Meijers Committee
Standing committee of experts on international immigration, refugee and criminal law

Secretariat
p.o. box 201, 3500 AE Utrecht/The Netherlands
phone 0031 30 297 43 28/43 21
fax 0031 30 296 00 50
e-mail cie.meijers@forum.nl
http://www.commissie-meijers.nl

[redacted] [redacted]

To (by email) HOME-family-reunification-green-paper@ec.europa.eu

Reference CM1204
Regarding Reply to the Green Paper on the right to family reunification of third-country nationals living in the European Union (COM(2011) 735 final)
Date 22 February 2012

Dear Ms Malmström,

The Meijers Committee welcomes the Green Paper on the right to family reunification of third-country nationals living in the European Union as a useful instrument taking stock of opinions of citizens, organisations and public authorities in the Member States.

In the accompanying note, the Meijers Committee proposes not to revise Directive 2003/86/EC on the right to family reunification on short notice. Instead, it urges the Commission to closely supervise the implementation and application of the Directive in the Member States and to start infringement procedures in case of incomplete or incorrect implementation or application.

Moreover, the Meijers Committee suggests that the Commission publishes guidelines to shed light on the correct interpretation of central clauses in the Directive. In this note some interpretative guidelines are proposed and reference is made to empirical research on issues dealt with in the Green Paper.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,

C.A. Groenendijk

Prof. dr. C.A. Groenendijk
Chairman

CC Members of the LIBE-Committee of the European Parliament, the Dutch Parliament, the Dutch Minister for Immigration, Integration and Asylum and various NGO's.

Introduction: supervision and guidelines instead of revision of the Directive

The Meijers Committee is of the opinion that amending the Directive is not "necessary" in the meaning of Article 19 of Directive 2003/86/EC on the right to family reunification (hereafter the Directive). The Directive in its present form has proven to offer minimum protection to members of the core family of legally residing third country nationals. Most questions in the Green Paper are pertaining to restrictions entered into the text of the Directive during the negotiating process. Removing those restrictions would undoubtedly increase the legal protection of third country nationals seeking family reunification. It would also substantially increase the harmonization of the relevant national law of Member States. The Court of Justice held that the Directive in its present form is compatible with the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights, since Member States have to apply the Directive in conformity with those instruments.[1]

The Meijers Committee proposes not to revise the Directive on short notice. Instead, considering the incomplete or incorrect implementation in most Members States as reported by the Commission in 2008, it urges the Commission to closely supervise the implementation and application of the Directive in Member States and to start infringement procedures in case of incomplete or incorrect implementation or application. Moreover, the Meijers Committee suggests that the Commission publishes guidelines to shed light on the correct interpretation of central clauses in the Directive, similar to the guidelines for better transposition and application of Directive 2004/38/EC published in 2009.[2] Such guidelines will assist national authorities and lawyers in the correct application of the Directive and may also assist national courts in deciding to make a reference on the interpretation of the Directive to the Court of Justice.[3] Guidelines may also be used to give guidance on the actual meaning of Article 3(4) of the Directive on more favourable provisions for family reunification and the rights of family members in the international instruments referred to in that Article, such as Decision No. 1/80 of the Association Council EEC-Turkey and Article 12 of the European Convention on the legal status of migrant workers.[4] The guidelines could also cover the provisions on family reunification in other EU migration and asylum directives and their relation to the Directive.

In the following remarks the Meijers Committee will – where appropriate - (a) suggest interpretations that could be laid down in interpretative guidelines (indicated as *Proposal for interpretative guideline*) and (b) refer to empirical research on issues dealt with in the Green Paper (indicated as *Research and jurisprudence*).

1. Scope of application

1.1 Who can qualify as a sponsor?
(Proposal for interpretative guideline)
The Commission in its first question in the Green Paper refers to Article 3(1) Directive 2003/86 requiring that 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.

The Meijers Committee considers that the interpretation of Article 3(1) of the Directive could best be clarified by reference to the clause on temporary admission in Directive 2003/109. The most likely purpose of Article 3(1) of the Directive, is to exclude sponsors having a residence permit solely on temporary grounds as defined in Article 3(2)(e) of Directive 2003/109. In the interpretative guidelines it should be made clear that the residence permit of the sponsor must qualify for the status of long term resident after completion of a period of residence of 5 years, but that it is not required – for the purpose of his right to family reunification - that the sponsor at the moment of seeking reunification with his family members meets all conditions for the status of long-term resident in Directive 2003/109. This interpretation would enhance the cohesion of EU

[1] C-540/03, *European Parliament v Council of the European Union,* 27 June 2006.
[2] COM (2009) 313, 2 July 2009.
[3] The first reference on the Directive, C-578/08, *Chakroun v Minister van Buitenlandse Zaken*, 4 March 2010, was made shortly after publication of the Commission's communication COM (2008) 61, 8 February 2008.
[4] Consultative Committee, 8th report on the application of the European convention on the legal status of migrant workers, Strasbourg 12 December 2011, T-MG(2011)1, p. 63-69.

migration law. The uniform application of Article 3(1) of the Directive could also profit from the guidance by the Court of Justice in its judgment in the case on the interpretation of Article 3(2)(e) of Directive 2003/109 currently before the Court.[5]

1.2 Eligible family members

(Research and jurisprudence)

The Commission asks whether the age requirement in Article 4(5) of the Directive is legitimate in relation to the two aims mentioned in that clause: ensuring better integration and prevention of forced marriages. The Meijers Committee notes that the effectiveness of this requirement in respect of neither of those two aims has been convincingly established.

Forced marriages are a serious human rights violation, but it is problematic to determine what constitutes a forced marriage. Studies by the Advisory Committee on Migration Affairs (ACMA) and the Research and Documentation Centre of the Dutch Ministry of Justice (RDC) pointed at the different definitions of forced marriages and the grey zone between free partner choice, arranged marriages and forced marriages.[6] It appears from these studies that it is difficult to adequately measure forced marriages. Most published data on this problem are based either on accounts of individual experiences or on indications or suspicions reported by welfare agencies, schools or police officers. There are little reliable data both on the extent to which forced marriages occur and on the relation between age and forced marriages. From qualitative research by the research centre of the Dutch Ministry of Justice it appeared that the age requirement had limited impact on forced marriages.[7] Recently, the UK Supreme Court held that the British statutory minimum age requirement of 21 years for spouses violates Article 8 ECHR because it does not serve the legitimate aim it pursued.[8] An unknown number of forced marriages is not sufficient justification for the introduction of restrictive rules obstructing the reunification of the great majority of voluntary concluded marriages. The judgment made reference to a qualitative study which signalled the ineffectiveness of the age requirement in the reduction of forced marriages.[9] There is also no empirical evidence on the effects of the age requirement on integration of the spouses. The only certain effect is that the beginning of the actual integration of certain spouses in the host country is postponed by the minimum age requirement.

The Meijers Committee advises to first conduct a large-scale study on the relation between age requirements and the integration of spouses and the prevention of forced marriages. This study should also consider the effectiveness of alternative measures against forced marriages[10] and the possibility that liberalisation of certain rules on the admission of spouses may have a better preventive effect than the introduction of more restrictive rules.

2. Requirements for the exercise of the right to family reunification

2.1 Integration measures

(Proposal for interpretative guideline)

The Meijers Committee would welcome an interpretative guideline of the Commission clarifying that Article 7(2) of the Directive refers to “integration measures” (such as offering language courses or other forms of support in the country of origin) and not to “integration conditions” (such as the requirement to pass an examination by all spouses to acquire the same level of knowledge abroad, irrespective of the availability of facilities to learn the language). In 2011, the Commission stated in its submission to the EU Court of Justice

[5] C-502/10, *Staatssecretaris van Justitie v M.Singh*, lodged on 20 October 2010.

[6] ACMA, *Forced into marriage: Report on the scope for preventive, corrective and criminal law measures to prevent forced marriages*, ACMA: The Hague 2005 and E. Ratia and A. Walter, *International Exploration on Forced Marriages, A study on legal initiatives, policies and public discussions in Belgium, France, Germany, the United Kingdom and Switzerland*, Nijmegen 2009.

[7] *Internationale gezinsvorming begrensd*, WODC: Den Haag, 2009, cahier 2009 - 4, p. 104.

[8] UK Supreme Court, *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)*; and *R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)*, [2011] UKSC 45 (12 October 2011) .

[9] M. Hester, K. Chantier, D. Gangoli, J. Devgon, S. Sharma & A. Singleton, *Forced marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the UK as a spouse or fiancé(e)*, 2007, p. 37, <http://www.bris.ac.uk/sps/research/projects/completed/2007/rk6612/rk6612finalreport.pdf>.

[10] H. Bielefeldt, *Zwangsheirat und multikulturele Gesellschaft, Anmerkungen zur aktuelle Debatte*, Deutsches Institut für Menschenrechte, Berlin 2005.

that refusal of a visa for family reunification to a member of the core family solely on the basis that he or she has not passed an integration examination abroad is incompatible with Article 7(2) of the Directive.[11] In October 2011, the German Bundesverwaltungsgericht held that the question whether the requirement of passing a language test abroad is compatible with the Directive should be referred to the EU Court of Justice.[12]

(Research and jurisprudence)
From a study commissioned by the Dutch Ministry of Justice it appears that it is complicated to measure the integration effects of the Dutch integration examination abroad, because of the difficulty to identify a control group to compare integration results and because integration is a long-term process influenced by many other factors than passing an exam before entry. From the study it appeared that family members who had passed the integration exam abroad at the time they started their integration course in the Netherlands had a marginally better knowledge of the Dutch language than immigrants who had no obligation to pass the exam. The difference could, according to the researchers, be explained by the higher educational level of those who passed the exam abroad.[13] The pass rates vary considerably between the countries of origin of the spouses.[14] From the statistical data on the applications for visa entry for family reunification it appears that the number of applications decreased significantly in the first years after the introduction of the examination abroad.[15] This could be an indication that certain groups do no longer apply for family reunification because they are not able to pass the integration exam. While the declared aim of the examination is to improve the integration of family migrants, the result is a decrease in applications. It is doubtful whether this effect is compatible with the objective of the Directive "which is to promote family reunification".[16] The Dutch National Ombudsman in a report published in May 2011 has pointed at difficulties for illiterate persons, logistical problems to reach certain embassies where the examination has to be taken, and that the Minister hardly ever makes an exception of the obligation to pass the exam on compassionate grounds.[17] Six years after the Netherlands and four years after Germany introduced the requirement of passing an integration or language test abroad for the reunification of spouses, there is no serious evidence of the effect of this rule on the integration of the family members concerned in those Member State.[18]

3. Asylum related questions

3.1 Exclusion of subsidiary protection
(Proposal for interpretative guideline)
Article 3(2)(c) of the Directive explicitly excludes beneficiaries of subsidiary protection from the personal scope of application of Directive 2003/86, whilst refugees are included. This exclusion is related to the fact that at the time of adoption of that Directive the negotiations on the Qualification Directive 2004/83 were still on going. However, from the text of the Qualification Directive, it is clear that the issue of family reunification of beneficiaries of subsidiary protection is – in general terms - covered by Union law. This raises the question whether differences in treatment between refugees and persons with subsidiary protection and their respective family members can be justified under Union law and whether there is room for interpretation of

[11] District Court 's-Gravenhage/Zwolle 31 March 2011, *JV* 2011/224 [*LJN*: BQ0453], the Commission's written observation of 4 May 2011 in case C-155/11, Migratieweb ve11001571 and C-155/11 PPU *Bibi Mohammed Imran v Minister van Buitenlandse Zaken*, 10 June 2011 where it was decided that there was no need to rule on the preliminary questions of the referring court anymore.
[12] Bundesverwaltungsgericht, 28 October 2011, case 1 C 9.10, www.bverwg.de.
[13] M. Brink e.a., *De Wet inburgering buitenland: Een onderzoek naar de werking, de resultaten en de eerste effecten.* Regioplan: Amsterdam, 2009, < http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2009/07/03/evaluatie-wet-inburgering-in-het-buitenland-bijlage-2-eindrapport-wib-regioplan/ii2009041564bbijlage2eindrapportwibregioplan.pdf>.
[14] M. van de Grift a.o., *Monitor inburgeringsexamen buitenland 2010*, Barneveld 2011 (Significant).
[15] G.G. Lodder, *Juridische aspecten van de Wet inburgering buitenland, Evaluatie onderzoek Wet inburgering buitenland*, Instituut voor Immigratierecht: Leiden 2009, <https://zoek.officielebekendmakingen.nl/blg-24443.pdf>, p. 21-24.
[16] C-578/08, *Chakroun v Minister van Buitenlandse Zaken*, 4 March 2010, point 43.
[17] Nationale Ombudsman, *Rapport Inburgering in het buitenland*, Rapportnummer 2011/135, 2011
[18] K. Groenendijk, *Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy*? European Journal of Migration and Law, 2011, p. 1-27.

the secondary Union law in order to reduce the differences in treatment of refugees and subsidiary protected persons in this respect.
The fundament for such an interpretation should be the Qualification Directive. Article 23(1) of Directive 2004/83 states in general terms both for refugees and subsidiary protected persons: "Member States shall ensure that family unity can be maintained". In Article 2 (h), the definition of "family members" is limited to the family insofar as it already existed in the country of origin and to family members who are present in the same Member State.
These family members of subsidiary protected persons are thus covered by Union law, and Member States are obliged under Union law to secure that family unity is maintained. The Qualification Directive does not differentiate between subsidiary protected persons and refugees in this respect.

For family reunification of refugees, more specific obligations of Member States are provided for in Chapter V of Directive 2003/86. For family reunification pertaining to the family of subsidiary protected persons which already existed in the country of origin of Member States, undeniably, have more room for discretion as Directive 2003/86 does not apply to their situation. However, according to the judgment of the EU Court of Justice in *Parliament v Council*, this discretion cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life.[19]
Furthermore, differences of treatment between refugees and subsidiary protected persons pertaining to their rights to reunite with family members would violate EU law, more specifically Articles 6, 18, 20, 21 and 24 of the EU Charter of the Fundamental Rights, if sufficient justification for that difference of treatment is absent. In that case such differences would be discriminatory. Finally, if family members of subsidiary protected persons fall beyond the scope of Article 2(h) Qualification Directive, it is clear that Member States must still comply with their obligations under Article 8 and 14 ECHR.[20]

Therefore, the Meijers Committee would suggest an interpretative guideline, reminding Member States of their obligation with regard to the family members of beneficiaries of subsidiary protection under the Qualification Directive and stating that the right to family unity as laid down in the Directive and the CEAS must be considered as a whole and that Member States may, accordingly, not maintain or introduce discriminatory distinctions between refugees and subsidiary protected persons as to their rights to reunite with family members.

3.2. Other asylum related questions
The Meijers Comittee considers it important that the Commission underlines in an interpretative guideline that discretion granted by the Directive to the Member States to adopt more restrictive legislation with regard to the general standards of Chapter V does not allow for a mechanistic and formalistic formulation or application of this legislation, which would neglect the individual circumstances of each case. Again, the judgment of the EU Court of Justice in *Parliament v Council*, provides the leading framework. The options given to Member States in Article 9(2), 12(1), last sentence, do not authorise the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life, or which do not have due regard to the best interests of the child, as required by Article 5(5).
In other words, if Member States do not apply the standards of Chapter V of the Directive because the family relationship does not predate entry or because the application for family reunification was submitted after a period of three months after the granting of refugee status, they still must apply the general part of the Directive having due regard to the specific problems for refugees and their family members to comply with the conditions of Article 7(1) – which is in itself not a mandatory provision and leaves sufficient room for the required individual exceptions.

The interpretative guideline should underline that the concept of "family" according to Article 8 ECHR is leading. Member States are not allowed to introduce the extra condition that reunification is granted only to family members who were 'actual part of the family of the refugee on the moment of flight from the country of origin', which is the policy rule in the Netherlands. In particular children who were left behind with other family members are excluded from reunion. The European Court of Human Rights expressly rejected in the Tuquabo-Tekle judgment the validity of Dutch arguments for refusing family reunification, based on: (a) late application and (b) the alleged settlement of the child in provisory family setting in the country where it was left behind.

[19] C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para.71.
[20] C-256/11, *Dereci and others v Bundesministerium für Inneres*, 15 November 2011, para 72; C-127/08, *Metock and others v Minister for Justice, Equality and Law Reform*, 25 July 2008, para 79.

The Court stated:

> "Turning to the particular circumstances of the case, the Court notes that the Government's submissions centre on their contention that the applicants could have applied for Mehret to come to the Netherlands much sooner, and that, in the absence of sound reasons for their not having done so, it had to be assumed that Mehret's staying with her grandmother and uncle in Eritrea was intended to be a permanent arrangement. However, the Court has previously held 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 (see *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001). Indeed, it appears clearly from the facts of the present case that Mrs Tuquabo-Tekle always intended for Mehret to join her. (…)".[21]

4. Fraud, abuse, procedural issues

4.1. Marriages of convenience

(Research and proposal for interpretative guideline)

From a comparative analysis of rules and practices concerning marriages of convenience in four Member States conducted in 2010, it appears that it was not possible to estimate the scope of the phenomenon.[22] There is no reliable evidence of current and specific problems in the implementation of the provision on arranged marriages in Articles 16(2)(b) and 16(4) of the Directive. The Commission could consider to include in guidelines for the better application of the Directive a reference to its guidelines on a similar provision on marriage of convenience in Article 35 of Directive 2004/38.[23]

4.2. Fees

(Proposal for interpretative guideline)

The Meijers Committee suggests that the Commission confirms in an interpretative guideline that administrative fees may neither have the purpose nor the effect of introducing an additional financial condition for family reunification. Such fees should be incompatible with the objective of the Directive and should reduce its *effet utile*.[24]

In a recent judgment of the European Court of Human Rights in the case of *G.R. v The Netherlands*, the Court held that levying fees that are disproportionate to the family income may result in a violation of Article 13 ECHR.[25] This judgment illustrates that high fees for residence permits in the Netherlands impede both the right to family reunification and the access to an effective remedy by a court in cases of family reunification.

The Meijers Committee would like to draw the attention of the Commission to the fact that the Dutch fees for a visa for family reunification since 1 July 2011 have been raised to 1250 euro for the first family member plus an additional 250 euro for every other family member, above the costs for the integration test abroad (350 euro) and other costs to be paid. According to recent calculations commissioned by the Minister for Immigration, Integration and Asylum the administrative cost of issuing a visa or a residence permit for family reunification is 1026 euro.[26] Thus, the fee for family reunification exceeds even the actual costs and the surplus is treated as a source of income for the Ministry. In the 2010 coalition agreement the current Dutch government presented the increase of fees as one of a series of measures aimed at "a very substantial decrease of the immigration to the Netherlands.[27]

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[21] ECtHR, *Tuquabo-Tekle a.o. v The Netherlands*, 1 December 2005, appl.no. 60665/00, para 45.

[22] E. Pöyry, *Marriages of convenience: A Comparative study – Rules and practices in Norway, Sweden, Germany, Denmark and the Netherlands*, Commissioned by the Norwegian Directorate of Immigration 2010, <http://www.udi.no/Global/upload/Publikasjoner/FOU/R-2010-053_SAA_Marriages_of_convenience.pdf>, p. 48.

[23] COM(2009) 313, 2 July 2009, para. 4.2.

[24] C-578/08, *Chakroun v Minister van Buitenlandse Zaken*, 4 March 2010, points 43 and 47 and the Opinion of the Advocate-General in C-508/10, *Commission v the Netherlands*, 19 January 2012.

[25] ECtHR *G.R. v The Netherlands* 10 January 2012, appl.no. 22251/07.

[26] Letter of the Minister for Immigration, Integration and Asylum to the Second Chamber, 31 January 2012, TK 30573, no. 94, annex 2,

[27] TK 32417, 7 October 2010, no. 15, p, 21-22.

4.3. Horizontal clauses

(Proposal for interpretative guideline)

In 2008 the Commission reported that Articles 5(5) and 17 of the Directive were incorrectly or incompletely implemented in the national law or incorrectly applied in several Member States. The situation may have improved in some Member States. In other Member States, such as the Netherlands, Article 5(5) is still not implemented at all and Article 17 of the Directive is implemented only partially, i.e. only in cases of refusal or withdrawal of residence permits on public order grounds. The Chakroun case illustrated that a mechanical application of the statutory requirements and the policy instructions leaves, as practised in the Netherlands, little if any room for an individual appreciation of the actual circumstances of the families concerned.

Hence, the Meijers Committee recommends the Commission to adopt an interpretative guideline confirming that Articles 5(5) and 17 of the Directive necessitate an individual assessment of every request for family reunification, where the best interests of the child shall be a primary consideration and 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/her country of origin - thereby, where appropriate, making exceptions with regard to conditions for family reunification which cannot reasonably be fulfilled.

In its first judgment interpreting the Directive, the Court of Justice already clearly stated that in each case an individual examination is necessary of the best interests of the child (if applicable) and the circumstances mentioned in Article 17 of the Directive.[28] The Meijers committee is of the opinion that further clarification in this respect in the Directive is not necessary and deems it more urgent that the Commission scrupulously supervises the implementation and application of the Directive in Member States and actively uses the infringement procedure in order to correct incorrect implementation or application.

From the list of infringement procedures on the website of DG Home Affairs it appears that the Commission did not start one single procedure concerning an infringement of Directive 2003/86 by a Member State after the publication of its first report on the application of the Directive in Member States in October 2008. This absence of any new infringement procedure is difficult to reconcile with the Commission's statement in the second last paragraph of its 2008 report: "The Commission will examine all cases where application problems were identified and ensure that the provisions are correctly applied, in particular in conformity with fundamental rights such as respect for family life, the rights of the child and the right to an effective remedy. This will imply launching, during 2009, the necessary procedural steps for non-compliance, where appropriate in accordance with Article 226, in particular in cases where there are clear differences in interpretation of Community law between the Member States and the European Commission."[29]

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[28] C-540/03, *European Parliament v Council of the European Union*, 27 June 2006

[29] COM(2008) 610, 8 October 2008, p. 30.