The relevant date for considering the age of unaccompanied minor refugees for the purpose of family reunification

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1. Introduction

The present opinion has been formulated in light of a question submitted to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The case concerns the application of certain provisions of the Family Reunification Directive (henceforth also: FRD),[1] namely those creating more favourable conditions for unaccompanied minor refugees to obtain family reunification upon being recognised as a refugee in a European (EU) Member State.

The Administrative Jurisdiction Division of the Council of State (henceforth: the Council of State), the highest administrative court in the Netherlands, gave its interpretation on the right of family reunification of unaccompanied minors with their parents in two judgments of 23 November 2015.[2] It held that for the determination whether an applicant should be considered an unaccompanied minor, the moment of arrival in the host State is decisive. However according the Council of State events which take place following the arrival of an applicant in a Member State are also relevant for this determination. Here it refers to the fact that according to Article 2(f) FRD an applicant is no longer an unaccompanied minor if he is effectively taken into the care of an adult who has responsibility for him. Therefore the fact that the applicant has become an adult after arrival in the host State should be taken into account in the determination whether he is (still) an unaccompanied minor.

The District Court of Amsterdam was doubtful as to the correctness of this interpretation and has referred a preliminary question to the CJEU in order to clarify this issue. Specifically, the CJEU was asked to determine whether the term 'unaccompanied minor' used in Article 2(f) FRD is supposed to also include a minor applicant of a third country or a minor stateless person, who arrives in the state of destination unaccompanied by an adult responsible by law or custom who:

- Applies for asylum;
- Turns 18 years during the asylum procedure;
- Is granted asylum retroactively; and
- Applies for family reunification.[3]

The answer to this question is not only relevant for the Dutch context, but also for other EU Member States. The question of the relevant date regarding family reunification has been interpreted differently across Member States, and this inevitably creates a situation where a refugee has the right to family reunification in one Member State, but not in another. In some jurisdictions, the relevant date is the date of the application for family reunification; while, in others, it is the moment of the decision on the application for family reunification which is considered relevant.[4] This legal reality undermines the project of harmonisation, as there is no predictability regarding the outcomes an individual might experience at the EU level. A possible consequence of the current variation in implementation of this aspect of the FRD could be to encourage secondary movements

[1] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.
[2] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3711 and ABRvS 23 November 2015, ECLI:NL:RVS:2015:3712.
[3] Rb Amsterdam 26 October 2016, AWB 15/16252.
[4] European Migration Network, *Ad-Hoc Query on Age limit for Family Reunification*, December 2009.

of refugees seeking to achieve family reunification in Member States where more favourable conditions make this possible.

The argument in this opinion has the following structure. Section 1 constitutes an overview of the case being presented before the CJEU, and offers an analysis of relevant legislation and case law from the Netherlands on this and similar matters. The opinion then explores the purpose and objective of family reunification in section 2. It considers in particular the significance of the EU legislator having elected to recognise a specific right to family reunification for refugees in the Family Reunification Directive.

The primary contention in this case is the relevant date at which it can be said that the right to family reunification *exists*, and at which date it can be said to be *effective*. This is particularly difficult, because the relation between refugee protection and the time of the procedure is rather complex. On the one hand, someone is a refugee the moment he fulfils the refugee definition (often when he leaves his country of origin). However he or she is only recognised as a refugee in the asylum procedure and legal procedures to recognise someone as a refugee take time. Section 3, therefore, explores the declaratory nature of refugee status.

The case at hand bears witness to this problem of time, recognition and claiming one's rights; in fact, this problem comes probably nowhere as urgent to the fore as regarding the question of unaccompanied minor refugees and their right to family reunification with their parents. After all, only where there is a different legal regime for children does the question of lapse of time within the procedure arise. If a right only applies to people of a certain age, the time of the procedure becomes fundamental.

Section 4 is the corner stone of the argument put forward in this opinion that the moment of the application for asylum is the relevant moment in time to determine who is considered as an unaccompanied minor in Article 2(f) of the Directive. It is argued that principles of EU law do not allow for an understanding of the meaning of 'unaccompanied minor' in this provision that takes the date of the decision on the asylum application as the relevant moment. This becomes apparent after a scrutiny of the principles of effectiveness, equal treatment and legal certainty, the risk of manipulation by the Member State and the particular vulnerable character of unaccompanied minors.

The conclusion in section 5 summarises the overall findings of this opinion that the relevant moment for determining who is an unaccompanied minor in Article 2(f) FRD is the date of the application for asylum. The argument is that the family reunification for refugees is very important, yet that the determination of the rights attached to the refugee status is particularly difficult, especially where it concerns unaccompanied minors, because their rights are attached to a certain period of time in their life.

In this expert opinion, we repeatedly use the phrase 'aging out'. This expression is used to describe the specific phenomenon highlighted by the present case, wherein an individual (usually a minor) holds a right they are unable to exercise due to an externally imposed precondition. During the process of meeting this precondition, the minor reaches a (maximum) age limit - in this case 18 - and the right is rendered meaningless. For no other reason than the mere passage of time, a right previously held is lost; the individual has 'aged out'.

1.1. Facts of the case

This case involves an Eritrean girl, A.A., born on 2 June 1996. She applied for asylum in the Netherlands on 26 February 2014, at the age of 17. On 21 October 2014, Ms A.A., then 18 years old, was granted asylum in the Netherlands. Therefore, she received a residence permit retroactively dated from the moment of her application for asylum. She subsequently requested family reunification with her parents and her three minor brothers on 23 December 2014. Her father lives in Israel, while her mother and siblings are residing in Ethiopia. The relevant aspect of the case is that the applicant was an unaccompanied minor when she entered the Netherlands and applied for asylum, but was 18 years old when she applied for family reunification.

On 27 May 2015, the Immigration Service (IND) decided that the applicant could not benefit from the special provisions for unaccompanied minors, as she had already turned 18 at the moment of the application for family reunification. The applicant's lawyer made an objection against this decision with the IND (*bezwaar*). He highlighted the fact that the applicant was a minor when she left the country of origin, arrived in the Netherlands and applied for asylum. In his view, it is the date of her application for asylum which is decisive when determining the application for family reunification. On 13 August 2015, the IND rejected this reasoning, claiming instead that the age of the applicant at the date of application for family reunification is the decisive factor.

The applicant's lawyer lodged an appeal (*beroep*) against this decision before the District Court of Amsterdam. On 5 July 2016, the court decided that the case would be referred to a panel of three judges (*meervoudige kamer*). On 26 October 2016, the case was once again presented. The Court stated it doubted the correctness of the judgments of the Council of State of 23 November 2015. It specifically questioned whether the applicant can no longer be considered an unaccompanied minor and therefore be refused the right to family reunification, because she has become an adult after her arrival in the Netherlands.[5]

The District Court referred to the communication of the Commission to the European Council and Parliament containing guidelines for the application of the Family Reunification Directive 2003/86/EC. This communication highlights that, because the right to family reunification is the general rule, any deviation should be interpreted strictly. In these guidelines, the Court could not find any indication as to the correctness of the judgments of the Council of State, nor for the point of view that an unaccompanied minor cannot be referred to as such when s/he reaches adulthood after arrival in the Member State. The Court further pointed to the fact that, while the application for family reunification was made while she was an adult, her refugee status was granted retroactively, from a date at which she was still a minor.

Finally, the Court sought clarification from the CJEU on the correct procedure to follow when an unaccompanied minor applies for asylum and receives retroactive recognition as a refugee, but has turned 18 before being able to apply for family reunification.[6]

[5] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3711 and ABRvS 23 November 2015, ECLI:NL:RVS:2015:3712.
[6] Rb Amsterdam 26 October 2016, AWB 15/16252.

1.2 Relevant Dutch legislation

Under Dutch law, non-citizens, including refugees and asylum seekers, are subject to the Aliens Act 2000 (*Vreemdelingenwet 2000*). According to Article 1 Aliens Act 2000, a 'minor' is a person under the age of 18. Furthermore, Article 26 Aliens Act 2000 specifies that refugee status in the Netherlands is granted retroactively from the date of the application for asylum. It is on the basis of this provision and Article 28 Aliens Act 2000 that Ms. A.A. was granted asylum on the basis of Article 29(1)9b) Aliens Act 2000 (subsidiary protection) and received a residence permit valid for five years. According to Dutch law persons with a subsidiary protection status are granted exactly the same rights as persons recognised as a refugees.[7] This also applies to the right to family reunification. Therefore in the Dutch context, the special rules concerning the right to family reunification of refugees laid down in the Family Reunification Directive are applied to persons granted a subsidiary protection status.

Article 29(2)(c) Aliens Act 2000 mentions the conditions for family reunification of persons with a refugee status or subsidiary protection status and their family members. It states:

> A residence permit for a fixed period of time as referred to in Article 28 can be granted to family members if they, at the moment of arrival of the applicant, were a part of her family and arrived in the Netherlands at the same time as the applicant or three months after the applicant was granted her residence permit.

The parents of an unaccompanied minor in the meaning of Article 2(f) of the Family Reunification Directive are considered to be such family members.

It is thus possible for unaccompanied minors in the Netherlands to benefit from family reunification with their parents. However, in order to be eligible, the applicant must be recognised as a refugee or a person in need in subsidiary protection. This creates the risk that the unaccompanied minor will turn 18 during the asylum procedure. As it will be seen in the following section, aging out during the asylum procedure is interpreted by the Council of State as no longer being able to fulfil the stipulated requirements for family reunification.[8] Therefore, applicants will be denied family reunification with their parents on the ground that they are no longer minors, even though they were minors when they entered the Netherlands and applied for asylum and on the date of entry of their asylum permit.[9]

Interestingly, on 4 September 2016, the State Secretary of Security and Justice made a decision to broaden the possibility for parents who received an asylum status in the Netherlands to have family reunification with their adult children.[10] Indeed, it was recognised that an undesirable situation would arise if only the parents who could demonstrate 'more than normal emotional ties'[11] with their adult children could be considered eligible for family reunification. This would effectively

[7] Aliens Act 2000, Art 28.
[8] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3711 and ABRvS, 23 November 2015, ECLI:NL:RVS:2015:3712.
[9] Rb Den Haag (zittingsplaats Middelburg) 12 May 2016, ECLI:NL:RBDHA:2016:5513, Rb Den Haag (zittingsplaats Arnhem) 25 March 2016, AWB 15/22753 and Rb Den Haag (zittingsplaats Utrecht) 23 March 2016, AWB 15/17159.
[10] Stb. 2016, 46741.
[11] Ibid.

have the detrimental result of the adult child being the only member of the family left behind in the country of origin. Thus, it was decided that adult children who have been a constant part of the family before the parent's departure from the country of origin qualify for family reunification.[12] Therefore, it is demonstrable that while adult children with an asylum status in the Netherlands are not allowed to reunify with their parents, parents with an asylum status in the Netherlands are allowed to reunify with their adult children. Dutch law thus only acknowledges the need for unaccompanied adult children to be reunited with their parents if these children are left behind in the country of origin or a third country, but not if they are staying in the Netherlands.

1.3 Dutch case law

Dutch courts have issued several rulings with regard to the right to family reunification of minors or adults with their parents. They affirmed that Article 29(2) Aliens Act 2000 does not apply in their circumstances.[13] Several applicants in the Netherlands have already attempted to argue that, not the age at the moment of the application for family reunification, but the age at the moment the refugee flees his country of origin should be considered decisive in the determination whether he should be considered an unaccompanied minor.[14]

In its rejection of this submission, the Council of State referred to the definition of unaccompanied minor in Article 2(f) FRD:

> 'Unaccompanied minors' means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States.

The Council of State emphasises that according to this definition an applicant is no longer an unaccompanied minor if he is effectively taken into the care of an adult who has responsibility for him. According to the Council of State this means that events taking place following the arrival of an applicant in a Member State are relevant for the determination whether the applicant fulfils the definition of an unaccompanied minor.[15] The Council of State explicitly stated that there is no reason to disregard the fact that an unaccompanied minor turns 18 during the asylum procedure.[16] The Council of State also referred to the ratio behind family reunification of an unaccompanied minor with his or her parents: the continuation of parental care. It argued that this ratio no longer applies when the minor has reached adulthood during the procedure.[17]

[12] *Kamerstukken* II, 2014/15, 32 175, nr 57.
[13] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3711 and ABRvS 23 November 2015, ECLI:NL:RVS:2015:3712.
[14] Rb Den Haag (zittingsplaats Arnhem) 26 February 2015, AWB 14/28260.
[15] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3711.
[16] Ibid.
[17] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3712.

1.4 Conclusion

It can be inferred from the analysis of Dutch legislation and case law and that the current national interpretation of Article 29(2) Aliens Act 2000 leaves little or no room for family reunification for those unaccompanied minors who age out during their asylum procedure. In the present case, the District Court of Amsterdam questions this interpretation, as it does not seem to derive from Article 2 FRD.[18]

The next section will address the purpose of the Family Reunification Directive. It will be argued that it is not in line with the spirit of the Family Reunification Directive to interpret the term 'unaccompanied minor' restrictively by choosing the date of the application for family reunification as the relevant moment in time, as this entails the automatic exclusion of a large number of applicants who would age out during the time between their asylum application and family reunification application.

[18] Rb Den Haag 26 oktober 2016, ECLI:NL:RBDHA:2016:12824.

2. The purpose of the Family Reunification Directive

The Refugee Convention does not contain an explicit right to family reunification. However, it is recognised that refugees should be granted rights extending beyond mere protection by the host state, including, for example, the right to naturalisation[19] and personal status rights.[20] The 1951 Refugee Convention forms the basis of international protection in EU law, as noted in the Qualification Directive.[21] In the process of giving effect to the Convention, however, EU legislators have established provisions which unambiguously establish a right to family reunification in EU law.

The Family Reunification Directive is the primary instrument of EU law which gives effect to the right to family reunification and includes provisions specifically formulated for recognised refugees in Chapter 5. The Directive draws upon international legal instruments, noting in particular the ECHR and Charter of Fundamental Rights of the European Union (CFREU) when outlining the significance of the right it created.[22] It can be seen from the Preamble that family reunification was regarded as a means of ensuring that Member States meet their obligations to observe the right to family and private life.[23]

There is, of course, a margin of appreciation afforded to national governments to determine the precise conditions under which they will deem it appropriate to give effect to this right. A full consideration of relevant legal instruments alongside accompanying preparatory works and case law demonstrates that this margin of appreciation does not confer upon Member States a *carte blanche* to interpret their obligations restrictively. On the contrary, this chapter will demonstrate that Member States should formulate national provisions consistently with an expansive understanding of the right to family reunification.

2.1 The Directive

The Preamble to the Family Reunification Directive recognises the significance of family reunification for the integration of third country nationals within Member States. Where international law recognises the inviolability of the family in general, the Directive notes in particular that family reunification 'helps to create social cultural stability'[24] and 'serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty'.[25] The advantages of family reunification are not limited to an individual, or even third country national members of a family, but to the community of the host country as a whole. For refugees, the ability to rebuild one's life post flight will invariably entail the establishment of family life in the country of asylum. The family

[19] Convention Relating to the Status of Refugees, 1951 (Refugee Convention), Art 34.
[20] Ibid, Art 12.
[21] Council Directive 2011/95/EU 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) [2011] OJ L 337, recital no 3.
[22] Ibid.
[23] Recital no 2 Preamble FRD.
[24] Recital no 4 Preamble FRD.
[25] Ibid.

functions as an economic and social entity within society, providing a consistently nurturing and supportive environment for its members.[26]

It is submitted that the Council of the European Union recognised this when it drew attention to the situation of refugees in the Preamble, noting that not only equal protection but rather '*more favourable conditions*'[27] should be laid down for family reunification of refugees. The reason for such conditions is that refugees are by definition individuals who have been forced to flee their country of nationality and are regarded accordingly as having been denied the ability to exercise their right to enjoy family life for reasons beyond their control. In recognising this crucial dimension specific to the situation of refugees, the Council called upon Member States to assist refugees to re-establish their family lives once settled in the country of asylum.[28]

2.2 Preparatory works

A consideration of the Commission's preparatory works for the Family Reunification Directive further attests to the advantages of family reunification for Member States. Family members 'deepen the roots' of refugees, and facilitate a level of normalcy in an otherwise disrupted and uncertain period of such individual's lives.[29]

Also discussed in the preparatory works were international instruments which should be taken into account by Member States when exercising their discretion. The Commission drew its conclusions from principles identified in the Universal Declaration of Human Rights, and International Covenants of 1966 on Civil and Political Rights and on Economic and Social Rights, which outline that the family is the natural and fundamental unit of society.[30]

The Commission highlights European legal instruments such as the European Convention of Human Rights (ECHR), in particular Articles 8 and 12, which secure the right to respect for private and family life and the right to marry and found a family respectively. The preparatory works refer to the body of case law produced by the European Court of Human Rights (ECtHR), noting that whilst an unlimited right to family reunification cannot be deduced from the Court's judgments, national authorities also do not enjoy an unlimited discretionary power in measures intended to affect this right.[31] The Commission goes on to describe family reunification as 'indispensable'[32] for family life, further noting that in the particular case of refugees, family life in the country of origin is impossible, and therefore may only be brought about by family reunification.

Commenting on Article 1 of the Directive, the Commission restates the value of the right to family reunification for third country nationals residing lawfully in a Member State. Article 10 commentary affirms that refugees should be offered 'more favourable conditions' than other categories of third country nationals.[33] Elaborating on the exclusion of asylum seekers from the

[26] Recital no 6 FRD.
[27] Recital no 8 FRD (emphasis added).
[28] European Commission, 'Proposal for a Council Directive on the right to family reunification', COM (1999) 638 final, para 7.2.
[29] Ibid, para 2.2.
[30] Ibid, para 3.1.
[31] Ibid, Art 8.
[32] Ibid, para 7.2.
[33] Ibid, Art 10(2).

scope of the Directive, the commentary recognises that the outcome of asylum applications cannot be predicted in advance, and therefore family reunification is restricted to those who have obtained the requisite residence permit.[34]

It is further submitted that the comments on Article 5 FRD, proposing a '*de jure'* and '*de facto*' assessment of the relationship between minors and ascendant dependents, indicates that it is not in line with the spirit of the Directive to interpret the relevant date restrictively, as this entails the automatic exclusion of a large number of applicants who would age out during the time between their asylum application and family reunification application. The commentary is so clear in delimiting restrictions to eligibility that a restrictive interpretation of the relevant date becomes difficult to reconcile with the Directive, the preparatory work and additional commentary.

2.3 Case law of the CJEU

The CJEU has established that fundamental rights form an integral part of the general principles of EU law. In *Parliament v Council*[35] the Court assessed the compatibility of provisions of the Family Reunification Directive with fundamental rights. The Court affirmed that the general principles by which Member States are bound extend to and include fundamental rights. This determines the extent of Member States' discretion when implementing EU law, as they are bound to apply the rules 'as far as possible'[36] in accordance with such requirements.

Parliament v Council demonstrates the importance of fundamental rights generally within EU and national legislation. In a subsequent case addressing the nature of the right to family reunification, the CJEU considered the extent of the discretion enjoyed by Member States. In *Chakroun*[37] the Court stated that since authorisation of family reunification is the general rule, derogations should be interpreted strictly. The Court further emphasised that the obligations imposed upon Member States require them, in some cases, to authorise family reunification 'without being left a margin of appreciation'.[38] Noting the Court's emphatic support for family reunification outlined in the judgments above, it is clear that to afford a restrictive interpretation would be to undermine the objective of the Directive, which the Court noted is fundamentally 'to promote family reunification'.[39]

It is noted that international legal instruments concerning fundamental rights do not include an explicit right to family reunification. In devising legislation in conformity with its international legal obligations, however, the EU deemed it necessary and appropriate to create a right to family reunification. Therefore, this right should inform the development of domestic legislation as far as possible. The next sections will address the right to family life under the Refugee Convention and the ECHR, which have been important sources of inspiration of EU migration law in general and the Family Reunification Directive in particular.

[34] Ibid, Art 3(2)(a).
[35] CJEU Case C-540/03 *European Parliament v Council of the European Union* [2006].
[36] Ibid, para 105.
[37] CJEU Case C-578/09 *Rhimou Chakroun v Minister van Buitenlandse Zaken*, [2010].
[38] Ibid, para 41.
[39] Ibid, para 43.

2.4 The Refugee Convention

The Refugee Convention does not contain an explicit right to family reunification. The drafters of the Convention did however recognise the importance of family unity through several articles. This includes the protection of personal status rights, particularly those attached to marriage, in Article 12, the right to family welfare in Article 24 and the rights to religious and public education of children in Articles 4 and 22.

In addition, refugees' right to family life is considered essential in the recommendations of the Conference of Plenipotentiaries. The recommendations provide that the family is the natural and fundamental group unit of society. Governments are recommended to take necessary measures to protect the refugee's family and ensure that the unity of the family is maintained.[40] During the drafting of the recommendations, one representative noted that it might be wise to include this reference, even though it was an 'obvious proposition' that assistance of refugees also includes assistance to their families.[41]

It follows that the intention of the Refugee Convention drafters was to protect the unity of the family. The recommendations should also be read in conjunction with the aim of the Convention, which is to 'assure refugees the widest possible exercise of these fundamental rights and freedoms'.[42]

In the 2016 UK Upper Tribunal case *AT and another (Article 8 ECHR - Child Refugee - Family Reunification),*[43] the Tribunal considered the consequences of a policy prohibiting two 16 and 19 year old Eritrean siblings from being able to reunite with their mother in the UK. Judge McCloskey highlighted that a potential outcome of the prohibition could be that the refugee departs from the country of asylum [UK] in the hope of securing reunification of the family in another country. The President of the Upper Tribunal noted with concern that the prohibition would 'deprive him of the protection which he has obtained as a result of being recognised a refugee',[44] and that such an outcome would be incompatible with the philosophy and rationale of the Refugee Convention. The gravity of such an outcome merited serious consideration by the Tribunal. Judge McCloskey, in determining that the Secretary of State for the Home Department had an obligation to consider the applicants eligible to apply for family reunification, considered this possibility to be 'far from fanciful'.[45] It is proposed that this judgment further attests to the nature of the right to family reunification as a corollary right to those which are explicitly outlined in the Convention.

As well as being emphasised in various sources of EU and international law, the importance of family reunification has been historically and repeatedly confirmed by UNHCR. The organisation

[40] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 1951, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952, Recommendation B.
[41] Paul Weis (ed.), *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary* (Cambridge, Cambridge University Press, 1995), p 380.
[42] Refugee Convention, Preamble, see 'Considering n. 2'.
[43] *AT and another (Article 8 ECHR - Child Refugee - Family Reunification)* Eritrea [2016] UKUT 227.
[44] Ibid, para 38.
[45] Ibid.

has called upon States to take action to assist refugees in re-establishing family unity post flight since its Executive Committee adopted its first conclusion regarding this question in 1977.[46]

In 2001 as a part of UNHCR's Global Consultations on International Protection, a group of judges, practitioners, academic experts, government officials and NGO representatives met to discuss family reunification. The group agreed that there is a right to family unity which applies to all human beings, including refugees. The roundtable concluded that 'respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated'.[47]

Like all refugee law, the Refugee Convention should be interpreted considering the evolution of international law, including related treaties/agreements and state practice. Regarding the right to family unity, there has been a progressive development in the international law of family reunification. Today it is widely recognised that states have an obligation to reunite close family members who are unable to enjoy the right to family life elsewhere.[48]

Even though there is no explicit right of family reunification in the Refugee Convention, this right arises from the interaction with other law. As a result, the rationale for Contracting parties to admit family members is connected to the refugee recognition.

2.5 The European Convention of Human Rights

The right to family life is protected under Article 8 ECHR. For non-citizens, the Article primarily prevents family separations in cases of removal or deportation, but may also give a right to family reunification. As a general principle, states have the right to control the entry of non-nationals into its territory and Article 8 does not impose a general obligation to authorise family reunification.[49] Under certain conditions, it is possible to make an exception from the main rule and give a right to family reunification within the territory of the Contracting State. This is the case when it is difficult for the family to reunite in any other country. The degree of difficulty that is required has varied between different cases: in *Gül v Switzerland,* family reunification in the Contracting State had to be the 'only way' for the family to reunite,[50] whilst it being the 'most adequate means' was sufficient in *Tuquabo-Tekle and others v the Netherlands.*[51] In *Abdulaziz and others v the United Kingdom* 'obstacles' or 'special reasons' were instead required.[52]

In *Tuquabo-Tekle and others v the Netherlands*, the ECtHR recognised the special situation of refugees under Article 8 of the ECHR. The Government argued that the applicant, Mrs Tuquabo-Tekle, was not entitled to family reunification since she chose to leave her daughter behind in the

[46] Executive Committee*, Conclusions Nos. 1* (*XXVI*),1975, para. f. See also, *Conclusions Nos. 9 (XXVIII*), 1977; 24 (XXXII), 1981; 84 (XLVIII), 1997; 85 (XLIX), 1998, paras u–x; 88 (L), 1999.
[47] UNHCR Global Consultations on International Protection*, Summary Conclusions on Family Unity*, Geneva Expert Roundtable (8-9 November 2001), para 5.
[48] K Jastraam and K Newland*, '*Family Unity and Refugee Protection' in: E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's global consultations on international protection* (Cambridge, Cambridge University Press, 2003).
[49] ECtHR 28 May 1985, *Abdulaziz v United Kingdom*, Appl no 9214/80, paras 67-68.
[50] ECtHR 19 February 1996, *Gül v Switzerland*, Appl no 23218/94, para 39.
[51] ECtHR 1 March 2006, *Tuquabo-Tekle and others v the Netherlands*, Appl no 60665/00, para 47.
[52] ECtHR 28 May 1985, *Abdulaziz v United Kingdom*, Appl no 9214/80, para 68.

country of origin. The ECtHR stated that it was 'questionable to what extent it can be maintained in the present case, as the Government did, that Mrs Tuquabo-Tekle left her daughter behind of 'her own free will', bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad following the death of her husband'.[53] In cases concerning migrants without refugee status, the ECtHR has stressed the (im)possibility of the applicant to return to his or her country of origin and develop a family life there.[54] In *Bah v the United Kingdom*, the Court stated that 'immigration status where it does not entail, for example, refugee status, involves an element of choice'.[55] Since refugees, unlike other migrants, have experienced forced migration, they have a particularly strong right to family reunification under Article 8 of the ECHR.

2.6 Conclusion

A range of EU and international legal sources demonstrates the significance attached to the right to family reunification for refugees, and indicates that this right should be afforded an expansive interpretation by Member States when developing national provisions. The fact that refugees are not subject to the same waiting times and integration requirements as other would be applicants for family reunification indicates that the Directive intended to create expansive conditions for family reunification for refugees. This also applies to the underlying reason for the exclusion of asylum seekers from the scope of the Directive, namely that their future possession of a residence permit cannot be prior determined.

The Directive does not create an unlimited right to family reunification for all refugees and Member States continue to be best placed to develop domestic provisions which reflect the national interest. It is noted, however, that family life for refugees is not merely more difficult, but impossible, in the country of origin. For this reason, domestic provisions should interpret factors such as the relevant date for eligibility for family reunification expansively, so as to ensure that refugees do not encounter such matters as a barrier to family life in the country of asylum.

The question remains however, and will turn out to be rather complicated, how this right of family reunification for refugees relates to time. This will be the subject of the next section.

[53] ECtHR 1 March 2006, *Tuquabo-Tekle and others v the Netherlands*, Appl no 60665/00, para 47.
[54] ECtHR 19 February 1996, *Gül v Switzerland*, Appl no 23218/94, para 41.
[55] ECtHR 27 September 2011, *Bah v the United Kingdom*, Appl no 56328/07 para 45.

3. The declaratory nature of the refugee status

Since refugee status is declaratory, a refugee becomes a refugee the moment he fulfils the refugee definition and, often, this is the moment when he departs from the country of origin. As evidenced in section 2 of this expert opinion, refugees have a right to family life under international law. However, due to asylum seekers' uncertain prospects of a residence permit, this right cannot be exercised during the asylum procedure. It must be noted, though, that the right to family reunification is connected to the individual's refugee status, and not to the State's recognition of such status.

In this opinion, the question of *when* the refugee can apply for family reunification with his parents is not a point of discussion, as the FRD clearly stipulates in Article 3 that only recognised refugees can apply for family reunification. Indeed, the relevant issue is not the question of when the refugee can apply for the reunification, but rather whether he only has the right from the *moment he is recognised* as a refugee. Often this difference in time is of no significance; yet, for unaccompanied minors, the aging out during the procedure has critical consequences since a different legal regime applies for the reunification of adults with their parents. If the definition of 'minor' in Article 2(f) FRD were not to be interpreted as including everyone who is a minor when arriving on the territory of the Member State, this would in many cases result in the refugee aging out of eligibility. Therefore, a right the refugee was entitled to when entering the territory could be permanently lost because of the asylum procedure.

3.1 Declaratory nature of the refugee status

At a universal level, refugee status is governed by the 1951 Refugee Convention and its 1967 Protocol.[56] Such status is declaratory, not constitutive. As highlighted by Hathaway, refugee status arises from the nature of one's predicament rather than from a formal determination of status:[57]

> As a fundamental principle, the acquisition of refugee rights under international law is not based on formal status recognition by a state or agency, but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition.[58]

As affirmed by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 'a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition'.[59] This occurs prior to the moment at which refugee status is formally

[56] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, p 137; UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol 606, p 267.
[57] J Hathaway*, The Rights of refugees under International Law* (Cambridge, Cambridge University Press, 2005), pp 11 and 278.
[58] Ibid, p 11.
[59] UNHCR, '*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992), para 28.

determined. Recognition of refugee status does not therefore make an applicant a refugee, but declares him/her to be one. Asylum seekers do not become refugees because of recognition, but are recognised because they are refugees.[60] This view is supported by provisions of the EU Qualification Directive which recognises that, when a claimant enters a Member State, they must be treated as putative refugees, possessing certain rights on arrival.[61] Furthermore this is recognised by the Dutch asylum system as the asylum status (of refugees and persons in need of subsidiary protection) is granted retrospectively from the date of the asylum application.[62]

The declaratory nature of refugee status has also been recognised by domestic courts across Europe in cases involving asylum seekers' entitlement to exercise a series of rights. Very recently, the Belgium Labour Tribunal found that the declaratory nature retroactively affected an applicant's rights concerning social integration, so that she had access to an integration income from the moment she requested social assistance, even though at that time the applicant had not yet been recognised as a refugee.[63]

The Court of Session in Scotland further elaborated on the declaratory character of refugee status, pointing out the special circumstances in which the refugee finds himself, when compared to a foreign student or a worker. In light of such vulnerability, international and humanitarian obligations require the state to facilitate their assimilation and naturalisation.[64]

Recognition of the declaratory character of refugee status does not intend to undermine the necessity of a refugee determination status procedure. This is vital to a person's protection and status[65] for the fact that, only after gaining this status, a refugee is entitled to the full enjoyment of the rights flowing from the Convention. However, the eligibility procedure merely acknowledges a pre-existing quality, since a person is a refugee due to the facts which compelled them to flee their home country and not by the host State's legal decision granting refugee status.[66]

As highlighted previously, asylum seekers have a right to family life but are excluded from the scope of the Family Reunification Directive since the outcome of their asylum application cannot be predicted in advance. This situation, wherein immediate access to a right is impeded by an administrative procedure, can be compared to the refugee's predicament during the process of flight: in principle, he is entitled to protection, but is not able to claim such right until he has reached the territory of a Contracting State.[67]

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[60] Ibid.

[61] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted L 304/12, recital 14; also see International Association of Refugee Law Judges, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive- Judicial criteria and standards* (March 2013).

[62] Art 44(2) Aliens Act 2000.

[63] Tribunal du Travail Francophone de Bruxelles 16 April 2015, – Jugement définitif no 15/4960.

[64] Scottish Extra Division, Inner House, Court of Session, *A v the Secretary of State for The Home Department*, P1025/14, [2016] CSIH.

[65] K Staples, *Simplifying refugee status determination* (January 2016).

[66] Amnesty International, *Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection, COM (2001) 510* final (October 2002).

[67] J Hathaway and M Foster, *The Law of the Refugee Status* (Cambridge, Cambridge University Press, 2014).

Since refugee status has not yet been declared during the asylum procedure, the asylum seeker is potentially both a refugee and not a refugee at the same time. However, as soon as the refugee has been recognised as such, he is treated as a person who has been a refugee during the entire asylum procedure. In other words, the refugee's earlier condition as potentially being both a refugee and not a refugee is erased retrospectively once the refugee status is recognised.

Clearly, the procedure of recognising the refugee status is a lengthy process involving assessment of various aspects of the applicant's narrative and the conditions in their country of origin. However, it is undeniable that if a minor turns 18 during the refugee status determination procedure, his right is in substance affected by the time of the process. While recognising the inevitability that the asylum procedure requires time, losing a human right permanently as a consequence of such procedure is not legally necessary. It is highly problematic that a procedure which, in principle, is meant to grant rights to the individual, effectively negates them as a result of a technicality. This view is supported by provisions of the recast Asylum Procedures Directive (henceforth also: APD) which require a fast asylum procedure, as asylum seekers should not lose their rights due to a long procedure.[68] Section 4 will consider this issue in greater detail.

3.2 Conclusion

For refugees aging out during their asylum procedure, the question of the relevant date for their right to family reunification is very important. Seen from the perspective of the declaratory character of the refugee status, this question cannot be easily resolved. After all, refugees generally have the rights from the moment they fulfil the refugee definition. Yet simultaneously, the application for certain rights is conditional upon the moment someone is *legally recognised* as a refugee. This section argued that it is problematic that refugees lose rights to which they were entitled at the moment they applied for asylum, because of the fact that their refugee status had to be assessed during the asylum procedure. Several national courts also recognised that because of the declaratory nature of the refugee status, refugees should be granted rights retrospectively.[69]

In the next section, it will be argued that principles of European law do not allow for an understanding of unaccompanied minors which takes the moment of the decision on the asylum application as the relevant moment in time.

[68] Art 31(3) of 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) (Asylum Procedures Directive) [2013] OJ L 180/60.

[69] Tribunal du Travail Francophone de Bruxelles 16 April 2015, – Jugement définitif no 15/4960, Scottish Extra Division, Inner House, Court of Session, *A v the Secretary of State for The Home Department*, P1025/14, [2016] CSIH.

4. Principles of EU law

The Family Reunification Directive created a right to family reunification. This right is not intended to be merely advisory, but rather capable of being relied upon directly by refugees who meet the eligibility criteria outlined in the Directive. Recognition as a refugee following a national asylum recognition procedure is an essential precondition for recourse to the provisions of the Family Reunification Directive. This requirement is an administrative necessity, and is not disputed. However, the impact of this procedure on the individual rights of the refugee does warrant scrutiny. Indeed, in the specific circumstances of the case in which the District Court of Amsterdam referred its preliminary question, the impossibility for the applicant to enjoy her rights deriving from the status of unaccompanied minor was caused by the length of time taken by the Dutch authorities to process her asylum application. In order to be able to exercise her right to family reunification, she was exclusively dependent on the national administration.

In this section, it is argued that several principles of European law do not allow for an understanding of the notion of unaccompanied minor in the Family Reunification Directive which takes the moment of the application for family reunification as the relevant moment in time. It will address the principle of effectiveness, the principle of equal treatment, the principle of legal certainty, the risk of manipulation by the Member States and the vulnerability of unaccompanied minors. However, first EU legislation with regard to time limits in asylum procedures will be discussed.

4.1 Time limits for decision-making in the asylum procedure

According to the Asylum Procedures Directive, a decision on an asylum claim is to be made as soon as possible.[70] In addition, Article 31(3) APD specifies that the first instance examination procedure should be concluded within 6 months of lodging an application. This time limit may be extended by a further 9 months in certain circumstances and exceptionally by an additional 3 months when it is necessary to ensure an adequate examination. The maximum time limit is set at 21 months from the lodging of the application.[71] The Netherlands implemented these time limits in the Aliens Act 2000.[72]

While the Directive has regulated time limits in asylum procedures to some extent, practice across Europe illustrates that these deadlines are not strictly observed.[73] Although extensions to the time limits may be legitimate under certain circumstances,[74] the delay appears to be a common practice within national administrations.[75]

[70] Art 5(4) FRD.
[71] Art 31(5) APD.
[72] Art 42 Aliens Act 2000.
[73] Crucially, the Directive does not include procedural consequences for the authorities' failure to comply with the time limits. However, cases where decisions were not made within the time frame have been successfully challenged in the form of action for performances.
[74] Art 31(3) APD.
[75] European Database of Asylum Law, *Justiciable rights stemming from delays in first instance determination decisions* (4 November 2016).

In 2015 and in the beginning of 2016, the Dutch IND did not succeed in complying with the six-month time limit in many asylum cases.[76] This was due to the high influx of asylum applicants during that period. For that reason, the State Secretary decided in February 2016 to extend the time limit in all asylum cases from 9 months to 15 months.[77] Furthermore, he decided in November 2015 to make a distinction between different categories of asylum cases with regard to the speed of the asylum procedure. Asylum applications of persons who could be transferred to another EU Member State under the Dublin Regulation[78] and of persons from safe countries of origin would be processed quickly.[79] The purpose of this measure was to deter these persons from coming to the Netherlands, and to make room in the reception centres for persons in need of international protection.[80] The Secretary of State also introduced the possibility to apply a simpler and quicker asylum procedure for applications with a high chance of success (applicants from Syria and Eritrea) in the Aliens Decree.[81] However, this procedure was never applied in practice. As a consequence, Syrians, Eritreans and other applicants with a high chance of success had to wait for long periods of time before they could begin the asylum procedure and ultimately be recognised as refugees.

4.2 Effectiveness of the right to family reunification

According to the EU principle of effectiveness, 'a national procedural rule [..] must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order'.[82] The application of such a principle to the present case should mean that persons applying for family reunification should be in a position to avail themselves of the rights conferred on them by the Family Reunification Directive.[83] This implies that the length of the asylum procedure should not undermine the purpose of the Directive itself, which affirms the right of family reunification as particularly important for refugees, and fundamental for unaccompanied minors.[84]

The text of the Family Reunification Directive does not make clear which moment in time (the asylum application, the date of the grant of the asylum status or the date of the application for family reunification) is decisive for the decision whether a person is an unaccompanied minor for the purposes of family reunification. Nevertheless, it follows from the CJEU's judgment in *Noorzia*[85] that this margin of discretion is 'subject to the requirement not to impair the effectiveness of EU law'. Since respect for the effectiveness is one of the driving principles in the implementation of the

[76] *Kamerstukken II* 2015-2016 19637, 2124, p 2.
[77] *Kamerstukken II* 2015-2016 19637, 2124, p. 2.
[78] 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) [2013] OJ L 180/31.
[79] Art 3.109ca Aliens Decree, *Kamerstukken II* 2015- 2016 19637, 2086.
[80] Nota van Toelichting bij het besluit van 17 februari 2016 tot wijziging van het Vreemdelingenbesluit 2000, *Stb.* 2016, 87, p 9.
[81] Art 3.123a Aliens Decree.
[82] CJEU Case C-429/15 *Danqua* [2016], para 39.
[83] CJEU Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* [2014], para 16, CJEU Case C-429/15, *Danqua* [2016], para 39.
[84] Recital no 8 Preamble FRD.
[85] CJEU Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* [2014], para 16.

Family Reunification Directive, this can be interpreted as being the limit to the discretion exercisable by Member States.

This view is also supported by the ECtHR, as the Court has explicitly recognised promptness, flexibility and effectiveness as guarantees to be provided in the family reunification procedure.[86] Such criteria represent determining factors in the exercise of a fair balance between the applicants' interest and the right of the State to control immigration.

The length of the asylum procedure is generally not determined by the applicant, but by the State authorities. However, it is this factor which determines whether or not an unaccompanied minor will enjoy the right to family reunification. In light of the consequences of such delay highlighted in the present case, it is clear that this undermines the effectiveness of the right to family reunification.

4.3 Equal treatment of persons with an asylum status

In its judgment in *Noorzia,* the CJEU indicated that the decision on which date is used to determine whether a person has the right to family reunification must comply with the principle of equal treatment.[87] The right to family reunification of a refugee is effectively suspended pending the outcome of the asylum procedure. The duration of such suspension will vary from case to case, as there is, of course, considerable variation in the length of time it may take a national authority to reach a decision on an individual application.

As explained in section 4.1, in the Dutch situation the length of the asylum procedure depends not only on the complexity of the individual case. It also depends on the country of origin of the asylum applicant. First of all, a political choice has been made to give preference to asylum applicants who have a low chance, resulting in longer waiting periods for people who are more likely to be recognised as refugees. Furthermore, the assessment of applications of asylum applicants from certain countries of origin may take longer than others because they need more research by the IND, due to a lack of country of origin information or a lack of interpreters.[88]

In light of the above, it is clear that taking the age of a person on the date he receives his asylum status as the point of reference for his right to family reunification will lead to unequal treatment of asylum applicants on individual grounds and/or on the basis of country of origin. There is no justification for this difference in treatment.

4.4 The EU principle of legal certainty

The Family Reunification Directive further requires Member States to handle an individual's affairs transparently and fairly, in order to offer appropriate legal certainty to those concerned.[89] Furthermore, the CJEU indicated in its judgment in *Noorzia* that the decision on which date is

[86] ECtHR 10 July 2014 *Seniguo Longue and Others v France*, Appl no 19113/09, para 75.
[87] CJEU Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* [2014], para 17.
[88] Compare CJEU C-175/11 *H.I.D and B.A.*[2013], para 26-27, where it is noted that the Irish Minister 'may, where he considers it necessary or expedient to do so, give a direction in writing to the Refugee Applications Commissioner and/or to the Refugee Appeals Tribunal requiring either or both of them [..] to give priority to certain categories of applications'.
[89] Recital no 13 Preamble FRD.

considered relevant to determine whether a person has the right to family reunification must comply with the principle of legal certainty.[90]

The EU principle of legal certainty requires an individual to be able to regulate their conduct in light of the foreseeability of their actions. However, the duration of the asylum procedure is dependent on many factors beyond the control of the applicant. It is submitted that the circumstances to be taken into account should be those existing at the moment of the asylum application. This is the most certain way of protecting individuals from unforeseeable or arbitrary outcomes. The reasoning has been applied by the CJEU, which stated:

> The condition relating to the date of lodging the application makes it possible to guarantee that all applicants who are in the same situation chronologically are treated identically, by ensuring that the success of the application depends principally on circumstances attributable to the applicant and not to the administration, such as the length of time taken considering the application.'[91]

4.5 Risk of manipulation by the Member States

EU Member States may use time limits in asylum procedures (quick procedures for applicants with a low chance of success and longer asylum procedures for applicants with a high chance of success) to deter persons from seeking asylum. It is not submitted that, in the present case, the Dutch authorities intentionally delayed the decision for the purpose of excluding the applicant from the family reunification process. However, as noted by the European Commissioner of Human Rights, a restrictive interpretation of the relevant date creates the *possibility* for national authorities to do so.[92]

Accordingly, it is submitted that circumstances arising from the behaviour of the national administration should not be capable of changing or negating a right which is in principle granted and which, in the present case, was held by the applicant when she presented as an unaccompanied refugee minor in the Netherlands. The CJEU has held in its judgment in *Laub* that the parties to the proceedings should not be penalised because of a failure to comply with procedural rules 'when this non-compliance arises from the behaviour of the administration itself'.[93] This judgment concerned the requirement for exporters to provide the necessary documents in order to obtain a refund. The CJEU considered that the principle of good administration would be violated if the authorities would hold it against the exporter that he did not provide such documents, if he was not granted the opportunity to produce the necessary documentation. The Court further held that it would be against the objectives of the relevant Regulation 'if the actions of the competent authority were able

[90] CJEU Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* [2014], para 17.
[91] Ibid, para 18.
[92] European Commissioner of Human Rights, *Time for Europe to get migrant integration right* (May 2016), p 13. He states that the 'inclusive family reunion policies' of the Member States 'are being misinterpreted as major "pull factors"'. See also European Commissioner of Human Rights, *Restrictive laws prevent families from reuniting*, November 2011, where he suggests that family reunification procedures are delayed intentionally.
[93] CJEU Case C-428/05 *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas* [2007], para 25.

to prevent exporters of agricultural products from benefiting from the system of export refunds, when they fulfil the conditions set out in that regulation and are acting in good faith'.[94]

The case referred to the CJEU by the District Court of Amsterdam shows the risk of delaying the decision to grant asylum: the lapse of time of six months for a decision to be taken on the applicant's asylum application resulted in an 'implied decision' on the part of the Dutch authorities on the (future) application for family reunification. This procedure tacitly undermines the obligation on States to provide an individual examination of the family reunification application, which cannot whatsoever be automatically refused by exceeding a given threshold[95], being, in this case, the age of the applicant.

4.6 Vulnerability of unaccompanied minors

The recast Asylum Procedures Directive requires Member States to identify vulnerable asylum applicants and to provide them with the necessary procedural guarantees and reception conditions.[96] Unaccompanied minors are considered to be vulnerable persons.[97] Therefore the recast Asylum Procedures Directive states that asylum cases of unaccompanied minors may be prioritised.[98] For asylum applicants it is difficult to wait for an asylum decision, knowing that they can only reunite with their family members (who are often in danger) after they have received their asylum status. According to the European Commissioner for Human Rights, 'for couples and families willing but unable to reunite, separation causes severe stress, social isolation and economic difficulties that prevent a normal life for both those who have left and those who are left behind'.[99] This applies also to unaccompanied minors, especially if they know that they will soon turn eighteen and lose their right to family reunification. Taking the date of the asylum application as the point of departure for his right to family reunification will provide the unaccompanied minor at least with legal certainty[100], meaning that he knows that he will not age out. Therefore this would take into account the vulnerability of unaccompanied minors and the best interest of the child, guaranteed by Article 24 of the Charter.

4.7 Conclusion

In conclusion, this section has highlighted that the restrictive interpretation of the relevant date affects a small category of people who are not mentioned in the Family Reunification Directive as being intended to age out during the procedure; their exclusion following the passage of time is

[94] Ibid, para 26.
[95] CJEU Case C-578/09 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010], para 48.
[96] See Art 24 APD and Arts 21-22 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180/96 (recast Reception Conditions Directive, also RCD).
[97] Arts 25 and 31(7)(b) APD and Art 21 RCD.
[98] Art 31(7)(b) APD.
[99] European Commissioner of Human Rights, *Time for Europe to get migrant integration right*, May 2016, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da596, p 13.
[100] See also section 4.4 of this expert opinion.

incidental. As noted, this creates arbitrary outcomes for individuals depending not only on personal circumstances, but also on which EU Member State is considering their asylum application.

It is submitted in this section that taking the date of the asylum application as the point of departure for the right to family reunification of an unaccompanied minor would best ensure that EU general principles are respected for the following reasons:

- If the date of the grant of the asylum status is decisive for the right to family reunification of an unaccompanied minor, the length of the asylum procedure determines whether or not an unaccompanied minor will enjoy the right to family reunification. In most cases it is not the applicant but the State which determines the length of the asylum procedure. This undermines the effectiveness of the right to family reunification.
- Taking the age of a person on the date he receives his asylum status as the point of reference for his right to family reunification will lead to unequal treatment of asylum applicants on individual grounds and/or on the basis of country of origin. Applicants from certain countries of origin or with more complex asylum cases will have to wait longer for their asylum decisions than others and therefore run a higher risk to age out. Taking the date of the asylum application as the point of reference guarantees that all applicants who are in the same situation chronologically are treated identically.[101]
- Taking the date of the asylum application as the point of reference also best guarantees legal certainty. It makes it foreseeable whether an unaccompanied minor will have the right to family reunification if he qualifies for international protection. This way, the right to family reunification is not dependent on the length of the procedure which is beyond the control of the applicant.[102]
- Time limits in asylum procedures may be used by States to deter persons from seeking asylum and thus often depend on political choices. If the date of the grant of the asylum status is decisive for the right to family reunification, this creates the *possibility* for national authorities to delay the asylum decision in order to reduce the number of persons eligible for family reunification.[103] It follows from the CJEU's judgment in *Laub* that circumstances arising from the behaviour of the national administration should not be capable of changing or negating a right which is in principle granted.[104]
- Taking the date of the asylum application as the point of departure for their right to family reunification takes into account the vulnerability of unaccompanied minors and is in the best interest of the child, guaranteed by Article 24 of the Charter. It provides unaccompanied minors certainty that they will not age out during the asylum procedure. Uncertainty about the right to family reunification may cause severe stress to unaccompanied minors.[105]

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[101] Compare CJEU Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* [2014], para 17.
[102] Ibid.
[103] European Commissioner of Human Rights, *Time for Europe to get migrant integration right* (May 2016), p 13. He states that the 'inclusive family reunion policies' of the Member States 'are being misinterpreted as major "pull factors"'. See also European Commissioner of Human Rights, *Restrictive laws prevent families from reuniting*, November 2011, where he suggests that family reunification procedures are delayed intentionally.
[104] CJEU Case C-428/05 *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas* [2007], para 25.
[105] European Commissioner of Human Rights, *Time for Europe to get migrant integration right*, May 2016, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da596, p 13.

5. Conclusion

The present opinion has been formulated in light of a question submitted to the CJEU for a preliminary ruling by the District Court of Amsterdam. The District Court asked the CJEU to determine whether the term 'unaccompanied minor' used in Article 2(f) FRD is supposed to also include a minor applicant of a third country or a minor stateless person, who arrives in the state of destination unaccompanied by an adult responsible by law or custom who applies for asylum, turns 18 years during the asylum procedure, is granted asylum retroactively and applies for family reunification.

The reason for the District Court to ask this question was that Dutch legislation and the case law of the Council of State[106] leaves little or no room for family reunification for those unaccompanied minors who age out during their asylum procedure. In the present case, the District Court of Amsterdam questions this interpretation, as it does not seem to derive from Article 2 FRD.[107]

The purpose of the Family Reunification Directive

This expert opinion first addressed the objective of the Family Reunification Directive. The right to family reunification laid down in the Directive does not only aim to protect the private and family lives of refugees, but also to promote the integration of refugees in the country of asylum. The Preamble to the Directive and the preparatory works in particular emphasise the social cohesion benefits of family reunification. [108] The Directive lays down more favourable conditions for family reunification of refugees, because they cannot exercise family life in their country of origin.

It was argued on the basis of the CJEU's case law that the right to family reunification as laid down in the Directive should be interpreted expansively. It follows from the CJEU's judgment in *Chakroun* that derogations from authorisation of family reunification as the general rule should be interpreted strictly.[109] Furthermore in *Parliament v Council* the CJEU reiterated that the general principles by which Member States are bound extend to and include fundamental rights.[110] This limits the extent of Member States' discretion when implementing EU law, as they are bound to apply the rules 'as far as possible' in accordance with such principles.[111]

It was highlighted that an expansive interpretation of the provisions of the Family Reunification Directive is in conformity with the Refugee Convention, which protects rights related to family and private life such as personal status rights including marriage, and the right to education.[112] In 2016 the UK Upper Tribunal recognised that the denial of the right of family reunification to refugees may have as a result that the refugee leaves the country of asylum in order to secure family reunification elsewhere.[113]

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[106] ABRvS 23 November 2015, ECLI:NL:RVS:2015:3711 and ABRvS 23 November 2015, ECLI:NL:RVS:2015:3712.
[107] Rb Den Haag 26 oktober 2016, ECLI:NL:RBDHA:2016:12824.
[108] European Commission, 'Proposal for a Council Directive on the right to family reunification', COM (1999) 638 final, paras 2.2, 3.1, 7.2, Recitals nos 2, 4, 6 and 8 Preamble FRD.
[109] CJEU Case C-578/09 *Rhimou Chakroun v Minister van Buitenlandse Zaken*, [2010].
[110] CJEU Case C-540/03 *European Parliament v Council of the European Union* [2006].
[111] Ibid, para 105.
[112] See Arts 4, 12, 22 and 24 FRD.
[113] *AT and another (Article 8 ECHR - Child Refugee - Family Reunification)* Eritrea [2016] UKUT 227.

Finally, the expert opinion showed that the ECtHR takes into account in its assessments under Article 8 ECHR whether family life can be established in another country.[114] In its judgment in *Tuquabo-Tekle* the ECtHR recognised the unique situation of refugees, as family life is impossible in the country of origin.[115]

The declaratory nature of the refugee status

Section 3 examined the declaratory nature of the refugee status. This means that asylum seekers do not become refugees because of recognition, but are recognised because they are refugees.[116] The EU Qualification Directive recognises that, when a claimant enters a Member State, they must be treated as putative refugees, possessing certain rights on arrival.[117] Furthermore the declaratory nature of the refugee status is recognised by the Dutch asylum system as the asylum status (of refugees and persons in need of subsidiary protection) is granted retrospectively from the date of the asylum application.[118] The question referred to the CJEU concerns the relevant date for the right to family reunification of unaccompanied minor refugees: the date of the application for asylum or the date of the grant of the asylum status.

Seen from the perspective of the declaratory character of the refugee status, this question cannot be easily resolved. Refugees generally have the rights from the moment they fulfil the refugee definition. At the same time the application for certain rights is conditional upon the moment someone is *legally recognised* as a refugee. However, this expert opinion argued that it is highly problematic that unaccompanied refugees permanently lose the right to family reunification because their refugee status had to be assessed during the asylum procedure. This view is supported by judgments of Belgian and Scottish courts, which recognised that because of the declaratory nature of the refugee status, refugees should be granted rights retrospectively.[119]

General principles of EU law

Section 4 of this expert opinion contended that taking the date of the asylum application as the point of departure for the right to family reunification of an unaccompanied minor would best ensure that the EU principles of effectiveness, equal treatment and legal certainty be respected. Furthermore it argued that this would take into account the vulnerability of unaccompanied minors and serve their best interests in the meaning of Article 24 of the Charter.

First the *effectiveness* of the right to family reunification would be undermined if the length of the asylum procedure determines whether or not an unaccompanied minor will be able to enjoy this right. This is the case if the date of the grant of the asylum status is decisive for the right to

[114] ECtHR 28 May 1985, *Abdulaziz v United Kingdom*, Appl no 9214/80, paras 67-68, ECtHR 19 February 1996, *Gül v Switzerland*, Appl no 23218/94, para 39.
[115] ECtHR 1 March 2006, *Tuquabo-Tekle and others v the Netherlands*, Appl no 60665/00.
[116] Ibid.
[117] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted L 304/12, recital 14; also see International Association of Refugee Law Judges, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive- Judicial criteria and standards* (March 2013).
[118] Art 44(2) Aliens Act 2000.
[119] Tribunal du Travail Francophone de Bruxelles 16 April 2015, – Jugement définitif no 15/4960. Scottish Extra Division, Inner House, Court of Session, *A v the Secretary of State for The Home Department*, P1025/14, [2016] CSIH.

family reunification of an unaccompanied minor. In most cases the applicant cannot influence the length of the asylum procedure: it is the State which determines which cases are prioritised or accelerated and which cases need to wait longer.

Secondly taking the age of a person on the date he receives his asylum status as the point of reference for his right to family reunification will lead to *unequal treatment* of asylum applicants on individual grounds and/or on the basis of country of origin. Applicants from certain countries of origin or with more complex asylum cases will have to wait longer for their asylum decisions than others and therefore run a higher risk to age out. Taking the date of the asylum application as the point of reference guarantees that all applicants who are in the same situation chronologically are treated identically.[120]

Thirdly Taking the date of the asylum application as the point of reference also best guarantees *legal certainty*. It makes it foreseeable whether an unaccompanied minor will have the right to family reunification if he qualifies for international protection. This way, the right to family reunification is not dependent on the length of the procedure which is beyond the control of the applicant.[121]

Fourthly taking the date of the grant of the asylum status as the decisive date for the right to family reunification, creates the *possibility* for national authorities to delay the asylum decision in order to reduce the number of persons eligible for family reunification.[122] It follows from the CJEU's judgment in *Laub* that circumstances arising from the behaviour of the national administration should not be capable of changing or negating a right which is in principle granted.[123]

Finally taking the date of the asylum application as the point of departure for their right to family reunification takes into account the vulnerability of unaccompanied minors and is in the best interest of the child, mentioned in Article 24 of the Charter. Uncertainty about the right to family reunification may cause severe stress to unaccompanied minors during the asylum procedure.[124] If the date of the asylum application is decisive for the right to family reunification this provides unaccompanied minors certainty that they will not age out during the asylum procedure.

We thus ask the CJEU to consider to answer the question referred to by the CJEU as follows:
The term 'unaccompanied minor' as used in Article 2(f) FRD includes a minor applicant of a third country or a minor stateless person, who arrives in the state of destination unaccompanied by an adult responsible by law or custom, who applies for asylum, turns 18 years during the asylum procedure, is granted asylum retroactively and subsequently applies for family reunification.

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[120] Compare CJEU Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* [2014], para 17.
[121] Ibid.
[122] European Commissioner of Human Rights, *Time for Europe to get migrant integration right* (May 2016), p 13. He states that the 'inclusive family reunion policies' of the Member States 'are being misinterpreted as major "pull factors"'. See also European Commissioner of Human Rights, *Restrictive laws prevent families from reuniting,* November 2011, where he suggests that family reunification procedures are delayed intentionally.
[123] CJEU Case C-428/05 *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas* [2007], para 25.
[124] European Commissioner of Human Rights, *Time for Europe to get migrant integration right*, May 2016, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da596, p 13.