

**The 'bewijsnood' policy of the Dutch immigration service:
A correct interpretation of the Family Reunification Directive or an unlawful procedural hurdle?**



May 2017

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1. Introduction

1.1 Evidence in Eritrean family reunification cases

This expert opinion is about Eritrean asylum status holders in the Netherlands, who try to be reunited with their family members left behind. Asylum applications by Eritrean nationals seeking protection in the Netherlands against serious and individual threat by the Eritrean government are generally granted by the Dutch authorities. An asylum status holder can apply for reunification with his family left abroad, within three months following the decision granting his or her asylum status. One of the conditions for family reunification is that the family members prove their identity and the existence of actual family ties with the sponsor. Both the identity and the family ties are in principle established through official documents (such as passports, identity cards or civil marriage and birth certificates). However, the situation of the asylum status holder (hereafter: the sponsor) and his or her family members sometimes makes it difficult or even impossible to provide these documents. Usually in cases where no official documents are submitted, it is possible to establish the identity and family ties through alternative evidence, for example unofficial documents such as religious certificates or non-documentary evidence such as a DNA-investigation or identifying interviews.

Since the beginning of 2016 the Dutch Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*, hereafter: IND) applies a new policy making it more difficult for family members to be accepted for reunification.¹ Analysis of the IND decisions shows that in Eritrean family reunification the IND applies the pre-existing policy concept of '*bewijsnood*' (hereafter also referred to as: the Dutch evidentiary policy) in a stricter manner. The Dutch term *bewijsnood* refers to a situation in which it is accepted that there are insurmountable obstacles for providing the required proof. Only if the IND has accepted that there is a situation of *bewijsnood* it is prepared to take alternative evidence into account, like DNA testing or interviews. The stricter application of the Dutch evidentiary policy had led to considerable amount of rejections of Eritrean family reunification cases since the beginning of 2016.

This problem was brought to the attention of the Migration Law Clinic by attorney Mirjam van Riel. She presented a number of cases in which family reunification was refused for reasons of insufficient proof of family ties. A summary of one of these decisions can be found in Annex 1 to this expert opinion. From these cases it emerges that the IND rejects the applications for family reunification of Eritrean nationals because:

- they submitted insufficient official documents proving the identity and the family ties of the family members;
- they have given insufficient explanation why they cannot provide official documents; and
- they have made insufficient effort to obtain official documents where this could arguably have been possible, for example through the help of third parties (e.g. family members or authorised persons).

The applicant has to provide an extensive and plausible explanation why he is not or has never been in the possession of the required official documents. This explanation should be substantiated with

¹ [IND Instruction 2016/7](#) on DNA tests and identifying interviews in family reunification cases (17 November 2016).

documentary evidence. Furthermore, the applicant has to explain why it is not possible for him to obtain the documents at present. The applicant has to show what he or she has done to get the documents through the help of third parties.

Arguments relied upon by Eritrean applicants include:

- It is common in Eritrea to possess only a religious marriage certificate and Eritreans rarely apply for an official civil marriage license with the relevant authorities because this may be dangerous;
- Only government officials, civil servants, or other representatives of the state are able to apply for a passport. At this moment no passports are issued to persons above 18 years, as it is currently prohibited to leave Eritrea;
- Applying for an Eritrean identity document is dangerous, because there is a risk to be recruited for the army;
- Eritreans who go to school do not need an identity card because they possess a school identity card, which allows them to travel.
- Eritreans mostly have certificates of their baptism instead of birth certificates, because births are often not registered in Eritrea.

In practice such explanations by Eritrean applicants are rarely accepted. The IND insists that Eritreans can request documents from the Eritrean authorities through third persons, such as family members, friends or an authorised person. However Eritrean applicants contend that asking a third person to request such a document from the authorities would be dangerous for this person as well as for themselves. This could bring them in the spotlight of the authorities. In its decisions not accepting these – and similar - explanations, the IND relies on the country reports on Eritrea from the Dutch Ministry of Foreign Affairs of 30 July 2015² and 7 February 2017³, the EASO report on Eritrea of May 2015⁴ and the website of the Eritrean Ministry of Information⁵.

1.2 Research questions

The cases presented by Mrs van Riel raise a question of fact and a question of law which will both be addressed in this expert opinion. The factual question is:

Is the rejection by the IND of the explanation of Eritrean sponsors for the lack of official documentation based on sufficient and reliable country of origin information?

In the framework of this expert opinion, a thorough investigation of the factual correctness of the Country report referred to by the IND is not possible. However, pertinent questions can be raised with regard to conclusiveness of the country reports on Eritrea from the Dutch Ministry of Foreign Affairs in comparison to what is known from other sources. We will refer to lectures on family law and registration in Eritrea presented during an expert meeting which took place at VU University on

² Dutch Ministry of Foreign Affairs, [Official country report on Eritrea](#) (30 July 2015).

³ Dutch Ministry of Foreign Affairs, [Official country report on Eritrea](#) (7 February 2017).

⁴ EASO, [Country of Origin Information Report, Eritrea Country Focus](#) (May 2015).

⁵ Website of the Eritrean Ministry of Information: www.shabait.com.

7 March 2017.⁶ These showed an essentially different picture as compared to the views of the IND. On that basis, we will argue that there may be solid grounds to doubt the IND's position with regard to the alleged possibilities for Eritrean applicants to obtain the required documents. As a result it may be contended that it is virtually impossible for Eritreans to get the required documents and thus to be reunited with their families. This conclusion is of importance for the answer to the legal and central research question of this expert opinion:

Is the Dutch evidentiary policy, as it is applied in Eritrean family reunification cases, compatible with the EU Family Reunification Directive?

This expert opinion is divided in three parts which concern Dutch national law and evidentiary policy, country of origin information on Eritrea and the requirement with regard to evidentiary rules following from the Family Reunification Directive⁷.

In Chapter 2 we will explain the criteria for family reunification of asylum status holders. Furthermore we will discuss the Dutch evidentiary policy and how it is being applied in Eritrean family reunification cases in more detail.

In Chapter 3 we describe what is known about the situation of family law and registration in Eritrea. Furthermore we will pay attention to the potential risks for (the family members of) Eritrean asylum status holders when they request the Eritrean authorities to issue official documents. Based on this information we will question the Dutch evidentiary policy, according to which only official civil documents are accepted as evidence of family ties.

In Chapter 4 we will examine which requirements for, or limitations to national evidentiary rules for family reunification of asylum status holders follow from the Family Reunification Directive. First we will address the question whether the Family Reunification Directive applies not only to Eritrean refugees, but also to (the large majority of)⁸ Eritreans granted subsidiary protection. We will pay attention to text and the purpose of the Family Reunification Directive. Moreover we will examine how the Directive should be interpreted in the light of the Charter and general principles of EU law, including the right to family life, the rights of the child and the principle of effectiveness.

Finally in Chapter 5 we will conclude whether Dutch evidentiary policy is compatible with the Family Reunification Directive.

⁶ Expert meeting '[Proving family ties in Eritrean family reunification cases](#)', organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017). The speakers were: Dr Gunter Schröder, Dr Yohannes Amanuel, Lena Reim and the authors of this expert opinion.

⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

⁸ According to UNHCR around 2782 Eritrean were granted subsidiary protection, while only 30 were recognised as a refugee.

2. The Dutch asylum evidentiary policy in Eritrean family reunification cases

2.1 Family Reunification of asylum status holders

According to Article 29 (1)(a) and (b) Aliens Act 2000 (*Vreemdelingenwet 2000*), there are two grounds on which asylum protection may be granted:

- a) Refugee status: qualification as a refugee under Article 1A of the Refugee Convention⁹ or;
- b) Subsidiary protection: based on Article 3 of the European Convention on Human Rights¹⁰ and Article 15 of the Qualification Directive.¹¹

All applicants granted protection under Article 29 (1)(a) and (b) Aliens Act 2000 receive a temporary asylum residence permit (*vergunning voor bepaalde tijd asiel*). The rights attached to this asylum permit do not differentiate between refugees and persons benefiting from subsidiary protection. Refugees and subsidiary protected persons have the right to be reunited with their family members under the same conditions.

Under Article 29(2) Aliens Act 2000, the family members of an asylum permit holder who were left behind may obtain a derived asylum residence permit. The family members eligible for such derived permit are: the children of the sponsor (including adoptive and foster children), the spouse or partner of a sponsor and the parents of an 'unaccompanied' minor sponsor. The purpose of Article 29(2) Aliens Act 2000 is to reunite asylum status holders in the Netherlands with their family, as it existed before arrival in the Netherlands.¹² The conditions for this form of family reunification commonly referred to as follow-migration (*nareis*) are more lenient than those for the general (regular) form of family reunification, especially with regard to fees, income conditions and integration exam obligations.¹³

In order to get family reunification under the more lenient conditions asylum status holders need to apply for it within three months after the day on which their asylum application was granted. If they fail to meet this deadline they must comply with the 'regular' family reunification conditions. This expert opinion solely focuses on the family reunification procedure under the more lenient conditions for asylum status holders.

The family reunification procedure starts with an application for a visa to enter the Netherlands for the purpose of family reunification with an asylum status holder. The IND assesses whether the particular family members are eligible for family reunification on the basis of Article 29(2) Aliens Act 2000. If they have obtained the visa, the family members may travel to the Netherlands. After arrival they will be granted a derived residence permit *ex officio*.

⁹ United Nations, Convention relating to the status of Refugees 1951 (Refugee Convention).

¹⁰ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

¹¹ 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 [2011] OJ L 337/9 (Qualification Directive).

¹² *Kamerstukken II* 2011/2012, 33 293, nr. 3, p 17.

¹³ See the requirements under Art 16 Aliens Act 2000.

Crucial under Article 29(2) Aliens Act 2000 is the existence of ‘actual family ties’ between the sponsor and the family members. The sponsor must demonstrate that the family members, whom he or she wants to be reunited with, belonged to his or her family at the time of entry in the Netherlands, and that the family ties still exist.¹⁴ Moreover, the family members should be able to prove their identity. The burden of proof as to the identity of the family member and the existence of actual family ties lies entirely with the applicant.¹⁵ In principle, the identity and actual family ties in cases of family reunification are established through *official and original* documents. The applicant needs to submit:

- a valid travel document proving the identity of the family member(s);
- where applicable, a document proving the existence of a valid marriage;
- where applicable, a document that proves both the partnership and cohabitation in the country of origin; and
- where applicable, a document certifying the family relationship between the minor child and the parent.¹⁶

The situation of asylum status holders and their family members often makes it difficult or even impossible to provide one or more of the abovementioned official documents. In such cases, the identity or family ties can be demonstrated through other evidence, for example non-official documents, DNA-investigation or identifying interviews (i.e. further investigation).

Under the Dutch evidentiary policy however, the option to establish the identity or family ties through further investigation is only offered to those who make plausible that the absence of the required documents is not attributable to them (in Dutch terms, if there is a situation of ‘bewijsnood’).¹⁷ In the following section, we will elaborate further on what this policy entails.

2.2 Dutch policy with regard to evidence in family reunification cases

According to the Dutch evidentiary policy, further investigation can only be offered in cases where it has been accepted that the applicant is unable to meet the standard of proof. Applicants who do not possess official family and/or identity documents, must make plausible that the lack of official documents is not attributable to them. This policy is set out in the IND Instruction 2016/7 on DNA tests and identifying interviews in family reunification cases (hereafter: Instruction 2016/7).¹⁸

Instruction 2016/7 makes a distinction between family reunification of asylum status holders under Article 29(2) Aliens Act and ‘regular’ family reunification. The evidentiary requirements are stricter for ‘regular’ family reunification cases than for family reunification cases of asylum status holders.

In ‘regular’ family reunification cases, the IND will accept that the lack of official documents is not attributable to the applicant if the civil registers in the concerned country of origin do not exist,

¹⁴ The Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, hereafter: ABRvS) ruled that the requirement that spouses must have lived together before the flight violates the Family Reunification Directive. ABRvS 20 February 2017, [ECLI:NL:RVS:2017:455](#).

¹⁵ Paragraph C1/4.4.6 Aliens Circular 2000 ([Vreemdelingencirculaire](#))

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ [IND Instruction 2016/7](#) on DNA tests and identifying interviews in family reunification cases (17 November 2016).

are incomplete or unreliable, or if it is not possible to obtain documents due to the political situation. The applicant must demonstrate that he or she has requested documents from the relevant authorities. Only under such circumstances, will the IND establish that the lack of documents is not imputable to the applicant.¹⁹

Asylum status holders do not have to prove that the relevant authorities have been requested for the required documents. However, it is still their responsibility to make plausible that the lack of official documents is not attributable to him or her, and that it cannot be expected that they obtain or submit the required documents. If the applicant is not in the possession of the required official documents, and the applicant has made plausible that the lack of official documents is not attributable to him or her, unofficial documents (e.g. religious certificates) will be taken into account in the assessment of the identity and the existence of actual family ties. The IND will also consider whether further investigation (i.e. DNA test or identifying interviews) is required to establish the identity and/or family ties.²⁰ However, if the IND holds against the applicant that the lack of official documents is attributable to the applicant, it does not accept unofficial documents and refuses to do further investigation. That is what happens in many Eritrean cases.

2.3. Evidentiary policy with regard to Eritrean nationals

The evidentiary policy described above has been part of the Dutch policy for years, but has until recently not been applied in a strict manner in Eritrean cases.²¹ In fact, the application of the policy has been given an entire new dimension in Eritrean family reunification cases since the beginning of 2016.

On 27 November 2015 the State Secretary of Security and Justice announced measures taken by the Dutch Government in the field of family reunification.²² According to the State Secretary, family members of asylum status holders who apply for family reunification, constituted a significant part of the current immigration to the Netherlands. The State Secretary held that in particular applications for family reunification of Eritrean nationals put a burden on the capacity and the resources of the IND and Dutch consulates and embassies. As these cases often incur problems with regard to the provision of official documentary evidence, they also require further investigation. According to the State Secretary, a relatively large amount of the Eritrean applications is rejected, even after further investigation has taken place. The aim of the new 'measures', was to reduce the pressure on the (financial) resources of the IND and Dutch representations abroad, by raising the evidentiary threshold for family reunification in these cases.

The letter of 27 November 2015 does not explicitly mention that the evidentiary policy will be applied in a stricter manner. But shortly afterwards a considerable increase in rejections in Eritrean family reunification cases could be noted from around 50% in December 2015 to around 70% in December 2016.²³ In cases where the IND previously assumed that the inability to provide

¹⁹ Ibid, p 4.

²⁰ Ibid.

²¹ See [IND Instruction 2014/9](#) with regard to DNA investigation and identifying interviews (17 February 2015), as well as [IND Instruction 2012/6](#) and [IND Instruction 2008/3](#).

²² *Kamerstukken II* 2015/16 19637, [no 2086](#).

²³ Letter from the IND to lawyer van Riel of 20 April 2017, in which the IND states that the percentage of applications for family reunification of Eritreans **granted** was 48% in December 2015, 35% in January 2016, 19% in February 2016, 26% in March 2016, 23% in April 2016, 31% in May 2016, 22% in June 2016, 24% in July 2016, 24% in August 2016, 30% in September 2016, 27% in October 2016, 30% in November 2016 and 34% in

official documents was not attributable to the applicant, it was now applying the policy with regard to evidence very strictly in cases concerning Eritrean nationals.

In its decisions, the IND states that inhabitants of Eritrea can obtain official documents proving their identity and family relationship. In support of this position the IND refers to country information on Eritrea.²⁴ If the applicant and/or the sponsor have not sufficiently substantiated that they tried to obtain the required documents the IND concludes that 'it has not been shown that the lack of official documents is not attributable to the applicant'.

2.4 Conclusion

In the past year the new interpretation of the Dutch evidentiary policy has led to a large number of rejections of applications for family reunification lodged by Eritrean asylum status holders. This evidentiary policy entails that, if an applicant does not submit official documents proving the identity of, and family ties with their family members, s/he must show that this lack of documents is not attributable to him or her. In practice this is very difficult. The IND assumes on the basis of country of origin information about Eritrea that applicants are able to obtain such documents, if necessary with the help of family members or third persons.

The fact that the Eritrean sponsor is not able to show that he is not able to obtain official documents has important consequences. First alternative evidence of identity and/or family ties, such as documents evidencing a customary or religious marriage, is not taken into account. Secondly the Dutch authorities will not do any further investigation, such as DNA testing or interviews. Finally the IND does not subject the application to an individual assessment on the basis of all the facts and circumstances submitted by the applicant. As a result the application for family reunification will in most cases be denied.

The next chapter will discuss the country of origin information relied on by the IND. We will show that there are other sources of information on the basis of which the IND's position, that Eritreans can obtain official documents in support of their application for family reunification, may be questioned.

December 2016.

²⁴ Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (30 July 2015), Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (7 February 2017), EASO, [Country of Origin Information Report, Eritrea Country Focus](#) (May 2015), Website of the Eritrean Ministry of Information: www.shabait.com.

3. Family Law and Registration in Eritrea

The IND bases its position that Eritreans are generally able to possess or obtain official identity documents and documents proving their family ties on information from the website of the Eritrean Ministry of Information²⁵, an EASO report on Eritrea of 2015²⁶ and a the country report of the Dutch Ministry of Foreign Affairs of 2015.²⁷ In February 2017 the Ministry of Foreign Affairs issued new country report on Eritrea.²⁸

According to these sources, Eritrea has an electronic population register that is kept up-to-date. From those registers, transcripts can be requested for different purposes (for individuals, families, etc.). Many inhabitants possess a residence card or an identity card, which they must show on many occasions. Irrespective of their domicile, every inhabitant of Eritrea can request extracts of the civil registers in Asmara. The 'Public Registration Office' in Asmara issues official documents about birth, marriage, divorce, residence, associations, marital state and the family. These documents are valid in all countries. It is also possible to obtain these documents from abroad. The Eritrean representations abroad can authorise a third person. With this authorisation, a third person can apply for the required documents at the authorities in Eritrea.

The IND holds that religious marriages are recognised as 'legally valid' marriages, but only if they have been recorded in the civil registers. Further, to obtain an ID card, the applicant could contact the embassy of Sudan.

In this section we will show that there are other sources which raise doubts about the validity of the IND's position. We will first discuss some relevant history of Eritrean family law. After that we will address the registration of religious and customary marriages and the possibility to obtain identity documents. For this purpose we will mainly refer to information from two experts: Günter Schröder (consultant and expert on the Horn of Africa²⁹) and Yohannes Amanuel (a former judge of Eritrea in civil and criminal law cases). Both experts spoke during an expert meeting on 7 March 2017.³⁰ Finally we will discuss the potential risks for family members or other third parties when they request official documents from the Eritrean authorities on behalf of an Eritrean sponsor residing in the Netherlands.

3.1 History of Eritrean family law

According to Schröder various factors and processes have shaped the social and legal concepts relating to marriage and paternity in Eritrea. The two most important factors are:

- the multi-ethnic (9 ethnic communities) and multi-religious (two major religious communities) composition of its population;
- the succession of different political powers actually ruling over parts or the whole of what today constitutes Eritrea (traditional Ethiopian Empire and Turco-Egyptian Empire till 1890,

²⁵ Website of the Eritrean Ministry of Information: www.shabait.com.

²⁶ EASO, *Country of Origin Information Report, Eritrea Country Focus* (May 2015).

²⁷ Dutch Ministry of Foreign Affairs, *Country report on Eritrea* (30 July 2015).

²⁸ Dutch Ministry of Foreign Affairs, *Country report on Eritrea* (7 February 2017).

²⁹ <https://www.ein.org.uk/schroeder>.

³⁰ Expert meeting 'Proving family ties in Eritrean family reunification cases', organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017).

Italy 1890-1941, Great Britain 1941-1952, Ethiopia 1952-1991, Eritrean Government since 1991).³¹

Since the establishment of the Colony Eritrea in 1890, marriage and paternity were regulated within a specific three-dimensional legal framework composed of customary, religious and statutory law, which were applicable to different sectors of Eritrean society. The indigenous population of Eritrea continued to regulate marriage and paternity according to their customary and religious laws without any noticeable interference of the colonial power.

Under the Eritrean government, which has been in power since 1991, an Eritrean Civil Code (ErCC) was drafted. Although a first draft had been prepared by 1999, the final version only entered into force in May 2015 according to Schröder.³² It should be noted however that according to Amanuel it is unclear whether the ErCC has indeed entered into law in 2015.³³ Still, hereunder the date of May 2015 will be referred to as de date of entering into force. Articles 518-521 of the new ErCC recognised the existence of civil, religious and customary law marriages. It maintained the common condition for all forms of marriages that both parties to the marriage have to have attained the age of 18 years. According to Schröder, the Eritrean government fully recognised marriages concluded under the regulations of Ethiopian Civil Code and those of the various liberation fronts, when they were either documented through a marriage certificate of the respective front or confirmed through three witnesses.

3.2 Registration of religious and customary marriages

According to Article 556 of the ErCC all types of marriage are equivalent.³⁴ Marriage produces the same legal effects, whatever the form according to which it has been celebrated. No distinction shall be made as to whether the marriage has been celebrated before a civil status officer or according to the forms prescribed by religion or custom.

Registration of marriages is obligatory, under Article 113 ErCC. However, according to Amanuel the validity of the marriage is not affected by non-registration.³⁵ Schröder points out that Article 2775 of the Final Provisions of the ErCC rules that legal situations created prior to the coming into force of the Civil Code in 2015 shall remain valid. Therefore at least all marriages contracted before May 2015 are valid marriages even if they are not registered.³⁶ According to Amanuel, there are three ways to prove marriage: registration by a civil status officer, possession of status (testimony by four witnesses that the ceremony took place) and act of notoriety by a court.³⁷

³¹ G. Schröder, *Legal and Social Issues Relating to Marriage and Paternity in Eritrea*, Presentation at the Expert meeting 'Proving family ties in Eritrean family reunification cases', organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017), p 1, available at www.migrationlawclinic.org.

³² Civil Code of the State of Eritrea, Asmara 15 May 2015.

³³ Y.A. Amanuel, *Supplementary Comment to "Expert Opinion on religious marriage and its modes of proof in Eritrean legal system"* (7 February 2017), see Annex 4 to this expert opinion.

³⁴ Y.A. Amanuel, *Expert Opinion on religious marriage and its modes of proof in Eritrean legal system* (28 November 2016), pp 2-3, see Annex 3 to this expert opinion.

³⁵ Ibid, pp 1, 3-4.

³⁶ G. Schröder, *Legal and Social Issues Relating to Marriage and Paternity in Eritrea*, Presentation at the Expert meeting 'Proving family ties in Eritrean family reunification cases', organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017), p 7, , available at www.migrationlawclinic.org.

³⁷ Y.A. Amanuel, *Expert Opinion on religious marriage and its modes of proof in Eritrean legal system* (28 November 2016), pp 3-4, see Annex 3 to this expert opinion.

Both Amanuel and Schröder contend that policy behind the laws in Eritrea is to push for registering customary and religious marriages.³⁸ However, in reality registration is hard to enforce. Although the ErCC has become law in May 2015, the necessary infrastructure for full registration coverage of all civil status events does not yet exist.³⁹ According to Schröder, the ErCC does not contain provisions how to deal with civil status events, which remained unregistered after May 2015 due to lack of capacities of the state.⁴⁰ Thus, the situation existing prior to the coming into the force of the Civil Code in respect to registration of Civil Status events still exist. A majority of Civil Status events occurring *after May 2015* are still not yet registered. The overwhelming majority of such events having occurred *before May 2015* remain unregistered till today. If documentary proof of the occurrence of such events is needed, the only option is to contact one of the already existing Civil Status Registration Offices and ask for a post-fact document based on other documentary evidence or witness testimonies.⁴¹

Religious institutions also issue civil status documents. All Eritrean authorities recognise birth, baptism, and marriage certificates issued by recognised religious communities as legal proof of the civil status event recorded in them. For religious marriages it is not mandatory to have a civil marriage certificate issued.

The Ministry of Foreign Affairs country report on Eritrea

Compared to this information, the official Dutch country report on Eritrea from 2017 at first sight seems to draw – with regard to registration of civil status documents - a completely different picture. From the section on ‘documents’ a general image arises of an orderly organised country in which everything works as designed.⁴² Only once the country report refers to practical problems.⁴³ It quotes a confidential source, stating that it is difficult for Eritreans to obtain an identity document on short notice, due to electric power interruption, limited opening hours and absence of the civil servants. Also in many other respects, the country report leans on ‘confidential sources’, for instance describing the procedure for obtaining a birth certificate⁴⁴ and the non-recognition of religious marriage acts as identity document⁴⁵. The information presented in the Country Report appears to have been derived from official documents and confidential sources on how things *should* go, but it gives no insight in what happens in reality. In that respect, the information given by Schröder and Amanuel seems to remain uncontested and can serve as complementary information.

However, the Dutch report also contains contradicting or at least confusing information. It states - on authority of EASO - that religious marriage acts are not recognised as official marriage acts, but are used as source-document in order to have a marriage document registered at the Civil

³⁸ Y.A. Amanuel, *Expert Opinion on religious marriage and its modes of proof in Eritrean legal system* (28 November 2016), p 4, see Annex 3 to this expert opinion. G. Schröder, Legal and Social Issues Relating to Marriage and Paternity in Eritrea, Presentation at the Expert meeting ‘[Proving family ties in Eritrean family reunification cases](#)’, organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017), p 7, , available at www.migrationlawclinic.org.

³⁹ G. Schröder, Legal and Social Issues Relating to Marriage and Paternity in Eritrea, Presentation at the Expert meeting ‘[Proving family ties in Eritrean family reunification cases](#)’, organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017), p 7, , available at www.migrationlawclinic.org.

⁴⁰ Ibid.

⁴¹ Ibid, pp 7-8.

⁴² Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (7 February 2017), pp 19-33.

⁴³ Ibid, p 20.

⁴⁴ Ibid, footnotes 156, 157 and 158.

⁴⁵ Ibid, footnote 167.

Register.⁴⁶ The purport of this passage is limited to the legal question to what extent a religious marriage act can be equated with a civil marriage act. However, it might wrongly be understood that religious marriages would not be valid as long as they are not registered in the Civil Register. This misunderstanding prominently figures in the legal discourse before the Dutch courts. In his presentation on 7 March, Amanuel criticized several judgments by Dutch Courts wrongly assuming that a religious or traditional marriage that is not registered must be considered invalid.⁴⁷ Recently the district court of Amsterdam has ruled that the State Secretary of Security and Justice had given insufficient reasons why a religious marriage, which is not registered in the Kebabi register, is not valid.⁴⁸

3.3 Identity documents

It follows from various sources referred to in the EASO report and the Dutch Ministry of Foreign Affairs country report of 2015, that it is (currently) very difficult or even impossible to obtain identifying documents such as ID cards, passports or exit visas.⁴⁹ Corruption was extensive for government services involving issuance of identification and travel documents and individuals requesting exit visas or passports often had to pay bribes. This forced the majority of the Eritreans who wanted to leave the country to do so clandestinely.⁵⁰ The Dutch mentions that since 2015 70.000 identity cards have been issued and that most Eritreans possess an identity card.⁵¹

3.4 Risk of reprisals from the Eritrean authorities

The Dutch Ministry of Foreign Affairs country report on Eritrea of 2017 questions whether family members of persons, involved with activities undesirable to the regime, risk reprisals. It states that 'most foreign observers' think that the risk of reprisals for family members are hardly worth mentioning anymore. Who these foreign observers are, is not clear. In the footnote, the country

⁴⁶ Ibid, p 25.

⁴⁷ Y. Amanuel, Marriage Law in Eritrea, Presentation at the Expert meeting '[Proving family ties in Eritrean family reunification cases](#)', organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017), slides 13-16, available on www.migrationlawclinic.org. See Rb Haarlem, 31 January 2017, AWB 16/18132, Rb Haarlem, 6 January 2016, AWB 16/14794.

⁴⁸ Rb Amsterdam 8 February 2017, [ECLI: NL:RBDHA:2017:3069](#).

⁴⁹ Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (30 July 2015), p 31-32; Immigration and Refugee Board of Canada (IRB), [Eritrea: Identification documents, including national identity cards and birth certificates; requirements and procedures for obtaining and renewing identity documents, both within the country and abroad \(2009-August 2013\)](#) (16 September 2013), Immigration and Refugee Board of Canada (IRB): [Eritrea: prevalence of fraudulent identity documents, including national identity cards \(2012-august 2014\)](#) (6 September 2014), Immigration and Refugee Board of Canada (IRB), [Eritrea and Sudan: Situation of the border region between the two countries, including military and police patrols, as well as legal crossing points; information on physical obstacles to prevent crossing, such as fences and mines; number of people legally and irregularly crossing the border \(2013-May 2014\)](#), 20 December 2014, Home Office (United Kingdom), [Country Information and Guidance Eritrea: National \(incl. Military\) Service](#) (11 March 2015), Home Office (United Kingdom), [Eritrea Country of Origin Information Report \(COI\)](#), 18 September 2013, pp 128-129.

⁵⁰ US Department of State, [Country Reports on Human Rights Practices for 2013 — Eritrea](#) (27 February 2014), Home Office (United Kingdom), [Eritrea Country of Origin Information Report \(COI\)](#), 18 September 2013, p 85, Immigration and Refugee Board of Canada (IRB): [Eritrea: prevalence of fraudulent identity documents, including national identity cards \(2012-august 2014\)](#) (6 September 2014).

⁵¹ Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (7 February 2017), p 21.

report refers to 'confidential sources'.⁵²

The Dutch country report also refers to a report of the UN Committee on inquiry on human rights in Eritrea. According to this Committee these risks still exist. It considered that the punishment of third parties for alleged wrongs continues. With regard to the claims made by government officials that any punishment of third parties would be pursuant to legal proceedings on charges of aiding and abetting the alleged wrongdoer, the commission found no evidence to support this. On the contrary, all witnesses told the commission that there had been no judicial proceedings relating to their punishment.⁵³

According to the Committee reprisals of third parties 'are integral to the Government's efforts to maintain its authority in a manner contrary to international law'. This includes punishing family members of Eritreans who left the country. Punishments include arbitrary detention, enforced disappearance and murder.⁵⁴

A recent research report⁵⁵, requested by the Dutch government, shows that Eritreans in the Netherlands fear for repercussions for their family in Eritrea if they would act openly against the Eritrean government. This may also explain their hesitance to ask family members or other third parties to request official documents from the Eritrean authorities. This fear (realistic or not) is stimulated by the pressure exerted by the Eritrean Government Party on Eritreans in the Netherlands. The report shows that several organisations of Eritreans in the Netherlands are controlled by the Eritrean government party PFDJ. One of the most important goals of Eritrean organisations abroad is raising money. The majority of the Eritreans in the Netherlands experience pressure and intimidation from the Eritrean government party. The pressure varies from subtle to more explicit forms. Though Eritreans may feel inhibitions for filing complaints with the Dutch police, complaints were found about ill-treatment, rape, disappearance, (alleged) suicide, extortion related to human smuggling or trafficking, extortion related to paying diaspora tax and other 'voluntary' contributions and intimidation. The research report cites a number of respondents who state that board members of organisations, who wish to remain neutral or apolitical are warned in (anonymous) telephone calls that they must be aware of their family in Eritrea. Also the family in the Netherlands, and sometimes in Eritrea was put under pressure.⁵⁶

Most respondents pay diaspora tax (2 % of the income) and keep quiet in order to avoid problems for the family in Eritrea.⁵⁷ The Dutch country report on Eritrea of 2017 confirms that applicants for identity documents with the Eritrean embassies and consulates, are often required to prove that they paid diaspora tax. Furthermore deserters and persons circumventing military service are asked to sign a statement of regret. Family members can be authorised to collect the identity document.⁵⁸

⁵² Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (7 February 2017), p 41.

⁵³ UN General Assembly, Human Rights Council, [Report of the commission of inquiry on human rights in Eritrea](#) (9 May 2016), p 8.

⁵⁴ Ibid, pp 8 and 14.

⁵⁵ DSP groep Amsterdam, Universiteit Tilburg, [Niets is wat het lijkt, Eritrese organisaties en integratie](#), presented to the Second Chamber of Parliament by letter of 15 December 2016, attached to *Kamerstukken II* 22 831, no 125.

⁵⁶ Ibid, p 37.

⁵⁷ Ibid, p 13.

⁵⁸ Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (7 February 2017), p 20.

3.5 Conclusion

On the basis of the information of Schröder and Amanuel the IND's position that religious or customary marriages are only valid if they are registered and can thus be proved with official documents, may be questioned. Furthermore various sources referred to in the EASO report and the Dutch Ministry of Foreign Affairs country report of 2015 confirm that it is very difficult to obtain identity documents from the Eritrean authorities.⁵⁹ Finally several reports substantiate that it may be dangerous for family members and other third parties to request the Eritrean authorities to issue official documents on behalf of an Eritrean asylum status holder in the Netherlands.⁶⁰ The answer to the first research question of this expert opinion is thus that the rejection by the IND of the explanation of Eritrean sponsor for the lack of official documentation is not based on sufficient and reliable country of origin information. As a result, the strict application of the concept of *bewijsnood* may make it very difficult or even impossible for Eritrean asylum status holders to reunite with their family members.

The next chapter will examine whether the Dutch evidentiary policy, including the strict application of the concept of *bewijsnood* in family reunification cases of Eritrean asylum status holders, is in conformity with the Family Reunification Directive.

⁵⁹ Dutch Ministry of Foreign Affairs, [Country report on Eritrea](#) (30 July 2015), p 31-32; Immigration and Refugee Board of Canada (IRB), [Eritrea: Identification documents, including national identity cards and birth certificates; requirements and procedures for obtaining and renewing identity documents, both within the country and abroad \(2009-August 2013\)](#) (16 September 2013), Immigration and Refugee Board of Canada (IRB): [Eritrea: prevalence of fraudulent identity documents, including national identity cards \(2012-august 2014\)](#) (6 September 2014), Immigration and Refugee Board of Canada (IRB), [Eritrea and Sudan: Situation of the border region between the two countries, including military and police patrols, as well as legal crossing points; information on physical obstacles to prevent crossing, such as fences and mines; number of people legally and irregularly crossing the border \(2013-May 2014\)](#), 20 December 2014, Home Office (United Kingdom), [Country Information and Guidance Eritrea: National \(incl. Military\) Service](#) (11 March 2015), Home Office (United Kingdom), [Eritrea Country of Origin Information Report \(COI\)](#), 18 September 2013, p 128-129.

⁶⁰ DSP groep Amsterdam, Universiteit Tilburg, [Niets is wat het lijkt, Eritrese organisaties en integratie](#), presented to the Second Chamber of Parliament by letter of 15 December 2016, attached to *Kamerstukken II* 22 831, no 125, UN General Assembly, Human Rights Council, [Report of the commission of inquiry on human rights in Eritrea](#) (9 May 2016).

4 Evidentiary rules under the Family Reunification Directive

The central question of the expert opinion is whether the Dutch evidentiary policy is in conformity with the Family Reunification Directive (hereafter also: the Directive or FRD). Therefore this chapter will examine which requirements for, or limitations of national evidentiary rules follow from the Directive. We will specifically focus on the conformity with EU law of national evidentiary rules which require a person to make plausible that s/he cannot provide the required type of documents as well as evidentiary rules which exclude specific types of evidence. Furthermore we will focus on the duty to investigate and the right to an individual assessment of the case.

The Family Reunification Directive determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. According to Article 3(1), the Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

In Chapter V of the Directive, specific provisions are made for family reunification with sponsors who have *refugee status*. Article 11(2) of this Chapter contains specific evidentiary rules with regard to family reunification of refugees. We will discuss how this provision should be interpreted according to its text and the purpose of the Family Reunification Directive. Furthermore we will assess how this provision should be interpreted in the light of the Charter and EU general principles, in particular the right to family life, the rights of the child and the EU principle of effectiveness. First however, we should examine whether Eritreans who are granted *subsidiary protection* in the Netherlands can rely on Chapter V of the Directive, because most of the Eritreans in the Netherlands who are in need of international protection receive a subsidiary protection status.

4.1 Scope of application of Chapter V of the Family Reunification Directive

Chapter V of the Family Reunification Directive is – according to its provisions - applicable to sponsors who are refugee, but not to sponsors granted subsidiary protection on the basis of the criteria of the Qualification Directive. However, there may be a basis in *national law* to apply Chapter V of the Directive analogously to persons granted subsidiary protection under the Qualification Directive.

In another context, the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, or ABRvS) already gave an example of how national law may lead to analogous application of the Family Reunification Directive. It ruled that the Dutch immigration authorities must analogously apply the Directive to Dutch nationals who apply for family reunification with a third country national.⁶¹ This prevents situations in which Dutch sponsors are treated less favourably than third country sponsors.

The Court of Justice of the European Union (hereafter: CJEU) held in its judgments in *Leur-Bloem*⁶² and *Romeo*⁶³ that it is competent to interpret rules of national law in which Union law is made directly and unconditionally applicable to purely internal situations. Accordingly, the relevant

⁶¹ See eg ABRvS 17 December 2014, [ECLI:NL:RVS:2014:4650](#), ABRvS 10 March 2015, [ECLI:NL:RVS:2015:839](#).

⁶² CJEU Case C-28/95 *Leur-Bloem* [1997].

⁶³ CJEU Case C-313/12 *Romeo* [2013].

EU law is applicable to such internal situations.

In similar vein it is conceivable that Chapter V of the Family Reunification Directive with regard to families of refugees, should analogously be applied to families of persons granted subsidiary protection in the Netherlands on the basis of the Qualification Directive. Such persons are granted exactly the same asylum permit with exactly the same legal position as refugees. The purpose of this so-called one-status system is that persons who are granted subsidiary protection cannot appeal the (implied) rejection⁶⁴ of the refugee status because they have no legal interest.⁶⁵ If the rules for family reunification for persons granted subsidiary protection would be less beneficial for than those for refugees this would undermine the one-status system.

The ABRvS has not yet ruled on the question whether the Family Reunification applies to subsidiary protected. However, the Dutch State Secretary of Security and Justice confirmed in a letter of May 2016 to the ABRvS in a pending procedure that the Directive applies in the Netherlands to *all* asylum status holders, refugees and subsidiary protected persons, in family reunification cases based on of Article 29(2) Aliens Act 2000. 'The consequence of the fact that the Netherlands applies the same rules for family reunification to subsidiary protected persons is indeed that, in accordance with the above mentioned case law of the Court, the interpretation of the Court also applies to the interpretation of those rules. This means that the Netherlands is materially bound by the Directive, also with regard to subsidiary protected persons'.⁶⁶ In the Netherlands, Chapter V of the Family Reunification Directive is thus applicable to all sponsors holding a Dutch asylum status who apply for family reunification under Article 29(2) Aliens Act 2000.

4.2 Evidentiary rules for family reunification of refugees

Article 5(2) FRD states that an application for family reunification

shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents. If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary. When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

Chapter V of the Directive provides for more favourable conditions for family reunification of refugees.⁶⁷ Accordingly, Chapter V derogates from the requirements set in Chapter IV, for instance

⁶⁴ It follows from Art 2(f) of the Qualification Directive that Member States should first assess whether an asylum applicant qualifies as a refugee before they examine his right to subsidiary protection.

⁶⁵ ABRvS 28 March 2002, nr. [200105914/1](#). See also Art 46(2) 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) [2013] OJ L 180/60 (the Procedures Directive).

⁶⁶ See p 2-3 of the letter of the IND of 17 May 2016 to the Administrative Jurisdiction Division of the Council of State, which can be found in Annex 2 to this expert opinion.

⁶⁷ Though it was established above, that in the Netherlands this Chapter also applies to subsidiary protected persons, we will in this paragraph only refer to refugees in accordance with the text of Chapter V.

with regard to conditions regarding income, housing and sickness insurance laid down in Article 7 FRD.⁶⁸ Furthermore, Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her (Article 8 FRD).⁶⁹ According to Article 11(1), the evidentiary requirements laid down in Article 5(2) FRD do apply to applications for family reunification of refugees. This means that Member States 'may consider documentary evidence to establish the family relationship, and interviews and other investigations may be carried out if appropriate and necessary'.⁷⁰ However, Article 11(2) FRD provides for more lenient evidentiary rules for refugees who apply for family reunification:

Where a refugee cannot provide official documentary evidence of the family relationship, the Member State shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.

According to the European Commission, this provision acknowledges the particularly difficult evidentiary position of refugees (see further section 4.6).⁷¹

The Dutch evidentiary policy can only be compatible with this provision if the word 'cannot' in Article 11(2) FRD may be interpreted strictly, meaning that the applicant must have proved that the lack of documentary evidence is not attributable to him. In the next sections we will examine on the basis of the text and purpose of the Directive whether such strict interpretation of Article 11(2) FRD is in conformity with EU law. Furthermore we will assess whether the Charter of Fundamental Rights or EU principle require a certain interpretation of this provision.

4.3 The text of Articles 5 and 11(2) Family Reunification Directive

It follows from the text of Article 5(2) FRD that Member States have 'a certain margin of appreciation in deciding whether it is appropriate and necessary to verify evidence of the family relationship through interviews or other investigations, including DNA testing'. According to the European Commission

the appropriateness and necessity criteria imply that such investigations are not allowed if there are other suitable and less restrictive means to establish the existence of a family relationship. Every application, its accompanying documentary evidence and the appropriateness and necessity of interviews and other investigations need to be assessed on a case-by-case basis.⁷²

The text of Article 11(2) FRD is clear in two regards. First, a rejection of family reunification of refugees is *prohibited if it is solely based* on the fact that documentary evidence of family

⁶⁸ Art 12(1) FRD.

⁶⁹ Art 12(2) FRD.

⁷⁰ 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](#)' COM(2014) 210 final, p 22.

⁷¹ Ibid.

⁷² Ibid, p 9.

relationship is lacking.⁷³ The text of Article 11(2) FRD does not leave the Member States any margin of appreciation in this regard.⁷⁴

Secondly a Member State is *obliged* ('shall') to take into account other evidence than official documentary evidence if it is determined that the applicant *cannot* provide such documentary evidence of the family relationship. Article 11(2) leaves a margin of appreciation to the Member States ('in accordance with national law') to the Member States which other evidence they take into account.⁷⁵

Still, this does not fully rule out that a Member State could legitimately attribute a lack of documentary evidence to the applicant if such evidence is *available*. The Dutch authorities may thus argue that the obligation to take into account 'other evidence' only comes into existence, once it has been established that the applicant genuinely '*cannot*' provide official documentary evidence. The question is however under which circumstances the Dutch authorities should accept that documentary evidence '*cannot*' be provided. Is the very high threshold applied by the IND in Eritrean cases in conformity with EU law? May the IND deny an application for family reunification for the sole reason that the applicant has not made plausible that the lack of official documents is not attributable to him? In the next section we will examine this question in the light of the object and purpose of the Family Reunification Directive. We will conclude that Article 11(2) FRD leaves hardly any room to the member states to refuse further investigation of the family ties of the applicants.

4.4 The object and purpose of the Family Reunification Directive

In this section we will first address the general object and purpose of the Directive and secondly that of the provisions for family reunification of refugees in particular.

4.4.1 Ensuring the right to family reunification

Article 1 FRD states that the purpose of the Family Reunification Directive 'is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member State'. The legislator thus aimed at creating a right to family reunification for third country nationals lawfully residing in a Member State. The intention of the EU legislator was to make the conditions for the exercise of the right to family reunification for third country nationals as close as possible to those of European citizens, as it is one of the objectives set out by the EU.⁷⁶

The right to family reunification aims to 'create socio cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty'.⁷⁷ Furthermore it aims to ensure respect for the right to family life as enshrined in Article 7 of the Charter and many instruments of international law, including Article 8 of the European Convention for the Protection of

⁷³ See also 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](#)' COM(2014) 210 final, p 22.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Recital 3 Preamble FRD, Tampere European Council, 15 and 16 October 1999, [Presidency Conclusions](#).

⁷⁷ Recital 4 Preamble FRD.

Human Rights (ECHR).⁷⁸ For this reason, this expert opinion will also refer to case law of the European Court of Human Rights (hereafter: ECtHR) under Article 8 ECHR in order to interpret the right to family reunification under the Directive.⁷⁹ Finally the Directive aims to promote the best interests of children.⁸⁰ Therefore this expert opinion will also address the rights of the child following from Article 24 of the Charter and the Convention of the right of the Child.

The CJEU recognised in its case-law the importance of the right to family reunification of third country nationals. In *Parliament v Council* it held that

Article 4(1) of the Directive imposes positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, *without being left any margin of appreciation*.⁸¹

Furthermore, the CJEU stated in *Chakroun* that 'since authorisation of family reunification is the general rule' restrictions to this right must be interpreted strictly. Furthermore, 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 Directive, which is *to promote family reunification, and the effectiveness thereof*.⁸² It follows from this judgment that Member States may not use their margin of appreciation to establish evidentiary rules for family reunification (for refugees) to undermine the right to family reunification. Sections 4.5 and 4.6 will further discuss how the principle of effectiveness limits the discretion of Member States with regard to evidentiary issues. Section 4.7 will address the requirement of an individual assessment which takes into account the best interests of the children involved.

4.4.2 Importance of family reunification of refugees

Under Chapter V of the FRD, the general points of departure set out in the previous section apply even more intensively to family reunification for refugees. According to the Preamble to the Directive, special attention should be 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. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.⁸³

The importance of the right to family reunification for refugees was also recognised by the ECtHR in its judgment in *Tanda-Muzinga*. The ECtHR stressed that family reunification is an essential right of refugees and a fundamental element allowing them to regain a normal life after facing persecution.⁸⁴ The ECtHR finds that there is consensus on the international and European level that more favourable procedures for family reunification of refugees are necessary. It considers that it is

⁷⁸ Recital 2 Preamble FRD.

⁷⁹ Art 52(3) of the Charter, where Charter rights correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR.

⁸⁰ Art 5(5) FRD.

⁸¹ CJEU Case C-540/03 *Parliament v Council* [2006], para 60, emphasis added.

⁸² CJEU Case C-578/08 *Chakroun* [2010], para 43, emphasis added. See also CJEU Case C-508/10, *Commission v the Netherlands* [2012].

⁸³ Recital 8 Preamble FRD.

⁸⁴ ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10, para 75.

essential that the national authorities take into account the vulnerability and the difficult personal background of the applicant, that they pay due attention to the arguments that are important to the outcome of the dispute and that they state the reasons which oppose to family reunification and that they quickly decide on applications for visa.⁸⁵ In its judgment the ECtHR explicitly refers to the Family Reunification Directive and the opinion of UNHCR.⁸⁶

In its response to the green paper on family reunification UNHCR stated that ‘family reunification is a fundamental aspect of bringing normality back to the lives of persons who have fled persecution or serious harm and have lost family during forced displacement and flight’.⁸⁷ In UNHCR’s view

it is a generally agreed fact that the family is the fundamental unit of society entitled to protection by society and the State. Following separation caused by forced displacement such as from persecution and war, family reunification is often the only way to ensure respect for a refugee’s right to family unity. Separation of family members during forced displacement and flight can have devastating consequences on people’s well-being and ability to rebuild their lives.⁸⁸

4.4.3 Conclusion

It should be concluded that the Family Reunification Directive aims to ensure the right of family reunification for third country nationals. This right aims to promote integration and to ensure the right to family life and the rights of the child. It is recognised in the Directive and underlined by the ECtHR⁸⁹ and UNHCR⁹⁰ that family reunification is particularly important for persons who needed to flee their country of origin. It is often the only way to be together with their family members and it helps them to rebuild their lives in the country of asylum. This means that provisions limiting the right to family life should be interpreted restrictively. This interpretation should moreover be in accordance with the Charter, in particular the right to family life and the best interests of the child. Furthermore national (procedural) rules may not undermine the effectiveness of the right to family reunification.⁹¹

Under Article 11(2) FRD, a rejection of family reunification of refugees is prohibited if it is solely based on the fact that documentary evidence of family relationship is lacking. It was already concluded in section 4.3 that the text of Article 11(2) FRD does not leave the Member States any margin of appreciation in this regard. Further, a Member State is obliged to take in account other evidence than official documentary evidence if it is determined that the applicant cannot provide such documentary evidence of the family relationship. The effectiveness of this provision would be fatally undermined if Member states would have wide discretion to assess whether problems experienced by refugees to provide documentary evidence of the family relationship may be held

⁸⁵ Ibid.

⁸⁶ Ibid, para 47.

⁸⁷ 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) (February 2012), p 2.

⁸⁸ Ibid, p 3.

⁸⁹ ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10, para 75.

⁹⁰ 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) (February 2012), p 2.

⁹¹ CJEU Case C-578/08 *Chakroun* [2010], para 43

against the refugee or his family. Only if the required documentary evidence would be clearly and easily available without any type of risk, a Member State might perhaps be allowed to refuse further investigations in the form of an interview or DNA tests, as the right to family reunification would in such circumstances arguably not be made virtually impossible or excessively difficult. But even then, it should be borne in mind that Article 11(2) FRD *prohibits* rejection of family reunification on the sole basis that documentary evidence is lacking and *obliges* Member States to take in account other evidence.

In sections 4.6 and 4.7 we will argue on the basis of EU case law that not only the text of Article 11(2) FRD but also the effectiveness principle limits the discretion of Member States to establish impeding evidentiary rules. First of all however we will show that the authorities have a duty to perform an individual assessment and to take into account the best interests of the child.

4.5 The need for an individual assessment and rights of the child

Under the Dutch evidentiary rule, no individual assessment of all the facts and circumstances will be done if the IND concludes that the lack of official documents is attributable to the applicant. This implies that the national authorities will also not take into account the interests of the children involved in the case. For that reasons we will examine in this section whether an individual assessment and an examination of the interests of children is required under EU law.

According to the Commission the provisions in Chapter V of the Directive must be read in accordance with the principles set out in Articles 5(5) and 17.⁹² Therefore, when the sponsor is a refugee, Member States shall make an individual assessment of all interests at play, taking into account the aim of Chapter V and the best interests of the child. The Dutch evidentiary policy has a result that if the applicant does not prove that he is unable to provide official documents proving his family relationship, the case will not be investigated further and the application for family reunification will be rejected. This means that no individual assessment of the takes place and that the best interests of the minor children involved (as a sponsor or a family member) are not assessed. This section will assess whether this practice is in conformity with the Family Reunification Directive. For this purpose we will discuss relevant case law with regard to the individual assessment and the best interests of the child.

4.5.1 The duty to an individual assessment

According to Article 17 of the Directive, Member States have the duty to weigh several factors when assessing an application for family reunification. Article 17 of the Directive provides that

Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his or her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

⁹² 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](#)' COM(2014) 210 final, p 21.

Therefore, the assessment must be based on the analysis of a number of factors, taking into account the individual situation of the applicant. Advocate General Mengozzi stated in his opinion with *Naime Dogan* that

the fundamental purpose of such individual examination is to uphold the effectiveness of the directive so far as possible and avoid undermining its main objective, which is to enable family reunification. Therefore, Directive 2003/86 generally precludes all national legislation which makes it possible to deny the exercise of the right to family reunification based on a series of predetermined conditions, without the possibility of a case-by-case evaluation based on the specific circumstances.⁹³

The need to take all relevant factors into account in specific cases in reference to Article 17 of the Directive was also emphasised by the CJEU in the case *Parliament v Council*.⁹⁴ A similar approach can be found in *O. and S.* which concerned EU citizenship. The CJEU ruled that Member States must make a balanced and reasonable assessment of all interests at stake.⁹⁵

This case law implies that a practice of a mechanical rejection of an application based on one single factor is contrary to the purpose of the Family Reunification Directive. State authorities should conduct a specific and individual examination of every document received by the applicant.⁹⁶ The CJEU found that such requirement also follows from the ECtHR's case law under Article 8 ECHR.⁹⁷

4.5.2 Taking into account the best interests of the child

Article 5(5) of the Directive requires Member States to have due regard to the best interests of minor children. The European Centre for Refugees and Exiles (ECRE) has collected several national cases with regard to the right to family life guaranteed by Article 7 of the Charter and Article 7 of the Convention of the Rights of the Child (hereafter: CRC) in its report *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*.⁹⁸ The cases concern the Dublin III Regulation, but also deal with the evidentiary assessment a national authority should make in order to meet its obligation under Article 7 of the Charter and Article 7 CRC. This case law can therefore be applied by analogy to the Family Reunification Directive.

A for our subject relevant case is the ruling of the UK Upper Tribunal in *MK, IK and HK v Secretary of State for the Home Department*.⁹⁹ The case concerned two minors that had applied for asylum in France. The children's mother was residing in the UK with an indefinite leave, therefore the French authorities requested UK to take charge of the applicants under Dublin Regulation III. The UK rejected the request on the basis that the information submitted by France did not match the previous asylum interview of the mother. The French authorities subsequently submitted two new

⁹³ CJEU Case C-138/13 *Dogan* [2013], opinion of AG Mengozzi, para 57.

⁹⁴ CJEU Case C-540/03 *Parliament v Council* [2006], para 64.

⁹⁵ CJEU Case C-356/11 *O. and S.* [2012]. See also CJEU Case C-202/13, *McCarthy* [2014] paras 46-52; CJEU Case C-146/14 *Mahdi* [2014], para 70.

⁹⁶ CJEU Case C-612/13 *ClientEarth v Commission* [2013], para 81.

⁹⁷ CJEU Case C-540/03 *Parliament v Council* [2006], para 64.

⁹⁸ ECRE, [Information Note on Family Reunification for Beneficiaries of International Protection in Europe](#), June 2016), p 36.

⁹⁹ *The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department* (2016) UTIAC JR/2471/2016.

take charge request that were both rejected by UK authorities based on the credibility of the evidence provided. The applicants requested a judicial review of the Home Office decisions by the UK Upper Tribunal claiming that the UK Home Office violated the substantive and procedural rights of the applicants under Article 7 of the Charter through omission of evidential gathering.

In its ruling, the Upper Tribunal considered that the Dublin Regulation could not be read in vacuum of other European and international regulations such as the Charter, the ECHR and the CRC. The Upper Tribunal found that the Home Office acted unlawfully on two different grounds. First, the Home Office had in fact neglected a positive duty of inquiry.¹⁰⁰ According to the Upper Tribunal, the Home Office had in this case been completely passive in investigating the possibility of proving a family tie through DNA-analysis, such as investigating what possibilities there were for DNA-testing in France or investigating the possibility of allowing the children's entry into the UK for DNA testing purposes. Secondly, the Upper Tribunal found that there are both explicit and implicit duties of enquiry, investigation and evidence gathering in the Dublin III Regulation itself. It argued that Member States must take reasonable steps to secure these duties.

If we extrapolate this view of the Upper Tribunal we may come to the following conclusion. The Family Reunification Directive, read in light of Article 7 of the Charter, obliges Member States, especially in cases regarding children, to take *appropriate* and *proactive* steps to ensure the right to family life. In this regard, a positive obligation is posed on Member States to actively investigate family relationships when assessing an application for family reunification. This may for example include an obligation to provide opportunity for DNA-testing.

In the Chavez-Vilchez judgment, the Court of Justice EU found that it is for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would deprive the child of the genuine enjoyment of the substance of the rights at stake. Account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.¹⁰¹

4.5.1 Conclusion

The omission of an individual assessment of all the facts and circumstances in Eritrean family reunification cases in which a lack of official documents is attributed to the applicant, may violate Article 17 FRD read in the light of the CJEU's case law.¹⁰² On the basis of the evidence provided by the third-country national, the necessary enquiries must be undertaken by the Member States. Account must be taken of all the specific circumstances including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to

¹⁰⁰ The Upper Tribunal refers to the "Tameside principle" (used in UK law) that embodies 'incumbent on the decision maker to have regard to all material considerations, in other words a duty of enquiry'. This principle entails the same core elements of the duty of inquiry asserted as forming part of the right to be heard in *M.M vs Ireland* case stipulating that the authorities has a duty of 'examining carefully and impartially *all the relevant aspects* of the individual case', para 88.

¹⁰¹ CJEU Case C-133/15, Chavez-Vilchez [2017], para 71, 78,

¹⁰² CJEU Case C-540/03 *Parliament v Council* [2006], CJEU Case C-356/11 *O. and S.* [2012].

the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium. Furthermore it may be argued, in line with a judgment of the UK upper tribunal¹⁰³, that the Family Reunification Directive, read in light of Article 7 of the Charter, obliges Member States to take *appropriate* and *proactive* steps to ensure the right to family life in cases in which children are involved. This may imply a duty to actively investigate family relationships, for example by providing applicants an opportunity for DNA-testing or interviews.

The next sections will examine how the principle of effectiveness limits the discretion of Member States to impose evidentiary rules. In section 4.6 we will specifically focus on the question whether EU law allows Member States to require a specific types of evidence and to exclude other types of evidence. Subsequently in section 4.7 we will examine how the special evidentiary position of persons in need of international protection should be taken into account in this regard.

4.6 Limitations to national evidentiary rules

Apart from documentary evidence (the ideal type of evidence) Article 5 FRD mentions that other types of evidence, such as interviews, can be used to establish family relationship. In 2014 the European Commission mentioned several alternatives to documentary evidence which can be used to establish family links, including written and/or oral statements from the applicants, interviews with family members, or investigations carried out on the situation abroad.¹⁰⁴ The Commission considers that these statements 'can then, for instance, be corroborated by supporting evidence such as documents, audio-visual materials, any documents or physical exhibits (e.g. diplomas, proof of money transfers...) or knowledge of specific facts'.¹⁰⁵ Reliable means of proof of the family relationship between unmarried partners can be 'correspondence, joint bills, bank accounts of ownership of a real estate etc...'.¹⁰⁶

The CJEU has addressed evidentiary issues mainly under the principle of effectiveness. This principle entails that 'a national procedural rule [...] must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order'.¹⁰⁷ It is clearly established in the CJEU's case law under this principle in other areas than migration law, such as taxation law, that national authorities cannot solely accept the strongest evidence in a case (and disregard other evidence).¹⁰⁸ In the *SpA San Giorgio* case the CJEU held that any requirement of proof which has the effect of making it 'virtually impossible or excessively difficult' to exercise a right granted by EU law is incompatible with EU law. The CJEU held that such requirements may include 'special limitations concerning the form of evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence'.¹⁰⁹

¹⁰³ The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (2016) UTIAC JR/2471/2016.

¹⁰⁴ 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'](#) COM(2014) 210 final, p 22.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, p 9.

¹⁰⁷ CJEU Case C-429/15 *Danqua* [2016], para 39.

¹⁰⁸ See for example, CJEU Case C-262/09 *Meilicke* [2011], paras 43-47. See also CJEU Case C-310/09 *Accor* [2011], paras 99-101.

¹⁰⁹ CJEU Case C-199/82 *SpA San Giorgio* [1983], para 14.

4.6.1 Exclusion of specific types of evidence

The CJEU concluded in several judgments that national provisions requiring a specific form of proof are contrary to EU law. In *Meilicke*, a tax case, the CJEU considered that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether or not to grant that advantage. However, the CJEU held that such an assessment must not be conducted too formalistically. The provision of documentary evidence which lacks the degree of detail and is not presented in specific form of a certificate, but which enables the authorities to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met, must be considered by those authorities to be equivalent to the production of the aforementioned certificate. Only if the taxpayer concerned produces no information, may the tax authorities refuse the tax advantage sought.¹¹⁰

The CJEU's judgment in *Commission v Italy* concerned the implementation of a directive on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture.¹¹¹ The question was whether Italy had correctly implemented this directive amongst others because it required architects wishing to obtain recognition in Italy of a qualification awarded to them in another Member State to submit their original diploma or a certified copy. According to the Commission that requirement should be reserved for cases in which there is legitimate doubt as to the authenticity of the qualifications.¹¹² The CJEU ruled that a national requirement specifying that the only acceptable evidence is the original of the diploma or a certified copy of the original is clearly disproportionate to the objective pursued, because it precludes any other form of evidence which might establish with the same degree of certainty the existence of the diploma in question, such as a certified statement or recognition of the applicant's diploma by the authorities or professional organisations of the Member State of origin.¹¹³

4.6.2 Proving inability to provide the ideal evidence

In the context of this expert opinion the case of *Ambisig* is of particular importance. It concerns a directive expressly allowing for alternative evidence if the ideal evidence is not available, thus resembling Article 11(2) FRD. Article 48(2)(a)(ii) of Directive 2014/18/EC¹¹⁴ provides that, where the recipient was a private purchaser, evidence of the economic operators' technical abilities may be furnished by 'the purchaser's certification or, failing this, simply by a declaration by the economic operator'. In *Ambisig* there was a legal discussion on the circumstances in which alternative evidence (a declaration by the economic operator) is allowed. According to Advocate General Wathelet the

¹¹⁰ CJEU Case C-262/09 *Meilicke* [2011], paras 43-47.

¹¹¹ Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1985] OJ 1985 L 223.

¹¹² CJEU Case C-298/99 *Commission v Italy*, para 33.

¹¹³ *Ibid*, paras 36-40.

¹¹⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2014] OJ L 134.

evidence of the impossibility to provide official documents must be assessed in the light of the specific circumstances of each case.¹¹⁵ The CJEU considered in this case that

rules in a contract notice allowing an economic operator to produce a unilateral declaration in order to prove his technical abilities *only if he proves that it is absolutely impossible* to obtain a private purchaser's certification *would prove disproportionate*. Such rules would place an excessive burden on him in relation to what is necessary in order to avoid distortion of competition and ensure compliance with the principles of transparency, non-discrimination and equal treatment in the sphere of public contracts.¹¹⁶

The CJEU considered that there is no violation of the principle of proportionality if the rules allow an economic operator to rely upon such a unilateral declaration where he proves, by means of objective evidence to be checked on a case-by-case basis, that there is a *serious difficulty* preventing him from obtaining such a certification. Such serious difficulties may include the bad faith of the private purchaser concerned. According to the CJEU such rules would not place an excessive burden of proof on the operator in question.¹¹⁷

4.6.3 Conclusion

It should be concluded that evidentiary rules may not render it impossible or excessively difficult for a person to make use of rights granted to him by EU law.¹¹⁸ The CJEU has held in several judgments that exclusion of specific types of evidence which are able to prove the relevant facts, because they are not considered the ideal evidence, is contrary to the principle of effectiveness.¹¹⁹ Furthermore it has held that it is disproportionate to ask a person to prove that it is *absolutely impossible* to obtain the required documentation, where EU legislation provides that alternative evidence should be accepted if a person is unable to obtain such documentation. In the same vein a 'bewijsnood' policy based on the principle according to which only the ideal evidence is acceptable and the refugee must prove that it is absolutely impossible to provide such ideal evidence violates the principle of effectiveness. What can be expected of the applicant needs to be assessed in the specific circumstances of the case, taking into account the purpose of the EU legislation at issue.¹²⁰ In the next section we will see that the specific evidentiary position of refugees warrants for leniency where it concerns evidentiary policy.

4.7 The special evidentiary position of refugees

Article 11(2) FRD acknowledges that refugees are in a particularly difficult position where it comes to obtaining documentary evidence. The Commission notes that

¹¹⁵ CJEU Case C-46/15, *Ambisig* [2016], opinion of AG Wathelet, para 50.

¹¹⁶ CJEU Case C-46/15 *Ambisig* [2016], para 41, emphasis added.

¹¹⁷ *Ibid*, para 42.

¹¹⁸ CJEU Case C-199/82 *SpA San Giorgio* [1983], para 14.

¹¹⁹ CJEU Case C-262/09 *Meilicke* [2011], paras 43-47. See also CJEU Case C-310/09 *Accor* [2011], paras 99-101, CJEU Case C-298/99 *Commission v Italy*, paras 33-40.

¹²⁰ CJEU Case C-46/15 *Ambisig* [2016], para 41

the particular situation of refugees who were forced to flee their country implies that it is often impossible or dangerous for refugees or their family members to produce official documents, or to get in touch with diplomatic or consular authorities of their country of origin.¹²¹

In the asylum context the difficult position of asylum applicants where it comes to documentary evidence is also recognised in the Qualification Directive (QD). Under Article 4(1) QD (which applies to the assessment of the right to refugee status and subsidiary protection) the Member States have the duty to assess the relevant aspects of the application *in cooperation* with the asylum applicant. According to the CJEU this duty entails

that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled.¹²²

Furthermore Article 4(5) QD requires the determining authorities to grant the asylum applicant the benefit of the doubt where aspects of the applicant's statements are not supported by documentary or other evidence, if certain conditions have been fulfilled. The applicant must have made a genuine effort to substantiate his application and the general credibility of the applicant must have been established.

4.7.1 The ECtHR's case law under Article 8 ECHR

The ECtHR has recognised in its case law under Article 8 ECHR that refugees may experience difficulties to gather the necessary proof in family reunification cases. The case of *Tanda-Muzinga* concerned an applicant with Congolese nationality who was granted a refugee status in France. He applied for family reunification with his wife and three children, who were staying in Cameroon. The French authorities refused the application for family reunification because it considered the birth certificates of applicant's youngest daughter and son to be false. Only years later the authenticity of the birth certificates of the children could be established. The ECtHR concluded in this case that Article 8 ECHR had been violated for a number of reasons, including the excessive period of time which elapsed before the French authorities recognised the applicant's family ties with his children.¹²³

The ECtHR underlined in *Tanda-Muzinga* that the applicant faced several obstacles in order to participate effectively in the procedure. Furthermore he had problems to obtain other evidence proving the parent-child relationship between him and his son recognised ('faire valoir les « autres éléments » de preuve des liens de filiation').¹²⁴ In this light, the ECtHR concluded that the procedure did not take into account the specific situation of the applicant and did not meet the requirement of

¹²¹ 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](#)' COM(2014) 210 final, p 22.

¹²² CJEU Case 277/11 *MM v Minister for Justice, Equality and Law Reform* [2012], para 66.

¹²³ ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10, para 80.

¹²⁴ *Ibid*, para 79.

effectiveness in order to ensure the respect of the right to family life.¹²⁵ The ECtHR thus recognises that Article 8 ECHR requires national authorities to take into account ‘other elements’ than official documents in family reunification cases of persons who are granted international protection.¹²⁶

It is important to note that in the case of *Tanda-Muzinga* the ECtHR refers to its case law under Article 3 ECHR with regard to the burden of proof in expulsion cases.¹²⁷ This implies that the ECtHR’s case law with regard to special evidentiary rules for persons who (allegedly) risk a violation of Article 3 ECHR upon return is relevant in family reunification cases of such person. For that reason we will pay attention to this case law in the next section.

4.7.2 The ECtHR’s case law under Article 3 ECHR

In expulsion cases under Article 3 ECHR the ECtHR considered that ‘owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof’.¹²⁸ Furthermore the ECtHR held that the decision-making authorities have a duty to investigate, in particular where certain evidence is more accessible to them than to the applicant. In *Singh v Belgium* for example the ECtHR held that the authorities could have contacted UNHCR in India in order to check whether the applicants were registered there as (Afghan) refugees as they claimed.¹²⁹

Most importantly the ECtHR has made clear that decision-making authorities are not allowed to accept only official documentation. Moreover they may not exclude evidence only because there is a possibility that it is forged. In *F.N. v Sweden* the ECtHR found a violation of Article 3 ECHR, amongst others because the Swedish authorities did not take into account several documents (employment books, a birth certificate and a copy of a driver’s license) which supported their identity because they failed to present an original passport. The ECtHR considered:

Although the Court agrees that the best way for asylum seekers to prove their identity is by submitting a passport in original, this is not always possible due to the circumstances in which they may find themselves and for which reason other documents might be used to make their identity probable.¹³⁰

The ECtHR considered ‘that the documents submitted by the applicants, in particular those in original not questioned per se by the Swedish authorities, cannot be ignored simply on the ground that the applicants have failed adequately to prove their identities’.¹³¹

The ECtHR also held that copies of documents may not be excluded from the assessment of the asylum claim. In *M.A. v Switzerland* the Swiss authorities ignored copies of summonses on the ground ‘of a generalised allegation that such documents could theoretically have been bought in

¹²⁵ Ibid para 82.

¹²⁶ Ibid, para 79.

¹²⁷ Ibid, para 69.

¹²⁸ See eg ECtHR 22 August 2016, *JK v Sweden*, Appl no 59166/12, para 93.

¹²⁹ ECtHR 2 October 2012, *Singh v Belgium*, Appl no 33210/11, para 104.

¹³⁰ ECtHR 18 December 2012, *FN v Sweden*, Appl no 28774/09, para 72. The ECtHR refers to this case in ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10, para 69. See also ECtHR 7 January 2014, *A.A. v Switzerland*, Appl no 58802/12, para 61.

¹³¹ ECtHR 18 December 2012, *FN v Sweden*, Appl no 28774/09, para 72.

Iran'.¹³² The ECtHR considered that

[t]his approach disregards the particular situation of asylum seekers and their special difficulties in providing full proof of the persecution in their home countries [.]. The veracity of the applicant's story must therefore also be assessed in the context of the documents submitted.¹³³

Also in *Singh v Belgium* the authorities ignored documents submitted in support of the applicant's identity and concluded that the applicant's Afghan nationality had not been established. The applicants submitted original identity cards and copies of the identity pages of their passports. Furthermore they provided email correspondence between their lawyer and a representative of the *Comité Belge pour l'aide aux réfugiés* (CBAR) a partner of the UNHCR, about their registration as a refugee in India. According to the Belgian authorities the emails and documents of UNHCR could easily have been falsified and original documents should have been provided.¹³⁴ The ECtHR established that these documents were not irrelevant. It ruled that the Belgian authorities could not ignore the documents without having verified their authenticity, for example by contacting UNHCR in India.¹³⁵

Only if there are serious doubts about the submitted documents and the applicant has not undertaken all possible steps to clarify his identity, national authorities would be allowed to ignore these documents. In *A.A. v Switzerland* the applicant had submitted a birth certificate (issued on 26 July 1987) in the second asylum procedure. In the ECtHR's view the Swiss authorities rightly questioned the authenticity of this document because the applicant had stated in the first asylum procedure that he had lost all his personal documents in a fire at his home in Darfur and that he never had possessed a document showing his date of birth.¹³⁶

4.7.3 Conclusion

Both EU legislation and the ECtHR's case law under Article 8 and 3 ECHR recognise that refugees (and persons in need of subsidiary protection) experience difficulties to prove their statements with documentary evidence. For this reason they apply more lenient evidentiary rules to this category of migrants. Both Article 11(2) FRD and the ECtHR's judgment in *Tanda-Muzinga* require that the authorities assessing an application for family reunification of a refugee take into account 'other elements' than official documents.¹³⁷

In *Tanda-Muzinga* the ECtHR made clear that its case law under Article 3 ECHR with regard to evidentiary issues in asylum claims, is also relevant in the context of family reunification.¹³⁸ Arguably this also applies to Article 4 QD which provides for evidentiary rules in asylum cases. According to the ECtHR's case law and the CJEU's case law under Article 4 QD the authorities should actively cooperate with the applicant to gather all the relevant evidence.¹³⁹ Furthermore the ECtHR's has

¹³² ECtHR 18 November 2014, *MA v Switzerland*, Appl no 52589/13, para 62.

¹³³ Ibid.

¹³⁴ ECtHR 2 October 2012, *Singh v Belgium*, Appl no 33210/11, para 105.

¹³⁵ Ibid, para 104.

¹³⁶ ECtHR 7 January 2014, *A.A. v Switzerland*, Appl no 58802/12.

¹³⁷ ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10.

¹³⁸ Ibid, para 69.

¹³⁹ CJEU Case 277/11 *MM v Minister for Justice, Equality and Law Reform* [2012], para 66, ECtHR 2 October

ruled in many cases that documents, other than official documents, cannot be disregarded only because they are not official or copies of (official) documents.¹⁴⁰ Authorities should also give specific reasons why they doubt the authenticity of documents. Finally, according to Article 4(5) QD and the ECtHR's case law under Article 3 ECHR asylum applicants should be granted the benefit of the doubt when they failed to support their statements with evidence, but made a genuine effort to substantiate their application and the general asylum account should be considered credible.¹⁴¹

2012, *Singh v Belgium*, Appl no 33210/11, para 104.

¹⁴⁰ ECtHR 18 November 2014, *MA v Switzerland*, Appl no 52589/13, ECtHR 18 December 2012, *FN v Sweden*, Appl no 28774/09, ECtHR 2 October 2012, *Singh v Belgium*, Appl no 33210/11.

¹⁴¹ ECtHR 22 August 2016, *JK v Sweden*, Appl no 59166/12, para 93.

5 Conclusion

This expert opinion examined whether the Dutch evidentiary policy, as it is applied in Eritrean family reunification cases, is in conformity with the Family Reunification Directive. This policy entails that applicants for family reunification must provide official documents proving the identity of, and family ties with their family members. If the applicant fails to do so, he must convince the IND that this is not attributable to him. In Eritrean family reunification cases the IND assumes on the basis of country of origin information about Eritrea that applicants are able to obtain official documents, if necessary with the help of family members or third persons.

If the IND concludes that the Eritrean sponsor did not convincingly show that he is not able to obtain official documents, this has important consequences. First, alternative evidence of identity and/or family ties, such as documents evidencing a customary or religious marriage, is not taken into account. Second, the Dutch authorities will not further investigate the case, for example by offering DNA testing or identifying interviews. Third, the IND does not subject the application to an individual assessment on the basis of all the facts and circumstances submitted by the applicant. As a result the application for family reunification may be denied. The Dutch evidentiary policy led to a large number of rejections of applications for family reunification lodged by Eritrean asylum status holders in the past year.

Insufficient basis in country of origin information

This expert opinion first assessed whether the IND's assumption, that Eritrean asylum status holders are able to obtain official documents for the purpose of their application for family reunification, is based on sufficient and reliable legal and country of origin information. The IND refers to information provided by the website of the Eritrean Ministry of Information¹⁴², an EASO report on Eritrea of 2015¹⁴³ and a the country reports of the Dutch Ministry of Foreign Affairs of 2015¹⁴⁴ and 2017¹⁴⁵.

However, this information often merely describes the official regulations and largely fails to show how the law is applied in reality. The information relied on by the IND is completed in that respect by information provided by the Eritrea experts Günter Schröder¹⁴⁶ and Yohannes Amanuel. These experts dispute some conclusions drawn by the IND. They reject on the basis of legal information the IND's position that religious or customary marriages would only be valid if they are registered and can thus be proved with official documents. Furthermore various sources confirm that it is very difficult to obtain identity documents from the Eritrean authorities.¹⁴⁷ Finally several reports

¹⁴² Website of the Eritrean Ministry of Information: www.shabait.com.

¹⁴³ EASO, *Country of Origin Information Report, Eritrea Country Focus* (May 2015).

¹⁴⁴ Dutch Ministry of Foreign Affairs, *Country report on Eritrea* (30 July 2015).

¹⁴⁵ Dutch Ministry of Foreign Affairs, *Country report on Eritrea* (7 February 2017).

¹⁴⁶ G. Schröder, Legal and Social Issues Relating to Marriage and Paternity in Eritrea, Presentation at the Expert meeting 'Proving family ties in Eritrean family reunification cases', organised by the Migration Law Clinic and the Dutch Council for Refugees (7 March 2017), p 7, available at www.migrationlawclinic.org and Y. Amanuel, Marriage Law in Eritrea, see Annex 3 and 4 with this expert opinion.

¹⁴⁷ Dutch Ministry of Foreign Affairs, *Country report on Eritrea* (30 July 2015), p 31-32; Immigration and Refugee Board of Canada (IRB), *Eritrea: Identification documents, including national identity cards and birth certificates; requirements and procedures for obtaining and renewing identity documents, both within the country and abroad (2009-August 2013)* (16 September 2013), Immigration and Refugee Board of Canada (IRB): *Eritrea: prevalence of fraudulent identity documents, including national identity cards (2012-august 2014)* (6 September 2014),

substantiate that it may be dangerous for family members and other third parties to request the Eritrean authorities to issue official documents on behalf of an Eritrean asylum status holder in the Netherlands.¹⁴⁸ We therefore conclude that the IND's rejection of the explanations of Eritrean sponsors for the lack of official documentation is not based on sufficient and reliable legal sources and country of origin information. In other words: the assessment by the IND according to which the applicants are not in a situation in which obtaining the required ideal evidence is impossible, is based on disputable grounds. The strict application of the concept of *bewijsnood* may thus make it excessively difficult or even impossible for Eritrean asylum status holders to reunite with their family members.

Incompatibility with the Family Reunification Directive

The expert opinion continued to examine whether the application of the Dutch evidentiary policy in Eritrean family reunification cases is in conformity with the Family Reunification Directive. With regard to evidentiary issues Articles 5 and 11(2) FRD are most relevant. Article 11(2) FRD provides that where a refugee cannot provide official documentary evidence of the family relationship, the Member State *shall* take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. According to this provision a decision rejecting an application *may not* be based solely on the fact that documentary evidence is lacking.

Article 11(2) FRD is laid down in Chapter V FRD which contains special provisions for family reunification of *refugees*. We established in this expert opinion that, in the Dutch situation, Chapter V FRD is applicable to both Eritrean refugees *and persons granted subsidiary protection*.¹⁴⁹ This is the result of the fact that both categories of migrants are granted exactly the same asylum status in the Netherlands, with the same rights. This one status system aims to prevent that persons granted subsidiary protection have a legal interest to appeal the rejection of the refugee status.¹⁵⁰ As a result of the application of the Directive to family reunification cases of persons granted subsidiary protection the CJEU is competent to interpret the provisions of Chapter V FRD in this context.¹⁵¹

Under Article 11(2) FRD, a rejection of family reunification of refugees is prohibited if it is solely based on the fact that documentary evidence of family relationship is lacking. Further, a Member State is obliged to take in account other evidence than official documentary evidence if it is determined that the applicant *cannot* provide such documentary evidence of the family relationship. The word 'cannot' leaves some discretion to Member States to assess when a lack of official documents can be attributed to the applicant. However, a strict interpretation of this provision would be contrary to the purpose of the Family Reunification Directive. The Directive aims to ensure the right of family reunification for third country nationals and recognises that family reunification is

Immigration and Refugee Board of Canada (IRB), [Eritrea and Sudan: Situation of the border region between the two countries, including military and police patrols, as well as legal crossing points; information on physical obstacles to prevent crossing, such as fences and mines; number of people legally and irregularly crossing the border \(2013-May 2014\)](#), 20 December 2014, Home Office (United Kingdom), [Country Information and Guidance Eritrea: National \(incl. Military\) Service](#) (11 March 2015), Home Office (United Kingdom), [Eritrea Country of Origin Information Report \(COI\)](#), 18 September 2013, p 128-129.

¹⁴⁸ DSP groep Amsterdam, Universiteit Tilburg, [Niets is wat het lijkt, Eritrese organisaties en integratie](#), presented to the Second Chamber of Parliament by letter of 15 December 2016, attached to *Kamerstukken II* 22 831, no 125, UN General Assembly, Human Rights Council, [Report of the commission of inquiry on human rights in Eritrea](#) (9 May 2016).

¹⁴⁹ Compare ABRvS 17 December 2014, [ECLI:NL:RVS:2014:4650](#), ABRvS 10 March 2015, [ECLI:NL:RVS:2015:839](#).

¹⁵⁰ ABRvS 28 March 2002, nr. [200105914/1](#).

¹⁵¹ CJEU Case C-28/95 *Leur-Bloem* [1997], CJEU Case C-313/12 *Romeo* [2013].

particularly important for persons who needed to flee their country of origin.¹⁵² This means that provisions which limit the right to family life should be interpreted restrictively. The strict application of the Dutch evidentiary policy in Eritrean family reunification cases undermines the effectiveness of the EU right to family reunification. Only if the required documentary evidence would be clearly and easily available without any type of risk, a Member State might perhaps be allowed to refuse further investigations in the form of an interview or DNA tests, as the right to family reunification would in such circumstances arguably not be made virtually impossible or excessively difficult. Such interpretation of the text of Article 11(2) FRD is supported by the general duty to an individual assessment required by Article 17 FRD and the CJEU's case law with regard to evidentiary issues under the principle of effectiveness.

The Dutch practice of a mechanical rejection of an application for an application for family reunification based on one single factor (that the lack of official documents is attributable to the applicant) is contrary to Article 17 FRD read in the light of the CJEU's cases law. These require that applications for family reunification are subjected to an individual assessment.¹⁵³ Furthermore this practice violates Article 5(5) FRD, which requires that the best interests of the children involved are taken into account.¹⁵⁴

In its case law in the context of the principle of effectiveness the CJEU has held that evidentiary rules may not render it impossible or excessively difficult for a person to make use of rights granted to him by EU law.¹⁵⁵ It was concluded on the basis of country of origin information that for Eritrean status holders and their family members it may indeed be very difficult or even impossible to provide official documents proving their identity and family ties. Moreover the high threshold applied by the IND to prove that the lack of official documents is attributable to them is problematic in the light of the CJEU's judgment in *Ambisig*. The CJEU held in this judgment that it is disproportionate to ask a person to prove that it is *absolutely impossible* to obtain the required documentation, where EU legislation provides that alternative evidence should be accepted if a person is unable to obtain such documentation. What can be expected of the applicant needs to be assessed in the specific circumstances of the case, taking into account the purpose of the EU legislation at issue.¹⁵⁶ This means that in the interpretation of Article 11(2) FRD the specific evidentiary position of refugees should be taken into account.

In this light, the exclusion of other types of alternative evidence, in cases where the lack of official documents is attributed to the applicant, is problematic. This follows from the CJEU's case law in other fields than migration law¹⁵⁷ and the ECtHR's case law on refugees and family life. In *Tanda-Muzinga* the ECtHR required that the authorities assessing an application for family reunification of a refugee take into account 'other elements' than official documents.¹⁵⁸ In this judgment the ECtHR made clear that its case law under Article 3 ECHR with regard to evidentiary issues in asylum claims,

¹⁵² See also ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10, para 75 and 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) (February 2012), p 2.

¹⁵³ Art 17 FRD, CJEU Case C-540/03 *Parliament v Council* [2006], CJEU Case C-356/11 *O. and S.* [2012].

¹⁵⁴ See also *The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department* (2016) UTIAC JR/2471/2016.

¹⁵⁵ CJEU Case C-199/82 *SpA San Giorgio* [1983], para 14.

¹⁵⁶ CJEU Case C-46/15 *Ambisig* [2016], para 41

¹⁵⁷ CJEU Case C-262/09 *Meilicke* [2011], paras 43-47. See also CJEU Case C-310/09 *Accor* [2011], paras 99-101, CJEU Case C-298/99 *Commission v Italy*, paras 33-40.

¹⁵⁸ ECtHR 10 July 2014, *Tanda-Muzinga v France*, Appl no 2260/10.

is also relevant in the context of family reunification of refugees.¹⁵⁹

According to the ECtHR's and the CJEU's case law the authorities should actively cooperate with asylum applicants to gather all the relevant evidence.¹⁶⁰ Furthermore, the ECtHR's has ruled in many cases that documents, other than official documents, cannot be disregarded only because they are not official or copies of (official) documents.¹⁶¹ Authorities should also give specific reasons why they doubt the authenticity of documents. In the light of the special situation of asylum applicants, they should be granted the benefit of the doubt if they made a genuine effort to substantiate their application and the general asylum account should be considered credible.¹⁶²

In sum, the factual and safe availability of documentary evidence as required by the Dutch authorities from Eritrean applicants is far from evident. In the light of the EU case law referred to above it should be concluded that an evidentiary policy only accepting a certain type of ideal evidence and blaming the refugee for not showing that it was absolutely impossible to obtain such evidence violates general principles of EU law. Similarly, EU law is violated by an evidentiary policy making it impossible or excessively difficult to exercise a right granted by EU law, in this case the right to family reunification.

¹⁵⁹ Ibid, para 69.

¹⁶⁰ CJEU Case 277/11 *MM v Minister for Justice, Equality and Law Reform* [2012], para 66, ECtHR 2 October 2012, *Singh v Belgium*, Appl no 33210/11, para 104.

¹⁶¹ ECtHR 18 November 2014, *MA v Switzerland*, Appl no 52589/13, ECtHR 18 December 2012, *FN v Sweden*, Appl no 28774/09, ECtHR 2 October 2012, *Singh v Belgium*, Appl no 33210/11.

¹⁶² Art 4(5) QD, ECtHR 22 August 2016, *JK v Sweden*, Appl no 59166/12, para 93.

Annex 1

Summary of an IND decision in an Eritrean family reunification case

This case concerns the rejection of the application for family reunification of an Eritrean woman who is in the possession of a Dutch asylum residence permit for a fixed period (hereafter: sponsor) and her husband (hereafter: applicant). The IND based the rejection on the fact that the applicant did not provide official documents that prove his identity and his marriage with the sponsor, and that the applicant has not made plausible that the absence of these documents is not attributable to him.

The application for family reunification of the applicant with his wife was submitted on September 9th, 2015. In response to the application, on the 2nd of February 2016, the IND informed the applicant in a letter that he needed to provide the required documents that could prove his identity and the existence of actual family ties between the applicant and the sponsor. In this regard, the IND therefore asked for a marriage certificate, issued by the Eritrean authorities and an extract of the civil family register ('family record') to prove the family marriage, together with one or more documents that could prove the applicant's identity (i.e. identity card/passport/driving licence/residence card to).

In response to the letter of the IND, the applicant stated that he only possesses a religious marriage certificate and that this is very common in Eritrea. Moreover, he explained that applying for an official civil marriage license is not common in Eritrea, and that if he would apply for this license with the relevant authorities, this would cause a direct danger of him being arrested by these authorities. Furthermore, the applicant stated that he is not in the possession of an Eritrean identity document and that he cannot apply for this without getting in danger.

On the 4th of March 2016, the IND gave the applicant another opportunity to provide for the required documents, insisting that he should express exactly what action he and his wife had taken in order to obtain the necessary documents and substantiate this with proof and documents. According to the IND, requesting documents from the Eritrean authorities could be done through third persons, such as family members and friends or through an authorised person. The applicant was asked again to explain why he has never been in the possession of the required documents and why it is impossible for him to obtain the documents at present.

On the 21st of March, 2016, the applicant replied to the letter of the IND. With regard to the civil marriages certificate, that he and his wife have been married in the church, after which they received a religious marriage certificate. They have never had any interest in applying for a civil marriage certificate issued by the authorities of Eritrea, since the sole possession of a religious marriage certificate is very common in Eritrea. They never had to provide a certificate that was issued by the authorities to any governmental body in Eritrea. The original religious marriage certificate is currently in the possession of his wife in the Netherlands. Concerning an extract of civil family registers ('family record'), the applicant presumed that there is no official system of family registration in Eritrea.

With regard to an identity card, passport or driving license, the applicant stated that because he is not a government official, a civil servant, or any other representative of the state, he has never been able to apply for a passport. In this regard, the applicant refers to a statement of Expert Dr John Campbell. Moreover, the applicant stated that when he was in school, he was in the possession of a school identity card, which allowed him to travel. Therefore, there it was not necessary to apply for

an ID card or a passport. According to the applicant it is common to hand in your school card as soon as you leave school. For this reason, the applicant is not in the possession of a school card anymore. The reason why he never applied for an ID card afterwards, was because he wanted to avoid the authorities. If he were to make a request, he would be recruited for the army.

With regard to the possibility to possess the required documents at this moment, the applicant repeatedly states that until recently, he was hiding from the same authorities to which he should apply to for the required documents. If he would request the authorities for these documents, he would risk to be arrested. The reason that he had been in hiding, was that he had fled from a *giffa* (a type of raid or *razzia* carried out by Eritrean authorities). Dealing with the proposed option to obtain the documents through third persons, the applicant states that if he would ask a third person to request such a document from the authorities, this would bring this person in danger. Moreover, he would put himself in the spotlight of the same authorities he was hiding from. Furthermore, he states that it is commonly known that at this moment no passports are issued to persons above 18 years, as it is currently prohibited to leave Eritrea.

In response to the aforementioned statements of the applicant, the IND states that the statement of the applicant are not substantiated with evidence in any manner. In this regard, the IND refers to country information on Eritrea which shows that inhabitants of Eritrea can obtain legal documents issued by the Eritrean authorities that can prove their identity and the existence of a family relationship.¹⁶³

According to these sources, Eritrea has an electronic population register that is kept updated. From those registers, transcripts can be requested for different purposes (for individuals, families, etc.). Many inhabitants possess a residence card or an identity card, which they have to show on many occasions. Irrespective of their domicile, every inhabitant of Eritrea can request extracts of the civil registers in Asmara. The 'Public Registration Office' in Asmara issues official documents about birth, marriage, divorce, residence, associations, marital state and the family. These documents are valid in all countries. It is also possible to obtain these documents from abroad. The Eritrean representations abroad can authorise a third person. With this authorisation, a third person can apply for the required documents at the authorities in Eritrea.

With regard to the argument on religious marriages, the IND holds that these marriages are recognised as official marriages, but only if they have been recorded in the civil registers.

On the basis of these grounds, the IND concludes that inhabitants of Eritrea can obtain official documents proving their identity and family relationship. It has not been shown that the applicant or the sponsor made any effort to obtain the required documents. With regard to the information of Dr John Campbell, the IND contemplates that this information relates only to the obtainment of passports (not identity cards). To obtain an ID card, the applicant could contact the embassy of Sudan.

This leads to the conclusion that it has not been shown that the lack of official documents is not attributable to the applicant. The applicant does not fulfil the requirements for family reunification under Article 29(2) Aliens Act 2000. For this reason, the IND rejected the application for family reunification.

¹⁶³ EASO, *Report on Eritrea*; Website of the Eritrean Ministry of Information; Dutch Ministry of Foreign Affairs, *Official country report on Eritrea*, 2015.

Annex 2:

Letter of the IND to the Administrative Jurisdiction Division of the Council of State

17. Mei 2016 16:21

Nr. 3110 P. 1/5



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Ministerie van Veiligheid en Justitie

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Datum 17 mei 2016
Betreft
geboren op: 1995
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21-078287568

Uw kenmerk
201506676/1

Onder verwijzing naar uw brief van 14 april 2016 ontvangt hierbij de antwoorden op de in uw brief gestelde vragen.

Op p. 35 van de nota van toelichting bij het Besluit van 17 december 2013 (Stb. 2013, 580) is vermeld dat alle relevante bepalingen van Richtlijn 2003/86/EG (hierna: de Richtlijn) over narels zijn geïmplementeerd binnen het asielbeleid en dat dit betekent dat de reguliere narelsbepalingen overbodig zijn geworden. Daarnaast is op p. 11 van de memorie van toelichting behorende bij het wetsvoorstel tot wijziging van de Vw 2000 in verband met het herschikken van de gronden voor asielverlening (Kamerstukken II 2011/12, 33 293, nr. 3) vermeld dat er niet voor is gekozen narelszende gezinsleden binnen het reguliere kader van gezinshereniging onder te brengen.

Vraag 1: Indien u zich naar aanleiding van bovenvermelde informatie (thans) op het standpunt stelt dat artikel 29, tweede lid, van de Vw 2000 een implementatie is van de Richtlijn, kunt u dan toelichten welke bepalingen van de Richtlijn in artikel 29, tweede lid, van de Vw 2000 zijn geïmplementeerd? De Afdeling verzoekt u daarbij in het bijzonder toe te lichten in hoeverre artikel 4, tweede lid, en artikel 10, tweede lid, van de Richtlijn daarin zijn geïmplementeerd.

Antwoord: De Staatssecretaris gaat er van uit dat met toepassing van artikel 29, tweede en vierde lid, Vw 2000 aan alle uit de Richtlijn voortvloeiende minimumvereisten wordt voldaan. Daarnaast zijn de facultatieve bepalingen voor een deel geïmplementeerd en op sommige onderwerpen gaat Nederland zelfs verder dan de Richtlijn vereist.

Artikel 4, tweede lid, van de Richtlijn betreft een facultatieve bepaling en Nederland heeft ervoor gekozen deze bepaling deels te implementeren. Artikel 4, tweede lid onder a van de Richtlijn ziet op ouders van de gezinsreuniger of zijn echtgenoot in het algemeen, die de nodige gezinssteun ontberen. Hier gaat het niet om ouders van alleenstaande minderjarige specifiek, zoals in artikel 29, tweede lid, onder c, Vw 2000 wel bedoeld. Nederland heeft ervoor gekozen deze bepaling te implementeren voor wat betreft de ouders van een alleenstaande minderjarige vreemdeling, zonder daarbij te vereisen dat sprake is van een situatie waarin zij de nodige gezinssteun ontberen, en gaat op dit punt dus verder dan de Richtlijn strikt genomen vereist.



Artikel 4, tweede lid, onder b, van de Richtlijn ziet op meerderjarige ongehuwde kinderen van de gezinshereniger of zijn echtgenoot die wegens hun gezondheidstoestand niet in staat zijn in hun levensonderhoud te voorzien. Nederland maakt gezinshereniging mogelijk met een meerderjarig kind indien dit kind zodanig afhankelijk is van de hoofdpersoon dat hij om die reden behoort tot diens gezin (artikel 29 lid 2 onder b, Vw 2000). Hierbij is niet langer vereist dat sprake is van 'more than normal emotional ties,' zoals bedoeld bij toepassing van artikel 8 EVRM in de relatie tussen meerderjarige gezinsleden (zie ook Kamerstukken II, 2014/15, 32 175, nr. 57). Hierbij geldt niet dat er sprake moet zijn van een slechte gezondheidstoestand en Nederland gaat ook hier dus verder dan de Richtlijn strikt genomen vereist.

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Ook artikel 10, tweede lid, van de Richtlijn is een facultatieve bepaling. Deze laat gezinshereniging toe van niet in artikel 4 genoemde gezinsleden, indien deze ten laste komen van de hoofdpersoon. Nederland heeft ervoor gekozen gezinshereniging toe te staan met partners en meerderjarige kinderen die tot het gezin behoren van de hoofdpersoon, zoals hierboven omschreven. Ook pleegkinderen, die niet specifiek in de Richtlijn genoemd zijn, worden door Nederland toegelaten in het kader van nareis indien deze kinderen behoren tot het gezin van de hoofdpersoon (zie paragraaf C-2/4.1 Vreemdelingencirculaire).

Nederland heeft kortom op bovenstaande wijze de Richtlijn geïmplementeerd en gaat daarbij op sommige punten verder dan strikt genomen vereist is.

Vraag 2: In artikel 29, tweede lid, van de Vw 2000 is geen uitzondering gemaakt voor zaken waarin de gezinshereniger houder is van een verblijfsvergunning asiel krachtens artikel 29, eerste lid, aanhef en onder b, van de Vw 2000. De Afdeling verzoekt u deze keuze toe te lichten en daarbij aan te geven wat dit volgens u betekent voor de toepasselijkheid van de Richtlijn in dergelijke zaken. De Afdeling verzoekt u daarbij artikel 3, tweede lid, aanhef en onder c, van de Richtlijn en de uitspraak van de Afdeling van 17 december 2014 in zaak nr. 201400027/1/V3 te betrekken.

Antwoord: Nederland gaat hier verder in zijn implementatie dan conform de Richtlijn vereist is. In artikel 3, tweede lid, aanhef en onder c, van de Richtlijn staat immers dat de Richtlijn niet van toepassing is op personen met een subsidiaire vorm van bescherming. Nederland heeft er desondanks voor gekozen om ook personen met subsidiaire vormen van bescherming onder dezelfde soepeler voorwaarden gezinshereniging (nareis) toe te staan en heeft daarvoor goede redenen. Deze zijn met name gelegen in het feit dat in Nederland aan verlening van een verblijfsvergunning vanwege vluchtelingenschap of vanwege subsidiaire bescherming dezelfde rechtsgevolgen worden verbonden. Dit zogeheten één - status stelsel is destijds doelbewust ingevoerd om te voorkomen dat asielzoekers na inwilliging op de in artikel 29, eerste lid, aanhef en onderdeel b bedoelde grond zouden gaan doorprocederen voor inwilliging op grond van onderdeel a. Omdat middels het één - status stelsel asielzoekers na inwilliging op de b-grond dezelfde voorzieningen en rechten krijgen als verdragsvluchtelingen, hebben zij volgens vaste jurisprudentie van uw Afdeling hier geen belang bij.

In de uitspraak waarnaar uw Afdeling in vraag 2 verwijst wordt onder meer op de brief van voormalig Staatssecretaris Teeven gewezen (Kamerstukken II, 2014/15, 30 573, nr. 127). In dit kader zijn de arresten van het Hof van Justitie EU. Leur Bloem (HvJ EU 17 juli 1997, nr. C-28/95) en Romeo (HvJ EU 7 november 2013, nr. C313/12) van belang. Uit deze arresten volgt kort gezegd dat, wanneer Unrechtelijke bepalingen na implementatie in het nationale



recht door de nationale wetgever rechtstreeks en onvoorwaardelijk toepasselijk zijn gemaakt op zulke interne situaties, het Hof bevoegd is uitleg te geven over deze regels. Daarmee zijn die Unierechtelijke regels op dezelfde manier van toepassing op interne situaties.

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De Staatssecretaris begrijpt uw vraag zo dat u wilt weten of het bovenstaande ook geldt voor de categorie subsidair beschermden en derhalve of de Richtlijn ook voor hen van toepassing is. Het gevolg van het feit dat Nederland dezelfde regels toepast voor gezinshereniging op subsidair beschermden is inderdaad dat, conform bovengenoemde Hof jurisprudentie, de uitlegging van die regels door het Hof ook op deze categorie van toepassing is. Dat betekent dat materieel gezien Nederland ook wat betreft subsidair beschermden aan de Richtlijn is gebonden.

Vraag 3: Indien u zich naar aanleiding van bovenvermelde informatie op het standpunt stelt dat artikel 29, tweede lid, van de Vw 2000 een implementatie is van de Richtlijn, dan verzoekt de Afdeling u per bovenvermelde zaak toe te lichten of de Richtlijn van toepassing is en zo nee, waarom niet.

Antwoord: In de onderhavige zaak is de gezinsherenigingsrichtlijn evenmin van toepassing. Ook hier is sprake van toepassing van het bovenstaande oude toetsingskader voor meerderjarige kinderen, nu het gaat om de meerderjarige dochter en kleindochter van een referent met een asielvergunning in Nederland. In deze zaak is geoordeeld dat vanwege het feit dat ~~_____~~ was gehuwd en haar eigen gezin gesticht had, geen sprake meer was van een feitelijke gezinsband, noch van een meer dan gebruikelijke afhankelijkheid van de hooftpersoon. Om deze reden voldeed betrokkene niet aan de voorwaarden voor narels onder artikel 29, tweede lid, van de Vw 2000 en is derhalve ook de Richtlijn niet op haar van toepassing, hetgeen is gevolgd door de rechtbank.

Ook onder het huidige beleid is het huwen en stichten van een eigen gezin een contra-indicatie bij de vaststelling van de feitelijke gezinsband. Een vergelijkbare zaak zou dus evenmin binnen het toepassingsbereik van artikel 29, tweede lid, van de Vw 2000 en binnen de reikwijdte van de Richtlijn vallen.

Vraag 4: Indien de Richtlijn op bovenvermelde zaken van toepassing zou zijn, welke gevolgen heeft dat volgens u voor de toepasselijkheid van het Handvest van de grondrechten van de Europese Unie, artikelen 7 en 24 in het bijzonder? De Afdeling verzoekt u bij de beantwoording van deze vraag toe te lichten welke gevolgen dit volgens u heeft voor bovenvermelde zaken.

Antwoord: Gelet op de omstandigheid dat in geen van de vier voormelde zaken de Richtlijn van toepassing is, zijn evenmin de grondrechten, en in het bijzonder artikelen 7 en 24, van het Handvest van de Europese Unie toepasselijk.

Dit neemt uiteraard niet weg dat indien een zaak wel binnen de reikwijdte van de Richtlijn zou vallen en aldus sprake is van ten uitvoerlegging van bepalingen van het Unierecht, het Handvest onverkort van toepassing is.

Vraag 5: In hoeverre betreft u artikel 8 van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden bij uw beoordeling of een vreemdeling in aanmerking komt voor een verblijfsvergunning krachtens artikel 29, tweede lid, van de Vw 2000?



Antwoord: Het narelsbeleid is een bijzondere vorm van gezinshereniging met beperkte voorwaarden voor gezinnen die door de vlucht van een of meer gezinsleden in het land van herkomst (of het land van eerder verblijf), van elkaar gescheiden zijn. De Nederlandse wetgever heeft de rol van artikel 8 EVRM in het narelsbeleid strikt beperkt tot de kaders van dat bijzondere beleid. Het narelsbeleid geeft de vreemdeling die een asielvergunning heeft gekregen de mogelijkheid om, binnen drie maanden na verlening van de asielvergunning, om de overkomst van zijn gezinsleden te vragen. Deze gezinsleden worden, indien voldaan aan de voorwaarden, eveneens in het bezit gesteld van een verblijfsvergunning asiel. Wanneer de (gezins)situatie buiten de kaders van het narelsbeleid valt, wordt de aanvraag afgewezen en biedt het beleid geen plaats voor inhoudelijke toetsing aan artikel 8 EVRM.

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Z1-8782887568

Uiteraard kan door de vreemdeling indien zijn narelsaanvraag niet binnen de reikwijdte van de gunstige bepalingen voor gezinshereniging voor vluchtelingen van de Richtlijn valt, zoals in de onderhavige zaken het geval is, een reguliere aanvraag voor gezinshereniging als bedoeld in artikel 14, van de Vw 2000, worden ingediend. Hierbij gelden de overige (imperatieve) bepalingen van de Richtlijn voor reguliere gezinshereniging en is ook artikel 8 EVRM in volle omvang van toepassing.

Deze wijze van toetsen is het gevolg van de waterscheiding tussen asielprocedures en reguliere procedures, hetgeen het EHRM recentelijk nog in zijn rechtspraak heeft geaccepteerd. Er is derhalve geen plicht om bij dergelijke aanvragen vol aan artikel 8 EVRM te toetsen (zie EHRM 9 februari 2016, appl.no. 39670/11, F.A. t. Nederland, r.o. 26 en 27 en 12 januari 2016, zaak nr. 46856/07, M.R.A. tegen Nederland, r.o. 93).

In het kader van de wetwijziging die zag op het herschikken van de gronden voor asielverlening is de procedure vereenvoudigd, omdat er werd geconstateerd dat het afdoen van verblijfsaanvragen van narelszigers binnen de asielprocedure aanzienlijke administratieve lasten tot gevolg had, nu alle stadia van de procedure werden doorlopen (Kamerstukken II 2011/2012, 33 293, nr. 3, p. 10 e.v.). Om die reden kan een vreemdeling er nu voor kiezen meteen een aanvraag voor narels in te dienen en een afgeleide asielvergunning verkrijgen, zonder de hele procedure te doorlopen. Hierbij wordt alleen aan de bepalingen voor narels getoetst en niet aan artikel 8 EVRM.

Dit neemt echter niet weg dat het een vreemdeling vrij staat ervoor te kiezen toch de gehele asielprocedure te doorlopen. Indien dit niet leidt tot de verlening van een zelfstandige asielvergunning kan alsnog een afgeleide asielvergunning in het kader van narels worden verleend indien aan de voorwaarden wordt voldaan. Indien ook hiertoe geen aanleiding bestaat, wordt - indien de asielaanvraag binnen 6 maanden na inreis is ingediend - ook getoetst aan artikel 8 EVRM (ingevolge artikel 3.6a, Vreemdelingenbesluit 2000). Op deze manier kan de vreemdeling, naast het indienen van een reguliere aanvraag, er derhalve ook voor kiezen om via het doorlopen van de gehele asielprocedure ook een beoordeling in het kader van artikel 8 EVRM te krijgen nadat is vastgesteld dat hij niet in aanmerking komt voor een zelfstandige asielvergunning.

Deze mogelijkheid is er eveneens indien een vereenvoudigde narelsaanvraag is ingediend en een vergunning op deze grond is geweigerd. Ook dan kan een vreemdeling ervoor kiezen een zelfstandige asielaanvraag in te dienen en wordt, indien de asielaanvraag binnen 6 maanden na inreis is ingediend, ook getoetst aan artikel 8 EVRM.

17. Mei 2016 16:23

Nr. 3110 P. 5/5



Hoogachtend,

De Staatssecretaris van Veiligheid en Justitie,
namens deze,

*Deze brief is geproduceerd in een geautomatiseerd proces en daarom niet
ondertekend.*

Directie Juridische Zaken
J2 Den Bosch Team 8

Datum
17 mei 2016

V-nummer
2804356196

Annex 3

To: mr. drs. Mirjam L. van Riel Immigratieadvocaat

From: Amanuel, Yohannes Abraha

Date: 28 November, 2016

Re: Expert Opinion on religious marriage and its modes of proof in Eritrean legal system.

Expert Credentials

The expert, Amanuel Yohannes Abraha, studied LLB at University of Asmara and LLM at Maastricht University. Started work as a judge in a sub-regional court and later promoted to judge of regional court. Experience in judging includes civil bench adjudication in first instance proceedings and appeals bench on cases related to marriage, divorce, child maintenance, adoption, etc. The question stated below was presented by a lawyer, mr. drs. Mirjam L. van Riel, for expert legal opinion.

Questions presented

- 1) Is a religious marriage concluded in Eritrea before an Orthodox Church a legal marriage in Eritrea?
- 2) If the answer to the above question is yes, does failure to register such a religious marriage by an officer of civil status invalidate (annul) the marriage?

Short answer

- 1) Yes. 2) No, failure to register a religious marriage in a register of civil status does not invalidate (annul) a marriage.

Introduction

This is an expert opinion on the status of a religious marriage in Eritrea and the consequences of failing to register such marriage in a register of civil status. The writer believes a small note on the different possibilities permitted by law to contract marriage will help in understanding the question presented. Eritrea adopted a new Civil Code in 2015 (hereafter NCCE). The focus of this opinion is on the provisions of the NCCE. However, the new code is heavily inspired by the Civil Code of Ethiopia of 1960 which was adopted with minor amendments after Eritrea's independence from Ethiopia (hereinafter TCCE). Indeed to a large extent the articles that I will discuss are a direct copy from the TCCE. In this opinion the expert will also attempt to highlight some practice that developed due to the lack of implementing the TCCE. For the sake of convenience this opinion will first explore modes of marriage, followed by methods of proving the existence of marriage, and the consequences of failure to register marriage.

1. Modes of marriage

The laws in Eritrea permit three modes of concluding marriage. Accordingly, a contract of marriage can take one of the following forms: civil, religious or customary. The majority of marriages concluded are either customary or religious. Civil marriages are rarely used for lack of knowledge and limited access to officers of civil status. Outside the above noted three modes of marriage, marriage by agreement of two spouses alone is not permitted. The majority of marriages by Christians are a mixture of both customary and religious ceremony. Common features include providing a guarantor ('*wahs*' in Tigrinya), dowry, feast (usually food and traditional drink-'*swa*'), and church ceremony. From the reading of the provisions of the Civil Code it seems that the policy is to encourage people to use civil marriage or to register other forms of marriage. For the purpose of registering marriage an officer of civil status is mandated to register, keep the register, and provide copies of certificates of marriage. Article 518 enumerates the various kinds of marriage permitted according to the NCCE. It provides:

Art. 518. - Various Kinds of Marriages.

- (1) Marriages may be contracted before a civil status officer.
- (2) Marriages may also be contracted according to the religion of the parties or to local custom.

Reference could be made to provisions related to civil marriage (article 519 and 537) and customary marriage (articles 521 and 546) which set requirements necessary for these two types of marriage contracts. Since the present opinion is on religious marriage here follows the provisions governing religious marriage as stated under articles 520 and 545.

Art. 520. - Religious Marriage.

A religious marriage shall take place when a man and a woman have performed such acts or rites as are deemed to constitute a valid marriage according to their religion or the religion of one of them.

Art. 545. - Religious Marriage.

- (1) The conditions on which a religious marriage may be celebrated and the formalities of such celebration shall be as prescribed by the religion of the parties concerned.
- (2) The provisions of this Code relating to the Conditions Common to All Forms of Marriage shall be complied with in all cases.
- (3) A record of marriage shall be drawn up in accordance with the provisions of the Title of this Code relating to Natural Persons.

Therefore, the conclusion of a religious marriage and its formalities to be followed are prescribed by the religion concerned. The three major church denominations; Orthodox, Catholic, and Protestant follow a slightly different procedures.

It is important to note here that there is no **hierarchy** between the types of marriage. Religious, customary, or civil marriages are equal in effect (article 556).

Art. 556. - Various Forms of Marriage Equivalent.

- (1) Marriage produces the same legal effects, whatever the form according to which it has been celebrated.
- (2) No distinction shall be made as to whether the marriage has been celebrated before a civil status officer or according to the forms prescribed by religion or custom.

However, the probative value of a civil marriage is superior in comparison to a religious marriage which is not registered (or customary marriage for that matter). All legal requirements or conditions necessary to conclude marriage apply equally to the three forms of marriage (article 522 - 536). These requirements include the permissible marriageable age, prohibition on marriage amongst relatives and extraordinary requirement for marriage by representation.¹

Religious or customary marriage is a valid marriage even if it is not registered in the register of civil status. It is clear that marriage concluded according to religion is required to be registered in the register of civil status (article 113).

Art. 113. - When Record Required.

A declaration of marriage and the drawing up of the record of marriage shall be required in all cases, irrespective of the form according to which the marriage is celebrated.

The duty to report for registration of a religious marriage lies on the spouses, witnesses of the spouses, the institution that held the celebration (church), or the officer of civil status himself if he knows of such a fact (article 114, 115).

Failure to register a religious marriage does not amount to invalidity of the marriage. Under the old civil code, TCCE, failure to report marriage was a criminal offence.² The new code, NCCE, does not include reference to a criminal penalty.

2. Proof of marriage

There are three ways to prove marriage: record of marriage, acts of notoriety or possession of status. On modes of proof article 42 and 588 provide:

Art. 42. - Modes of Proof.

- (1) Births, deaths and marriages shall be proved, in case of doubt or dispute, by means of the record of civil status.
- (2) They may also be proved, in the case provided by law, by means of acts of notoriety or of possession of status.

¹ Essential conditions for validity of marriage relate to three grounds: biological (sex, age, and state of health); psychological (freedom of will); and sociological (bigamy, marriage between persons related by consanguinity or affinity as well as adoption).

² TCCE article 142:

The punishments prescribed by the Penal Code shall apply to:

(a) any person who, being bound to declare an event to the officer of civil status, fails to declare it within the periods prescribed by law, when, as a result of such failure, a record of civil status has not been drawn up;
 (b) any person who, having been required by the officer of civil status to give information for the purpose of the drawing up of a record of civil status concerning them, fails to give such information.

Art. 588. - Record of Marriage.

Marriage is proved by producing the record of marriage drawn up at the time of or after its celebration in accordance with law.

As a policy it is clear that registering religious marriage is preferred and encouraged. The reality in Eritrea is however far from achieving this. Let alone for the entire country, civil registration offices are only available in few cities, the one in Asmara being relatively well organized and reliable. This reality of the Eritrean society is captured by the recognition that marriage could also be proved by 'act of notoriety' or 'possession of status'. To show 'possession of status' it is sufficient to demonstrate by four witnesses who could testify that they have a 'direct or indirect' knowledge that religious marriage was concluded. To this effect article 589 provides:

Art. 589. - Possession of Status.

- (1) In default of the record of civil status, marriage is proved by the possession of the status of spouse. Two persons have the possession of the status of spouses when they mutually consider and treat themselves as spouses and when they are considered and treated as spouses by their family and by society.
- (2) The possession of the status of spouse may be proved by producing four witnesses, who have direct or indirect knowledge of the fact that marriage was concluded.
- (3) It may also be contested by producing four witnesses, being relatives or not of the interested parties.

In case 'possession of status' could not be proved the law provides a third option, proof by act of notoriety. Drawing an act of notoriety could only be allowed by a court when specified conditions are fulfilled (article 590 – 592).

Validity of unregistered religious marriage is further strengthened by a relaxed requirement on formalities. The court is barred from automatically annulling a religious marriage if it does not meet some conditions required by religion. Correspondingly a religious institution, that has celebrated a marriage, cannot annul for a failure to observe one of its rules. A church's decision to that effect can only be a ground for divorce if one or both spouses decide to request divorce on that ground. In this regard article 554 provides:

Art. 554. - Nullity.

- (1) The annulment of a marriage may not be ordered by the Court on the ground that one or more conditions or formalities required by religion or by custom have not been observed.
- (2) The annulment of a religious marriage ordered by the religious authorities may lead to a divorce in accordance with Chapter 7 if one or both spouses apply for it.
- (3) The annulment of a marriage according to custom ordered by the customary authorities shall be of no legal effect.

The NCCE makes no reference to the validity of a marriage celebrated before a church outside of Eritrea. A considerable number of Eritreans live abroad. Those who are in neighboring countries, especially in Sudan, make use the service of an Orthodox Church to conclude a contract of marriage. Weddings at the Eritrean Orthodox Church in Khartoum are conducted regardless of citizenship, as long as the parties can sufficiently identify themselves; and as long as one of them satisfies as an

Orthodox Cristian and a member of the church.³ A priest conducts the ceremony, the parties provide three witnesses and a certificate of marriage is issued by the church.⁴ Similarly, Eritreans can also get married before an Ethiopian Orthodox church in Khartoum.⁵

The NCCE incorporates a time limit within which a religious marriage is to be registered in a register of civil status. The period of limitation is one month for urban communes and two years for rural communes.⁶ After the lapse of the time limit records may only be drawn up by virtue of a Court decision.⁷

3. Conclusion

From the above discussion it seems that the drafters of the new Civil Code of Eritrea, NCCE, intended to simplify modes of concluding a contract of marriage. The new law, of course, remains short in legalizing marriage by mutual agreement of the two spouses. Religious marriage remains one of the three forms of marriage recognized by the NCCE. The policy behind the NCCE favors registering a religious marriage in a register of civil status. However the reality of the country is not ripe for strictly enforcing such a requirement. In recognition of this reality failure to register a religious marriage does not lead to its invalidity. No distinction or hierarchy is implied between the three forms of marriage. Religious marriage has the same effect as civil marriage even if it is not registered. Furthermore, failure to observe some rules of a religious marriage does not automatically invalidate the marriage, except where a court passes a decision to that effect. In addition a religious institution cannot declare a marriage invalid for not observing some of its rules.

³ Swedish Migration Board (now Swedish Migration Agency), page 4(11) – 5(11), Temarapport, Marriage for the Eritrean and Ethiopian Diaspora in Khartoum, 2010-07-08 version 1.2 – uppdaterad 2016-02-15. Foreigners who can demonstrate identity by providing a passport or Ethiopian identity cards are accepted. One of the spouses can verify his religion through three witnesses. Marriage certificates with serial numbers are issued and archived by the church.

⁴ Id

⁵ Id, 5, [t]he church [Ethiopian Orthodox Church] marries anyone who is an Orthodox Christian regardless country of origin. Ethiopian Orthodox Church has slightly different rules on confirmation of religion, number of witnesses, etc.

⁶ NCCE article 56(c) and article 64.

⁷ NCCE article 57 and article 64.

Annex 4

To: mr. drs. Mirjam L. van Riel Immigratieadvocaat

[REDACTED]

[REDACTED]

T: [REDACTED]

[REDACTED]

From: Amanuel, Yohannes Abraha

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Date: 03 February, 2017

Re: Supplementary Comment to “Expert Opinion on religious marriage and its modes of proof in Eritrean legal system”

On 28 November 2016 I wrote an expert opinion on two legal questions. My opinion was based on the new Civil Code of the State of Eritrea of 2015 (NCCE). I stated in my opinion, with regard to the legal questions, the NCCE is identical to the old civil code (Transitional Civil Code of Eritrea (TCCE)). There is one ambiguity - whether the NCCE has entered into force or not. Since the NCCE made no significant departure in relation to the legal issues I addressed, my expert opinion remains the same.

For this reason the tables below show the corresponding articles in the NCCE and the TCCE in an order as cited in the expert opinion. Table 1 indicates a list of articles referred in the body of the text while table 2 shows reference to articles cited in the foot note.

Table 1

No	New Civil Code of Eritrea 2015 (NCCE)	Transitional Civil Code of Eritrea (TCCE)
01	Article 518	Article 577
02	Article 519 and 537	Article 578 and 597
03	Article 521 and 546	Article 580 and 606
04	Article 520	Article 579
05	Article 545	Article 605
06	Article 556	Article 625
07	Article 522 – 536	Article 581 - 596
08	Article 113	Article 117
09	Article 114, 115	Article 118, 119
10	Article 42	Article 47
11	Article 588	Article 698
12	Article 589	Article 699 and 700
13	Article 590 – 592	Article 701 – 703
14	Article 554	Article 623

Table 2

No	New Civil Code of Eritrea 2015 (NCCE)	Transitional Civil Code of Eritrea (TCCE)
01	Article 56(c) and 64	Article 62
02	Article 57 and 64	Article 63 and 70