The requirement of 'sufficient substance' of the relationship between father and child: Conformity with Articles 4 and 16 of the Family Reunification Directive?

May 2019

Migration Law Clinic
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Inhoud

1. Introduction

This expert opinion was written at the request of lawyers J. van der Wielen and J. Werner. It concerns the refusal by the IND to grant a residence permit for the purpose of family reunification to third-country national children of fathers legally residing in the Netherlands. The IND based these refusals on the Dutch Aliens Decree 2000 and the Aliens Circular 2000[1]. They determine (read in conjunction) that when children are born out of wedlock, the fathers should have given sufficient substance to the relationship with their child in order to qualify for family reunification.

1.1 Family life between parents and children under Dutch law

Article 3.14 of the Aliens Decree 2000 determines who the beneficiaries of family reunification are according to Dutch law. In subsection c, the Article mentions the 'minor biological or legal child of the sponsor, who [according to the judgement of Our Minister] is and in the country of origin already was a factual part of the family of the sponsor and who is under the lawful authority of the sponsor'.

This Article has been developed further in paragraphs B7/3.2.1 and B7/3.8.1 of the Aliens Circular 2000. Paragraph B7/3.2.1 determines that 'the Immigration and Naturalization Service (henceforth: IND) will assume that the child is (and already was in the country of origin) a factual part of the family of the sponsor, where there is 'family life' between the sponsor and the child within the meaning of Article 8 ECHR'.

Paragraph B7/3.8.1 states that the IND will assume, in any case, family life between parents and their children, who are born from a marriage or non-marital relationship. The IND will only assume family life between a biological father and a child not born from a (marital) relationship, if sufficient substance has been given to the relationship between father and child.

1.2 The cases

In the cases giving rise to this expert opinion, the Dutch Council of State was confronted with the question whether or not the above mentioned policy is in conformity with the FRD. The cases concern fathers from Ghanaian or Guinean origin, who have acquired Dutch citizenship. They all have children, who were born out of wedlock between 1996 and 2001, and envisage residence with their fathers in the Netherlands. Their applications for family reunification have been rejected. One of the reasons put forward by the Dutch State Secretary, is that the requirement 'that sufficient substance has been given to the relationship between father and child' has not been met. This argument was contested with reference to the 2016 lower court ruling, stating that this requirement is not in line with the FRD.

The Council of State's reasoning regarding the conformity with the FRD is as follows. Article 4(1)(c) FRD, has been implemented in Article 3.14 sub c Aliens Decree 2000. The requirement that the children are 'dependent on him' has been translated into the requirement that they are 'a factual part of the family of the sponsor'. In doing so, the legislator has also implemented the requirement that there is a 'real family relationship' from Article 16(1)(b) FRD, into Article 3.14 sub c Aliens Decree 2000. According to the Council of State, the legislator has therefore correctly implemented Article 4 and 16 FRD, provided that the implementation is in conformity with Article 8 of the European Convention of Human Rights (henceforth: ECHR). According to the Council of State, this requirement of the implementation being in conformity with Article 8 ECHR has been met by the legislator because paragraph B7/3.8.1 Aliens Circular 2000 makes a distinction between children born in and out of wedlock, a distinction derived from the case law of the European Court of Human Rights (henceforth: ECtHR).

[1] Vreemdelingenbesluit 2000, Vreemdelingencirculaire 2000.

1.3 This expert opinion

This expert opinion addresses the question whether the Dutch implementation of Articles 4 and 16 FRD is correct. More specifically, it examines whether the requirement of a 'real family relationship' between a parent and a child, in the meaning of Article 16(1)(b) FRD is an additional requirement compared to the requirements of Article 4 FRD (the children must be minors, not married, dependent on the sponsor and under the custody of the sponsor). Moreover, if Article 16(1)(b) FRD does set an extra requirement, what is then the meaning of this extra requirement?

The issue will be addressed first by an inventory of the conditions posed for family reunification between a father and an older child born out of wedlock in the FRD in Chapter 2. Chapter 3 will investigate the meaning of particularly the conditions of 'custody' and 'dependency'. Chapter 4 will analyse whether the condition of a 'real family relationship', as mentioned in Article 16(1)(b) FRD, has a separate and additional meaning. Finally, Chapter 6 briefly addresses the (relevance of) the case law of the ECtHR.

2. The requirements of Article 4 and Article 16 FRD

In this chapter, the meaning of the requirements of Article 4 and 16(1)(b) FRD will be analysed in light of the object and purpose of the Directive. It will notably discuss the position of children born out of wedlock, who are older than 15 years and particularly with regard to the relationship with their father with whom they have not lived together, before applying for family reunification. Special attention will be paid to the concepts of 'custody', 'dependency' and 'real family life'.

2.1 Content of Articles 4 and 16 FRD

Article 4(1) FRD requires Member States 'to authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members':

- the sponsor's spouse;
- the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;
- the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;
- the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

According to Article 16 FRD, Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit amongst others 'where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship'.[2]

2.2 Conditions for children born out of wedlock under Article 4 and 16

Under Article 4(1) FRD, children born out of wedlock must meet four conditions in order to be eligible for family reunification with a parent:

- They must be below the age of majority set by the law of the Member State concerned
- They must not be married
- They must be dependent of the sponsor
- The sponsor must have custody.

It appears that in the cases, which were the cause of this expert opinion, the Dutch Government did not consider these four conditions sufficient to assess whether all the requirements for family reunification were met. According to Dutch policy, it should also be established that sufficient substance had been given to the relationship between father and child. This requirement was derived

[2] Art 16(1)(b) FRD.

from Article 16(1)(b) FRD where mention is made of the issue of a 'real family relationship'. The Dutch conception of Article 16(1)(b) FRD is the object of this expert opinion.

2.3 The questions

Basically, the question to be answered in this expert opinion is whether there is always a 'real family relationship' between a parent and a child – in the sense of Article 16(1)(b) FRD - once it has been established that the four conditions of Article 4(1) FRD are met. Alternatively, does the requirement of a 'real family relationship' included in Article 16(1)(b) FRD set an additional condition for family reunification, and if so, what is exactly the meaning of this condition?

In order to answer these questions, this expert opinion will first investigate what the content and purport is of the conditions posed in Article 4(1) FRD and what – in that light - the potential added value of the concept of 'real family relationship' may be. Attention must also be paid to the potential relevance of the age of the child. From the text of Article 4(1) and 4(6) FRD, it can be deduced that the drafters of the Directive attached some weight to the circumstance that a child is older than 12 or 15 years before joining the family of the sponsor. Though the relevant passages are not directly applicable to the cases concerned in this expert opinion, as the Netherlands did not choose to apply the options embodied in them, they may provide some useful indications. According to the CJEU, these optional provisions acknowledge that for children arriving after their 12th or 15th year, integration in another environment is liable to give rise to more difficulties. However, the Court underlined that even in applying those optional clauses, the Member State is still obliged to examine the application in the interests of the child and with a view to promoting family life. This expert opinion expressly focuses on the position of children older than 15 years, thereby taking into account that these children may have lived their whole life in the country of origin before applying for reunification with their fathers in an EU Member State.[3]

For the purpose of this expert opinion, it will be assumed that the age (under 18) and marital status (not married) is not disputed. It will further be assumed, that the biological and legal family relationship between the father and the child has been satisfactorily assessed. Specifically interesting for this opinion, is how the concepts of 'custody' and 'dependency' should be dealt with under the FRD. These concepts will be examined more elaborately in the next chapter. When interpreting these concepts, the purpose and meaning of the FRD are relevant.

[3] CJEU Case C-540/03 *Parliament v. Council* [2006], paras 74, 88.

3. Meaning of the teams 'custody' and 'dependency'

3.1 Purpose and meaning of the Directive

The FRD contains minimum standards, which 'shall not affect the possibility for the Member States to adopt or maintain more favorable provisions'[4], and prevents them from adopting less favorable ones. The Member States are not allowed to refuse family reunification on other grounds than those mentioned in the FRD. However, they have room for judging and investigating whether the conditions are met.

From the start, the CJEU adopted the stance that the FRD provides a subjective right to family reunification. In the standard-setting judgment in the case *Parliament v. Council*, the CJEU stated:

> Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined 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 a margin of appreciation.[5]

In the *Chakroun* judgment the CJEU clarified that authorisation to family reunification is the general rule. Limitations to the right to family reunification must be interpreted strictly and in a way that does not undermine the objectives and effectiveness of the directive, that is to promote family reunification. [6]

The FRD must be implemented in accordance with the fundamental rights as laid down in the Charter of Fundamental Rights.[7] When examining an application, the Member States shall have due regard to the best interests of minor children.[8] In the case of *E.*, the CJEU ruled, in line with this, that the objective pursued by Directive 2003/86 is also to give protection to third country nationals, in particular minors. [9]

How must these points of departure be applied when the concepts of 'custody' and 'dependency' are interpreted in the context of a request of family reunification of a minor child which is more than 15 years old, and a Dutch father, in a situation where the child and the father have never lived together?

3.2 Custody

The term 'custody' is not defined in the FRD. Under the Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, the term 'rights of custody' is defined as 'rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence'. [10] Similarly, the 2014 European Commission Guidance to the Family Reunification Directive ("Guidance to the FRD") provides that the concept of 'custody' can be understood as a set

[4] Art 3(5)Directive (EU) No 2003/86/EC of 22 September 2003 on the right to family reunification (2003) OJ L 251/12 (FRD).
[5] CJEU Case 540/03 *Parliament v Council* [2006], para 60.
[6] CJEU Case C-578/08 *Chakroun* [2010], para 43.
[7] Preamble, recital 2.
[8] Art 5(5) FRD
[9] CJEU Case C-635/17 *E*. [2019], para 45. See also CJEU Case C-356/11 and C-357/11,2012, *O and Others*, [2012], para 69.
[10] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

of rights and duties relating to the care of a person of a child, and in particular the right to determine the child's place of residence. In general, the custody arrangement between the parents must be proven and the required agreement should be given in line with the Member States' family law and, if necessary, private international law. However, if a particular situation leads to an unresolvable blockage of family reunification, it is up to Member States to determine how to deal with such situations. Nevertheless, a decision should be taken in line with the best interests of the child as set out in Article 5(5) and 17 FRD on a case-by-case basis, taking into account the reasons for not being able to obtain agreement and other specific circumstances of the case.[11] The condition of custody is thus a legal requirement to be fulfilled in line with a Member States' family law. The requirement for custody fulfils the legal relationship, which gives the parent sponsor the rights and responsibilities relating to the care of the child and the right to determine the child's place of residence.

A father who has custody of his child can determine the place of residence of the child. Should Member States respect a father's decision that his child should live with him in the same Member State? Article 18(1) of the Convention on the Rights of the Child (CRC) provides that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In general terms, Article 24(2) CFR states that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration,' which is also reflected in Article 5(5) FRD. Accordingly, the wish of the father to determine the Member State where he lives, as the child's place and residence should principally be recognised in light of the best interest of that child.

3.3 Dependency

As far as the dependency condition is concerned, there are no clear guidelines yet. Is it comparable with the condition of dependency in Article 2(2)(d) Citizens' Directive 2004/38? If that is the case, it is useful to look at the *Jia* judgment. In this case the Court stated that 'dependent on them' means that members of the family of an Union citizen established in another Member State need the *material* support of that Union citizen or his or her spouse. 'The need for material support must exist in the State of origin of those relatives or the State when [..] they came at the time when they apply to join the Community national'. [12] Proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Union citizen or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.[13]

According to the European Commission's Guidelines, the interpretation made by the CJEU in its case law regarding the Citizens' Directive can be used for Article 4(2) FRD[14]. The Commission provides:

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[11] 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. <http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf>.

[12] CJEU Case C-1/05 *Jia* [2007], para 37.

[13] Ibid, para 38.

[14] 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, 3 April 2014, p.6, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf .

> While it needs to be kept in mind that the context and purpose of both Directives are not the same, the criteria used by the CJEU to assess dependency may, mutatis mutandis, serve as guidance to Member States to establish criteria to appreciate the nature and duration of the dependency of the person concerned in the context of Article 4(2)(a).[15]

The interpretation of 'dependency' in cases of adult children and first-degree relatives, given by the CJEU in cases of free movement of workers[16] requires an examination of the legal, financial, emotional and material support for the family member provided by the sponsor or by his or her spouse/partner.[17] In *Lebon* the Court made explicit that dependency must be assessed using the factual circumstances of the case.[18] In *Rahman and Others,* the Court established that dependency between first-degree relatives must exist at the time the application is lodged[19].

In the sources cited above, emotional support is mentioned as one of the conceivable elements of 'dependency' while the elements of financial and material support appear to dominate. However, it would also be conceivable to attach a stronger psychological and social meaning to the dependency condition, such as has been emphasised in the jurisprudence of the Court in the cases of *Chavez*[20] and *K.A*.[21] In the *K.A.* judgment the Court described dependency as follows:

> Where the Union citizen is a minor, the assessment of the existence of such a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium. The existence of a family link with that third-country national, whether natural or legal, is not sufficient, and cohabitation with that third-country national is not necessary, in order to establish such a relationship of dependency.[22]

When applying the *Chavez* case law on the FRD, it is necessary to bear in mind, that in the *Chavez* context 'dependency' is the paramount requirement for the existence of an exceptional residence right for a third country national parent of a Union citizen. This residence right aims to prevent that minor Union citizens are forced to live outside the EU, together with their third country national parent. In the *Dereci* judgment, the CJEU stressed the exceptional character of the issue:

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[15]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, 3 April 2014, p.6, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf .

[16] CJEU Case C-316/85 *Lebon* [1987], paras 21-22; CJEU Case C-200/02 *Zhu and Chen* [2004], para 43; CJEU, Case C-1/05 *Jia* [2007], paras 36-37; CJEU Case C-83/11, *Secretary of State for the Home Department v Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman* [2012], paras 18-45; CJEU, Cases C-356/11 and C-357/11, *O. & S.v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L* [2012], para 56.

[17] 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, 3 April 2014, p.6, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf.

[18] CJEU Case C-316/85 *Lebon* [1987], paras 21-22.

[19] CJEU Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman* [2012], para 35.

[20] CJEU Case C-133/15 *Chavez* [2017].

[21] CJEU Case C-82/16 *K.A. and others* [2018], para 76.

[22] Ibid.

> That criterion is specific in character, inasmuch as it relates to situations in which, *although subordinate legislation on the right of residence of third country nationals is not applicable*, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.[23]

In the context of the *Chavez* case law, it is likely that its dependency concept will be applicable predominantly in cases of young children in need of permanent care and supervision. When children grow older, they tend to become more independent of their parents. This may be a relevant factor under the *Chavez* jurisprudence.

3.4 Dependency of older children

However, the right to family reunification under the FRD explicitly also extends to older children, as long as they have the minor age. The optional provisions in Article 4(1) and 4(6) FRD pay attention to the circumstance that a child is older than 12 or 15 years before joining the family of the sponsor, but they do not detract from the purpose of the Directive. The choice of the age of 12 years in the final subparagraph of Article 4(1) does, according to the CJEU, not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties. The Member State may – if the option is applied (which the Netherlands does not) - verify whether he or she meets a condition for integration.
According to the CJEU, even if the option of Article 4(6) would be used (which the Netherlands does not), the Member State is still obliged to examine the application in the interests of the child and with a view to promoting family life. Article 4(6) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.[24]

Thus, under the FRD, the authorisation of family reunification is the general rule, also for children older than 12 or 15 years. Therefore, it would be contrary to the purpose of the Directive, if the dependency requirement would be able consistently to exclude older children from the right to reunification because of the very fact that they are normally less dependent when they grow older. The provisions of the FRD

> must be interpreted and applied in the light of Article 7 and Article 24(2) and (3) of the Charter, as is moreover apparent from recital 2 and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life.[25]

Member States shall, according to Article 5(5) FRD have due regard to the best interests of minor children when examining an application, which arguably also includes acknowledgment of their growing independence and maturity. Article 5 of the Convention on the Rights of the Child (henceforth: CRC) states that States Parties 'shall respect the responsibilities, rights and duties of parents […] to provide, in a manner consistent with the *evolving capacities* of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present

[23] CJEU Case C-256/11 *Dereci* [2011], para 67 (emphasis added). See also CJEU Case C-133/15 *Chavez* [2017] para 77.
[24] CJEU Case C-540/03, *Parliament v. Council* [2006] para. 88, 90.
[25] CJEU Case C-635/17 *E.* [2019], para 56.

Convention'.[26] The gradual development of the child into a more mature person is also recognised in Article 12(1) CRC. This Article provides that States Parties 'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight *in accordance with the age and maturity of the child*'.[27]

According to the CJEU, limitations of the right to family reunification in the FRD must be interpreted strictly and in a way that does not undermine the objective and effectiveness of the directive that is to promote family reunification.[28] Therefore, it seems reasonable to interpret the dependency requirement of the FRD in conformity with what is generally known about the development of children, implying that it must be taken for granted that minor children older than 15 years are 'dependent' in another and less stringent sense than small children in need of permanent care and supervision. Though adolescent children remain in need of emotional and psychological support, they are less 'dependent' in that respect from their parents than when they were babies and toddlers. This means that the dependency requirement should reasonably be interpreted such, that emotional and psychological dependency becomes importantly different as the child grows up and that the accent is shifting more and more to dependency of legal, financial and material support.

In relation to the parents, the dependency position of an older child should not be interpreted such, that the own responsibility and the own views of the child would be negated. Thus, it will always be important to know whether the decision of the father, who has custody over the child, corresponds with the view of the child itself.

3.5 Interim conclusion

Thus, the assessment of whether the conditions of 'custody' and 'dependency' are fulfilled, always requires that the relationship between the father and the child is examined, taking into account the age, maturity and the own view of the child. If the child is older than, for instance, 15 years, the dependency criterion will predominantly regard issues of legal, financial and material support. According to the *K.A.* judgment the existence of a family link, whether natural or legal, is not sufficient, and cohabitation is not necessary, in order to establish a relationship of dependency.

[26] Emphasis added.
[27] Ibid.
[28] CJEU, Case C-578/08, *Chakroun* [2010] para 43.

4. Meaning of the 'real family relationship' criterion in Article 16(1) FRD

The next question is whether there is room for a separate assessment of the existence of a 'real family relationship' as mentioned in Article 16(1)(b) FRD in addition to the investigations under Article 4(1) FRD of whether there is a biological and legal family bond, custody and dependency. Several methods of interpretation are available in order to find an answer to this question, amongst others literal interpretation, historical interpretation and contextual interpretation. These methods will be applied in this chapter in order to interpret Article 16(1)(b) FRD in conjunction with Article 4(1) FRD.

4.1 Literal interpretation: additional requirement?

Article 4(1) FRD makes the right to family reunification 'subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16.' A literal interpretation of the text of Article 4, takes into account the ordinary meaning of these words. These words imply that Article 16 FRD imposes conditions on sponsors and family members that they should meet in order to qualify for family reunification. The different language versions of the Directive support this reading. In all 23 language versions, Article 4 states that Member States shall authorize entry and residence of the family members mentioned in that article 'conditional upon compliance with the conditions of Article 16', 'provided that the conditions in Article 16 are met', 'subject to the conditions of Article 16', or 'if the conditions of Article 16 are met'.[29] Relying on this interpretation, one could assume that Member States are allowed to require evidence that family members live in a real family relationship (as will be analysed below)

Although the literal interpretation appears to provide some clarity, various scholars argue that its value should not be overestimated: 'Interpretation is a multidimensional and articulated heuristic process which pushes the interpreter to clarify the meaning of a rule by different legal arguments that do not follow a fixed hierarchical order of priority'.[30] Especially when the literal interpretation could produce results that are inconsistent or contradictory, different methods of interpretation are needed.[31] According to the CJEU, the literal method of interpretation should only prevail 'in the absence of working documents clearly expressing the intention of the draftsmen of a provision'.[32] As will be discussed below, clarification of the connection between Article 4 and Article 16 FRD therefore requires the application of additional methods of interpretation.

4.2 Historical interpretation

The drafting process for the Directive commenced in December 1999, following the presentation of a proposal by the European Commission.[33] When comparing this initial proposal with the final Directive, a noteworthy difference is that the proposal did not mention living in a 'real family relationship' as a

[29] German: 'Vorbehaltlich der in Kapitel IV sowie in Artikel 16 genannten Bedingungen'; Spanish: 'siempre que se cumplan las condiciones establecidas en el capítulo IV y en el artículo 16'; French: 'sous réserve du respect des conditions visées au chapitre IV'; Dutch: 'op voorwaarde dat aan de in hoofdstuk IV en artikel 16 gestelde voorwaarden is voldaan'.

[30] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (1st edn, Oxford University Press, 2009), p 123; Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) p 23 (1-2) <https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12226> 1 January 2019, p 98.

[31] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (1st edn, Oxford University Press, 2009), p 139.

[32] CJEU Case 15/60 *Gabriel Simon v. Court of Justice of the European Communities* [1961], para 7.

[33] European Commission, 'Proposal for a Council Directive on the right to family reunification COM (1999) 638 final.

condition for family reunification. In response to the Commission proposal, the European Parliament made 16 amendments and approved the proposal as amended.[34] None of the amendments suggested additional conditions for family reunification. The requirement of living in 'a real family relationship' was not mentioned. After this, the Commission presented a second proposal in which 11 of the amendments were incorporated.[35]

The second proposal included some (linguistic) alterations to the provisions on accommodation and financial resources and excluded beneficiaries of subsidiary protection from the more favorable conditions applicable to refugees, but did not include any additional conditions. After the presentation of this proposal, the progress stagnated. In December 2001, the European Council issued a statement requesting that an amended proposal for the Directive be submitted by 30 April 2002.[36] The Commission complied with this request and presented a third proposal.[37] The Commission was well aware of the failed negotiations up to that point and decided to take a new approach that offered more flexibility.[38] This ultimately resulted in a proposal that was less ambitious and left more leeway for national policies.[39]

A striking difference with the former proposals was the expansion of the article on fraud, Article 16. For the first time, this Article mentioned the absence of 'real family life' as a ground for rejection of an application. Strik describes how this phrase suddenly found its way into the proposal.[40] Dutch legislation included provisions that essentially meant that, in order to be eligible for family reunification, children had to be a factual part of the family or that they could no longer be taken care of in their country of origin. At the start of the negotiations in 2000, the Dutch delegation made an attempt to introduce such a requirement into the Directive and suggested that children should not only have legal ties to the sponsor, but factual ties as well. They received no support for this requirement. The Commission dismissed this proposal because they found it undesirable to add another condition. The other Member States found the requirement incomprehensible. They could not understand that you 'could deny a child to live with its parents, purely because it had lived separately from its parents for a while'.[41] Eventually, the Dutch succeeded in inserting no(t) (longer) having an 'effective family bond' into the grounds for rejection and withdrawal. Once again, the Commission found this requirement undesirable because it feared for unnecessary meddling in the family life of persons admitted to the territory of the Member States. A compromise was reached by including the requirement of a 'real family life' in the third proposal by the Commission. Emphasis was put on the need to combat abuse of the right to family reunification. This convinced the other Member States. The Commission proposal did not include a reference to Article 16 in Article 4 FRD. That such reference did end up in the final version of the FRD was, again, the work of the Netherlands. They suggested the reference at a time when there were ongoing negotiations about different topics and in that way, it more or less slipped through the cracks. The parties involved in the negotiations at that moment were not aware what the exact consequences of the reference would be.[42] In the end, the Netherlands got what it wanted to begin with: they were able to maintain their requirement that a child should be 'a factual part' of the family of the sponsor.

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[34] European Parliament, Report on the proposal for a Council directive on the right to family reunification (COM(1999)638 – C5-0077/2000 – 1999/0258(CNS)) A5-0201/2000, p 14.

[35] Commission, 'Amended proposal for a Council Directive on the right to family reunification COM (2000) 624 final.

[36] Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001, p. 14.

[37] Commission, 'Amended proposal for a Council Directive on the right to family reunification' COM (2002) 225 final.

[38] Ibid, para 2.1.

[39] T Strik, *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau* (Boom Juridische Uitgevers 2011), p 62.

[40] Ibid, p 99.

[41] Ibid.

[42] Ibid, pp 99-101.

The negotiations show that the 'real family relationship' formulation was only accepted as means to combat abuse of the right to family reunification, which is why it was included in the chapter dealing specifically with fraud and penalties. Nothing gives the impression that the Commission or the other Member States intended to include a condition that enables authorities to require evidence that families meet some norm of what a 'real family relationship' should look like.

4.3 Contextual interpretation

In the previous chapter, the meaning of the conditions of custody and dependency, posed in Article 4 FRD was investigated. It was shown that applying these requirements already involves an assessment of the merits of the relationship between a father and the child, which takes place after their biological and legal family links have been satisfactorily established. What could be the added value of an assessment of the existence of a 'real family relationship' under Article 16 FRD to this assessment under Article 4 FRD? There are two terms in the requirement of a 'real family relationship', which will both be examined now: the term 'real' and the term 'family relationship'.

4.3.1 The term 'family relationship'

The term 'family relationship' appears under Article 2(d), Article 5(2), Article 9(2), Article 11(2), Article 15(2) and Article 17 FRD. In two articles about proving the family relationship, some indications may be found on what exactly should be proven. Article 5(2) FRD states that the application shall be accompanied by documentary evidence of the family relationship. Member States may, if appropriate, carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary, in order to obtain evidence that a family relationship exists. Article 11(2) FRD states that, where a refugee cannot provide official documentary evidence of the family relationship, the Member States 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.

These provisions suggest that a family relationship is something, which is normally proven by official documentary evidence. Only if such evidence is missing, alternative means of proof may be tried, like interviews. This indicates that the emphasis is on proving the existence of *legal* family relationship, by documents like marriage certificates and birth certificates.

However, Article 5(2) FRD states that, 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. Does this provision mean that, in assessing whether there is a family relationship, Member States must perform an investigation into the merits of the relationship of unmarried partners? To a certain extent this is true as, in this specific case, the merits of the relationship are part and parcel of its definition. According to Article 4(3) FRD a 'duly attested stable long-term relationship' should be proven. Where the existence of a marriage has been proven by a certificate, there is no need to prove that it entails a 'stable' and 'long-term' relationship. Only the intentions of the marriage may be tested. According to Article 16(2)(b) FRD, 'Member States may investigate whether a marriage, […] was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State'.

What does this mean specifically for proving the existence of a father-child relationship? Is there, apart from proof by a birth certificate (or by alternative means) any additional evidential requirement as to 'intention' or 'long-term stability'? The answer to this last question should be negative. There is some room to investigate the intention of founding family life with a child, but only in case of adoptions. Article 16(2)(b) FRD allows Member States to investigate whether an adoption serves the sole purpose of enabling a person (a child) to reside or enter in a Member State. However, in case of descent by birth this is not applicable. Neither is there any requirement in Article 5 FRD with

regard to the way in which the family relationship between parent and child was shaped before the moment of the application for family reunification.

Previous cohabitation of father and child in the country of origin is not necessary for establishing family relationship between a parent and a child. In Article 2(d) FRD it is clarified that 'family reunification' means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.' In the *Chakroun* judgment, the CJEU stated that the FRD, with the exception of Article 9(2) thereof, applies both to what the Netherlands legislation refers to as family reunification and to what it defines as family formation (where the family relationship was established when the third country national was already residing in the Netherlands). Furthermore, the CJEU states, that this interpretation is consistent with Article 8 ECHR and Article 7 of the Charter, which do not draw any distinction based on the circumstances in and time at which a family is constituted.

It should be concluded that the European Union legislature did not intend to make a distinction based on the time at which the family is constituted. Moreover, the right to family reunification under the Directive should not be interpreted restrictively and shall not be deprived of its effectiveness. Therefore, the Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive.[43]

Two other articles of the FRD mentioning 'family relationship' must still be investigated. From Article 15(1) FRD it can be inferred that a family relationship is something which may break down. This article relates to the granting of an autonomous residence permit for family members residing in the Member State for 5 years. It also provides Member States with the scope to limit the granting of residence permits in the following manner: 'Member States may limit the granting of the residence permit referred to in the first subparagraph to the spouse or unmarried partner in cases of breakdown of the family relationship'. It should be noted that 'family relationship' is used here with regard to a partner relationship and not a parent-child relationship. This reference to 'family relationship' does not provide guidance for the subject of this expert opinion in any respect.

Finally, Article 17 FRD requires Member States to take due account of the nature and solidity of the person's family relationships, the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/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. This provision has been inspired by case law of the ECtHR, applying Article 8 ECHR to expulsion of family members who had already acquired legal residence in the host-state. It apparently intends to secure a serious weighing of interests by a Member State, before it takes a negative decision with regard to family reunification. However, Article 17 cannot be interpreted as containing any extra requirement with regard to proving the existence of a family relationship under Article 5 FRD in the process of applying for family reunification. In that regard it is also relevant that Article 4(1) FRD refer to Article 17 FRD in the context of the conditions to be fulfilled for family reunification.

In sum: under Article 5 FRD the family relationship between a father and a child is proven by a birth certificate, or – if such document is lacking – by other evidence. There is no requirement with regard to cohabitation or long-term stability or intention.

4.3.2 The term 'real'

In searching for the meaning of the word 'real' it may be useful to determine what the *absence* of 'reality' would mean in cases of a father and an older child. According to the conception of the Dutch government, a family relationship would not be 'real' if no sufficient substance had been given to the relationship between the father and the child. As was argued in the previous section, the concept of 'family relationship' with regard to a father and a child does not contain any intrinsic requirement

[43] CJEU Case C-578/08 *Chakroun* [2010], paras 59-64.

regarding cohabitation, intention or long-term stability. It is hard to argue that a family relationship proven by birth certificate could be considered 'non-real' for absence of grounds that are not relevant for it.

Rather, it would be arguable that the word 'real' should be opposed to the word 'fake' – implying that it must be assessed that there is no issue of fraud or deception. That approach would be in line with the drafting history, where emphasis was put on the need to combat abuse of the right to family reunification.

In February 2018, the CJEU clarified the concept of fraud in its *Altun* judgment. In that case, which concerned fraudulently obtained declarations intended to evade EU legislation on secondment of employees, the CJEU explained that 'findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor'.[44] Satisfying the objective factor requires that the conditions for obtaining a right or advantage are not met.[45] The subjective factor requires that the individual concerned had the intention to evade those conditions with a view to obtaining the right or advantage.[46] An example of a situation in the context of migration law, which would satisfy both these elements, would be the conclusion of a *marriage* solely for the purpose of obtaining a residence permit. The parties to this marriage are aware that one of them does not satisfy the conditions to obtain an independent residence permit and they conclude the marriage to evade these conditions. It is difficult to conceptualise a 'fake' family relationship between a father and a child other than in cases of fraud, for instance falsification of a birth certificate.[47] There does not seem to exist such a thing as a 'convenience child-parent relationship', as a child never chooses its parents.

4.4 Interim conclusion

With regard to the research questions posed above, the findings are as follows. An investigation of the meaning of Article 16(1) FRD in relation to Article 4(1) FRD shows that both articles must be taken into account, when assessing whether the conditions for family reunification are met. However, the material contribution of Article 16(1) FRD to this assessment is limited. It means only that the evidence of the family relationship may not be fraudulent, which is also required by Article 16(2) FRD.

According to this expert opinion, the meaning of 'family relationship' in the FRD can best be approached by investigating how it must be evidenced. Under Article 5 FRD, the family relationship between a father and a child is proven by a birth certificate, or – if such document is lacking – by other evidence. From Article 5 FRD and from the context of the concept of 'family relationship' in the FRD it emerges that there is no requirement with regard to cohabitation or long-term stability or intention. Therefore, the existence of a 'real' family relationship does not depend on whether sufficient substance has been given to the relationship between the father and the child before the application was lodged. It follows from Article 2(d) FRD and its application in the *Chakroun* judgment,[48] that Article 16 FRD cannot be invoked in order to prevent family reunification when the relationship between the father and an older child will only develop in full depth after the arrival of the child.

The word 'real' in Article 16(1)(b) FRD should be read as opposed to the word 'fake' – implying that it must be assessed that there is no issue of fraud or deception. This is in line with the drafting history, where emphasis was put on the need to combat abuse of the right to family reunification. In that respect, Article 16(1)(b) FRD runs parallel to Article 16(2)(a) FRD.

The next Chapter of this expert opinion will look at the case law under Article 8 ECHR.

[44] CJEU Case C-359/16 *Altun* [2018], paras 48-52.
[45] Ibid, para 50.
[46] Ibid, para 51.
[47] See also CJEU Case C-557/17 *Y.Z.* [2019], para 43.
[48] CJEU Case C-578/08, *Chakroun* [2010], paras 59-64.

5. Does Article 8 ECHR have additional value for the interpretation?

In principle, it is not necessary to investigate article 8 ECHR in this expert opinion. The analysis of the FRD in the previous chapters did not leave any questions open, for which an analysis of Article 8 ECHR could have a meaningful value. It follows from the *Parliament v. Council* judgment[49] that the FRD 'does not disregard the level of protection afforded by' Article 8 ECHR[50] and goes even further in promoting family reunification.

Still, there may be reasons to look at Article 8 ECHR here, namely, where there may be a need to investigate the potential relevance of the referrals to that provision made by the Dutch government. The FRD respects the fundamental rights and observes the principles recognised in particular in Article 8 ECHR and in the Charter (recital 2 FRD). According to the CJEU, the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union'.[51] Though the EU and its legislation are not bound by the Article 8 ECHR and only by Article 7 of the Charter,[52] it may - in general - be helpful to investigate case law of the ECtHR, in order to interpret the meaning of Article 7 CFR. In doing so, it should be remembered that the ECtHR operates in a context, which is essentially different from that of the FRD.

5.1 Different position

Weighing 'respect for family life' is something essentially different from assessing whether a 'family relationship' exists. Under Article 8 ECHR, the conditions for creating a right to enter and reside based on the right to family life are extremely stringent as compared to the conditions for family reunification under the FRD. According to the ECtHR, Article 8 ECHR does not embody a right to enter and stay for the purpose of family reunification, while under the FRD the authorisation for family reunification is the general rule. This means that any referral to the case law on Article 8 ECHR should be done cautiously.

Under Article 8 ECHR, in cases of first application to entry and stay, the mere existence of a family relationship is not sufficient to attract protection against a refusal of family reunification. Only in exceptional cases, Article 8 ECHR may lead to a right to enter and stay. In view of that position, it is unlikely that a State's obligation to respect family life between a father and a child born out of wedlock, asking for family reunification after years of separation, will be deemed *exceptional* enough under the ECtHR's case law to establish a right of the child to enter and reside with the father.

However exceptional a right to family reunification may be under the ECHR, the ECtHR always respects immigration rights granted by national law. In the *Rodrigues da Silva* judgment, the ECtHR attached weight to the fact that under national law a residence permit would have been available.[53] Likewise, in the *Hamidovic* case, the Court took into account that the applicant had incidentally received a residence permit, though he could have been expelled at the time. In the *Bousarra* case, the ECtHR found relevant that the applicant would have had a right to legal residence in France under new French legislation.[54] Apparently the protection by Article 8 ECHR may not be lesser than the protection offered on a national level.

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[49] CJEU Case C-540/03 *Parliament v Council* [2006], para 60.
[50] Wordings quoted from CJEU Case C-601/15 PPU *J.N.* [2016], para 77.
[51] CJEU Case C-601/15 PPU *J.N.* [2016].
[52] CJEU Case C-601/15 PPU *J.N.* [2016], paras 45, 46.
[53] ECtHR 31 January 2006, *Rodrigues da Silva and Hoogkamer v the Netherlands,* Appl no 50435/99, para 43.
[54] ECtHR 4 December 2012, *Hamidovic v Italy*, Appl no 31956/05, para 45; ECtHR 23 September 2010, *Bousarra v France*, Appl no 25672/07, para 52.

National immigration law is nowadays in many respects to be regarded an implementation of EU migration law. Therefore, it is evident that the protection by Article 8 ECHR may never be lower than the protection offered in the national legislation of a Member State, as it has been shaped under the influence of EU law (the FRD). In the case of *Mendizabal*, the ECtHR noted that a right to legal residence was available to the applicant under both national *and European Community law* and that the denial of legal residence in spite of these entitlements during a period of 14 years violated Article 8 ECHR.[55] Thus, insights derived from the ECtHR's case law on Article 8 ECR can only be relevant for the issue of this expert opinion in so far as they offer more protection to family life than the FRD already does.

5.2 Immigration cases of the ECtHR and assessing the existence of family life

In immigration cases before the ECtHR, there is normally no dispute about the existence of family life between the family members involved in immigration cases. The focus is normally on whether the obligations stemming from Article 8 ECHR compel the contacting state to accept that the family members reunite on its soil. This last issue is not interesting for explaining the FRD, which already grants a right to reunification. Nevertheless, it may be interesting to note, that long-term separation of parent and child does not mean that family life disappears. In *Tuquabo-Tekle*, like earlier in *Şen*, the ECtHR stated that parents who leave children behind while they settle abroad, cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion.[56] These cases were about younger children and two parents or a mother. Also in *El Ghatet*, a case of a father wishing to reunite with his son who was 15 years old at the time of the application, there was no dispute as to whether there was family life, even when the son had reached adult age.[57] In that case, the ECtHR found a violation of Article 8 ECHR, because the interests of the son were only summarily taken into account.

5.3 'Family life' in relation to paternity and access to the child

For the sake of completeness, this expert opinion will also deal with two cases of the ECtHR in the realm of family law, which were invoked during the national procedures by the Dutch Government. These cases concern the relationship between a father and a child born out of wedlock. It is important to note that the first judgment was about the assessment of paternity and the second judgment was about allowing the father access to the child. The judgments were passed in the context of conflict between parents, which also affected the best interests of the child. In *Nylund v Finland* [58], it was about a man (A) who had a short relationship with a woman (B). She got pregnant. Then the relationship broke down and the woman married another man (C). As the child was born in wedlock, the husband (C) was presumed to be the father. However, the first man (A) claimed to be the biological father and litigated for recognition of his paternity. The woman (B) strongly opposed to that. The ECtHR first investigated whether there was family life between (A) and the child, such as to justify his claim to the recognition of his paternity and came to a negative conclusion:

> In the present case, the Court is aware that the applicant cohabited with the mother and was engaged to her at the time she became pregnant. Furthermore, the Court is also aware that the mother has not agreed that the applicant create any ties with the child. However, the

[55] ECtHR 17 January 2006, *Mendizabal v France*, Appl no 51431/99. See for a referral to EU law also ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, Appl No 30696/09, para 263.
[56] ECtHR 2 December 2005, *Tuquabo-Tekle v the Netherlands*, Appl no 60665/00, para 45. See also ECtHR 21 December 2001, *Şen v the Netherlands*, Appl no 31465/96, para 40.
[57] ECtHR 8 November 2016, *El Ghatet v Switzerland*, Appl no 56971/10, para 41.
[58] ECtHR 29 June 1999, *Nylund v. Finland*, Appl no 27110/95; See also ECtHR 1 June 2004, *L v The Netherlands*, Appl no 45582/99.

> Court cannot overlook that the applicant has not, in fact, seen the child or formed any emotional bond with her. In this respect, the case now at issue differs from the cases of Keegan […] and of Kroon and Others […], where the applicants had emotional bonds with the children in question. Moreover, unlike in the last-mentioned cases, the mother of the child has denied the applicant's paternity. The Court finds that, in the circumstances of this case, the applicant's link with the child has an insufficient basis in law and fact to bring the alleged relationship within the scope of family life within the meaning of Article 8 § 1 of the Convention.[59]

Further, the ECtHR investigated whether the right to private life had been violated. It attached essential weight to the fact that the mother and husband opposed to paternity of (A):

> The Court notes that, in comparison to the Kroon and Others case, in which the obstacle to bringing paternity proceedings ran counter to the wishes of those concerned, in the instant case it accords with the wishes of the married couple in whose wedlock the child was born. In fact, the obstacle is a result of their opposition. Furthermore, in the Kroon and Others case the Court noted that the legal presumption of paternity did not actually benefit anyone […]. The Court recalls that, in the instant case, the Court of Appeal dismissed the applicant's action not only on the basis of the wording of the provisions of the Paternity Act but also since an examination of the applicant's claim would not have been in the interest of the child. The Court of Appeal took into account that the establishment of biological paternity would not, as such, create any rights or obligations for those concerned. It also referred to the disturbance such an examination would cause to the family relationships in the child's family.[60]

The ECtHR attached considerable weight to the fact that the mother and the husband objected and the notion that the interests of the child would be affected negatively, when a second father would enter the stage.

In the case of *L v the Netherlands*,[61] the father had a child born out of wedlock from a relationship of 3 years. Though the man and the mother did not formally cohabit, he visited her and the child on a regular basis. He babysat the girl occasionally and had some discussions regarding her hearing impairment with the mother[62]. The paternity was undisputed. When the relationship broke down, the man was denied access to the child. He invoked Article 8 ECHR in order to compel the mother to let him see the child against her wish. In that context, the ECtHR had to answer the question, whether sufficiently close personal ties developed between the child and the father and therefore family life existed[63]. It was deemed relevant whether there is sufficient consistency and substance of the relationship between the applicant and the child in order to create *de facto* family ties.[64] In the judgment, the ECtHR took into account that the relationship of the parents lasted three years and was a genuine one and that the father had some sort of implication in the upbringing of the child[65]. It concluded that family ties existed and therefore family life between the child out of wedlock and her father, justifying a right to access, was established[66].

It is hard to see, what the relevance of these judgments may be for the issue of whether the existence a family relationship – in the sense of the FRD - can be assessed. The issues in these

[59] ECtHR 29 June 1999, *Nylund v. Finland*, Appl no 27110/95.
[60] Ibid.
[61] ECtHR 1 June 2004, *L v The Netherlands*, Appl no 45582/99.
[62] Ibid, para 37.
[63] Ibid, para 35.
[64] Ibid, para 36.
[65] Ibid, para 38.
[66] Ibid, para 40.

judgments were too far removed from the question to be answered in this expert opinion. Weighing 'respect for family life', and assessing whether there is (sufficient) 'family life' for the purpose of acknowledging paternity or allowing access to a child, is essentially different from assessing whether a 'family relationship' exists for the purpose exercising an EU right to family reunification.

Further, in the cases, which were the cause for this expert opinion, there was no conflict between the parents about the reunification of the child with the father, and there was legal custody. Issues like those relevant in the cases of *Nylund* and *L.* did not play any role in the cases at hand: the paternity of the fathers and their right to have contact with the child was undisputed by the mothers. Therefore, the judgments of the ECtHR in the cases of *Nylund* and *L.* are not helpful in the context of this expert opinion.

5.4 Interim conclusion

The analysis of the FRD in the previous chapters did not leave any questions open, for which an analysis of Article 8 ECHR could have a meaningful value. The FRD does not disregard the level of protection afforded by Article 8 ECHR and goes even further in promoting family reunification. Thus, Article 8 ECHR may only be relevant in so far as it offers more protection to family life than the FRD already does. Two family law judgments of the ECtHR on paternity and access were discussed and were not found helpful. In immigration cases, the judgments of the ECtHR in the cases of *Şen*, *Tuquabo Tekle* and *El Ghatet* show that family life does not stop to exist when parents leave children behind while they settle abroad. The *El Ghatet* judgment also shows that, in case of reunification of a father and an older child, specific and extensive attention must be paid to the interests of the child. This is consistent with the findings on the concept of 'dependency' in section 3.3, where it was found that the rights of the child imply that the maturity and the own views of the child must be respected and taken into account.

6. Conclusion

This expert opinion concerns the refusal by the IND to grant a residence permit for the purpose of family reunification to third-country national children of fathers legally residing in the Netherlands. These refusals are based on the Dutch national law[67], which determines that when children are born out of wedlock, the fathers should have given sufficient substance to the relationship with their child in order to qualify for family reunification.

The question addressed in this expert opinion whether this Dutch implementation of Articles 4 and 16 of the Family Reunification Directive (FRD) is correct. More specifically it examines whether the requirement of a 'real family relationship' between a parent and a child, in the meaning of Article 16(1)(b) FRD is an additional requirement compared to the requirements of Article 4 FRD (the children must be minors, not married, dependent on the sponsor and under the custody of the sponsor). Moreover, if Article 16(1) (b) FRD does set an extra requirement it should be examined what the meaning of this extra requirement is.

This expert opinion interpreted Article 4 and 16 FRD in the context of the FRD as a whole, its object and purpose and it's drafting history. It was argued that Article 16(1) FRD does not materially add any separate requirement for exercising the right to family reunification that cannot be read into Article 4(1) FRD.

Two requirements of Article 4(1) were highlighted: 'custody' and 'dependency'. *Custody* is a set of rights and duties relating to the care of a person of a child, and in particular the right to determine the child's place of residence. The wish of the father to determine the Member State where he lives as the child's place of residence should principally be recognised in light of the best interest of that child.

The meaning of *dependency* changes with the age of the child. It must be acknowledged that minor children older than 15 years are 'dependent' in another and less stringent sense than small children in need of permanent care and supervision. This means that the dependency requirement should reasonably be interpreted such, that emotional and psychological dependency becomes less intense as the child grows up and that the accent is shifting more and more to dependency of legal, financial and material support. In relation to the parents, the dependent position of an older child also implies recognition of the own responsibility and views of the child. Thus, it will always be important to know whether the decision of the father, having custody, corresponds with the view of the child itself.

This expert opinion approached the concept of 'family relationship' in the FRD by analysing how it must be evidenced. Under Article 5 FRD, the family relationship between a father and a child is proven by a birth certificate, or – if such document is lacking – by other evidence. From Article 5 FRD and from the context of the concept of 'family relationship' in the FRD it emerges that there is no requirement with regard to cohabitation or long-term stability or intention.

The question of whether there is a 'real' family relationship is therefore not dependent on whether sufficient substance has been given to the relationship between the father and the child, before the application was lodged. It follows from Article 2(d) FRD and its application in the *Chakroun* judgment,[68] that Article 16 FRD cannot be invoked in order to prevent family reunification, if the relationship between the father and an older child will only develop in full depth after the arrival of the child.

The word 'real' in Article 16(1)(b) FRD should be read as opposed to the word 'fake' – implying that it must be assessed that there is no issue of fraud or deception. This is in line with the drafting history, where emphasis was put on the need to combat abuse of the right to family reunification. In that respect, Article 16(1)(b) FRD runs parallel to Article 16(2)(a) FRD and contains no separate

[67] Vreemdelingenbesluit 2000, Vreemdelingencirculaire 2000.
[68] CJEU Case C-578/08 *Chakroun* [2010], paras 59-64.

requirement. This interpretation is in accordance with Articles 7 and 24 of the Charter of Fundamental Rights of the EU and relevant case-law of the ECtHR.