427</sup> Lawyer 4.

<sup>428</sup> Lawyer 4.

<sup>429</sup> VWN main office respondent.

<sup>430</sup> Lawyer 4.

## 5.2 Legal assistance, legal aid and the role of lawyers in the procedure

In order for refugees to be able to submit and proceed with their application for family reunification effectively and thereby achieve the result sought by the FRD, refugees need access to information, advice and assistance. Where such advice and assistance is provided, this leads to better quality initial decision-making, which can prevent subsequent time-consuming and costly appeals, and reduce the length of time that families are separated. This is in the interest of both refugee families seeking to reunify and the national authorities.<sup>431</sup>

In this context, it is worth noting that legal assistance, legal representation and legal aid are different. The right to legal assistance is the right to legal information about an individual's rights and obligations and the right to be permitted to consult with a legal advisor or counsellor. The right to legal representation is the right for a legal advisor or counsellor to represent individuals in their dealings with the relevant authorities. Even in situations where there is a right to legal assistance and representation the individual may not be entitled to receive them free of cost. The right to legal aid means that legal assistance and representation is to be provided free of charge if an individual cannot afford to pay for the assistance necessary for the effective protection of their rights.<sup>432</sup>

In the Netherlands, it is essentially VWN volunteers who provide refugees with **legal assistance** during the application phase of the family reunification procedure, although sometimes lawyers will assist refugees in cooperation with the VWN volunteer.<sup>433</sup> This is the case, for instance, in complex cases, where the VWN might refer a case to a lawyer, or a refugee might him/herself approach a lawyer, or the refugee's legal representative during the asylum procedure might refer the refugee to a colleague specialized in the family reunification procedure.

During the application phase, refugees are, however, only entitled to **legal aid** if a lawyer considers an application to be factually or legally complex and the refugee is unable to pay for the legal assistance or legal representation needed.<sup>434</sup> If the lawyer considers this to be the case, he/she needs to send a reasoned application for legal aid to the Legal Aid Board, which is responsible for deciding if the refugee is entitled to legal aid during the application phase. Otherwise, refugees are only entitled to legal aid at the appeal stage after an initial rejection of an application. The involvement of lawyers in the process, whether on the basis of informal cooperation with VWN volunteers or formally with legal aid or on a pro bono basis, makes an important contribution to the effective presentation of applications for family reunification both initially and at appeal.

In 2016, a draft policy to abolish government-funded legal aid during the asylum procedure in situations of a high influx motivated some Members of Parliament to highlight the importance of professional legal support during the asylum procedure. They also stressed that abolishing legal aid at this stage would have a negative impact on the family reunification procedure, since lawyers representing asylum-seekers during the asylum procedure also advise them of the importance of providing full details of all family members at that stage and, once they are recognized, of the need to apply for family reunification within three months.<sup>435</sup> To date, the reduction of legal aid available in the context of the asylum procedure has not been approved.

Following the general election in March 2017 and the formation of a four-party coalition led by People's Party for Freedom and Democracy (VVD), a similar proposal was included in the 2017-21 Coalition Agreement entitled "Confidence in the Future".<sup>436</sup> This proposal seeks to limit government-funded legal aid from the time there is an intention to reject an application for international protection. This is a concern for UNHCR, not only because it would result

<sup>431</sup> On the right to legal assistance, legal representation and legal aid, see generally, ECRE and VWN, *The Application of the EU Charter of Fundamental Rights to Asylum Procedural Law*, Oct. 2014, available at: <http://bit.ly/2OG40Zb>, pp. 57 et seq.

<sup>432</sup> *Ibid.*, p. 58.g.

<sup>433</sup> Lawyers 1 and 3.

<sup>434</sup> Besluit rechtsbijstand- en toevoegcriteria, Art. 8(1)(j).

<sup>435</sup> *Parliamentary Documents I 2016/17*, 34 550 VI, L, p. 9-10.

<sup>436</sup> *Regeerakkoord "Vertrouwen in de toekomst"*, 10 Oct. 2017, available in Dutch at: <http://bit.ly/2TaiCOZ>.

in serious shortcomings in the procedural guarantees during the first instance asylum procedure which is short with eight working days, but also because it would mean that refugees granted international protection would not receive a lawyer's advice on the importance of providing full details of all family members during the asylum procedure and the need to submit family reunification applications within three months of the grant of international protection. While this is advice that is in principle also provided by VWN volunteers, who are also there to ensure the correct spelling of names and provision of accurate biographical data relating to family members, removal of legal aid during the first instance asylum procedure removes an authoritative additional layer of advice. It could lead to practical issues related to verification of identity and the issuance of a regular provisional residence permit (MvV) enabling travel to the Netherlands, and/or an exit visa.

The consultations on the roles of both VWN volunteers and lawyers for the study thus underline the importance of ensuring the quality of initial applications, given the complexity of the process and the importance of a thoroughly grounded explanation of why the absence of certain documents is not attributable to the refugee. This will contribute to the effectiveness of the representation and support provided by NGOs, lawyers and other actors during the procedure and help "frontload" the process, thereby reducing the need for appeals, and shortening the length of the procedure and the length of time that families are separated.

### 5.3 The roles of other actors in the family reunification procedure

Other actors involved in the family reunification procedure in the Netherlands include Nidos, Defence for Children and the Red Cross.<sup>437</sup>

#### 5.3.1 Nidos

When unaccompanied foreign children arrive in the Netherlands, they are placed under the guardianship of the **Nidos Foundation** (Foundation for Protection of Young Refugees). The child's Nidos guardian is responsible, inter alia, for ensuring that the child's best interests are upheld and that he/she is able to participate in every decision affecting him/her, not only during the asylum procedure, but also when it comes to family reunification.

In the latter context, the guardian's responsibilities include ensuring that the child is informed about the family reunification procedure in a manner that he/she can understand, assisting the child to gather the required documentation, verifying it so that as complete an application as possible can be submitted by the prescribed deadline.<sup>438</sup> This may mean ensuring these tasks are undertaken by the VWN volunteer or, if necessary, undertaking them directly.<sup>439</sup> In particular, this generally involves the complex and time-consuming process of tracing and contacting the child's parents (and siblings or other family members). If a child does not wish to be reunited with his/her parents and/or other family members, then the Nidos guardian is responsible for making a "key decision" on whether reunification with the family member(s) concerned is in the child's best interests. This decision must be taken in consultation with the child's supervisor, behavioural scientists, legal advisors, and, if possible, with the parents and/or other relatives of the child.<sup>440</sup>

<sup>437</sup> For more on the roles of IOM and UNHCR, see chapter 6.4 Assistance by the IOM, UNHCR and other EU Member State embassies below.

<sup>438</sup> Nidos main office respondent.

<sup>439</sup> *Ibid.*

<sup>440</sup> European Network of Guardianship Institutions, *Unaccompanied Children and Family Reunification*, 2016, available at: <http://bit.ly/2yHV7Du>.

### 5.3.2 Defence for Children

**Defence for Children** supports the rights of children including unaccompanied refugee children and provides legal assistance in family reunification cases concerning children.<sup>441</sup> The number of asylum and family reunification cases that have been addressed to the organization has increased in recent years. In 2017, Defence for Children assisted in 160 asylum cases, as compared with 108 the year before, and it assisted in 143 cases concerning family reunification in 2017, as compared with 108 the year before. This reflects both the increase in the numbers of asylum applications generally and the increased numbers of unaccompanied children seeking asylum.<sup>442</sup>

### 5.3.3 The Red Cross

The **Red Cross** is not generally involved in family reunification procedures, although it may exceptionally provide practical assistance.<sup>443</sup> In most cases, this assistance involves providing guidance to family members of the sponsor who have specific needs regarding travel to embassies, or when temporary accommodation is necessary until family reunification can take place. The ability of the Red Cross to provide assistance depends on the possibilities in the country in which the family member(s) reside. From the moment contact between family members is restored, the assistance of the Red Cross ends. When a declaration of consent to permit a child to reunite with a refugee in the country of asylum causes problems due to a missing parent and there is a wish to restore contact, the Red Cross may agree to trace this person. In the Netherlands, the Dutch Red Cross received 928 tracing requests in 2015, 1,596 in 2016, 1,024 in 2017 and 1,374 in 2018. These requests are, however, not necessarily linked to family reunification for refugees.<sup>444</sup> Key types of situations in which the Red Cross can assist include tracing in the context of armed conflicts,

disasters, and situations where contact among family members has been lost as a consequence of migration or a humanitarian emergency. The Red Cross can offer humanitarian assistance in countries, which make their tracing services available, though the processing of such requests depends on the capacity of national Red Cross associations and the security situation in the country. Only requests made by family members are accepted.

### 5.4 International and European standards: Role of NGOs and legal assistance

In order for refugees to be able effectively to realize their right to family reunification under the FRD in line with the Directive's objective to "promote family reunification and the effectiveness thereof",<sup>445</sup> they require access to information, advice and assistance. NGOs have an important role to play in this process and contribute to ensuring the right to good administration under Article 41 of the EU Charter is upheld.

With regard to access to **legal assistance and legal aid** in family reunification cases, it has been noted that this "can be critical for beneficiaries of international protection, as complex issues of fact and law must frequently be understood and presented", this situation being "especially problematic if the sponsor's command of the language of the country of asylum is limited and they do not understand the complex systems that often apply".<sup>446</sup> The 2018 UNHCR Summary Conclusions state:

When the case is less straight-forward ... it would be useful if States could ensure that applicants for family reunification can access legal assistance. This could be done through engaging the support of international organisations, civil society actors, or even private legal advice providers acting *pro bono* to provide legal assistance to applicants for family reunification.<sup>447</sup>

<sup>441</sup> See generally <http://bit.ly/2ZLXBwo>.

<sup>442</sup> Defence for Children respondent and Defence for Children, Annual Report 2017.

<sup>443</sup> The information in this para. was provided by the Netherlands Red Cross respondent.

<sup>444</sup> Data from Annual reports 2015, 2016, 2017 and 2018 from the Red Cross the Netherlands.

<sup>445</sup> *Chakroun v. Minister van Buitenlandse Zaken*, CJEU, 2010, above fn. 75, para. 43.

<sup>446</sup> UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, 2018, above fn. 13, p. 111.

<sup>447</sup> UNHCR, *Summary Conclusions Family Reunification*, 2017, above fn. 50, para. 21.

With regard to **family tracing**, States are required by Article 22(2) of the CRC to cooperate with the UN, inter-governmental organizations and NGOs working with them “to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family”.

For its part, UNHCR has stressed that family tracing is “an essential component of family reunification for beneficiaries of international protection”, in particular for “unaccompanied minors for whom every effort should be made to trace parents and other relatives as soon as possible where it is in their best interest”.<sup>448</sup> UNHCR nonetheless reports that “[t]he conditions and length of separation of refugee families often lead to lengthy tracing procedures”, which “may be problematic where beneficiaries of international protection have to apply for family reunification within a certain timeframe”.<sup>449</sup>

## 5.5 RECOMMENDATIONS:

### ROLES OF VWN, LAWYERS AND OTHER ACTORS

In order to enable refugees to present their application for family reunification effectively and ensure the efficacy of the advice, representation and support provided by NGOs, lawyers and other actors:

#### 19.

UNHCR recommends that refugees should be supported by trained volunteers and/or professionals, whether lawyers, legal counsel or civil society actors who have the appropriate expertise and knowledge of family reunification procedures and refugee protection matters. UNHCR therefore recommends that the training of VWN volunteers be provided more promptly upon their appointment, that refresher/updating training be provided more frequently, since both policies and volunteers change over time, and that cooperation between VWN volunteers and lawyers at as early a stage as possible be promoted.

<sup>448</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 10.

<sup>449</sup> *Ibid.*, p. 10.



## 6. PROCESSING FAMILY REUNIFICATION APPLICATIONS ABROAD

As part of the family reunification procedure, family members of refugees must travel to a Dutch embassy or consulate to submit an application and/or documents, to attend identification interviews, undertake DNA testing, and/or to collect visas for the Netherlands. This chapter focuses on the requirement that family members must either be able to travel to a Dutch embassy/consulate in their country of origin or to a neighbouring country to do so, or, if they have to travel to another country to reach a Dutch embassy/consulate they must have “continuous residence” there or provide an explanation why they do not. It also examines the handling of family reunification requests at embassies and consulates abroad, and the challenges family members may face in this respect. Recommendations are contained in sections [6.1.4](#), [6.3.4](#), and [6.4.4](#).

“ My three children [aged 4, 8 and 10 years old] did not know that their mother had left Eritrea. To make it easier for them, I chose not to tell them that we would be travelling to the neighbouring country Ethiopia. I only told them that they would soon see their mother. As soon as we reached the refugee camp [in Ethiopia] they asked me, “Where is mommy?” From the moment that I explained that she is in the Netherlands they repeatedly asked, “When is mommy coming?” and “When can we see mommy again?” We stayed at the refugee camp for four months and waited another four months near the embassy until we could come to the Netherlands. It was really difficult for the children to be without their mother.

Refugee father/husband from Eritrea

### 6.1 Requirement of continuous residence

Family members seeking to reunify with a refugee in the Netherlands can face particular problems because of the requirement, in certain circumstances, of “continuous residence” in the country where they submit an application, as outlined further below.

#### 6.1.1 Legislative framework and case law

The Modern Migration Policy Act,<sup>450</sup> which entered into force in June 2013, instituted a so-called “Entry and Residence Procedure”, known as the “TEV procedure”. The process combines the substantive assessment of the family reunification application with that for the issue of an MVV – an entry visa for persons intending to stay in the Netherlands for more than three months. Once the MVV has been issued, the IND will in principle automatically grant a residence permit in the Netherlands when the person arrives in the Netherlands.

Since 2013, the sponsor in the Netherlands has also been permitted to submit the application for family reunification, whereas previously it was only the family member(s) abroad who could do so.<sup>451</sup> The Aliens Act stipulates:

An application for the authorization of provisional residence is submitted: a. at the Dutch diplomatic or consular representation in the country of origin or of continuous residence or, in the absence thereof, a neighbouring country where a representation is established, ... by the alien, or b. with Our Minister by the sponsor ....<sup>452</sup>

<sup>450</sup> Modern Migration Policy Act “Wet modern migratiebeleid”, Act amending the Aliens Act and some other laws, 7 July 2000, version of 21 Sept. 2013, available at: <http://bit.ly/33hkdHy>.

<sup>451</sup> While family members of refugees are not obliged first to apply for an MVV, in practice, this is usually what happens so that family members can enter the country legally. This is not least because airlines are obliged to ensure passengers have valid passports and visas (if the latter are required) in order to avoid having to pay carriers’ liability fines.

<sup>452</sup> Aliens Act 2000, Art. 2s (1) (author’s translation). “Bestendig verblijf” has been translated as continuous residence.

The Aliens Circular defines “continuous residence” as existing when family members, at the moment that the family reunification application is submitted or processed, reside in a country where they: (1) have a residence permit for the duration of at least three months; (2) are legally entitled to await the outcome of a residence permit procedure; or (3) have already completed a residence permit procedure of which the outcome has become legally indisputable and a legal objection to expulsion exists.<sup>453</sup>

The Minister of Internal Affairs is able to waive the continuous residence requirement<sup>454</sup> and issue an MVV even if the requirement is not met, if compelling humanitarian reasons apply.<sup>455</sup> According to the Directorate General for Migration, the IND assesses each case individually and the circumstances of the case play an important role when determining whether the procedural requirements for the issue of an MVV, such as the continuous residence requirement, must be met. This requirement primarily affects refugees.<sup>456</sup>

According to the IND, the aim of the continuous residence requirement is to prevent family members from prematurely coming to the Netherlands and to ensure they are available if further investigations are needed at the embassy/consulate.<sup>457</sup> One IND decision reviewed for the study described the aim of the requirement as being to prevent family members from residing illegally in a country while they await the outcome of the family reunification procedure and to prevent them from bypassing the authorities of that country.<sup>458</sup> The Directorate General for Migration noted further that family members who had not obtained continuous residence were at risk of being expelled from the third country before the family reunification procedure was completed and that the continuous residence requirement was in the interests of good interstate relations.<sup>459</sup> The IND further noted in the course of the research that the continuous residence requirement does not apply to

family members in neighbouring countries and when it does apply, it is waived as long as a reason is provided. If no such reason is given, however, the IND cannot waive the continuous residence requirement.<sup>460</sup>

The wording of Article 2s(1) of the Aliens Act, quoted above,<sup>461</sup> refers to “continuous residence” only in subparagraph (a) in relation to applications submitted by family members abroad; the term does not appear in the subparagraph (b) which refers to applications submitted by the sponsor in the Netherlands and contains no such requirement. This clear separation indicates that the continuous residence requirement does not apply when the application is submitted by the sponsor, which in the case of refugees is almost always the case. This has been the case since the policy changes of 2013, which now permit applications for family reunification to be made in the Netherlands by the sponsor with the result that the continuous residence requirement can no longer be held against the family abroad.

Requiring the family member(s) of refugees either to be in their country of origin, when they submit an application for family reunification, or to be in a neighbouring country or to have continuous residence in another country fails to take sufficient account of the often extremely difficult and precarious situations faced by the family members of refugees. If they remain in their country of origin, there may be no Dutch diplomatic representation,<sup>462</sup> especially if there is an ongoing conflict, which then obliges them to travel to another country under often treacherous and precarious conditions, through no fault of their own. If family members have themselves already fled persecution or conflict and are in a country of asylum in the region, which may or may not be a neighbouring country, they may have had to enter that country illegally and may not report themselves to the authorities to legalize their stay for fear of being expelled.

The practice examples and case studies below show some of the problems that can arise for the family members of refugees, who are often refugees themselves, as a result of the continuous residence requirement, even though the situation has improved considerably in recent years.

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<sup>453</sup> Aliens Circular 2000, para. B1/3.3.1.

<sup>454</sup> Aliens Act 2000, Art. 2s (4).

<sup>455</sup> Aliens Act 2000, Art. 2p (2).

<sup>456</sup> Directorate General for Migration respondent.

<sup>457</sup> IND respondent.

<sup>458</sup> IND decision of 17 Aug. 2015, one of the decisions analysed for this study. This rationale was confirmed by the Directorate General for Migration respondent.

<sup>459</sup> Directorate General for Migration respondent.

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<sup>460</sup> IND respondent.

<sup>461</sup> See text at fn. 457 above.

<sup>462</sup> This is, for instance, the case in both Syria and Yemen.

### 6.1.2 Practice: Obstacles arising from the continuous residence requirement

The continuous residence requirement was previously very problematic, for example, for Syrian family members residing in Egypt,<sup>463</sup> Eritrean family members residing in Israel,<sup>464</sup> and Tibetan family members residing in Nepal and India.<sup>465</sup> These particular cases have not been a problem in recent years, since the IND has accepted that family members in these situations can be accepted as legally staying in these three countries or that there were humanitarian reasons for waiving the requirement.

It nevertheless became clear in the course of the research for the study that the continuous residence requirement remains problematic in a few other cases because it can lead to family members having to travel long distances to UNHCR camps/offices and/or to government offices to request documents, which incurs significant costs in the process.<sup>466</sup> In addition, they may not be able to enter the country legally and consequently do not report themselves to the authorities to legalize their stay for fear of being expelled. As one lawyer stated:

The Dutch government should not require continuous residence on the grounds that it does not want to contribute to illegal stay. When people flee their country of origin they often end up in illegal situations. The refugee should not be held accountable for their illegal residence, but this is exactly what the Dutch government is doing.<sup>467</sup>

These few cases identified during the research showed the precarious and dangerous situations family members, including sometimes young children, may be obliged to place themselves in as a result of the requirement of continuous residence in a non-neighbouring country. These cases concerned in particular Somali family members. They have led to families remaining separated and/or to children residing alone in a country of asylum.

The cases identified suggest that due to unclear policy the implementation of the continuous residence requirement appears not to be uniform. From the IND's perspective, it noted that the continuous residence requirement does not apply to family members in neighbouring countries and when it does apply (for non-neighbouring countries), it is waived as long as a reason is provided, but if no such reason is given the IND cannot waive this requirement.

One example identified concerned family members who had to travel from Sierra Leone to Ghana, which are hundreds of kilometres apart and not neighbouring countries.<sup>468</sup> Two other examples show the precarious and dangerous situations family members, including sometimes young children, may be obliged to place themselves in as a result of the continuous residence requirement:

<sup>463</sup> Due to the workload at the Dutch embassy in Lebanon, some Syrian family members travelled to Egypt to the Dutch embassy there. Egypt accepted the residence of such family members when they had a valid six-month tourist visa and a UNHCR Yellow Card. Initially, the IND did not accept this as "continuous residence", although it later adopted a more flexible approach, accepting that proof the family members were entitled to await a residence application (which can be submitted when in possession of a Yellow Card) was sufficient to meet the continuous residence requirement.

<sup>464</sup> Eritreans residing in Israel do not qualify for a residence permit but only for a so-called "conditional release visa", which defers deportation and is renewable every two months. If an extension is no longer possible, they risk detention at the Holot detention centre where they receive a Holot residence card, which serves as a legal basis for their stay. In either case, they are not subject to deportation from Israel in line with the policy of non-removal. After UNHCR Israel sent a letter dated 27 December 2015 to the IND, it now accepts that there is legal objection to expulsion, as referred to in text at fn. 458 above.

<sup>465</sup> Tibetans who do not submit an application at the Dutch embassy in China but rather travel to India to do so and thereby do not follow the correct entry procedure from Nepal to India faced problems fulfilling the continuous residence requirement in India. As a result, their applications were rejected. In response to parliamentary questions, the Minister for Migration indicated that the IND would not apply the continuous residence requirement to Tibetan family members in India and Nepal on humanitarian grounds. See, Letter of 11 Dec. 2015 from the Minister for Migration.

<sup>466</sup> Interviews with the VWN main office, VWN locations 2 and 5, and lawyers 1 and 5.

<sup>467</sup> Lawyer 5.

<sup>468</sup> VWN location 5.

## CASE STUDY

A Somali family seeking to reunify with their refugee family member in the Netherlands fled to Saudi Arabia.<sup>469</sup> They could not meet the continuous residence requirement, because they had not reported to the Saudi authorities to legalize their stay out of fear of being expelled. Indeed, the Saudi government did eventually expel the family to Somalia. So the family fled once again, this time to Ethiopia, where they did not have to prove continuous residence, since it is a neighbouring country to Somalia. The family's application was then approved and they were able to come to the Netherlands.

This case study shows that the continuous residence requirement exposed the family to two precarious journeys and an expulsion before they could find a way of being able to apply.

## CASE STUDY<sup>470</sup>

An unaccompanied Somali girl fled to Yemen. Since the Dutch embassy in Yemen had closed due to the ongoing civil war she was forced to go to the Dutch embassy in Saudi Arabia. She had some acquaintances living in Saudi Arabia, who took her in temporarily. The IND asked the girl to prove that she had obtained continuous residence in Saudi Arabia, since she had not gone to Kenya or Ethiopia, which border on Somalia. This meant she had the option either of providing evidence issued by the Saudi government that she had obtained legal residence, which was practically impossible, or of being forced to travel alone to Kenya or Ethiopia. The girl's lawyer appealed the IND's decision before a court and requested an interim measure. During the hearing the IND responded it would see if it could process the application. Eventually, the girl was able to go to Jordan to pick up her visa. The continuous residence requirement was dropped by the IND.

This case shows how the continuous residence requirement can have negative implications in practice. The girl in question found herself in a refugee situation. It was not her choice to flee her country of origin, nor to go to Yemen, nor to Saudi Arabia. It would appear preferable in her case for the IND to have waived the continuous residence requirement on compelling humanitarian grounds. Suggesting she should have gone to Kenya or Ethiopia would seem a disproportionately strict response that was not in her best interests as a child.

Another case concerned a Saudi woman who was living in Damascus, who wished to reunify with her Syrian husband in the Netherlands. In the letter from the IND informing her of the requirements to be fulfilled for her to pick up her MVV in Lebanon, it was mentioned that she needed to have continuous residence there.<sup>471</sup>

According to the IND, a family reunification application cannot be rejected on the sole basis that a family member does not meet the continuous residence requirement.<sup>472</sup> In practice, however, the IND's approach appears not always to be uniform. In a recent decision, the IND rejected an application<sup>473</sup> concerning a Yemeni husband, who had tried to join his wife in the Netherlands by irregular means but ended up in Greece. The application was rejected because the husband did not have a continuous residence in Greece. In the response to a "rectification of omission letter" (*herstel verzuimbrieff*) the VWN had explained on behalf of the refugee sponsor and her husband why he did not have continuous residence in Greece, but this was not deemed sufficient. In another example, from an interview with an employee of a VWN office<sup>474</sup> UNHCR learned that a refugee sponsor was advised that if his Syrian family members would travel to Sudan to pick up their MVV, it would be rejected as they would require continuous residence. This advice would go against the new policy of the IND that this requirement could be waived if you explain why you do not have continuous residence in a non-neighbouring country. Eventually they undertook

<sup>469</sup> Example provided by lawyer 1.

<sup>470</sup> This case study was based on e-mail contact between lawyer 5 and the IND.

<sup>471</sup> Lawyer 1.

<sup>472</sup> IND respondent.

<sup>473</sup> IND decision of 30 October 2018.

<sup>474</sup> Interview with Dutch Council of Refugee employee on 7 February 2019

the risky endeavour to cross the border with Turkey illegally. According to a lawyer handling cases rejected for not having continuous residence, some IND officers seem to apply the continuous residence requirement strictly without considering that families do not choose to flee to a certain country and that sometimes the rule is still being used as a ground for rejection of an application for family reunification rather than a practical measure to ensure that families can be present for further investigation at embassies.<sup>475</sup>

Indeed, the IND has acknowledged that the requirement can be problematic, but states that in practice it does not apply the continuous residence requirement where there are compelling humanitarian reasons for doing so.<sup>476</sup> If the IND intends to reject an application in flight situations on the grounds that the continuous residence requirement is not met, the IND officer must first put the intended decision before the policy department within IND.<sup>477</sup> According to the Directorate General for Migration, practice shows that in many cases in which the family members of refugees did not meet the continuous residence requirement, the IND did not apply this requirement.<sup>478</sup>

UNHCR is, however, of the opinion that the continuous residence requirement should not be applied in cases concerning refugees. In UNHCR's view, rather than waiving the continuous residence requirement in exceptional cases only, thereby still exposing the families of refugees to potential danger, additional cost and uncertainty, it would be preferable if this requirement were not imposed in all cases concerning the family member(s) of refugees. This would also be in line with the report of the Advisory Committee on Migration Affairs which stated in its report "Reunited after Flight" that the requirement

for continuous residence is no longer applicable after the legislative amendments made it possible for the refugee sponsor in the Netherlands to file for family reunification.<sup>479</sup>

### 6.1.3 International and European standards: Continuous residence requirement

According to Article 5(3) of the FRD, an application for family reunification "shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides". It does not require those family members to have a particular residency status in that country. Indeed, the European Commission has noted, the continuous residence requirement in the Netherlands represents "an additional condition not provided for in the Directive".<sup>480</sup>

It has been argued that, since Article 6 of the EU Visa Code<sup>481</sup> states that an application for a visa shall be examined and decided by the consulate of the competent Member State in whose jurisdiction the applicant *legally* resides, a legal residence requirement should similarly apply in the context of the FRD. The CJEU has, however, clarified that the Visa Code only applies to short-term visas and not to visas for long-term stay, such as those required for family reunification.<sup>482</sup>

For its part, UNHCR has noted that although some "States require that the application is made in the country where the family member has legal residence, ... refugees often have no official legal recognition of residence in their first country of asylum".<sup>483</sup> UNHCR therefore recommends that in such States, this requirement should be waived.<sup>484</sup>

<sup>475</sup> Lawyer 1.

<sup>476</sup> Directorate General for Migration and IND respondents. See Aliens Act 2000, Art. 2s (4) and/or is it Art. 2p (2) as referred to in text at fn. 459 and 460 above.

<sup>477</sup> Directorate General for Migration respondent.

<sup>478</sup> *Ibid.*

<sup>479</sup> ACVZ, *Reunited after Flight*, 2014, above fn. 32, pp. 47 and 73.

<sup>480</sup> European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification*, COM(2008) 610 final, 2008, above fn. 32, p. 12.

<sup>481</sup> EU: European Parliament, *Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, 13 July 2009, available at: <http://bit.ly/2T7BkHb>.

<sup>482</sup> *X. et X. c. État belge*, C-638/16 PPU, CJEU, 7 March 2017, available at: <http://bit.ly/2T99jio>, paras. 40-43.

<sup>483</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 11.

<sup>484</sup> *Ibid.*, p. 12.



#### 6.1.4 RECOMMENDATION:

### CONTINUOUS RESIDENCE REQUIREMENT

With regard to the continuous residence requirement, in recognition of the fact that many family members of refugee sponsors are in a precarious situation themselves and/or are refugees in another country of asylum and that they are not responsible for the absence of a Dutch embassy/consulate in a particular country and may not be in a position to secure continuous residence:

#### 20.

UNHCR recommends that the Dutch government no longer require continuous residence for family members of refugee sponsors as compared to family members seeking reunification with other immigrants, in light of the specific circumstances and particular difficulties family members of refugees may have encountered before and after leaving their country of origin, including as a result of a requirement to travel to a Dutch embassy in another country.

## 6.2 Illegal border crossing and journeys to embassies

Family members, who have no option but to cross a border illegally to reach a Dutch embassy/consulate, may expose themselves to considerable danger on their journey especially when the security situation is difficult en route and may end up in detention. Sometimes they even have to travel multiple times and cross different borders for further investigations, to substantiate their identity and family ties, provide a declaration of consent, or collect an MVV.

The following case study describes the dangerous journey and eight months of precarious stay involved in securing family reunification for the husband of an Eritrean refugee and the couple's three young children:

### CASE STUDY<sup>485</sup>

An Eritrean refugee requested family reunification with her husband and three children who remained in Eritrea. The children were four, eight and 10 years old at the time. Since there is no Dutch embassy in Eritrea, the father had to undertake a dangerous journey with his three children from Eritrea to Ethiopia for the purpose of DNA testing. They travelled all by themselves at night and were anxious as they were obliged to cross the border illegally. The father feared for his and his children's life because they might be stopped during their journey. The family made it to Ethiopia safely, because people had told the father about the safest route for travelling with young children. In Ethiopia, they registered themselves at the refugee camp and stayed there for four months until the Dutch embassy in Addis Ababa asked them to travel to Addis Ababa. There, they waited two months until DNA testing took place and another two months until they could come to the Netherlands.

In another case already referred to above,<sup>486</sup> an Eritrean mother and her children attempted to reach Ethiopia, but they were all arrested and detained but for her six-year-old child who was then left alone. The IND rejected the application for family reunification of the six-year-old child, since the IND had not been able to verify the signature on the declaration of consent and the refugee could not prove that his wife and children were being held in detention, leaving the young child living alone in Ethiopia.

Both these case studies predate the provisional reopening of the Eritrean-Ethiopian border in September 2018.<sup>487</sup> They are emblematic of the dangerous journeys the family members of refugees may face.

The research identified similar obstacles encountered by foster and adopted children<sup>488</sup> and by family members required to travel to a UNHCR camp or office to register in order to obtain documents to be able to identify themselves at embassies.<sup>489</sup>

<sup>485</sup> This case study was based on an interview with the spouse of the refugee.

<sup>486</sup> See case study already referred to in text at fn. 260 above for further details.

<sup>487</sup> See e.g. "Ethiopia-Eritrea Border Opens for First Time in 20 Years", *New York Times*, 11 Sept. 2018, available at: <https://nyti.ms/33csaO6>; "I was euphoric": Eritrea's Joy Becomes Ethiopia's Burden Amid Huge Exodus", *The Guardian*, 12 Oct. 2018, available at: <http://bit.ly/2GNgOq4>.

<sup>488</sup> VWN locations 3 and 5 respondents and lawyer 1.

<sup>489</sup> VWN main office and VWN location 2 respondents.

**COMPLAINT TO DUTCH OMBUDSMAN FOR CHILDREN:  
TREATMENT OF A REFUGEE'S CHILDREN<sup>490</sup>**

A mother whose husband had died fled Somalia in early 2010 and eventually reached the Netherlands. She was granted an asylum residence permit in late 2011 and sought to reunify with her children who had in the meantime had to flee to Yemen. In 2013, three years after she had been separated from her children, they eventually joined her in the Netherlands. In 2015, the mother nevertheless lodged a complaint with the Dutch Ombudsman for Children about the IND's requirement that her three daughters, who were aged eight, nine and 10 at the time, undertake a dangerous journey from Yemen, where the embassy did not offer consular services, to the Dutch embassies in Kenya or Ethiopia solely to undertake DNA testing.

By way of intervention, the Dutch Ombudsman had contacted the IND about alternative solutions, such as having the Dutch embassy in Yemen make an exception for this distressing situation or letting the embassy of a different EU Member State that did provide consular services take DNA samples, but the IND was unwilling to cooperate in finding a solution. Accompanied by a woman they did not know, the children ended up having to travel to Ethiopia. Besides a four-day long journey to cross the sea, they were stopped several times in Ethiopia, threatened at gun point, and had to hand over money.

When the DNA testing had taken place, the children still needed to wait a further two months before they could finally join their mother in the Netherlands. The Dutch Ombudsman concluded that the IND should have had a more active approach, given the children's young age and the existence of possible alternative solutions. The Ombudsman also stated that the IND had not made the children's best interests a primary consideration or dealt with family reunification applications in a "positive, humane and expeditious manner", as required by Articles 3 and 10 of the CRC.

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<sup>490</sup> Dutch Ombudsman for Children, "Report on a complaint about the IND", KOM001/2015, 12 Jan. 2015, available at: <http://bit.ly/2M3blu2>.

There are also problems more generally at the Syrian-Turkish border for Syrians seeking to go to the Dutch embassy to submit documents, attend identification interviews, and/or collect MVVs. The Dutch and Turkish authorities came to an agreement that the Dutch embassy/consulate would alert the Turkish authorities when there were family members at the Syrian-Turkish border seeking entry to come to the Dutch embassy and eventually pass through en route for the Netherlands.<sup>491</sup> Implementation of the agreement is, however, still patchy and there continue to be problems for Syrian family members seeking to cross the border. There are even reports of six-year-old cases where family members have not been allowed to cross the border between Syria and Turkey. There are underlying problems with the agreement, since in order to agree to allow the entry of Syrian family members seeking reunification in the Netherlands, the Turkish authorities are effectively seeking a guarantee from the Dutch authorities that the application will be approved, which is something the IND can only guarantee once there is a positive final decision on the application for family reunification. It seems that there will continue be difficulties crossing the border for Syrian family members.

In Lebanon, the Embassy of the Kingdom of the Netherlands in Beirut has nevertheless been able to find ways to support family members of refugees seeking to attend family reunification interviews at the embassy, even when their entry to the country was restricted by the Lebanese authorities as outlined below.

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<sup>491</sup> Directorate General for Migration respondent. For other problems Syrian family members encounter in Turkey see also chapter 3.2.2 Practice: Requirement to provide official documents. Further information provided by UNHCR Office, The Hague.

## CASE STUDY

The Dutch embassy in Lebanon introduced an “invitation procedure” in response to developments in the Lebanese context. In light of the large number of Syrian refugees arriving from Syria, Lebanon imposed entry restrictions (also referred to as visa obligations) on stateless Palestinians from Syria at the end of 2014 and on Syrians as of January 2015 by demanding proof of a specific entry purpose: business, leisure with hotel reservation, embassy appointment or transit.

Before the restrictions, family reunification applicants could easily cross the border with a printout of an online MVV-appointment. Afterwards, the embassy had to start sending email appointments with full personal data and explanations of the embassy procedure and Lebanese conditions for entry and stay. For Palestinians, it also had to send weekly lists of named persons to the Lebanese General Security. (As a result, the embassy clustered appointments for stateless Palestinians from Syria on one day per week.)

There was no protocol or agreement between the embassy and General Security on this matter, but the embassy adjusted its working methods to Lebanese requirements. As a result of these requirements, the Lebanese authorities allowed applicants to enter no more than half a day before the appointment, which meant that they could only enter shortly before or after midnight. Applicants who arrived early had to wait a long time or were sent away. Unfortunately the embassy was unable to ensure earlier entry to Lebanon, as they cannot directly intervene in the Lebanese border procedure.

The Embassy remained flexible so that even if applicants arrived late in the afternoon due to border proceedings, they would schedule an urgent appointment the next day. The embassy is not aware of a single applicant who was not able to come to the embassy, except for those who had gone missing or been arrested by the Syrian authorities.

According to the embassy they needed to undertake special interventions for a very limited number of applicants. The embassy has had to contact the General Security to ask for a special facilitation. This was for stateless applicants other than of Palestinian origin, mostly for applicants from Kurdish origin.

The IND and the Ministry of Foreign Affairs also informed UNHCR about another positive example where the Dutch authorities went out of their way to facilitate the family reunification procedure for family members of refugee sponsors in Gaza, for whom it appeared to be virtually impossible to leave Gaza. These family members would, in theory, have to travel to the Netherlands Representative Office (NRO) in Ramallah to obtain their MVVs as well as for providing their biometric data. Bearing in mind that “permits” are required by the Israeli authorities and obtaining these has proven a lengthy process, several families became stuck in Gaza for extended periods of time. A solution has been sought in cooperation with the Netherlands Ministry of Foreign Affairs to make family reunification possible for them. A mobile biometric device was sent to Ramallah by diplomatic bag to obtain biometric data. A consular affairs employee from NRO Ramallah then travelled to Gaza city with the device and its documentation to collect biometric data from the family members. This way the requirements for the MVV were still met. After the biometric data was transferred to the IND system MVVs were issued to the family members. After the MVVs were granted, however, a transit visa from both Jordan (letter of non-objection – valid for three months after issuance) and from Israel (procedure of 70 days minimum) are still necessary to continue the journey to the Netherlands. The Dutch authorities noted that unfortunately the issuance of transit visa documents is outside its sphere of influence, but the use of mobile biometric devices and readiness to send diplomatic staff to meet with family members represent potential solutions in complex cases. In some cases, family members were able to pass through Egypt and were thereby able to reunite with their relatives in the Netherlands. For others, this seems to be impossible and they have been stuck in Gaza for a longer time.

A positive example in the EU is the Family Assistance Programme (FAP) which IOM established and operates at the request of and funded by the German Federal Foreign Office (GFFO). Currently, IOM operates five Family Assistance Programme (FAP) service centres in the cities of Istanbul and Gaziantep (Turkey), Beirut and Chtoura (Lebanon) and Erbil (Iraq). The objective of the FAP is to assist Syrian and Iraqi family members with their family reunification visa application to Germany. The FAP, among others, empower families with Arabic and Kurdish language information and visa support services; facilitates

efficient visa processing with German Consular Offices; and better prepares families for arrival and integration into German society.<sup>492</sup>

#### 6.2.1 RECOMMENDATION:

#### JOURNEYS TO EMBASSIES

In order to reduce the uncertainty and potential dangers associated with journeys to embassies, which can expose the family members of refugees, particularly if they are single women, mothers with children, unaccompanied children and persons with disabilities or health conditions, to risks such as travel through conflict zones, illegal border crossing, extortion and detention, and in order to make the process more efficient:

#### 21.

UNHCR recommends that the IND and embassies identify ways to reduce the number of visits to embassies required and examine other possibilities to facilitate the process, such as strengthening efforts to ensure appointments are made closer together and using videoconferencing.

### 6.3 The role of Dutch embassies/consulates in the family reunification procedure

Dutch embassies and consulates facilitate the family reunification process by executing certain tasks, though the IND in the Netherlands has primary decision-making responsibility for family reunification. Thus, the role of Dutch embassies/consulates mainly involves checking the identity of family members, including where needed through DNA testing and/or identification interviews, followed by placing an MVV visa sticker in the passport(s) of family member(s).<sup>493</sup>

#### 6.3.1 Processing family reunification applications

Since the 2013 merging of the substantive assessment of the family reunification application with that for the issue of an MVV visa sticker,<sup>494</sup> the embassies collect the relevant data from the family members together with their travel documents, passport photos and biometrics and send these to a regional support office. These are situated in a Dutch embassy in the region and provide consular services for a whole region, such as in the Dutch embassy in Amman for the Middle East. The regional support offices process this data for the issuance of the MVV after which the travel document with the visa sticker is handed over to the family members at the embassy.<sup>495</sup> Regional support offices have more employees with better knowledge of the procedure, ensuring a more efficient and speedy process for issuing MVVs.<sup>496</sup>

There is no legal maximum period for embassies to complete the whole process. Delays may arise as a result of increased numbers of applications leading to a heavier workload at the embassy/consulate, as well as a result of holiday periods. In addition, complications such as missing documents require embassy employees to report this to the IND, which can also cause a delay. In February 2017, for instance, in Ankara the waiting periods for DNA testing, identification interviews and obtaining the MVV were each six weeks,<sup>497</sup> while in Beirut, the waiting period at that time was four weeks for DNA sampling, eight weeks for identification interviews, and six weeks for obtaining the MVV.<sup>498</sup> Where embassies receive many family members of refugees, such as those in Khartoum and Beirut, they have hired more staff and opened more desks in order to reduce waiting periods and to support family members in the family reunification procedure.<sup>499</sup> Waiting periods for

<sup>492</sup> Information sheet on the IOM operated Family Assistance Programme for Syria and Iraqi refugees, <http://bit.ly/33ffPbV>.

<sup>493</sup> Respondent from Consular Affairs and Visa Policy Department of the Ministry of Foreign Affairs. The consular activities of this department are wider than the tasks performed for the IND.

<sup>494</sup> See chapter 6.1.1 Legislative framework and case law above.

<sup>495</sup> Ministry of Foreign Affairs respondent.

<sup>496</sup> Ministry of Foreign Affairs respondent.

<sup>497</sup> Respondent from Dutch embassy in Ankara.

<sup>498</sup> Respondent from Dutch embassy in Beirut.

<sup>499</sup> Ministry of Foreign Affairs respondent.

obtaining the MVV at the Dutch embassies are not longer than three months.<sup>500</sup>

A September 2018 District Court judgment<sup>501</sup> illustrates the challenges refugees can sometimes face when Dutch embassies/consulates are unable to issue the documentation needed to travel to the Netherlands. The case concerned an Iranian woman residing in Northern Iraq whose reunification with her husband in the Netherlands had been approved on 22 February 2018, but who was unable to obtain a laissez-passer from the Dutch authorities to be able to travel to join him. The Dutch authorities, in principle, issue a laissez-passer as an emergency travel document to family members accepted for family reunification in the absence of (valid) travel documents. The couple had each made several attempts to obtain the document, by contacting the Dutch consular services and international organizations. Finally, the Dutch authorities informed the applicant that the Dutch embassy in Baghdad and the Dutch Consulate in Erbil, northern Iraq, were unable to issue an MVV and a laissez-passer as their consular functions were affected by security concerns. Moreover, the travel document was only valid for a trip to the Netherlands.

The applicant requested interim measures, asking the Court to instruct the Dutch authorities to ensure the wife was able to obtain the MVV and laissez-passer. Referring to Article 13 of the FRD, which requires Member States to grant family members “every facility for obtaining the requisite visas”, “as soon as the application for family reunification has been accepted”, as well as the Commission’s guidance on this issue,<sup>502</sup> the court noted that the applicant and her spouse had made considerable efforts to cooperate with authorities, to obtain the document. The court required the Dutch authorities to instruct

the Dutch embassy in Jordan to contact the Jordanian authorities for the purposes of issuing a laissez-passer and facilitating the applicant’s travel. It further ruled that if the Dutch authorities did not instruct the Jordanian authorities to this effect or if the latter did not permit the wife to enter Jordan, the State Secretary for Justice and Security in coordination with the Ministry of Foreign Affairs were required to issue the MVV and laissez-passer to the applicant at the Dutch consulate in Erbil. Notably, in examining whether a provisional measure was reasonable, the judge took into account the time that had elapsed between the approval of the application and the interest shown by the applicant in reuniting with the spouse. Beginning of March 2019 the wife arrived in the Netherlands, directly from Erbil, to join her husband.<sup>503</sup>

### 6.3.2 Interviews to establish family relationship

Identification interviews are held at embassies to help verify, identity and establish the existence of factual family ties. They are provided for, for instance, when couples are unable to present documentation and when there are contra-indications that things are not in order.

In the past, identification interviews to establish the family relationship<sup>504</sup> conducted at Dutch embassies at the IND’s request have been criticized. The primary concern was how interviews with children were conducted, since some children were reportedly exposed to long, detailed interviews, even if they were sometimes under the age of 12.<sup>505</sup> Subsequently, the IND introduced a child-friendly interviewing policy in 2015, which included an instruction that in principle children under the age of 12 should not be interviewed.<sup>506</sup> Two Dutch embassy respondents

<sup>500</sup> See also Response of the State Secretary for Security and Justice to the report that family reunification for Eritrean asylum-seekers is almost impossible, 29 June 2017, available at: <http://bit.ly/2MGBLab>.

<sup>501</sup> AWB 18/5498, District Court the Hague, 20 Sept. 2018, ECLI:NL:RBDHA:2018:11841, available at: <http://bit.ly/2Ta17OG>.

<sup>502</sup> This states, inter alia, that this “implies that when an application is accepted, MSs should ensure a speedy visa procedure, reduce additional administrative burdens to a minimum and avoid double-checks on the fulfilment of the requirements for family reunification”. European Commission, *Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification*, 2014, above fn. 32, p. 19.

<sup>503</sup> A second preliminary/interim injunction judge from the court of Amsterdam imposed a recurring fine of 250 euros per day if the Dutch authorities would not issue the visa and a laissez-passer before 28 February 2019. Court ruling is not public.

<sup>504</sup> “*Identificerend gehoor*” (sometimes referred to as an identifying hearing).

<sup>505</sup> Defence for Children & VWN, “Hoelang duurt het nog voordat we naar onze moeder kunnen?”; Barrières bij de gezinshereniging van vluchtelingen, 2012, and Strik e.a., “*Nareis: het onderzoek naar de gezinsband in de praktijk*”, A&MR 2012, Nr. 9, pp. 472-480.

<sup>506</sup> For more information, see IND, *Work Instruction 2015/1: Child-friendly interviews at the embassy*, 14 April 2015, available in Dutch at: <http://bit.ly/2M4x4HO>.



clarified that the IND decides on the content of all questions and during the interview embassy staff take into account that the interviewee is a child.<sup>507</sup> The Ministry of Foreign Affairs stated that it is assumed that a parent, guardian or accompanying person always accompanies a child during an identification interview, since the Work Instruction requires some questions during the interview to be directed at the accompanying adult.<sup>508</sup> One embassy respondent noted that children are regularly asked if they have understood everything and if they need a break.<sup>509</sup>

During this research, however, UNHCR still heard some concern raised about the **quality of identification interviews at embassies**, including as regards age determination, as shown in the following case study.

#### CASE STUDY

In 2016, the 17-year-old son of an Eritrean refugee<sup>510</sup> was interviewed at the Dutch embassy in Khartoum. The father reported that at some point three other people entered the room. In order to determine his age, they looked inside his mouth. They criticized him by saying: “We do not believe you”, “You are a liar”, “I can see that you have a wisdom tooth”, and “You have beard growth”. He said that the interview scared him and that they did not treat him well. The father lodged a complaint with the embassy. The response was that the embassy did it at the request of the IND, which denied this was true. Eventually, someone at the embassy admitted it had been his own decision to do this for the IND. The complaint against the embassy with the children’s ombudsman resulted in him apologizing and assuring that it would not happen again. The father said that experience was very troubling and intimidating for his son.

It is notable that the complaint was made to the embassy in 2016, that is, after the Work Instruction was issued and UNHCR notes that it is one that

the IND itself was concerned about. In a recent case where a young adult son was interviewed to assess family ties, UNHCR nevertheless also found that insufficient questions were asked to ensure an adequate assessment of these ties and that the interview contained inappropriately personal questions.<sup>511</sup> Even though these might be isolated incidents, further investigation with regards to hearings conducted in the field would be necessary to determine the extent to which practice has improved since the last fact-finding mission in 2012.

Two further concerns arose during the research. The first concerned a **lack of registered interpreters at embassies**. One lawyer said that embassies also work with non-registered interpreters, who sometimes are brought by the family members.<sup>512</sup> According to the Ministry of Foreign Affairs, the embassy in principle arranges the interpreter and family members rarely bring an interpreter themselves.<sup>513</sup> The Ministry added that the standard of interpretation must have a certain level of reliability and that it therefore advises embassies to use interpreters from UNHCR, IOM and other international organizations, although this could be problematic since there is only a limited number of interpreters these organizations use.<sup>514</sup>

The second concern relates to the fact that **family members do not receive an interview report after the interview**, meaning that they are unable to submit corrections and additions in response to the report of the identification interview.<sup>515</sup> The IND confirmed that the refugee and family members cannot correct the report of the interview and that this is only sent with the decision on the family reunification application.<sup>516</sup> Two lawyers stressed that corrections and additions are necessary since interpreters abroad do not always interpret accurately.<sup>517</sup> It can be really difficult for lawyers in the Netherlands to know what family members said, since it is also not possible to

<sup>507</sup> Respondents from Dutch embassies in Ankara and Beirut.

<sup>508</sup> Ministry of Foreign Affairs respondent. See IND, *Work Instruction 2015/1: Child-friendly interviews at the embassy*, above fn. 506.

<sup>509</sup> Respondent from Dutch embassy in Ankara.

<sup>510</sup> Refugee E from Eritrea.

<sup>511</sup> IND Interview on 06 December 2018 and IND decision on 17 January 2019

<sup>512</sup> Lawyer 5. This was confirmed by VWN local office 5.

<sup>513</sup> Ministry of Foreign Affairs respondent.

<sup>514</sup> Ministry of Foreign Affairs respondent. See also IND, *Work Instruction 2015/1: Child-friendly interviews at the embassy*, above fn. 506.

<sup>515</sup> Lawyers 1, 2, 4 and 5.

<sup>516</sup> IND respondent.

<sup>517</sup> Lawyers 1 and 2.

record the interview.<sup>518</sup> In addition, interpreters abroad are generally interpreting from the language of the family members into English, which must then be translated by the interviewer into Dutch, thus leading to potentially significant misinterpretations and to sometimes very critical accounts of the interview.<sup>519</sup> Another lawyer believed that the IND should give the benefit of the doubt, where the report of the identification interview shows minor contradictions.<sup>520</sup> While refugees can make another application with new documentation or information, this prolongs family separation and increases the workload of the IND.

The Ministry of Foreign Affairs indicated<sup>521</sup> in relation to some of the above mentioned concerns that in posts where there are many family reunification applications (such as Addis Ababa, Ethiopia) that the IND posts a person to conduct, among others, the identification interviews. Another option which is used is that an IND expert is stationed at the embassy on a temporary basis (as in Khartoum, Sudan) where applications are then accumulated until the IND officer arrives. Where there are urgent cases, interviews can be scheduled via video conferencing. Video conferencing is more often used to conduct identification interviews. This has the advantage that the interview is conducted by an IND employee and registered interpreters in the Netherlands can be used.

### 6.3.3 International and European standards: Interviews

In terms of international standards regarding the interviewing of children, the CRC Committee notes that the child's right "to express [her or his] views freely" requires conditions that allow "the child [to] express her or his views without pressure" and that these conditions must "account for the child's individual and social situation" and involve "an environment in which the child feels respected and secure when freely expressing her or his opinions".<sup>522</sup> The CRC Committee further notes: "A child cannot

be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff."<sup>523</sup>

In a Joint General Comment, the CRC Committee and the Committee on the Rights of Migrant Workers and their Families have further stressed that States parties should "[e]nsure that the principle of the best interests of the child is appropriately integrated, consistently interpreted and applied through robust, individualized procedures in all legislative, administrative and judicial proceedings and decisions, and in all migration policies and programmes that are relevant to and have an impact on children, including consular protection policies and services".<sup>524</sup>

More generally the principle of good administration, as set out in Article 41 of the EU Charter, applies as a general principle of EU law. As the CJEU has ruled, "where ... a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable".<sup>525</sup> The right to good administration includes "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy" in accordance with Article 41(2).

The recital 13 of the FRD similarly requires that the procedure for examination of applications for family reunification and for entry and residence of family members "should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned".

<sup>518</sup> Lawyer 2.

<sup>519</sup> Lawyer 2.

<sup>520</sup> Lawyer 4.

<sup>521</sup> Interview with staff from Ministry of Foreign Affairs, The Hague on 06 March 2019.

<sup>522</sup> CRC Committee, *General Comment No. 12 (2009): The Right of the Child to be Heard*, 20 July 2009, CRC/C/GC/12, available at: <http://bit.ly/2yE3ekF>, paras. 22-23.

<sup>523</sup> *Ibid.*, para. 34.

<sup>524</sup> CRC Committee and CMW Committee, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, 2017, above fn. 47, para. 32(b).

<sup>525</sup> *H.N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, CJEU, 8 May 2014, available at: <http://bit.ly/2GRmZcR>, paras. 49-50. (The case concerned procedures for granting subsidiary protection, but the general principle applies.)

#### 6.3.4 RECOMMENDATIONS:

### IDENTIFICATION INTERVIEWS

With regard to identification interviews:

#### 22.

UNHCR recommends that the Dutch government be more transparent about the criteria for conducting identification interviews, when they are needed, and how they should be conducted.

#### 23.

UNHCR recommends that sufficient procedural guarantees equivalent to those applying to sponsors in the Netherlands be put in place to ensure a fair and efficient procedure in identification interviews at embassies, including by ensuring the provision of appropriate information to applicants on the family reunification procedure generally and the objective of the identification interview in particular, in a manner they can understand and sufficiently in advance for them to be adequately prepared for the interview; by ensuring access to quality, independent interpretation; and through training and review of interviews to ensure, inter alia, that they are child-friendly and gender-sensitive.

#### 24.

UNHCR recommends that the report of the interview should be provided to the refugee and family members in sufficient time and in any case before the decision is issued, so that it is possible for applicants to make corrections and additions to the report if needed. Furthermore, standard operating procedures should preferably be established to ensure that these procedural safeguards are properly implemented and a clear complaint procedure should exist so that refugees can file a complaint if an identification interview or the report of the interview appears to be incorrect.

### 6.4 Assistance by the IOM, UNHCR and other EU Member State embassies

This section examines the assistance and support that is and/or could be provided by IOM and UNHCR, as well as the potential for cooperation with other States in countries where there is no Dutch embassy/consulate.

#### 6.4.1 IOM

Dutch embassy staff may request the assistance of international organizations such as IOM or UNHCR, for example, for interpreters for an identification interview, since there are only a limited number of interpreters available.<sup>526</sup> Otherwise local IOM offices in the country of departure can support refugees during the process of obtaining visas and exit permission.<sup>527</sup> IOM can also assist with travel arrangements, including booking flights to the Netherlands and with transportation services within the country of departure, though they normally charge a fee for doing so.<sup>528</sup> Generally, it is the VWN or another NGO that contacts IOM if there is an issue that IOM may be able to help with, but occasionally applicants do so themselves.<sup>529</sup>

#### 6.4.2 The IND and its interaction with UNHCR and IOM

The IND can ask for IOM's assistance with gathering DNA samples of family members, if there is no Dutch embassy/consulate.<sup>530</sup> In practice, this only happens when refugees cannot temporarily and exceptionally travel to an embassy/consulate for DNA testing.<sup>531</sup> Such exceptional circumstances may be the closure of an embassy/consulate or problems reaching it, if the situation in the country of origin makes it temporarily impossible to enter or exit the country or area legally. There may also be exceptional individual circumstances that apply, if the family

<sup>526</sup> Ministry of Foreign Affairs respondent.

<sup>527</sup> IOM respondent.

<sup>528</sup> *Ibid.*

<sup>529</sup> *Ibid.*

<sup>530</sup> Internal Work Instruction between the IND and IOM, 26 May 2015.

<sup>531</sup> IOM respondent.

member is injured or has a disability or is a very young unaccompanied child. In any case, the family member would still have to travel to an embassy/consulate to obtain the MVV, though the option of IOM's assistance may reduce the number of sometimes dangerous and costly journeys that are needed. When IOM cannot reach the family members to collect a DNA sample, the IND could ask UNHCR if they can do so. The IND only asks for the support of IOM and sometimes UNHCR in a limited number of cases. That said, since mid-2017 the IND and IOM have been working together in Beirut, Lebanon, and IOM collects DNA samples there from family members who have applied for family reunification. As a result of this collaboration there was no longer a waiting time for DNA testing, were this used to be four weeks.

Assistance UNHCR could potentially provide includes providing assistance with DNA sampling, if there is no embassy nearby or if travelling to one is difficult or dangerous for family members. UNHCR is also able to arrange video conference calls with family members in countries where there is no access to a Dutch embassy/consulate or where travelling to one is problematic. The IND is familiar with video interviews, as these have been used in the past for interviewing refugees submitted to the Netherlands for resettlement. UNHCR could also facilitate various steps in the family reunification process, for instance, by arranging the transport of documents from family members to embassies, verifying the authenticity of documents. Another alternative would be for Dutch government personnel to undertake missions to refugee camps to prevent vulnerable refugees, such as children and single women/mothers, from having to travel long distances to capitals. Alternatively, UNHCR could facilitate secondment of IND staff to its operations (e.g. in North Ethiopia) where they could focus on processing of family reunification applications.

#### **6.4.3 Possible cooperation with other States if there is no Dutch embassy**

According to the Ministry of Foreign Affairs, the IND decides with the refugee which embassy the family member(s) must visit.<sup>532</sup> These visits can create serious problems, where there is no Dutch embassy/consulate or it has been closed due to security concerns, as is the case, for instance in Syria, Yemen, or Eritrea. For the family members of refugees it can mean they have to make several costly and sometimes dangerous journeys, including through a conflict zone or illegally across a border, if they are to reach the embassy/consulate they have been asked to attend.

UNHCR has encouraged Member States "to use the possibility for consular representation offered by EU legislation for the issuance of visas for the purpose of family reunification where there is no embassy of the country of asylum in the family member's country of residence".<sup>533</sup> Several years ago the Netherlands did indeed investigate the option of sharing a facility centre in countries of origin with other EU Member States for the purpose of processing MVVs.<sup>534</sup> Although the report confirmed that the embassies showed a serious interest in cooperating in the field of family reunification of Somali applicants in Addis Ababa, it also identified a number of operational issues, including concerning the determination of identity and common identity registration.<sup>535</sup>

When the Ministry of Foreign Affairs was asked, however, why it was not possible to carry out (part of) the family reunification procedure in the embassy of another EU Member State, for instance when applying for a Schengen-visa, the Ministry explained that this is problematic because the family reunification MVV is a visa based on national legislation and requirements meaning that collaboration with other EU embassies would not be possible, unlike the Schengen-visa which is based on EU legislation.<sup>536</sup> Even with regard to DNA sampling, the Ministry of Foreign Affairs said this would probably be problematic, since different test

<sup>532</sup> Ministry of Foreign Affairs respondent.

<sup>533</sup> UNHCR, *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification*, 2012, above fn. 1, p. 15.

<sup>534</sup> Directorate General for Migration respondent.

<sup>535</sup> IND, "Report Feasibility Study: Shared Facility Centre Addis Ababa, Towards an Effective Somali Family Reunification Process in Addis Ababa", 27 March 2014, available at: <http://bit.ly/2Yt9DhD>.

<sup>536</sup> Ministry of Foreign Affairs respondent.

kits would be used and personal information could be shared.<sup>537</sup> In 2012, the State Secretary for Justice and Security concluded that collaboration with embassies of other Member States, when there is no Dutch embassy in a certain country, was not an option for these reasons.<sup>538</sup> In January 2015, the State Secretary concluded that the result of the study regarding a shared facility centre in Addis Ababa, Ethiopia, for family reunification procedures had not been received with much enthusiasm from other Member States.<sup>539</sup> Another possibility could be to have external service providers or organizations such as IOM or UNHCR play a (greater) facilitating role.

In this respect, a recent Opinion in a case before the CJEU provides some insight. It concerns the process whereby “representation agreements” between Schengen States are used to permit consulates of another Schengen State to issue and refuse visas in third countries where the competent Member State itself has no consular presence. While this case does not concern family reunification or refugees as such, the Advocate General does note that such representation agreements “are concluded precisely with the objective of avoiding putting visa applicants to disproportionate effort, travel and expense in order to have access to consulates”.<sup>540</sup> Where the family members of refugees are involved, they face additional obstacles due to their specific circumstances and particular difficulties. It remains to be seen what the CJEU judgment itself will determine.

<sup>537</sup> *Ibid.*

<sup>538</sup> *Parliamentary Documents I 2012/13*, 31 549, L, p. 2; *Parliamentary Documents I 2012/13*, 31 549, P, p. 1.

<sup>539</sup> *Parliamentary Documents I 2014/15*, 31 549, R.

<sup>540</sup> *Vethanayagam and others v. Minister van Buitenlandse Zaken*, CJEU, C-680/17, AG Opinion, 28 March 2019, available at: <http://bit.ly/2Kr7N7g>.

#### 6.4.4 RECOMMENDATIONS:

### COOPERATION WITH OTHER ACTORS

In order to enhance the efficient running of the family reunification process and reduce the number of costly, long, and potentially dangerous journeys family members have to make to reach embassies/consulates:

#### 25.

UNHCR recommends that the IND investigate the possibilities for strengthening its cooperation with UNHCR and IOM, perhaps along the lines suggested above, both where embassies/consulates face increased workloads dealing with family reunification applications and where the security or other conditions mean the Netherlands is not able to provide consular services.

#### 26.

UNHCR recommends that the Dutch government work with other EU Member States to develop EU common or pooled administrative support in countries outside the EU, building on its previous investigation into the option of sharing a facility centre, and that it explore with EU and European Economic Area (EEA) States mechanisms to facilitate the family reunification process further. In this light, UNHCR recommends that the Ministry of Justice and Security make a renewed assessment of the option of carrying out identification interviews, DNA testing, and/or issuing MVVs at a shared facility centre, or at other EU Member State embassies/consulates, potentially through an external service provider. This would be in the best interests of children involved and prevent family members from having to take unnecessary risks to reach an embassy/consulate.



## 7. CONCLUSION

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The expeditious and inclusive reunification of refugees with their families can provide crucial psychological, social and economic support and be essential for their and their families' wellbeing and their prompter integration.

The study finds that in general the Netherlands' family reunification policy is among the more flexible and expansive in Europe and notes several recent positive policy changes in this respect. At the same time, the research and consultations undertaken identify a number of challenges faced by refugees and their families and by the Dutch authorities that impede the swiftness, efficiency and fairness of the procedure.

Priority concerns identified include:

- ➡ The substantiation of identity and family ties, where the execution of policy does not appear to take adequate account of the refugee experience, for instance, regarding lack of documentary evidence, for which the refugee is required to provide a plausible explanation as to why this should not be attributed to him/her, and could better focus more on the best interests of any children involved;
- ➡ The additional requirement to substantiate/prove "factual family ties" and that these ties have not been broken;
- ➡ The need for greater flexibility regarding the situation of vulnerable, dependent family members who are not part of the nuclear or close family and for a less restrictive interpretation of "dependency";
- ➡ The need for greater weight to be given to the assessment of the best interests of children involved in the process, especially in relation to unaccompanied children, whether they are in the Netherlands or elsewhere;
- ➡ The need for greater clarity regarding the situation of unaccompanied child refugees whose parents are no longer living or who cannot be traced, so that policy clearly accepts legal guardians and

siblings as included among family members able to reunite with the child;

- ➡ The need for a more flexible approach to deadlines in the case of refugees, since due to their circumstances they may, for instance, not be able to provide all the required documentation in time;
- ➡ The need to bear in mind the often vulnerable and precarious situation of refugees and their families, which means, for instance, that travel to embassies may involve dangerous journeys, high costs, and uncertainty.

Among the **standards** identified to guide the implementation of family reunification procedures are in particular the requirement to:

- ➡ Ensure respect for the right to family life and family unity under international and European human rights law, as well as the right to family reunification as explicitly set out in the FRD;
- ➡ Ensure that the best interests of children involved in the process are a primary consideration (Article 3 CRC);
- ➡ Ensure that applications for family reunification are dealt with in a "positive, humane and expeditious manner" (Article 10 CRC);
- ➡ Adopt an enabling approach to family reunification that implements the FRD in a manner that "promote[s] family reunification, and the effectiveness thereof" (CJEU, *Chakroun*);
- ➡ Ensure decision-making is in line with the principle of good administration (EU Charter), which requires respect for the principles of impartiality, proportionality, legal certainty, participation, respect for privacy, transparency, and taking action within a reasonable time limit; and

- ➔ Pay “special attention ... to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there” (recital 8 FRD).

The study identifies the roles of the different actors involved in the process, from the IND and embassies/consulates to the VWN, other NGOs, lawyers, IOM and UNHCR. It suggests ways cooperation could be enhanced among these different actors.

UNHCR hopes that the study can provide inspiration for further dialogue, research, and consideration by the authorities, national courts, lawyers, NGOs, embassies, legislators and policy-makers. UNHCR also hopes that the recommendations made can provide a useful basis for continued discussion, action and cooperation so as to strengthen further the family reunification process for refugees in the Netherlands.

# ANNEXES

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## **Annex 1:** Overview of the respondents interviewed and consulted

A total of 45 stakeholders contributed to this study resulting in 22 interviews and 11 consultations, as set out in the table below.

Most of the respondents in this study were interviewed in person or by phone based on a questionnaire they had received before the interview took place. Some respondents were consulted by e-mail and provided information based on a questionnaire.

	Stakeholders in the Netherlands				Stakeholders abroad		Total
	Dutch authorities	NGOs & other organizations	Lawyers	Refugees	Dutch embassy staff	UNHCR offices staff	
Number of respondents	6	19	7	9	2	2	45
Number of interviews	3	8	5	6	-	-	22
Number of consultations	1	4	2	-	2	2	11

### Notes

The **Dutch authorities** interviewed were staff members from the IND, the Consular Affairs and Visa Policy Department of the Ministry of Foreign Affairs, and the Directorate General for Migration.

The **NGOs** interviewed were VWN (main office, and five VWN local offices), Defence for Children and Nidos. The NGOs and other organizations consulted were the Netherlands Red Cross, IOM and ACVZ.

Six **refugees** were interviewed. All had been joined by their family member(s) in the Netherlands in the past two years. Sometimes the family member was also present at the interview. All were from Syria or Eritrea.

The **Dutch embassies** consulted were in Turkey (Ankara), Lebanon (Beirut) and Sudan (Khartoum). A response from the Dutch embassy in Ethiopia was not received.

The **UNHCR offices** consulted are located in Pakistan and Turkey. Respondents from the offices in Syria and Iraq explained that their office was not engaged in facilitating family reunification.

## Annex 2: Overview of data requested and received

For this study, UNHCR requested data from the IND, VWN and the Directorate General for Migration on family reunification requests and the capacity of the IND.

Organization	Data requested	Data received
IND	Number of family members entering the Netherlands on the basis of family reunification in 2015 – 2018	Yes
	Number of family reunification applications in 2015 and 2016, including backlog figures	Yes
	Data regarding the time between the submission of an application and the decision in 2015 – 2018	Yes
	Number of family reunification applications submitted, processed, and granted in 2014 – 2018	Yes
	Number of rejected applications in 2014- 2018, including reasons	Yes <sup>541</sup>
	Number of rejected applications in 2014- 2018 that were granted after an appeal was made	Yes
	Number of requests received and granted regarding the prioritizing of family reunification applications in 2014- 2018	No
	Number of current staff at the Asylum and Family Reunification Units of the IND and number of increased staff at these units since the influx	No
	Cohort figures regarding the length of the decision-making in 2014- 2018	No
	Most recent data on applications and average length of procedures 2015-2018	Yes <sup>542</sup>
VWN	Number of priority requests received from volunteers in 2016 and 2017	Yes <sup>543</sup>
	Number of priority requests sent through by the VWN main office to the IND in 2015 and 2016	Yes <sup>544</sup>
	Numbers regarding funds in the Refugee Fund	Yes
Directorate General for Migration	Most recent data regarding the backlog, decision time limits, overall length of the asylum and family reunification procedure and number of family reunification applications	Yes <sup>545</sup>
	Number of residence permits granted to vulnerable elderly persons for family reunification since the abolition of the more lenient policy towards vulnerable elderly persons	No <sup>546</sup>
	Current policy on determining family ties between LGBTI persons	Yes

<sup>541</sup> UNHCR received data on rejected applications, but the grounds for these rejections could not be generated automatically from the IND data system, according to the IND respondent.

<sup>542</sup> The IND respondent stated that it was not possible to deliver data on the average length of the procedures in 2017.

<sup>543</sup> The data received only covers the period from Oct. 2016 until 27 March 2017.

<sup>544</sup> The data for Sept. 2016 were not received.

<sup>545</sup> The data on the overall length of the asylum and family reunification procedures were not received.

<sup>546</sup> This data could not be generated automatically from the data system, according to the Directorate General for Migration respondent.

### Annex 3: Number of case studies

UNHCR asked all respondents to deliver cases that illustrate the topics covered in the interviews and the challenges identified in the study. In all, 52 cases were received, of which 26 were selected. Most cases were received from lawyers and VWN local offices.

UNHCR specifically requested cases concerning:

- Family ties that were considered to be broken
- The burden of proof applied regarding family ties
- A lack of documentary evidence
- Vulnerable elderly persons
- Other persons with specific needs, such as children and LGBTI persons
- Eritrean refugees for which the IND requested official documents that could not be obtained
- Unaccompanied children turning 18 years of age during the asylum procedure
- Applications submitted after the three-month deadline for submissions under Chapter V of the FRD
- Extended decision-making
- Requests for prioritized processing on medical grounds
- Requests for prioritized processing on other reasons
- The continuous residence requirement



## Annex 4: Definitions

Term	Definition
Refugee	Beneficiaries of international or subsidiary protection both fall under this definition in this report. The Netherlands does not make a distinction to these groups with regards to their rights.
Sponsor	Third-country national with an asylum residence permit seeking to bring his/her family member(s) to the Netherlands from abroad.
Asylum procedure	Legal procedure in which a request for international protection is assessed. In the Netherlands a person can be granted international protection on the basis of the 1951 Convention (refugee) or a risk of serious harm as a result of indiscriminate violence in situations of international or internal armed conflict (subsidiary protection) in the country of origin.
Adult child	Child aged 18 years and older.
Child	Child aged younger than 18 years, unless otherwise stipulated.
Delayed submission	Submission of an application for family reunification submitted after the three-month deadline.
MVV	An authorization for temporary stay (a visa sticker) which serves as an entry visa into the Netherlands.
Justified reasons check	Check by the IND which takes place when the three-month application deadline has been exceeded. Based on the outcome of this check the IND will decide whether a rejection should follow or not. The check concerns three criteria: (1) the length of the delay, (2) the approach of the refugee, and (3) the role of external actors providing support in the submission of applications. No policy has been drafted for this check.
Continuous residence (requirement)	A requirement laid down in policy rules, applicable to third country nationals applying for family reunification, who are not in their country of origin or a neighbouring country. Continuous residence is assumed to exist when family members, at the moment that the family reunification application is submitted or processed, reside in a country where they (1) have a residence permit for the duration of at least three months, (2) are legally entitled to await the outcome of a residence permit procedure, or (3) have already completed a residence permit procedure of which the outcome has become legally indisputable and a legal objection to expulsion exists.
Priority request	Request for priority processing of an application for family reunification which can be submitted to the IND.
Regular (family reunification) procedure	The Dutch family reunification procedure applicable to all third country nationals in which the more favourable provisions of chapter V of the FRD do not apply. This procedure falls under migration law and stricter requirements apply than for the asylum family reunification procedure for refugees which falls under asylum law. Applications based on the Netherlands' obligations under Article 8 ECHR are also considered under this procedure.







